BRB No. 12-0494 BLA

STEPHEN D. VIARS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUAIL RIDGE CONSTRUCTION COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/17/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5663) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on July 20, 2009. The administrative law judge credited claimant with over fifteen years of coal mine

employment,[1] and found that the evidence established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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 the evidence established the existence of complicated pneumoconiosis pursuant to 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 that a miner is 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 an opacity 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 reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

[1] Claimant's most recent coal mine employment was in West Virginia. Hearing Transcript at 13, 16; Director's Exhibit 5. 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).

In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-214, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). X-ray evidence that displays opacities greater than one centimeter in diameter loses its probative force only when other evidence affirmatively shows that the opacities are not there or are not what they appear to be. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eleven interpretations of four x-rays taken on September 29, 2009, November 28, 2009, August 11, 2010, and August 10, 2011. Considering the physicians' radiological qualifications as set forth on the ILO forms, the administrative law judge initially determined that the September 29, 2009 x-ray supported a finding of complicated pneumoconiosis, and that the other three x-rays were inconclusive.[2] Decision and Order at 10-11. The administrative law judge further discredited the negative readings of Drs. Scott and Wheeler – who provided all of the negative x-ray readings for complicated pneumoconiosis in the record – for offering "speculative alternative diagnoses" of granulomatous diseases, and concluded that their x-ray interpretations "are compromised because they are equivocal and are otherwise insufficiently documented and reasoned." Decision and Order at 15. The administrative law judge, therefore, found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

[2] Dr. Alexander, a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader, interpreted the September 29, 2009 x-ray as positive for complicated pneumoconiosis, identifying Category A large opacities; Dr. Wheeler, a Board-certified radiologist and B reader, read the x-ray as negative for the disease. Director's Exhibits 10, 16, 20. Dr. DePonte, a Board-certified radiologist and B reader, interpreted the November 28, 2009 x-ray as positive for complicated pneumoconiosis, identifying Category A large opacities; Dr. Scott, a similarly qualified physician, interpreted it as negative for the disease. Director's Exhibit 17; Employer's Exhibit 2. Drs. DePonte and Alexander read the August 11, 2010 x-ray as positive for complicated pneumoconiosis, identifying Category A large opacities; Drs. Wheeler and Scott interpreted the x-ray as negative for the disease. Claimant's Exhibits 3, 7; Employer's Exhibits 2, 3. Dr. DePonte interpreted the August 10, 2011 x-ray as positive for complicated pneumoconiosis, identifying Category A large opacities; Dr. Wheeler interpreted it as negative for the disease. Claimant's Exhibit 6; Employer's Exhibit 8.

Pursuant to 20 C.F.R. §718.304(c),[3] the administrative law judge discredited, as "insufficiently documented and reasoned," the medical opinions of Drs. Ghio and Spagnolo that claimant has a granulomatous disease rather than complicated pneumoconiosis. Decision and Order at 12-13, 15; Employer's Exhibits 4-7. The administrative law judge further found that the diagnoses contained in claimant's treatment notes, including old granulomatous disease and tuberculosis, were unclear and inconsistent, and, therefore, not entitled to any weight. Decision and Order at 13; Employer's Exhibit 1. The administrative law judge, therefore, found that the medical opinion evidence did not support a finding of complicated pneumoconiosis. Decision and Order at 13-14.

Weighing all the relevant evidence together, the administrative law judge found that the positive x-ray interpretations of Drs. Rasmussen, Alexander, and DePonte were entitled to the greatest weight. Decision and Order at 14-15. Consequently, the administrative law judge found that the weight of the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.*

Employer initially contends that the administrative law judge erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.304(a). Specifically, employer contends that the administrative law judge failed to explain his decision not to accord additional weight to the x-ray readings of Drs. Scott and Wheeler on the basis of their academic credentials, as professors of radiology. Employer's Brief at 6-11. As a result, employer argues, the administrative law judge's finding of complicated pneumoconiosis was based upon impermissible head-counting. *Id*. at 10. We disagree. Employer's argument focuses only on the first portion of the administrative law judge's weighing of the x-ray evidence, when he considered the physicians' qualifications as set forth on the ILO forms. At that point in his analysis, the administrative law judge observed that the September 29, 2009 x-ray (which yielded two positive interpretations and one negative interpretation) supported a finding of complicated pneumoconiosis, and that the remaining three x-rays (each of which produced an equal number of conflicting interpretations by dually qualified physicians) were inconclusive. Decision and Order at 10-11. The administrative law judge, however, also permissibly discredited the negative x-ray interpretations of Drs. Scott and Wheeler, because their alternative diagnoses of histoplasmosis, sarcoidosis, and tuberculosis were "speculative" and offered "without any medical data confirming that [c]laimant suffered from these ailments." *See*

[3] Although the record contains biopsy evidence, the administrative law judge found that the biopsy evidence did not address whether there were any large opacities. Consequently, the administrative law judge found that there was no evidence to support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Decision and Order at 11; Claimant's Exhibit 5.

Westmoreland Coal Co. v. Cox, 602 F.3d 276, 287, 24 BLR 2-269, 2-286-87 (4th Cir. 2010); Decision and Order at 15. The administrative law judge, therefore, permissibly found that the positive x-ray interpretations of Drs. Rasmussen, Alexander, and DePonte were entitled to greater weight, and that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[4] *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100-01.

Employer also argues that the administrative law judge erred in his consideration of the medical opinions of Drs. Ghio and Spagnolo, and claimant's treatment notes pursuant to 20 C.F.R. §718.304(c). Dr. Ghio opined that claimant does not have complicated pneumoconiosis, but instead suffers from post-tuberculosis inflammatory fibrosis. Employer's Exhibit 4 at 4; Employer's Exhibit 6 at 2. Dr. Spagnolo concluded that claimant does not have complicated pneumoconiosis, and observed that Drs. Scott and Wheeler believed that claimant's x-rays are most consistent with "a healing granulomatous process such as histoplasmosis or tuberculosis." Employer's Exhibits 5 at 6, 7 at 2. Employer contends that, in discrediting their opinions, the administrative law judge impermissibly substituted his own medical judgment for that of Drs. Ghio and Spagnolo. Employer's Brief at 15-18. We disagree.

An administrative law judge may discount, as speculative or equivocal, a medical opinion that attributes large opacities in a miner's lungs to a disease process other than complicated pneumoconiosis without substantiation, and without consideration of critical medical evidence. *See Cox*, 602 F.3d at 286-87, 24 BLR at 2-285-87. In this case, the administrative law judge noted that, in diagnosing post-tuberculosis inflammatory fibrosis, Dr. Ghio either was unaware, or failed to acknowledge, that claimant's fungal cultures were negative, and did not explain his diagnosis in light of claimant's negative purified protein derivative (PPD) skin test. Decision and Order at 12. Similarly, the administrative law judge observed that Dr. Spagnolo either failed to note, or was unaware of, claimant's negative PPD skin test. *Id*. at 13. Because they did not account for medical evidence that would be relevant in diagnosing tuberculosis, the administrative judge permissibly assigned little weight to the medical opinions of Drs. Ghio and

[4] The administrative law judge was not required to give extra weight to the interpretations of Drs. Scott and Wheeler based upon their status as professors of radiology. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting). Moreover, because the administrative law judge reasonably discredited Dr. Scott's and Dr. Wheeler's x-ray interpretations on other grounds, any error in his failure to explain why he declined to give Drs. Scott and Wheeler extra weight based on their additional radiological qualifications was harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 11.

Spagnolo.[5] *See Cox*, 602 F.3d at 286-87, 24 BLR at 2-285-87. Moreover, the administrative law judge permissibly discredited the opinions of Drs. Ghio and Spagnolo because they failed to discuss whether any of the alternative diseases suggested could occur in conjunction with pneumoconiosis.[6] *See Cox*, 602 F.3d at 286-87, 24 BLR at 2-285-87; *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 15.

Finally, we reject employer's contention that the administrative law judge erred in his consideration of claimant's treatment records. Although the administrative law judge acknowledged that claimant's treatment notes include Dr. Zaman's November 7, 2006 diagnosis of pulmonary tuberculosis, and Dr. Rushton's December 27, 2006 diagnosis of old granulomatous disease, Employer's Exhibit 1, the administrative law judge found that neither physician adequately identified the objective evidence underlying his diagnosis. Decision and Order at 8, 13. Consequently, the administrative law judge permissibly found that references to tuberculosis and granulomatous disease in claimant's treatment records are unclear and inconsistent, and thus not well-reasoned or documented. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Mabe v. Bishop Coal Co*., 9 BLR 1-67, 1-68 (1986); Decision and Order at 13.

The administrative law judge reasonably found that the x-ray evidence of complicated pneumoconiosis was the most probative evidence of record, and, therefore, established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, we affirm the administrative law judge's finding that claimant is entitled

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[5] Although Drs. Ghio and Spagnolo noted a history of tuberculosis in claimant's family, the administrative law judge found that there was no evidence in the record to demonstrate that tuberculosis has "a genetic component." Decision and Order at 12.

[6] Employer argues that the administrative law judge erred in weighing the medical opinion evidence by relying on a Centers for Disease Control (CDC) fact sheet and a CDC report regarding tuberculosis, without providing proper judicial notice. Employer's Brief at 12-15. We disagree. Although the administrative law judge used the CDC information to explain the significance of fungal culture testing and PPD testing, he did not rely on it to discredit the opinions of Drs. Ghio and Spagnolo. Decision and Order at 12-13, n.25. As explained above, the administrative law judge permissibly accorded less weight to the doctors' opinions because they failed to consider relevant medical evidence, and failed to consider whether claimant could have pneumoconiosis and another disease at the same time. Decision and Order at 12, 15. Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Ghio and Spagnolo, and discounting the value of claimant's treatment notes, any error regarding his use of the CDC fact sheet and report was harmless. *See Kozele*, 6 BLR at 1-382-83 n.4.

to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Because it is unchallenged on appeal, we also affirm the administrative law judge's finding, pursuant to 20 C.F.R. §718.203(b), that claimant's complicated pneumoconiosis arose out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983). We, therefore, affirm the administrative law judge's award of benefits.

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge