BRB No. 07-0373 BLA

D.L.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRANDON ENTERPRISES, LLC	)	
	)	DATE ISSUED: 01/31/2008
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 on Remand – Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

D.L.S., Jonesville, Virginia, *pro se*.

Sarah Y. M. Kirby (Sands Anderson Marks & Miller), Blacksburg, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order on Remand – Denying Benefits (04-BLA-5242) of Administrative Law Judge Stephen L. Purcell rendered on a claim filed pursuant to the provisions of Title IV of the Federal

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This case is before the Board for a second time. In his initial Decision and Order denying benefits, the administrative law judge credited claimant with 23.39 years of coal mine employment and accepted employer's stipulation that claimant suffered from simple pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.202, 718.203(b). The administrative law judge, however, determined that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge also determined that claimant was not entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, benefits were denied.

Claimant appealed, and the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to Sections 718.204(b)(2). [*D.L.S.*] *v. Brandon Enterprises, LLC*, BRB No. 05-0466 BLA, slip op. at 4 (Dec. 15, 2005) (unpub.). The Board, however, vacated the administrative law judge's denial of benefits on the ground that he provided "no ruling on employer's or any party's compliance with the evidentiary limitation" set forth at 20 C.F.R. §725.414, and thereby erred in his consideration of the x-ray evidence relevant to whether claimant suffered from complicated pneumoconiosis *Id.* at 6. Consequently, the Board remanded the case for the administrative law judge to apply the evidentiary limitations at Section 725.414 and to reconsider the evidence pursuant to Section 718.304. *Id.*

On remand, the administrative law judge instructed the parties to designate their medical evidence in accordance with Section 725.414. *See* Order Scheduling the Filing of Post-Remand Briefs (Mar. 23, 2006). On May 3, 2006, claimant advised the administrative law judge of his designated evidence. Employer also submitted a document entitled "Closing Brief and Designation of Evidence" on May 8, 2006.[3] Thereafter, on December 13, 2006, the administrative law judge issued his Decision and

[2] Claimant filed the instant claim on July 2, 2001. Director's Exhibit 1.

[3] Employer objected to the admission into the record of a positive reading for complicated pneumoconiosis by Dr. DePonte of an x-ray dated August 8, 2003, which reading was identified by claimant as affirmative evidence, but which had not been previously identified by claimant as evidence at the hearing. Employer's Closing Brief and Designation of Evidence at 3-4. Employer also stated, however, that it would rely on Dr. Wheeler's negative reading of a January 13, 2004 x-ray as rebuttal to Dr. DePonte's interpretation. *Id*. at 4; *see also* Employer's Exhibit 4. The administrative law judge admitted Dr. DePonte's reading into the record over employer's objection and also admitted Dr. Wheeler's reading into the record. Decision and Order on Remand at 5.

Order on Remand. The administrative law judge noted that since there was no pathology or reasoned medical opinion evidence of complicated pneumoconiosis, the only possible method by which claimant could establish complicated pneumoconiosis, and thereby invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, was by x-ray evidence. After concluding that the designated evidence was admissible under Section 725.414, the administrative law judge weighed the conflicting x-ray evidence and determined that, because the positive and negative readings for complicated pneumoconiosis by dually qualified readers were in equipoise, claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.,* 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.,* 12 BLR 1-176 (1989); *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986) (*en banc*). Failure to establish a requisite element of entitlement will preclude a finding of entitlement to benefits.

[4] Because claimant's most recent coal mine employment occurred in Kentucky, the Board will apply the law 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*); Director's Exhibit 2..

Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis. . . if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray. . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, OR C. . . ;or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) when diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original].

Before determining whether invocation of the irrebuttable presumption has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh together all relevant evidence pursuant to Section 718.304(a)-(c). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1990); *Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1991) (*en banc*).

Under Section 718.304, the administrative law judge correctly noted that the record contains eight readings of four x-rays dated January 31, 2002, January 8, 2003, April 24, 2003 and January 13, 2004. The January 31, 2002 x-ray was read by Dr. Patel, a Board-certified radiologist and B reader (dually qualified physician) as positive for complicated pneumoconiosis (2/2, Category A large opacities) and by Dr. Cappiello, a dually qualified physician, as negative for complicated pneumoconiosis (2/3, Category O large opacities).[5] Director's Exhibit 15; Employer's Exhibit 5. The January 8, 2003 x-

[5] Dr. Navani also prepared a quality reading of the January 31, 2002 x-ray. Director's Exhibit 15.

ray was read by Dr. DePonte, a dually qualified physician, as positive for complicated pneumoconiosis (2/1, Category A large opacities) but was also read by Dr. Scott, a dually qualified physician, as negative for complicated pneumoconiosis (2/2, Category 0 large opacities). Director's Exhibit 17; Employer's Exhibit 3. An April 4, 2003 x-ray was read by Dr. Halbert, a dually qualified physician, as negative for complicated pneumoconiosis (2/2, Category 0 large opacities), and as positive for complicated pneumoconiosis (3/2, Category A large opacities) by Dr. Cappiello, a dually qualified physician. Employer's Exhibit 1; Claimant's Exhibit 2. Lastly the January 13, 2004 x-ray was read as positive for complicated pneumoconiosis (3/2, Category A large opacities) by Dr. Alexander, a dually qualified physician, and as negative for complicated pneumoconiosis (1/0, Category O large opacities) by Dr. Wheeler, a dually qualified physician. Claimant's Exhibit 1; Employer's Exhibit 4.

The administrative law judge found that, because all of the physicians interpreting claimant's x-rays for the presence or absence of complicated pneumoconiosis are dually qualified as Board-certified radiologists and B readers, he could not rely on a comparison of the qualifications of the physicians to resolve the conflict in the x-ray evidence. Decision and Order on Remand at 5. Because the quality of all of the x-rays was noted as "good" or "acceptable," he also found that "there was no technical defect likely to impair classification of the radiograph," and therefore, he was unable to resolve the conflict in the evidence based on the quality of the x-rays. *Id*. The administrative law judge further noted that even the most recent x-ray was equally balanced with a positive and negative reading for complicated pneumoconiosis. *Id*. The administrative law judge thus concluded that "because the "x-ray evidence neither precludes nor establishes the existence of complicated pneumoconiosis" claimant has "failed to establish the existence of complicated pneumoconiosis under [Section] 718.304(a), or by any other means." *Id*.

As the administrative law judge properly performed both a quantitative and qualitative analysis of the x-ray evidence, *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-277 (6th Cir. 1993), and reasonably concluded that the x-ray evidence was equally balanced, we affirm, as supported by substantial evidence, his finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc recon.*); *see* Decision and Order on Remand at 5. Consequently, we affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 and that he is not entitled to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand – 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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REGINA C. McGRANERY
Administrative Appeals Judge