BRB No. 00-0613 BLA

PAUL JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
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 Denying Living Miner's Benefits of John M. Vittone, Administrative Law Judge, United States Department of Labor.

Paul Johnson, Kayenta, Arizona, *pro se*.

Michael J. Pollack (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Living Miner's Benefits (98-BLA-0813) of Administrative Law Judge John M. Vittone 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).[2] Adjudicating this claim pursuant

[1] Claimant, Paul Johnson, filed his application for benefits on June 17, 1997. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20

to 20 C.F.R. Part 718 (2000), the administrative law judge credited the parties' stipulation that claimant established twenty-six years of qualifying coal mine employment. Next, the administrative law judge found that claimant established the existence of pneumoconiosis by biopsy evidence, but failed to establish total respiratory disability. The administrative law judge found further that, because claimant failed to establish the existence of complicated pneumoconiosis, he failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this appeal, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which the Director and employer have responded.[3] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The Director's brief, dated March 13, 2001, asserts that the outcome of this case will not be affected by application of the revised regulations. In a brief dated March 14, 2001, employer similarly avers that none of the revised regulations affect the outcome of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

Initially, we address the administrative law judge's determination that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c) as the evidence of record failed to establish the existence of complicated pneumoconiosis.[4] In determining whether the existence of complicated pneumoconiosis has been established, the administrative law judge shall first determine whether the relevant evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh together the

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[4] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
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> > (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original].

evidence at subsections (a), (b) and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).[5]

Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has explained that although there are, "three different ways to establish the existence of statutory complicated pneumoconiosis for purposes of invoking the irrebuttable presumption, these clauses are intended to describe a single, objective condition." Moreover, " '[b]ecause prong (A) set out an entirely objective scientific standard' -- *i.e.* an opacity on an x-ray greater than one centimeter-- x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion' and what under prong (C) is an equivalent diagnostic result reached by other means." *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000), *citing Double B. Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, BLR (4th Cir. 1999). Additionally, the Fourth Circuit court held that, "... even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) or prong (C), then all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *see Blankenship*, 177 F.3d at 243-44, BLR . However, "...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." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 [emphasis added].

[5] The irrebuttable presumption under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," nor does it incorporate a purely medical definition of "complicated pneumoconiosis," but rather, the presumption is triggered by the application of congressionally defined criteria. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999).

Reviewing the relevant evidence in the instant case, the administrative law judge found that the x-ray evidence revealed that five of the ten chest x-ray films of record were read as positive for the existence of complicated pneumoconiosis. Dr. James, a B-reader, found a large opacity classified as either Category A or B complicated pneumoconiosis when reading the x-ray films dated December 8, 1994, July 6, 1995, January 2, 1996, August 20, 1997, and February 23, 1998, Claimant's Exhibits 2-5, but both Drs. Castle and Repsher, who are equally qualified readers, reread all but one, of these same films[6] and found absolutely no evidence of either simple or complicated pneumoconiosis. Employer's Exhibits 1, 13, 17. The administrative law judge noted that Dr. Preger, a Board-certified radiologist who is also a B-reader, read the film taken on August 20, 1997 and diagnosed a large opacity classified as Category B complicated pneumoconiosis, Director's Exhibit 10, and that Dr. Coultas, a B-reader, reread the February 23, 1998 film as demonstrating evidence of a large opacity classified as Category A complicated pneumoconiosis. Claimant's Exhibit 1.[7] The administrative law judge found that, although Dr. James diagnosed complicated pneumoconiosis his finding was not supported, Decision and Order at 11; Claimant's Exhibit 1, that Dr. Castle, in an opinion dated May 28, 1999, found that the upper lobe infiltrates seen on x-ray demonstrate evidence of granulomatous disease and not large opacities, that Dr. Kleinerman found that the "bilateral upper lobe infiltrates ... have persisted since 1994 and ... are suspected clinically as being the result of tuberculosis or granulomatous disease," and that Dr. Caffrey maintained that the bilateral upper lobe changes in the miner's lungs are the result of granulomatous disease and he could not make a diagnosis of complicated pneumoconiosis. Decision and Order at 6-7; Director's Exhibit 5.

Although the administrative law judge did not determine whether evidence in each

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[6] A review of the record reveals that neither Dr. Castle nor Dr. Repsher reread the August 20, 1997 x-ray film.

[7] In a review of the transbronchial lung biopsy, Dr. Sever diagnosed periarteriolar dust macule with anthracotic pigment and birefringent material, associated with very mild fibrosis in a report dated April 5, 1995. Employer's Exhibit 3. Dr. Sever further stated, "In the absence of marked fibrosis as usually seen with silicotic nodules, the findings are not specific for pneumoconiosis." *Ibid*. On September 13, 1998, Dr. Naeye's review of the lung biopsy revealed a small amount of black pigment present, but he nevertheless opined, "there is no evidence of any kind of simple or complicated CWP." Employer's Exhibit 5. Dr. Kleinerman reviewed the biopsy on July 1, 1998 and found evidence of simple coal workers' pneumoconiosis and bilateral upper lobe infiltrates suspected clinically of being the result of tuberculosis or granulomatous disease. Employer's Exhibit 2. *See* 20 C.F.R. §718.304(b).

category under Section 718.304(a)(3) tend to establish the existence of complicated pneumoconiosis, he properly weighed all the relevant evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Weighing all the evidence, the administrative law judge, within a proper exercise of his discretion, found that the x-ray evidence of record was insufficient to establish the existence of complicated pneumoconiosis in light of the fact that several of the same x-rays which were read as showing complicated pneumoconiosis were also read as showing no evidence of pneumoconiosis and several medical opinions provided other causes for the large opacities seen on the x-rays. *See* Decision and Order at 6-7; *Scarbro, supra*; *see generally Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge, therefore, rationally concluded that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304.

Relevant to Section 718.204(b)(2)(i), the record contains three pulmonary function studies taken on April 5, 1995, August 19, 1997, and February 23, 1998. Director's Exhibit 7; Employer's Exhibits 1, 3, 4. None of these studies yielded qualifying values.[8] Director's Exhibits 12, 16, 21. Thus, the administrative law judge properly found that the pulmonary function studies of record produced non-qualifying values, and therefore, failed to demonstrate total respiratory disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 12. Likewise, the administrative law judge properly determined that the two arterial blood gas studies of record dated September 9, 1997 and February 23, 1998 produced non-qualifying values. Director's Exhibits 9, 17. Hence, we affirm the administrative law judge's finding that total respiratory disability was not demonstrated under Section 718.204(b)(2)(ii). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 12-13. Similarly, the administrative law judge properly found that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated pursuant to Section 718.204(b)(2)(iii). *See Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989); Decision and Order at 12 n.10.

Relevant to Section 718.204(b)(2)(iv), the medical opinion evidence consists of seven physicians' opinions. Dr. Mosley opined that claimant suffered from a mild to moderate obstructive airway disease as identified by pulmonary function study, but had no significant

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C (2000), respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

limitation of function. Director's Exhibit 8. Drs. Kleinerman, Naeye, Caffrey, Renn, Tuteur, and Castle all opined that claimant does not have any respiratory or pulmonary disability. Employer's Exhibits 1, 2, 5, 7, 9, 11. The administrative law judge properly determined that, although Dr. Mosley diagnosed a mild to moderate pulmonary disease, he failed to provide an assessment as to the extent of claimant's disability. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); Decision and Order at 13 n.12. In addition, the administrative law judge permissibly found that Dr. Mosley neither explained his disability opinion in light of the non-qualifying pulmonary function and blood gas testing, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985), nor provided any opinion as to claimant's physical limitations, *see Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); Decision and Order at 13 n.12. Therefore, the administrative law judge, within a rational exercise of his discretion, found that all of the physicians of record, who rendered opinions addressing the extent of claimant's disability, opined that claimant was not totally disabled. Consequently, the administrative law judge reasonably found that these physicians' opinions were well reasoned and well supported opinions by the objective evidence of record, and as such, entitled to dispositive weight. *See Clark*, *supra*; Decision and Order at 13. Consequently, we affirm the administrative law judge's finding that claimant failed to demonstrate total disability pursuant to Section 718.204(b)(2)(iv).

Inasmuch as the administrative law judge's determination that claimant failed to satisfy his burden of establishing total respiratory disability, a requisite element in this Part 718 case, is rational and supported by substantial evidence, we must affirm the administrative law judge's denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[9]

Accordingly, the Decision and Order Denying Living Miner's Benefits of the administrative law judge is affirmed.

SO ORDERED.

[9] Because we affirm the administrative law judge's finding that claimant has failed to establish a totally disabling respiratory impairment, 20 C.F.R. §718.204(b)(2)(i)-(iv), we will not address the administrative law judge's other findings. 20 C.F.R. §718.202(a)(1)-(4); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge