BRB No. 13-0386 BLA

JIM SIMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SENECA ENERGY, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 02/20/2014
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Second Remand – Award of Benefits (2009-BLA-05120) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This claim, filed on October 31, 2005, is before the Board for the third time. Director's Exhibit 2.

In his initial Decision and Order, issued on October 13, 2009, the administrative law judge found that the x-ray evidence established that claimant suffers from complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a), and found that it arose out of claimant's eighteen-plus years of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Because he determined that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis, 20 C.F.R. §718.304, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence supported a finding of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a), but held that the administrative law judge improperly discounted the opinions of Drs. Dahhan and Vuskovich at 20 C.F.R. §718.304(c), and failed to explain the weight he accorded to conflicting evidence regarding the existence of complicated pneumoconiosis. *Simpson v. Seneca Energy, LLC*, BRB No. 10-0154 BLA, slip op. at 5-6 (Oct. 29, 2010) (unpub.). The Board, therefore, vacated the finding of complicated pneumoconiosis and the award of benefits, and instructed the administrative law judge, on remand, to weigh the CT scan evidence and the medical opinions of Drs. Dahhan, Vuskovich, and Burrell, pursuant to 20 C.F.R. §718.304(c), and to then determine whether claimant established the existence of complicated pneumoconiosis by weighing all of the evidence supporting such a finding against all of the contrary evidence. *Id*. at 6-7.

In his Order on Remand, issued on July 25, 2011, the administrative law judge again awarded benefits after finding, on the basis of the x-ray evidence, that claimant established the existence of complicated pneumoconiosis. The administrative law judge declined to consider the CT scan evidence, because employer did not establish that it was medically acceptable and relevant under 20 C.F.R. §718.107(b). In addition, the administrative law judge discredited the opinions of Drs. Dahhan and Vuskovich that claimant did not have pneumoconiosis.

Upon review of employer's appeal, the Board held that the administrative law judge permissibly declined to consider the CT scan evidence, and permissibly discounted Dr. Dahhan's opinion for relying on his own negative x-ray interpretation, which conflicted with the x-ray evidence that was found by the administrative law judge to support the existence of complicated pneumoconiosis. *Simpson v. Seneca Energy, LLC*, BRB No. 11-0797 BLA, slip op. at 5-6 nn.7-8 (Aug. 30, 2012) (unpub.). The Board vacated, however, the finding of complicated pneumoconiosis and the award of benefits, holding that the administrative law judge erroneously shifted the burden of proof to employer to rule out the existence of complicated pneumoconiosis, and failed to weigh all of the relevant evidence before determining that claimant established the existence of complicated pneumoconiosis. *Id*. at 5. The Board instructed the administrative law judge, on remand, to determine whether the medical opinion evidence supported the

existence of complicated pneumoconiosis, and to then weigh the x-ray evidence and the medical opinion evidence together to determine whether claimant established the existence of complicated pneumoconiosis. *Id*. at 5-6.

In his Decision and Order on Second Remand, issued on February 6, 2013, which is the subject of the current appeal, the administrative law judge considered the medical opinion evidence pursuant to 20 C.F.R. §718.304(c), and determined that Dr. Burrell's opinion, that claimant has complicated pneumoconiosis, was well-reasoned and more persuasive than Dr. Vuskovich's contrary opinion. Having discredited the opinions of Drs. Dahhan and Vuskovich, the administrative law judge found that the x-ray evidence and Dr. Burrell's opinion established the existence of complicated pneumoconiosis. Decision and Order on Second Remand at 4-6. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in weighing the medical opinion evidence, and therefore erred in finding that the totality of the evidence established the existence of complicated pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

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.[1] 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).

To establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b).[2] *See* 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. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether the claimant has invoked the irrebuttable presumption pursuant to 20 C.F.R. §718.304. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

In his medical report, Dr. Burrell diagnosed claimant with complicated pneumoconiosis, based on the x-ray readings of Drs. Barrett and Ahmed, which were positive for Category A large opacities. Director's Exhibit 12. In contrast, Dr. Vuskovich opined, in both his report and his deposition testimony, that claimant does not have complicated pneumoconiosis, or progressive massive fibrosis (PMF). The doctor provided several reasons for his diagnosis: claimant does not have a pulmonary impairment; radiological images showed claimant's pulmonary disease to be static, rather than progressive; and claimant has dermatomyositis, a disease that, Dr. Vuskovich explained, can mimic pneumoconiosis and PMF on x-rays. Employer's Exhibit 4 at 11-12; Employer's Exhibit 5 at 9-12.

In considering the medical opinion evidence pursuant to 20 C.F.R. §718.304(c), the administrative law judge found Dr. Burrell's opinion to be well-reasoned, and more persuasive than Dr. Vuskovich's opinion, because it was "more consistent with the x-ray evidence" and because Dr. Burrell "was in the best posture to render a diagnosis," having examined claimant personally. Decision and Order on Second Remand at 5. The administrative law judge further found that, even if claimant has dermatomyositis, "it does not necessarily follow that Dr. Burrell's diagnosis is incorrect. Therefore Dr. [Vuskovich] is less persuasive." *Id.* In making this finding, the administrative law judge further observed that pneumoconiosis is not "an 'all or nothing' proposition," and that "[c]omplicated pneumoconiosis is not mutually exclusive to other impairments." *Id.*

[2] The Board previously affirmed the administrative law judge's finding that claimant cannot invoke the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *Simpson v. Seneca Energy, LLC*, BRB No. 11-0797 BLA, slip op. at 3 n.4 (Aug. 30, 2012) (unpub.).

Employer contends that the administrative law judge erred in crediting Dr. Burrell's opinion over Dr. Vuskovich's opinion. Employer's Brief at 14-15. We disagree. As an initial matter, employer does not challenge the administrative law judge's decision to assign more weight to Dr. Burrell's opinion because it was "more consistent with the x-ray evidence." Decision and Order on Second Remand at 5. That credibility determination is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983). Moreover, in observing that Dr. Burrell's diagnosis of complicated pneumoconiosis does not preclude the existence of other impairments, the administrative law judge permissibly discounted Dr. Vuskovich's opinion for failing to adequately consider whether claimant could have dermatomyositis in conjunction with complicated pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87, 24 BLR 2-269, 2-285-87 (4th Cir. 2010). We therefore affirm the administrative law judge's permissible credibility determination that Dr. Burrell's opinion is entitled to more weight than that of Dr. Vuskovich. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Employer also argues that the administrative law judge failed to adequately explain his finding that the evidence as a whole established the existence of complicated pneumoconiosis. Employer's Brief at 15-16. This argument lacks merit. As stated above, the administrative law judge explained his decision to credit Dr. Burrell's medical opinion over Dr. Vuskovich's opinion, pursuant to 20 C.F.R. §718.304(c). Moreover, we previously affirmed the administrative law judge's finding that the x-ray evidence supported a finding of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a), and his decision to discount Dr. Dahhan's opinion, pursuant to 20 C.F.R. §718.304(c). The administrative law judge was not required, or instructed, to explain those determinations again on remand. He permissibly determined, based on the x-ray evidence and Dr. Burrell's opinion, that claimant established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick*, 16 BLR at 1-33; Decision and Order on Second Remand at 5-6.

Because substantial evidence supports the administrative law judge's findings as to the weight he accorded the evidence, we affirm his determination that claimant established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304. Decision and Order on Second Remand at 5-6. We also affirm, as unchallenged, the administrative law judge's finding that claimant's pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). *Skrack*, 6 BLR at 1-711; Decision and Order on Second Remand at 5-6. We therefore affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge