BRB No. 09-0736 BLA

JERRY SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOCUST GROVE, INCORPORATED	)	DATE ISSUED: 07/20/2010
	)	
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 – Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Paul E. Jones, Whitney L. Lucas and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2008-BLA-05877) of Administrative Law Judge Robert B. Rae with respect to 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). The administrative law judge credited claimant with at least twenty-two years of qualifying coal mine employment, and adjudicated this claim, filed on September 9, 2007, pursuant to 20 C.F.R. Part 718. Initially, the administrative law judge set forth the procedural history of this case and reiterated his preliminary determination denying claimant's motion to withdraw, but granting his requests to waive his right to appear at the hearing and to obtain a decision on the record.[1] *See* Administrative Law Judge's Exhibit 6. Addressing the merits of the claim, the administrative law judge found the medical evidence sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence was sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and was, therefore, sufficient to establish entitlement to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Additionally, the administrative law judge found that the evidence did not rebut the presumption that claimant's pneumoconiosis arose, at least in part, 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 challenges the administrative law judge's award of benefits, arguing that the administrative law judge's decision should be reversed as claimant's own pleading, the Motion to Withdraw, constitutes an admission against interest that should be considered as evidence that claimant is not entitled to benefits. Employer also generally contends that the administrative law judge erred in finding the preponderance of the medical evidence sufficient to establish complicated pneumoconiosis. In response, claimant urges the Board to reject employer's contentions, because employer waived its right to challenge the issue regarding claimant's Motion to Withdraw by not raising it before the administrative law judge. Claimant further contends that the administrative law judge reasonably weighed the medical evidence and properly found the evidence sufficient to establish complicated pneumoconiosis. The Director, Office of Workers'

[1] On January 6, 2009, claimant filed a Motion to Withdraw his claim. Administrative Law Judge's Exhibit 2. The administrative law judge, on January 13, 2009, issued an Order to Show Cause why claimant's motion should not be approved. Administrative Law Judge's Exhibit 3. The Director, Office of Workers' Compensation Programs (the Director), responded, opposing the motion, arguing that claimant was receiving interim benefits and, therefore, the regulations precluded claimant from withdrawing his claim because none of the interim benefits had been repaid. Administrative Law Judge's Exhibit 4. In addition, the Director stated that claimant has a meritorious claim and, thus, withdrawal would not be in claimant's best interest. *Id*. Claimant also responded, filing a Request for Waiver of Right to Appear in Lieu of a Withdrawal of Claim. Administrative Law Judge's Exhibit 5. Employer did not respond.

Compensation Programs (the Director), has a filed a letter stating that he will not file a substantive response to employer's appeal.

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.[2] 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 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of totally disabling pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment.[3] 30 U.S.C. §921(c)(4). By Order issued on May 4, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments in this case.

In response to the Order, claimant states that while claimant has established twenty-two years of coal mine employment in this case, "the [fifteen] year rebuttable presumption may be moot in this case[,]" as the evidence establishes entitlement to the irrebuttable presumption at Section 718.304. *See* Claimant's Supplemental Brief at 2. Consequently, claimant contends that, in light of the evidence of record, a remand is not necessary and the Board should affirm the administrative law judge's award of benefits. The Director responds, stating that, given the administrative law judge's award of

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[3] In addition, under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), as amended, a qualified survivor of a miner, who filed a successful claim for benefits, is automatically entitled to survivor's benefits without the burden of establishing entitlement.

benefits under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), the Board should review the administrative law judge's decision in light of employer's arguments. Director's Supplemental Letter Brief at 2. However, the Director maintains that, if the Board does not affirm the award of benefits, the case must be remanded for the administrative law judge to determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the case is remanded for consideration under Section 411(c)(4), the Director states that the administrative law judge should allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456. *Id*. Employer responds that the 2010 amendments should not change the Board's analysis of this case, because the issues involve the administrative law judge's denial of claimant's Motion to Withdraw and the administrative law judge's award of benefits based on a finding of complicated pneumoconiosis. Employer's Supplemental Brief at 1-2. Employer, therefore, states that the revival of the Section 411(c)(4) presumption is inapplicable. *Id*.

Based on the parties' responses, and our ultimate disposition of this case, *see* discussion, *infra*, we need not remand this case to the administrative law judge for consideration of the applicability of the Section 411(c)(4) presumption. We turn, therefore, to the issues raised by the parties on appeal.

Initially, we address employer's procedural challenge concerning claimant's Motion to Withdraw. On January 6, 2009 and prior to the hearing, claimant submitted a Motion to Withdraw his claim, stating that new evidence had surfaced that undermined the finding of complicated pneumoconiosis. Administrative Law Judge's Exhibit 2. Specifically, claimant stated that "Drs. Broudy, Dahhan and Alexander have all opined that the large opacities seen on the prior film is a coalescence and not indicative of complicated pneumoconiosis" and that a CT scan did not reveal any large opacities. *Id*. Claimant, therefore, stated that it was in his best interest to withdraw his claim. Claimant also noted that employer had no objection, but that the Director objected to withdrawal, unless the interim benefits already paid to claimant were reimbursed to the Trust Fund. *Id*. The administrative law judge then issued an Order to Show Cause, ordering employer and the Director to explain why claimant's motion should not be approved. Administrative Law Judge's Exhibit 3. Employer did not respond. The Director responded, noting its objection to approval of the withdrawal request, arguing that claimant was receiving interim benefits and, therefore, the regulations preclude claimant from withdrawing his claim because none of the interim benefits had been repaid. Administrative Law Judge's Exhibit 4. In addition, the Director stated that claimant has a meritorious claim and, thus, withdrawal would not be in claimant's best interest. *Id*. On March 11, 2009, claimant submitted a Request for Waiver of Right to Appear Before the Administrative Law Judge in Lieu of a Withdrawal of Claim, noting that all parties

agreed to waiver of the hearing and a decision on the record. Administrative Law Judge's Exhibit 5. On March 12, 2009, the administrative law judge issued his Order Denying Motion to Withdraw, Granting Waiver Request and Cancelling Hearing, granting the motion for a decision on the record and directing the parties to submit all documentary evidence and written stipulations by April 10, 2009. Administrative Law Judge's Exhibit 6. In response to this Order, claimant submitted his Evidence Summary Form, designating his evidence pursuant to 20 C.F.R. §725.414. Employer did not submit any additional evidence or an Evidence Summary Form. The administrative law judge then awarded benefits, based on a review of the evidence of record.

On appeal, employer contends that the administrative law judge's decision should be reversed as claimant's own pleading, the Motion to Withdraw, constitutes an admission against interest and should be considered evidence in this case, citing the Federal Rules of Evidence and similar rules of evidence under Kentucky law. Employer's Brief at 4. Specifically, employer contends that claimant requested that his claim be withdrawn, because new evidence surfaced that undermined the showing of complicated pneumoconiosis and did not meet the Act's criteria for entitlement to benefits. Employer contends, therefore, that the administrative law judge erred in ignoring this new evidence, proceeding with the claim, and awarding benefits.

Initially, we note that the parties are bound only by the Act and its implementing regulations, and are not bound by common law, statutory rules of evidence, or the technical or formal rules of procedure. 20 C.F.R. §725.455(b). Therefore, contrary to employer's contention, the administrative law judge was not required to consider the statements contained in claimant's Motion to Withdraw as formal evidence in this claim pursuant to the Federal Rules of Evidence.

Moreover, while the regulations allow for the withdrawal of a claim, 20 C.F.R. §725.306(a),[4] they also provide that claimant, at any time prior to approval, may request,

[4] Section 725.306 provides that:

(a) A claimant or an individual authorized to execute a claim on a claimant's behalf or on behalf of claimant's estate under §725.305, may withdraw a previously filed claim provided that:

> (1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;
>
> (2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant or his or her estate, and;

in writing, that the request for withdrawal be canceled.[5] 20 C.F.R. §725.307. Herein, prior to the administrative law judge's ruling on his Motion to Withdraw, claimant sought to cancel the request to withdraw his claim in his request for Waiver of Right to Appear Before the Administrative Law Judge in Lieu of a Withdrawal of Claim. Administrative Law Judge's Exhibit 5. By Order dated March 12, 2009, the administrative law judge denied the Motion to Withdraw, citing claimant's receipt of interim benefits. Instead, he granted claimant's request for waiver of the hearing and decision on the record, and allowed the parties the opportunity to submit additional evidence and designate their formal evidence. Administrative Law Judge's Exhibit 6. Employer did not respond to the administrative law judge's Order and the evidence associated with claimant's Motion to Withdraw was not designated as its evidence in this case. Therefore, the statements and the medical evidence accompanying claimant's Motion to Withdraw were not admitted into the formal record. 20 C.F.R. §725.461; *see* Decision and Order at 5 n.5, 6 n.6. Consequently, we reject employer's contention that the administrative law judge's Decision and Order should be reversed, as it was not error for the administrative law judge to proceed with the claim, nor was it error for the administrative law judge to rely only on the evidence formally admitted into the record.

Employer further challenges the administrative law judge's weighing of the evidence of record, arguing that the administrative law judge erred in ignoring the admissions of claimant in his Motion to Withdraw, and in finding that the preponderance of the evidence established complicated pneumoconiosis. Specifically, employer argues that the opinions of Drs. Broudy, Dahhan and Alexander, in addition to claimant's statements, are evidence contrary to a finding of complicated pneumoconiosis and, thus, that the administrative law judge erred in finding a preponderance of the evidence supportive of a finding of complicated pneumoconiosis. We disagree.

> (3) Any payments made to the claimant in accordance with §725.522 are reimbursed.

20 C.F.R. §725.306.

[5] Section 725.307 states that:

At any time prior to approval, a request for withdrawal may be canceled by a written request of the claimant or a person authorized to act on the claimant's behalf or on behalf of the claimant's estate.

20 C.F.R. §725.307.

Contrary to employer's contentions, the administrative law judge reasonably weighed the evidence properly admitted into the record and rationally found that the preponderance of the medical evidence was sufficient to establish complicated pneumoconiosis pursuant to Section 718.304.[6] Pursuant to Section 718.304(a), the administrative law judge found that the evidence consisted of five readings of three x-ray films, dated November 19, 2007, February 19, 2008 and February 21, 2008.[7] The November 19, 2007 film was read as positive for complicated pneumoconiosis by Drs. Alexander and Halbert, both of whom are Board-certified radiologists and B readers. Dr. Wheeler, also a Board-certified radiologist and B reader, read the film as showing neither simple nor complicated pneumoconiosis. Director's Exhibits 11, 12, 16. Dr. Dahhan, a B reader, read the February 19, 2008 film, as positive for simple pneumoconiosis, but did not note any large opacities. Director's Exhibit 14. Similarly, Dr. Broudy, also a B reader, read the February 21, 2008 film as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibit 14. Weighing the x-ray evidence, the administrative law judge reasonably accorded greater weight to the positive readings for complicated pneumoconiosis by both Drs. Alexander and Halbert, dually-qualified radiologists, over the contrary readings by Drs. Broudy and Dahhan, B readers, based on the superior professional qualifications of Drs. Alexander and Halbert. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7. The administrative law judge also reasonably rejected the reading of Dr. Wheeler, because he was the only physician who found no evidence of simple or complicated pneumoconiosis. *See Cranor v. Peabody Coal Co*., 22 BLR 1-1 (1999)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Consequently, the administrative law judge rationally found that the weight of the x-ray evidence of record established the existence of complicated pneumoconiosis pursuant to Section 718.304(a). *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

Pursuant to Section 718.304(c), the administrative law judge considered the medical opinion of Dr. Mettu, diagnosing claimant with complicated pneumoconiosis,

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[6] The administrative law judge properly found that there was no evidence in the record relevant to the issue of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Decision and Order at 6.

[7] The administrative law judge noted that the additional x-ray readings, negative readings by Dr. Alexander of films dated February 19, 2008 and February 21, 2008, which were associated with claimant's Motion to Withdraw, were not entered into evidence and were, therefore, not considered in his weighing of the x-ray evidence. Decision and Order at 5 n.5. Similarly, the report of a CT scan attached to the Motion to Withdraw was not entered into the record and was not considered. Decision and Order at 6 n.6.

with Category A large opacities, and the contrary opinions of Drs. Broudy and Dahhan, diagnosing simple pneumoconiosis, but finding no evidence of complicated pneumoconiosis. Decision and Order at 6-7; Director's Exhibits 12, 14. Weighing the medical opinions, the administrative law judge found that the opinions of Drs. Broudy and Dahhan were entitled to significant weight, as they addressed the presence and/or absence of simple and complicated pneumoconiosis. However, he reasonably accorded greater weight to the opinion of Dr. Mettu "as well documented and well reasoned" because it "was based on a comprehension [sic] evaluation of the medical evidence, including the x-ray evidence, the medical history, the physical examination and the work history of the [c]laimant." Decision and Order at 7; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Weighing the x-ray and medical opinion evidence together, the administrative law judge reasonably found that the weight of the medical evidence was sufficient to establish complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. *See Melnick*, 16 BLR at 1-34. Consequently, we affirm the administrative law judge's finding that the preponderance of the evidence that was properly admitted into the record established complicated pneumoconiosis and, therefore, established invocation of the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order – Awarding 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