BRB No. 07-0883 BLA

D.J.R. Claimant-Petitioner v. S & D COAL COMPANY, INCORPORATED and TRAVELERS INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/23/2008 DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits (06-BLA-5634) of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

D.J.R., Lebanon, Virginia, *pro se*.

Mary Beth Chapman (Pullin, Fowler & Flanagan, PLLC), Beckley, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel,[1] the Decision and Order–Denial of Benefits (06 BLA-5634) of Administrative Law Judge Richard T. Stansell-Gamm 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). The administrative law judge credited claimant with twenty years of coal mine employment, and found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), but failed to establish disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (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 supported by substantial evidence, are rational, and are consistent with applicable law.[3] 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).

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

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and does not contain any error requiring remand or reversal. In so concluding, we first address the administrative law judge's finding that the evidence of record was insufficient to establish the existence of complicated pneumoconiosis at Section 718.304.

Section 411(c)(3) of the Act, as implemented by Section 718.304, provides that 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 which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In order to determine whether claimant has established invocation of the irrebuttable presumption pursuant to Section 718.304, the administrative law judge is required to weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *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, 1-33-34 (1991)(*en banc*). However, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. *Melnick*, 16 BLR at 1-33; *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has explained:

> Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict….if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

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

In evaluating the evidence of record on the issue of complicated pneumoconiosis pursuant to Section 718.304, the administrative law judge first considered nine readings of six x-rays. 20 C.F.R. §718.304(a). He accurately found that the x-rays dated May 9, 2003 and August 31, 2003 were both interpreted as negative for a large pulmonary opacity. Decision and Order at 8; Employer's Exhibit 7; Director's Exhibit 13. Turning to the x-ray of October 19, 2004, the administrative law judge determined that Dr. Alexander identified a "3 x 1 cm large, Category A opacity present in the right upper lung zone consistent with complicated pneumoconiosis," Claimant's Exhibit 2; Decision and Order at 7, while Dr. Fino identified a "pulmonary scar extending from right upper lung, not complicated pneumoconiosis." Director's Exhibits 11, 13. The administrative law judge characterized Dr. Fino's interpretation as "inconclusive" for failure to provide measurements of identified opacities or scarring. Therefore, based on Dr. Fino's inconclusive reading, and Dr. Alexander's superior credentials as a dually qualified reader, the administrative law judge rationally determined that the October 19, 2004 x-ray established the presence of a large pulmonary opacity.[4] *See generally U. S. Steel Mining Co. v. Director, OWCP, [Jarrell]*, 187 F.3d 384, 391, 21 BLR 2-639, 2-652-2-653 (4th Cir. 1999); Decision and Order at 7, 8.

With respect to the January 20, 2005 x-ray, the administrative law judge noted that Drs. Forehand and Fino are similarly qualified as B readers. Decision and Order at 7-8. Dr. Forehand did not find a large pulmonary opacity. Dr. Fino noted a pulmonary scar, but because he failed to provide a measurement, his interpretation was again found inconclusive. The administrative law judge therefore accorded Dr. Forehand's negative reading "greater probative weight…due to the lack of specificity by Dr. Fino." Decision and Order at 8. Similarly, the administrative law judge found that Dr. Fino's notation of

[4] The record reflects that Dr. Alexander is a Board-certified radiologist and a B reader, while Drs. Hippensteel, Fino and Forehand are B readers. Decision and Order at 7-8; Director's Exhibits 11, 13, 15; Claimant's Exhibit 2; Employer's Exhibit 9.

A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §717.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

a pulmonary scar on the April 7, 2005 x-ray, standing alone, rendered the film inconclusive as to the presence of a large pulmonary opacity. *Id*. Thus, the administrative law judge reasonably concluded that the x-rays of January 20, 2005 and April 7, 2005 failed to establish the existence of a large pulmonary opacity. *Id*; Director's Exhibits 15, 11, 13. Lastly, the administrative law judge determined that the February 13, 2006 x-ray was positive for the presence of a large pulmonary opacity, as Drs. Alexander and Hippensteel both found a right upper large pulmonary opacity measuring over one centimeter. Decision and Order at 7-8; Claimant's Exhibit 1; Employer's Exhibit 9. Dr. Alexander identified the opacity as measuring 20 x 5 mm, while Dr. Hippensteel found a 7 x 30 mm linear scar, not consistent with pneumoconiosis. *Id*. Accordingly, of the six x-rays, the administrative law judge found one inconclusive, three negative, and two positive for the presence of a large pulmonary opacity. Decision and Order at 8.

The administrative law judge next addressed the additional evidence of record relevant to the existence of complicated pneumoconiosis at Section 718.304(c), including the medical opinions and treatment records, and determined that the evidence precluded a finding of complicated pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. The administrative law judge properly found that the sole computerized tomography (CT) scan of record, obtained on August 31, 2003, was insufficient to establish complicated pneumoconiosis because Dr. Estes noted the presence of a soft tissue mass in the right upper lobe, but did not describe its size, and opined it was related to idiopathic pulmonary fibrosis. Decision and Order at 8-9; *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999). Further, Dr. Fino concluded that claimant did not have complicated pneumoconiosis because the August 31, 2003 CT scan placed the right upper lung abnormality in the pleura, rather than the parenchyma, which precluded a determination that the mass was associated with pneumoconiosis. Decision and Order at 9. With respect to the x-ray interpretations furnished by Dr. Alexander, the administrative law judge observed that the physician's "certainty as to the cause of the large pulmonary opacity diminished between his two interpretations," since the physician gave a definitive diagnosis of complicated pneumoconiosis for the October 19, 2004 x-ray, but subsequently interpreted the February 13, 2006 x-ray as "possible complicated pneumoconiosis." Decision and Order at 9; Claimant's Exhibits 1, 2. The administrative law judge further determined that Dr. Roatsey diagnosed "possible complicated pneumoconiosis," and that Dr. Hippensteel opined that the right upper lung linear scar shown on x-ray did not constitute complicated pneumoconiosis. Decision and Order at 9; Claimant's Exhibit 5; Employer's Exhibits 4, 10. Finally, the administrative law judge observed that none of the other physicians of record who considered claimant's pulmonary condition diagnosed complicated pneumoconiosis. Decision and Order at 9.

The administrative law judge's determination to accord less weight to Dr. Alexander's opinion is reasonable, as a medical opinion denoting inconsistency may validly be accorded less weight. *See Hopton v. U. S. Steel Corp*., 7 BLR 1-12 (1984). Similarly, Dr. Roatsey's evidence was rationally characterized as a "less than certain diagnosis," since an inconclusive or equivocal opinion may be given less weight. Decision and Order at 9; *see generally Jarrell*, 187 F.3d at 391, 21 BLR at 2-652-653. Further, Dr. Hippensteel's determination that the scar identified on x-ray is not complicated pneumoconiosis constitutes evidence affirmatively showing that "the opacities are not what they seem to be," *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, and was therefore properly weighed against the x-ray evidence that was positive for complicated pneumoconiosis.

The administrative law judge validly weighed the evidence of record, and specifically explained the basis for the weight assigned to conflicting evidence. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.304, we affirm his determination that claimant failed to establish the existence of complicated pneumoconiosis thereunder. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.3d at 1146, 17 BLR at 2-117-8.

Next, as the administrative law judge found that total respiratory disability was established, we address his analysis of the relevant evidence bearing on the issue of disability causation. Disability due to pneumoconiosis is established if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" if it has a materially adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii).

In the present case, the administrative law judge evaluated the evidence with respect to total disability due to pneumoconiosis, and accurately determined that Drs. Beyers, Forrest, Turner, Nelson, Roatsey and Smiddy failed to address the issue. Decision and Order at 19-20. The administrative law judge found that of the remaining physicians, Drs. Green and Forehand concluded that claimant was totally disabled due to pneumoconiosis, while Drs. Fino and Hippensteel opined that claimant's disability was unrelated to pneumoconiosis. Decision and Order at 20.

Addressing the conflicting medical opinions, the administrative law judge acknowledged Dr. Green's status as claimant's treating physician, but found that his opinion, that claimant's disability was caused by chronic obstructive pulmonary disease primarily related to pneumoconiosis, was not well reasoned because Dr. Green failed to explain "the basis for his conclusion when [claimant] had two additional significant

pulmonary health hazards: cigarette smoking and severe obstructive sleep apnea." Decision and Order at 16, 20; Claimant's Exhibits 3, 4; *see* 20 C.F.R. §718.104(d)(5).[5] We conclude that the administrative law judge permissibly exercised his discretion as finder-of-fact in according little weight to the opinion of Dr. Green because it failed to account for the effect of claimant's other health problems. *See Collins v. J & L Steel*, 21 BLR 1-182, 1-188-89 (1999); *Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985).

Similarly, the administrative law judge accorded little weight to Dr. Forehand's opinion, that claimant was totally disabled due to his "insufficient residual gas exchange capacity" caused by pneumoconiosis, as the physician failed to address the role that claimant's severe sleep apnea may have played in concluding that pneumoconiosis was the "sole" cause of claimant's inability to properly oxygenate his blood. Director's Exhibit 15; Decision and Order at 13, 16. The administrative law judge therefore reasonably found that, due to "various documentation and reasoning shortfalls," the assessments of Drs. Green, Forehand and Fino on the issue of disability causation "have diminished probative weight and are outweighed by Dr. Hippensteel's opinion." Decision and Order at 21; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Based on the foregoing, we conclude that substantial evidence supports the administrative law judge's disposition of the opinions of Drs. Green and Forehand, as the only two physicians whose evidence could support a finding of disability causation pursuant to Section 718.204(c) on this record. However, because the medical opinion of Dr. Hippensteel was specifically found to be entitled to the most weight, we will briefly review the administrative law judge's relevant analysis. Addressing Dr. Hippensteel's opinion that claimant's severe obstructive sleep apnea and corresponding pulmonary hypertension, rather than exposure to coal mine dust, was the source of his disabling obstructive impairment, the administrative law judge found persuasive Dr. Hippensteel's explanation that claimant's blood gas study results did not demonstrate a loss of oxygenation with exercise, and that the valid pulmonary function studies of record showed no diffusion impairment. Decision and Order at 14, 16-17; Employer's Exhibits 4, 10. The administrative law judge noted Dr. Hippensteel's certification in pulmonary disease and his review of the entire record, and determined that his opinion presented a more probative and well-reasoned assessment that integrated all the medical evidence of record in explaining that claimant's impairment was not related to coal dust exposure. Decision and Order at 16-17, 21.

[5] The administrative law judge found that claimant, born in 1948, began smoking as a teenager, and continued off and on through the year 2000, at up to one and one-half packs per day. Decision and Order at 3.

It is the province of the administrative law judge to make credibility determinations and to resolve inconsistencies or conflicts in the medical evidence. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Maypray*, 7 BLR at 1-686. Here, the administrative law judge's evaluation of Dr. Hippensteel's medical opinion based on his credentials and his supportive reasoning were proper evaluative bases for crediting his opinion as determinative over those of Drs. Green, Forehand, and Fino, *see Ellison v. Ranger Fuel Corp*., 73 F.3d 357, 20 BLR 2-125 (4th Cir. 1995); Decision and Order at 16-17, 21, and the Board will not substitute its inferences for those of the administrative law judge. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As substantial evidence supports the administrative law judge's finding that claimant failed to establish the requisite element of disability causation pursuant to Section 718.204(c), we affirm his findings thereunder, and affirm his denial of benefits.

Accordingly, the administrative law judge's Decision and Order - 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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BETTY JEAN HALL
Administrative Appeals Judge