BRB No. 11-0269 BLA

CHARLES B. HALSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMFIRE LLC	)	DATE ISSUED: 12/05/2011
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5204) of Administrative Law Judge Richard A. Morgan rendered on claim filed on November 18, 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). After crediting claimant with at least thirty-four years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), however he found the evidence insufficient to establish total disability or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c) and 718.304. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence of record relevant to 20 C.F.R. §718.304. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[1]

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.[2] 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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis, if claimant 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

[1] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least thirty-four years of coal mine employment and his findings that the evidence was sufficient to establish the existence of simple pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because we have affirmed the administrative law judge's finding that claimant failed to establish total disability under 20 C.F.R. §718.204(b), we also affirm the administrative law judge's determination that claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4). Decision and Order at 21.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, 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. 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 of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy under prong (B) or by other means under prong (C), would appear as an opacity greater than one centimeter in size if it were seen on a chest x-ray. *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 (4th Cir. 1999).

Relevant to 20 C.F.R. §718.304(a), the record in the present case contains three readings of an x-ray dated January 21, 2009. Dr. Rasmussen, a B reader, interpreted the film as positive for both simple and complicated pneumoconiosis and marked "ax" on the ILO form, which denotes the coalescence of small opacities. Director's Exhibit 14. Drs. Castle and Fino, both B readers, read the x-ray as positive for simple pneumoconiosis and marked "ax" on the ILO form. Director's Exhibit 26; Employer's Exhibit 3.

Pertinent to 20 C.F.R. §718.304(c), Drs. Rasmussen, Castle and Fino also submitted medical opinions. Dr. Rasmussen examined claimant on January 21, 2009. Director's Exhibit 14. Relying upon his x-ray reading and claimant's employment history, Dr. Rasmussen diagnosed complicated pneumoconiosis caused by coal dust exposure, but determined that there was "no significant loss of lung function." *Id*. Dr. Castle examined claimant on July 21, 2009, and reviewed the report of Dr. Rasmussen's examination. Director's Exhibit 26. Dr. Castle opined that claimant has simple pneumoconiosis, but does not suffer from complicated pneumoconiosis, based on the x-ray evidence and the results of claimant's physical examinations and objective testing. *Id*. Dr. Castle reiterated his conclusions in a deposition obtained on July 14, 2010 and explained that on the x-ray dated January 21, 2009, "one can see the individual characteristics of the opacities as opposed to a large opacity where one cannot differentiate the borders of the opacities that have come together to form a larger opacity." Employer's Exhibit 4 at 19. Dr. Fino reviewed claimant's medical records and stated that, although there is x-ray evidence of simple pneumoconiosis, "there is no complicated pneumoconiosis." Employer's Exhibit 1. Dr. Fino also determined that

claimant does not have a respiratory impairment. *Id*. Dr. Fino was deposed on August 4, 2010 and confirmed the conclusions set forth in his report. Employer's Exhibit 5. Dr. Fino further indicated that claimant's January 21, 2009 x-ray showed "a coalescence of opacities, which means small opacities coming together but there was still normal lung tissue between the small opacities." *Id*. at 8.

Upon reviewing this evidence, the administrative law judge determined that the material issue before him was whether the January 21, 2009 x-ray showed large opacities of complicated pneumoconiosis. Decision and Order at 16. The administrative law judge accorded greatest weight to the x-ray readings and opinions rendered by Drs. Castle and Fino, who ruled out the presence of complicated pneumoconiosis.[3] *Id*. The administrative law judge noted, "[w]hile . . . Drs. Castle and Fino have been B readers for many years, the record lacks any equivalent showing for Dr. Rasmussen." *Id*. The administrative law judge also noted that Drs. Castle and Fino are Board-certified in Pulmonology and credited Dr. Castle's testimony that pulmonologists receive extensive training in x-ray interpretation.[4] *Id*. Based upon these factors, the administrative law judge accorded greatest weight to the findings of Drs. Castle and Fino that claimant does not have complicated pneumoconiosis. Accordingly, the administrative law judge determined that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. *Id*.

Claimant contends that the administrative law judge did not apply the correct legal standard in crediting the opinions of Drs. Castle and Fino, that the opacities on claimant's lungs were not complicated pneumoconiosis, because they were able to detect individual smaller opacities within the larger opacities. Claimant argues that their testimony demonstrates that the smaller nodules had coalesced to form a large opacity of complicated pneumoconiosis.

Claimant's allegations of error are without merit. Pursuant to 20 C.F.R. §718.304(a), the administrative law judge acted within his discretion as fact-finder in determining that the x-ray readings in which Drs. Castle and Fino indicated that there was no large opacity of complicated pneumoconiosis on the January 21, 2009 x-ray, were entitled to greater weight than Dr. Rasmussen's contrary reading, based upon their superior qualifications. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149; Decision and Order at 16. Relevant to 20 C.F.R. §718.304(c), claimant has not explained how the record supports his assertion that the x-ray finding of coalescence rendered by all three physicians is

[3] The record in this case does not include any biopsy evidence relevant to 20 C.F.R. §718.304(b).

[4] Dr. Rasmussen is Board-certified in Internal Medicine. Director's Exhibit 14.

equivalent to a diagnosis of complicated pneumoconiosis. Dr. Rasmussen's notation of coalescence was distinct from his notation that claimant's x-ray revealed Category A opacities in the upper lung zones. Director's Exhibit 14. Moreover, because none of the physicians provided a measurement of the coalescing nodules, the administrative law judge could not make a determination as to whether the coalescence is equivalent to an opacity greater than one centimeter in diameter on x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. We therefore affirm, as rational and supported by substantial evidence, the administrative law judge's finding that claimant has not established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis.

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge