BRB No. 09-0373 BLA

RONALD D. MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY	)	
	)	DATE ISSUED: 01/27/2010
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 – Denial of Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson Lefler & Associates), Princeton, 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 on Remand – Denial of Benefits (04-BLA-5373) of Administrative Law Judge William S. Colwell, rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the second time. In the initial decision, the administrative law judge credited claimant with twenty-two years of coal mine employment[1] and found that the evidence established the

[1] The record indicates that claimant's last coal mine employment was in West

existence of simple pneumoconiosis. The administrative law judge also found that claimant established the presence of complicated pneumoconiosis and that he was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in his consideration of the x-ray, medical opinion, and computerized tomography (CT) scan evidence under 20 C.F.R. §718.304. Consequently, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.304(a), (c),[2] and remanded the case for further consideration. *Miller v. Marfork Coal Co.*, BRB No. 06-0453 BLA (Apr. 30, 2007)(unpub.). The Board directed the administrative law judge, on remand, to consider the conflicting x-ray evidence in accordance with the standards set forth in 20 C.F.R. §718.304(a). Further, pursuant to 20 C.F.R. §718.304(c), the Board instructed the administrative law judge to address whether Dr. Patel's CT scan interpretation constitutes a diagnosis of a condition that would appear as a greater-than-one-centimeter opacity if it were seen on x-ray. Additionally, the Board instructed the administrative law judge to reconsider the opinions of Drs. Crisalli and Spagnolo, and to maintain the burden of proof on claimant to establish the existence of complicated pneumoconiosis.[3] *Miller*, slip op. at 7-10.

On remand, the administrative law judge again found that the x-ray evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge further found that the CT scan evidence was inconclusive as to the existence of complicated pneumoconiosis, and that the medical opinion evidence did not support a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(c). Weighing all of the relevant evidence together, the administrative law judge credited the medical opinion and CT scan evidence over the x-ray evidence, and determined that

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Virginia. *See* Director's Exhibits 1, 4, 6, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The Board noted that there is no autopsy or biopsy evidence in the record and that therefore, 20 C.F.R. §718.304(b) is not applicable in this case. *Miller v. Marfork Coal Co.*, BRB No. 06-0453 BLA, slip op. at 7 n.8 (Apr. 30, 2007)(unpub.).

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and his finding that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Miller*, slip op. at 2 n.1.

claimant did not establish the existence of complicated pneumoconiosis by a preponderance of the evidence under 20 C.F.R. §718.304. The administrative law judge further found that claimant did not establish that he is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his consideration of the CT scan and medical opinion evidence pursuant to 20 C.F.R. §718.304(c), and in weighing all of the relevant evidence together under 20 C.F.R. §718.304. Employer responds in support of the denial of benefits, and additionally asserts that the administrative law judge erred in finding the x-ray evidence supportive of a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

In order 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 one 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, as implemented by 20 C.F.R. §718.304, 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 that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The administrative law judge must consider all relevant evidence on this issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114,

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge found that, of four x-rays that were submitted, one x-ray supported complicated pneumoconiosis. Decision and Order on Remand at 3-4. Relevant to 20 C.F.R. §718.304(c), the administrative law judge considered three interpretations of an October 1, 2002 CT scan[5] and the medical opinions of Drs. Mullins, Crisalli, and Spagnolo. With respect to the CT scan evidence, the administrative law judge considered the physicians' radiological qualifications, and found that Dr. Patel did not opine whether the large masses he saw would equate to a one-centimeter or larger opacity if x-rayed, that Dr. Wheeler's CT scan interpretation did not support a finding of complicated pneumoconiosis, and that Dr. Spagnolo's CT scan interpretation was speculative as to the etiology of the large masses. The administrative law judge therefore determined that the CT scan evidence was inconclusive as to the existence of complicated pneumoconiosis. Decision and Order on Remand at 6.

Claimant asserts that the administrative law judge erred in discrediting Dr. Patel's CT scan interpretation solely because Dr. Patel's report did not contain a statement as to whether the progressive massive fibrosis that he observed would equate to a one-centimeter opacity if it were viewed on x-ray. We disagree. Claimant cites no authority in support of his position. Further, contrary to claimant's assertion, the United States Court of Appeals for the Fourth Circuit has held:

> Because clauses (A), (B), and (C) of §921(c)(3) are three different ways of diagnosing complicated pneumoconiosis, in construing the requirements of each, one must perform equivalency determinations to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. . . . By explicitly referencing prongs (A) and (B) as guides, prong (C) of the statute requires "plainly that equivalency determinations shall be made."
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[5] The administrative law judge considered the interpretations of the October 1, 2002 computerized tomography (CT) scan by Drs. Patel, Wheeler, and Spagnolo. Dr. Patel opined that the soft tissue masses in both upper lobes are consistent with progressive massive fibrosis secondary to complicated pneumoconiosis. Director's Exhibit 11. Dr. Wheeler opined that the masses in the upper lobes are not opacities of coal workers' pneumoconiosis. Employer's Exhibit 4. Similarly, Dr. Spagnolo opined that the larger densities in the upper lobes do not favor either simple or complicated pneumoconiosis. Employer's Exhibit 10.

> Because prong (A) sets out an entirely objective scientific standard, it provides the mechanism for determining equivalencies under prong (B) or prong (C).

Double B Mining, Inc. v. Blankenship, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999) (case citations omitted). Consequently, because the administrative law judge accurately observed that Dr. Patel did not state whether the progressive massive fibrosis that he diagnosed by CT scan would appear as a one-centimeter or larger opacity if viewed on x-ray, we reject claimant's assertion of error. *Id*. Further, because the remaining CT scan evidence does not support a finding of complicated pneumoconiosis, we affirm the administrative law judge's finding that the CT scan evidence is inconclusive as to the existence of complicated pneumoconiosis.

With regard to the medical opinion evidence,[6] the administrative law judge discounted Dr. Mullins' opinion because she "equivocated on the etiology" of the large masses seen on claimant's x-rays. Decision and Order on Remand at 6. By contrast, the administrative law judge determined that the opinions of Drs. Crisalli and Spagnolo were entitled to "great weight" in light of their "superior credentials" and because they based their opinions on claimant's x-rays, CT scan, and normal pulmonary function study results. The administrative law judge therefore found that the medical opinion evidence does not support a finding of complicated pneumoconiosis. *Id.* Weighing all of the relevant evidence together under 20 C.F.R. §718.304, the administrative law judge stated, "I give greater weight to the other evidence of record over the x-ray evidence and find that the Miner has failed to establish the presence of complicated pneumoconiosis by a preponderance of the evidence." *Id*. at 7.

Claimant asserts that the administrative law judge erred in rejecting Dr. Mullins' opinion pursuant to Section 718.304(c). We disagree. Contrary to claimant's assertion, the administrative law judge rationally found Dr. Mullins's opinion to be equivocal, because Dr. Mullins opined that the masses seen on claimant's x-rays were either complicated pneumoconiosis or tumors. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester*, 993

[6] Dr. Mullins opined that claimant's x-ray was consistent with coal dust exposure and that there were bilateral upper lobe masses consistent with progressive massive fibrosis or a tumor. Director's Exhibit 12. Dr. Crisalli opined that claimant does not have complicated pneumoconiosis based on claimant's normal objective studies, the negative x-ray interpretations of Drs. Wheeler and Scott, and claimant's CT scan. Employer's Exhibits 1, 12. Similarly, based on claimant's normal objective studies and Dr. Wheeler's x-ray and CT scan interpretations, Dr. Spagnolo opined that claimant does not have complicated pneumoconiosis. Employer's Exhibit 6.

F.3d at 1146, 17 BLR at 2-118; *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

Further, we reject claimant's assertion that the opinions of Drs. Crisalli and Spagnolo are necessarily speculative because the doctors based their opinions, in part, on the absence of a pulmonary impairment. Claimant's Brief at 8-9. As we held previously, the absence of a respiratory impairment is a relevant factor a physician may consider in ascertaining whether an x-ray diagnosis of complicated pneumoconiosis is appropriate. *Miller*, slip op. at 9.

We additionally reject claimant's assertion that the administrative law judge erred in finding the opinions of Drs. Crisalli and Spagnolo entitled to great weight given that they based their opinions, in part, on x-ray interpretations that were discredited by the administrative law judge, and that are contrary to the administrative law judge's finding that the x-ray evidence supports complicated pneumoconiosis at 20 C.F.R. §718.304(a). Claimant's Brief at 8-9. The administrative law judge accurately observed that, although Drs. Crisalli and Spagnolo based their opinions, in part, on negative x-ray evidence, Dr. Crisalli additionally based his opinion on his examination findings, and both physicians based their opinions on CT scan evidence, and normal pulmonary function and arterial blood gas studies. Further finding that a CT scan is a "sophisticated and sensitive" diagnostic tool, and that Drs. Crisalli and Spagnolo possess "superior credentials," the administrative law judge permissibly determined that the opinions of Drs. Crisalli and Spagnolo were entitled to great weight. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Because claimant raises no further challenge to the administrative law judge's weighing of the CT scan and medical opinion evidence of record, we affirm the administrative law judge's findings at Section 718.304(c).

Claimant asserts that the administrative law judge erred in failing to consider the x-ray reports of Drs. Willis, Daniel, and Lintala, when weighing all of the relevant evidence together at 20 C.F.R. §718.304. We disagree. Contrary to claimant's assertion, the record reflects that the administrative law judge considered these physicians' x-ray interpretations in his analysis under 20 C.F.R. §718.304(a), and that the administrative law judge considered their x-ray findings when weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.304. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33.

We additionally reject claimant's assertion that the administrative law judge committed reversible error in failing to consider a letter from Dr. Petsonk, notifying claimant that an August 27, 2002 x-ray had been interpreted as positive for complicated pneumoconiosis. Claimant's Brief at 11; Director's Exhibit 11. Claimant's failure to brief this allegation of error with specificity leaves unclear the significance of the

administrative law judge's oversight, given both the administrative law judge's finding that the x-ray evidence supported a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a), and the fact that neither the August 27, 2002 x-ray, nor the credentials of Dr. Petsonk, are contained in the record. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, as claimant raises no further challenges to the administrative law judge's finding at 20 C.F.R. §718.304, we affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis under Section 718.304. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34.

Because claimant failed to establish total disability, an essential element of entitlement, we affirm the denial of benefits. *Trent*, 11 BLR at 1-27. Additionally, because we affirm the denial of benefits, we need not address employer's argument that the administrative law judge erred in finding the x-ray evidence to be supportive of a finding of complicated pneumoconiosis. .

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of 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