BRB No. 11-0336 BLA

JOHN M. SALAZAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/20/2012
	)	
UNITED STATES FUEL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

R. L. Knuth and Bruce Wycoff (Jones, Waldo, Holbrook & McDonough PC), Salt Lake City, Utah, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-5840) of Administrative Law Judge William S. Colwell awarding benefits on a claim filed 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). This case involves a claim filed on May 27, 2005. After crediting claimant with eleven and one-half years of coal mine employment,[1] the administrative law judge

[1] The record reflects that claimant's coal mine employment was in Utah. Director's Exhibit 3; Claimant's Exhibit 4; Hearing Transcript at 27. Accordingly, this

found that the evidence established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits, and ordered benefits to be augmented to reflect one dependent, claimant's wife.

On appeal, employer contends that the administrative law judge erred in finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer also argues that the administrative law judge erred in ordering that claimant's award of benefits be augmented for his dependent wife. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[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. 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*).

Employer argues that the administrative law judge erred in finding that claimant established that he suffered from complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. 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

---

case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[2] The administrative law judge's finding of eleven and one-half years of coal mine employment is unchallenged on appeal. Thus, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

that a miner was totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of 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). *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 found at Section 718.304. 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 invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See* 20 C.F.R. §718.304; *Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.2d 975, 986, 24 BLR 2-72, 2-92 (11th Cir. 2007); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

Pursuant to Section 718.304, the administrative law judge considered the x-ray, CT scan, and medical opinion evidence.[3] With regard to the x-ray evidence under 20 C.F.R. §718.304(a), the administrative law judge found that it did not establish the existence of complicated pneumoconiosis, as none of the x-rays were interpreted as positive for large opacities. Decision and Order at 6. However, the administrative law judge found that the x-ray evidence was indicative of simple pneumoconiosis, as all but two treatment x-rays indicated the presence of simple pneumoconiosis. With regard to the CT scan evidence, the administrative law judge found that, although readings of three of the six CT scans identified a 1.3 or 1.4 centimeter mass in claimant's left lung, those readings did not address the presence or absence of complicated pneumoconiosis, as they did not identify the cause of the mass. Specifically, the December 30, 2004, March 30, 2005, and March 21, 2006 CT scans identified a 1.3 or 1.4 centimeter mass in the left lung. Claimant's Exhibits 15b, h, l; Employer's Exhibits 3, 5, 9. Additionally, Dr. James observed a 1.3 to 1.4 centimeter opacity in the left lobe on the May 31, 2006 CT scan. Claimant's Exhibit 1.

The administrative law judge then considered the medical opinions of Drs. James and Farney, which were based in part on the CT scan evidence, regarding the existence of complicated pneumoconiosis.[4] Decision and Order at 17 n.14. Dr. James, who is Board-

[3] The administrative law judge accurately noted that the record contains no biopsy or autopsy evidence. Decision and Order at 4 n.2.

[4] The administrative law judge found that the remaining medical opinions of Drs. Gagon and Khilnani did not address the presence or absence of complicated

certified in Internal Medicine and Pulmonary Disease, prepared two reports on December 1, 2006, and February 22, 2010. In his 2006 report, Dr. James diagnosed complicated pneumoconiosis, based on claimant's CT scans dated December 30, 2004 and May 31, 2006, which both indicated that there was a 1.3 centimeter opacity in the left upper lobe. Claimant's Exhibit 1. In his 2010 report, Dr. James stated further that the 1.3 centimeter opacity seen in claimant's left lobe on the CT scans from 2004 to 2006 would be a Category A opacity, if it were seen on a conventional x-ray:

> I have included additional images from the CT scan of [claimant] that was performed on 5/31/2006. This reveals a left lung large opacity of approximately 1.3 [centimeters] cm. A similar dimension was outlined on CT scans listed above, such as the study from 12/30/2004, which under findings notes 'there is a 1.3 x 1.3 cm spiculated noncalcified structure in the left upper lobe adjacent to the major fissure.' With a reasonable degree of medical certainty, this large opacity seen on CT scan in the left upper lobe, if it could be observed on plain film, would be a category A opacity . . . .

Claimant's Exhibit 17.

Dr. Farney, who is also Board-certified in Internal Medicine and Pulmonary Disease, prepared a report dated May 31, 2006, and testified at the hearing on March 15, 2010. Employer's Exhibit 1; Hearing Transcript at 89-163. Dr. Farney acknowledged that the CT scans from 2004 to 2006, identifying a 1.3 to 1.4 centimeter structure in the left lobe, "could meet the definition of a large or category A opacity[5] but other readers, and the present radiographic studies do not show this lesion. The reading by Jerome F. Wiot is of special importance because of his qualifications. He did not find a large opacity." Employer's Exhibit 1. Thus, Dr. Farney disagreed with Dr. James's determination that the large opacity seen on claimant's CT scans would be a category A large opacity, if it could be seen on x-ray, based on the fact that the opacity was not seen on claimant's x-rays, including the one that was read by Dr. Wiot. *Id.*; Hearing Transcript at 124.

The administrative law judge first considered the qualifications of Drs. James and Farney, noting that, while they both are pulmonologists, Dr. Farney specializes in, and has published medical literature, in the area of sleep disorders, while Dr. James

---

pneumoconiosis. Decision and Order at 17 n.14.

[5] Dr. Farney testified that a Category A opacity is defined as a large mass exceeding one centimeter. Hearing Transcript at 94-95.

specializes in occupational lung disease and has published medical literature in this area, and more specifically, in respiratory disease in miners and in pneumoconiosis. Decision and Order at 22.

The administrative law judge also considered whether the opinions were reasoned and documented. He found that Dr. James's opinion was sufficiently documented and reasoned, because the doctor relied on treatment records from 2004 to 2006, as well as the physician's testing. In contrast, the administrative law judge found that Dr. Farney's opinion was insufficiently reasoned, because Dr. Farney deferred to Dr. Wiot's findings, when Dr. Wiot had read only an x-ray, but not a CT scan. Specifically, because Drs. Farney and James agreed that the x-ray evidence did not show the 1.3 centimeter structure that was detected by the more sensitive high resolution CT scan, and since both physicians acknowledged that a CT scan can better detect complicated pneumoconiosis than can a conventional x-ray, the administrative law judge found that Dr. Farney's reliance on Dr. Wiot's x-ray reading to explain findings on the CT scan was "insufficiently reasoned to be probative." Decision and Order at 18. Moreover, the administrative law judge found that Dr. Farney's opinion was insufficiently reasoned because it was premised on Dr. Farney's generalized view that it would be rare for a coal miner who worked in the Western United States to develop complicated pneumoconiosis, rather than on the specifics of this case.[6]

Employer argues that the administrative law judge erred in according determinative weight to Dr. James's opinion, asserting that: 1) Dr. James does not have the necessary qualifications to render the equivalency determination that he made; 2) that Dr. James's opinion ignored Dr. Morrison's reading of the May 31, 2006 CT scan, which was the CT scan that Dr. James relied upon to make his equivalency determination; and 3) that Dr. James's opinion is contrary to the medical authority that Dr. James relied on, in making his equivalency determination and, in any case, is not reasoned. Employer's arguments lack merit.

First, employer argues that Dr. James lacked the necessary qualifications to render his opinion, and asserts that the administrative law judge "simply identified Dr. James'[s] credentials as: '[B]oard-certified in [I]nternal [M]edicine and [P]ulmonary [D]iseases." Employer's Brief at 6. Contrary to employer's contention, the administrative law judge did more than simply identify Dr. James as Board-certified in Internal Medicine and Pulmonary Disease. Specifically, the administrative law judge recognized that both Drs.

[6] Employer does not contest the administrative law judge's finding that Dr. Farney's opinion is not sufficiently reasoned to establish that claimant does not have complicated pneumoconiosis. Thus, the administrative law judge's finding in this regard is affirmed. *See Skrack*, 6 BLR at 1-711.

James and Farney are Board-certified in Internal Medicine and Pulmonary Disease, but observed that Dr. Farney specializes in sleep disorders, whereas Dr. James specializes in occupational lung diseases. Decision and Order at 22. Moreover, the administrative law judge observed that, while Dr. Farney has published medical literature in the area of sleep disorders, Dr. James has published medical literature in the areas of environmental lung disease, respiratory diseases in miners, and pneumoconiosis. *Id*. We therefore reject employer's argument with respect to Dr. James's qualifications.

Employer also asserts that Dr. James lacked sufficient knowledge, training, or expertise to read a CT scan, and that claimant failed to qualify him as an expert. Employer's Brief at 7-8, citing *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 893-94, 22 BLR 2-409, 2-422-24 (7th Cir. 2002). In *Stein*, the United States Court of Appeals for the Tenth Circuit affirmed an administrative law judge's finding that the evidence did not establish that a particular physician was experienced in interpreting CT scans for a diagnosis of pneumoconiosis. In so holding, the court stated that it would defer to the administrative law judge's well-reasoned finding, in the absence of guidelines for administrative law judges to follow when assessing the reliability of a physician's interpretation of a CT scan. *Stein*, 294 F.3d at 893, 22 BLR at 2-423. In this case, the administrative law judge reasonably found that Dr. James has the necessary experience and qualifications to render his opinion, and we defer to the administrative law judge's finding in this regard. We, therefore, reject employer's allegation of error.

Next, employer argues that the administrative law judge erred in crediting Dr. James's opinion because Dr. James, in rendering his equivalency determination, ignored Dr. Morrison's May 31, 2006 CT scan, in which Dr. Morrison did not detect a nodule in the left lobe, only in the right lobe. Employer's Brief at 9-12. We disagree, since the record reflects that the CT scan reading by Dr. Morrison indicates nodularity in both lobes of the lung. Employer's Exhibit 15. Moreover, as summarized by the administrative law judge, the December 30, 2004 CT scan revealed a 1.3 by 1.3 centimeter structure in the left lobe, as did the CT scans of March 30, 2005 and March 21, 2006. Claimant's Exhibits 15b, h, l; Employer's Exhibits 3, 5, 9. Further, employer's own expert, Dr. Farney, agreed that a 1.3 centimeter structure is present in claimant's left lobe. Employer's Exhibit 1. Therefore, we reject employer's allegation of error.

Lastly, with respect to the issue of complicated pneumoconiosis, employer argues that Dr. James's equivalency determination does not meet the definition of complicated pneumoconiosis, because a finding of complicated pneumoconiosis requires a two-centimeter mass or larger, and only a 1.3 centimeter mass was found. Employer's Brief at 12-16. Contrary to employer's contention, the statute and regulation do not mandate the use of a two-centimeter standard to establish the existence of complicated pneumoconiosis on CT scans. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240,

244, 22 BLR 2-554, 2-561-62 (4th Cir. 1999); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

We reject employer's additional contention that Dr. James's equivalency determination is not reasoned. Employer's Brief at 12-16. The administrative law judge found that Dr. James relied on treatment records from 2004 to 2006, and his own findings upon physical examination and testing. Because the question of whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide, we defer to the administrative law judge's finding that Dr. James's equivalency determination is sufficiently reasoned, and constitutes substantial evidence to support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[7] *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). We, therefore, affirm the administrative law judge's award of benefits.[8]

Finally, employer argues that the administrative law judge erred in augmenting benefits for claimant's dependent wife. Employer contends that claimant is not married, and points to evidence in support of its contention.[9] Employer's Brief at 17. The record, however, indicates that the district director issued an amended award on October 8, 2009,

[7] Because no party challenges the administrative law judge's finding that claimant is entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

[8] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Because we affirm the administrative law judge's award of benefits pursuant to 20 C.F.R. §718.304, we need not address whether amended Section 411(c)(4) affects this case.

[9] Employer accurately notes that claimant's claim form indicates that he was not then married, and that his wife died in 1995. Director's Exhibit 2. Employer further points out that Drs. James and Farney, in their medical reports, identify claimant as a widower. Claimant's Exhibit 1; Employer's Exhibit 1. Claimant's pre-hearing report also states that he was widowed with no dependents, his wife having died in 1995. Administrative Law Judge's Exhibit 6. At the hearing, claimant, who was eighty-eight years old at that time, testified that his wife died in 1985. Hearing Transcript at 47, 79. The death certificate of claimant's wife, Elsie T. Salazar, indicates, however, that she died on January 10, 1995. Director's Exhibit 8.

to reflect that claimant entered into a valid marriage to Maria Luisa Bojorguez on December 15, 2003 and, is therefore entitled to augmented benefits for his dependent wife. Director's Exhibit 34. Employer did not object to the admission of Director's Exhibit 34 into the record, Hearing Transcript at 10-11, and there is no indication that employer contested the finding in the district director's amended award, which augmented benefits for claimant's current wife, although employer and its counsel were served with this amended award. In its brief on appeal, employer makes no mention of the district director's amended award. Therefore, we decline to address employer's challenge to the administrative law judge's augmentation of benefits for claimant's dependent wife, since employer waived the issue by not raising it before the administrative law judge. *See Big Horn Coal Co. v. Director, OWCP* [*Alley*], 987 F.2d 1052, 13 BLR 2-372, 2-375-76 (10th Cir. 1990); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge