BRB No. 11-0773 BLA

RICKY P. WALLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	DATE ISSUED: 08/29/2012
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Waseem A. Karim (Jackson Kelly, PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-6032) of Administrative Law Judge Richard A. Morgan, rendered on a claim filed on January 30, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with at least twenty-nine years of coal mine employment, and adjudicated this claim under the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of simple clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge, however, determined that the evidence was insufficient to

establish the existence of legal pneumoconiosis, complicated pneumoconiosis or total disability due to clinical pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.304, 718.204(b), (c). The administrative law judge further found that since the evidence failed to establish a totally disabling respiratory or pulmonary impairment, claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the x-ray evidence, and in failing to find the evidence established the existence of complicated pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Program, has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Amended Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). In this case, the administrative law judge determined that claimant had more than fifteen years of qualifying coal mine employment. Decision and Order at 3, 27.

[2] We affirm, as unchallenged by claimant on appeal, the administrative law judge's findings that the evidence was insufficient to establish the existence of legal pneumoconiosis, total disability, and disability causation under 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), (c), and his determination that claimant is unable to invoke the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he or she suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he or she is totally disabled, and that his or her disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

In addressing whether claimant established the existence of complicated pneumoconiosis, the administrative law judge noted that the record contains nine readings of three x-rays dated January 23, 2007, August 9, 2007, and March 6, 2008. Decision and Order at 5-7, 13, 23. Dr. Valiveti read the January 23, 2007 portable chest x-ray as showing diffuse chronic interstitial changes with no pleural effusion. Decision and Order at 13; Claimant's Exhibit 5. The August 9, 2007 x-ray was read by Dr. Gaziano, a B reader, as positive for complicated pneumoconiosis. Decision and Order at 13; Claimant's Exhibit 5. The March 6, 2008 x-ray was read as positive for complicated pneumoconiosis by Dr. Rasmussen, a B reader, and by Drs. Ahmed and Alexander, both dually-qualified as Board-certified radiologists and B readers. Decision and Order at 5-6; *see* Director's Exhibit 11; Claimant's Exhibits 1, 2, 5. However, the March 6, 2008 x-ray was also read as negative for complicated pneumoconiosis by Drs. Wheeler, Scott and

Scatarige, all dually-qualified radiologists.[4] Decision and Order at 6; Director's Exhibit 12.

The administrative law judge determined that the x-ray evidence was insufficient to establish that claimant had complicated pneumoconiosis, based on the negative readings for complicated pneumoconiosis by the "better-qualified radiologists." Decision and Order at 23. The administrative law judge also weighed the x-ray readings in conjunction with other relevant evidence, including one positron emission tomography (PET) scan, two computerized tomography (CT) scans, the results of a right middle lung bronchoscopy, various treatment records, and the medical reports by Drs. Rasmussen, Rosenberg and Castle. *Id*; Director's Exhibit 11; Claimant's Exhibit 5; Employer's Exhibits 1-9. The administrative law judge concluded:

> Given the majority of better-qualified radiologists did not find [progressive massive fibrosis (PMF)] or complicated pneumoconiosis, instead finding an infectious process, a matter largely confirmed by two of three CT readings and a PET scan, I do not find they establish PMF or complicated pneumoconiosis. The readings of the two older x-rays from the medical records, one positive and one negative for PMF, add little. The pathology evidence does not establish PMF or complicated pneumoconiosis and the miner was treated by his family physician for [tuberculosis (TB)]. The cytology evidence was called "non-diagnostic." Both Dr. Rosenberg and Dr. Castle had a much better opportunity to make a more accurate diagnosis based upon their consideration of a full panoply of evidence, unlike Dr. Rasmussen who placed his reliance on his own examination and testing. I find the formers' documentation and reasoning much more inclusive and persuasive than Dr. Rasmussen's opinion. As Dr. Castle observed, any large lesion seen was more likely calcification consistent with TB and histoplasmosis and as Dr. Rosenberg stated, the distribution of the micronodules was not typical for a coal dust related lung disease.

Decision and Order at 23.

Claimant asserts on appeal that the administrative law judge erred in relying on the negative x-ray readings for complicated pneumoconiosis, and by not giving determinative weight to Dr. Gaziano's uncontradicted, positive reading of the August 9, 2007 x-ray. Claimant contends that the administrative law judge summarily dismissed Dr. Gaziano's reading without explanation. We disagree.

[4] Dr. Gaziano also read the March 6, 2008 x-ray in order to assign it a quality rating. Director's Exhibit 11.

The administrative law judge explained that he resolved the conflict in the x-ray evidence based on an examination of the qualifications of the readers. Decision and Order at 6-7; 23. The administrative law judge permissibly assigned controlling weight to the readings by the dually-qualified radiologists, and also permissibly considered other factors such as "professorship[s], publications and experience." Decision and Order at 7; *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983). The administrative law judge found Dr. Wheeler to be the "best qualified, followed by Drs. Scott and Scatarige."[5] Decision and Order at 7. The Board considers claimant's argument on appeal with regard to Dr. Gaziano's positive reading to be tantamount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in rendering his credibility determinations, we affirm his finding that claimant did not establish complicated pneumoconiosis, based on the x-ray evidence. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993).

Although claimant generally asserts that the record evidence supports a finding of complicated pneumoconiosis, he raises no specific error with regard to the weight accorded the CT scans, PET scan, biopsy reports, medical reports or the TB test results. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The administrative law judge has weighed all of the evidence relevant to the existence of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1145-46; 17 BLR at 2-117-18. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304. *See Melnick*, 16 BLR at 1-33-34. We, therefore, affirm the denial of benefits.

[5] The administrative law judge noted that Dr. Wheeler is an Associate Professor of Radiology at Johns Hopkins Medical Center (Johns Hopkins), that he has been a B reader since 1970 (the inception of the federal black lung program), that he is well-published, that he has served on the American College of Radiology task force on pneumoconiosis, and that he has extensive experience diagnosing and treating tuberculosis and histoplasmosis. Decision and Order at 7. The administrative law judge noted that Dr. Scott is an Associate Professor of Radiology at Johns Hopkins and has published multiple peer-reviewed scientific articles and books. *Id*. He found that Dr. Scatarige is an Assistant Professor of Radiology at Johns Hopkins and he is "very well-published." *Id*. He noted that Dr. Alexander is an Assistant Professor at the University of Maryland, and that Dr. Ahmed is an attending radiologist at Princeton Community Hospital, with two published articles, unrelated to coal workers' pneumoconiosis. *Id*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge