BRB No. 10-0371 BLA

RICHARD CHARLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/25/2011
	)	
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 on Remand Denying Living Miner's Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Richard Charley, Kayenta, Arizona, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Living Miner's Benefits (2005-BLA-00075) of Chief Administrative Law Judge John M. Vittone (the administrative law judge) rendered on a claim filed on May 22, 1997, 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 is on appeal to the Board for the second time.

In his first Decision and Order, the administrative law judge awarded benefits, crediting the x-ray, CT scan and medical opinion evidence to find complicated pneumoconiosis established at 20 C.F.R. §718.304. The administrative law judge also found claimant entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b).[1] The administrative law judge, therefore, found that claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis at 30 U.S.C. §921(c)(3). Benefits were, accordingly, awarded.

Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case for further consideration.[2] *R.C.* [*Charley*] *v. Peabody Coal Co.*, BRB No. 07-0903 BLA (Sept. 25, 2008) (unpub.). Specifically, the Board vacated the administrative law judge's finding of complicated pneumoconiosis at Section 718.304(a), based on his consideration of the x-ray evidence. In particular, the Board instructed the administrative law judge to consider both the comments made by Dr. Wheeler on his x-ray readings and the readings of Dr. Repsher. The Board also held that the administrative law judge erred in failing to address the medical opinion evidence at Section 718.304(c).[3] The Board, therefore, remanded the case for the administrative law judge to consider the relevant evidence under Section 718.304(a) and (c), and to then weigh together all of the relevant evidence to determine whether complicated pneumoconiosis was established at Section 718.304. The Board also instructed the administrative law judge to reconsider, if reached, whether claimant established that his complicated pneumoconiosis arose out of coal mine employment at Section 718.203 in order to establish invocation of the irrebuttable presumption. 30 U.S.C. §921(c)(3). Finally, the Board held that, if the administrative law judge determined that claimant did not establish invocation of the irrebuttable presumption, he must then consider whether claimant established totally disabling pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202, 718.203, and 718.204.

On remand, the administrative law judge found that the evidence was insufficient to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304. The

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[1] The administrative law judge noted that "[c]laimant worked at the [e]mployer's [coal] mine from October, 1973, to January, 1995." Decision and Order at 4; Director's Exhibits 2, 3.

[2] The lengthy procedural history of the case is set forth in the Board's 2008 decision.

[3] The Board affirmed the administrative law judge's finding that complicated pneumoconiosis could not be established at 20 C.F.R. §718.304(b), because there was no biopsy evidence in the record. Decision and Order at 14 n. 17.

administrative law judge also found that the evidence was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b). Benefits were, accordingly, denied.

On appeal, claimant generally asserts that he is entitled to benefits. Employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[4]

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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides 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. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically entitle claimant to the irrebuttable presumption found at Section 718.304. Rather, the

[4] 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 Director, Office of Workers' Compensation Programs, notes, however, that the amendments do not apply to this claim, because it was filed prior to January 1, 2005.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, as claimant was employed in coal mining in Arizona. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

administrative law judge must consider all the evidence relevant to the issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis. The administrative law judge must weigh this evidence, resolve any conflict in the evidence, and make pertinent findings of fact thereon. 20 C.F.R. §718.304; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Moreover, claimant is entitled to the irrebuttable presumption only if the evidence establishes that he has a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's decision denying benefits is rational, supported by substantial evidence, and in accordance with law.

Complicated Pneumoconiosis – 20 C.F.R. §718.304(a)

In reviewing the x-ray evidence on the issue of complicated pneumoconiosis at Section 718.304(a), the administrative law judge noted that the record contained a voluminous number of x-rays. Considering the most recent x-ray evidence, taken from November 2000, through February 2005, the administrative law judge found that it contained evidence of "large abnormalities," but also found, that there was evidence indicating "uncertainty about the nature of these abnormalities." Decision and Order on Remand at 9. Specifically, the administrative law judge found that Drs. Miller and Preger, dually-qualified readers, interpreted the November 30, 2000 x-ray as positive for the existence of complicated pneumoconiosis. Claimant's Exhibit 1; Director's Exhibit 11; Decision and Order on Remand at 9. However, the administrative law judge concluded that:

> [t]he remaining probative x-rays, most significantly the eight probative films taken since November 30, 2000, do not support such a finding for various reasons. These reasons included, that the interpretations were in equipoise, that the only relevant interpretation of record was too equivocal to qualify as a diagnosis, and, in the case of three films, Dr. Repsher's negative interpretation was effectively uncontradicted. Given these circumstances, I am without a logical basis for resolving the conflicts between the interpretations and therefore find that the x-ray evidence is in equipoise. Accordingly, the x-ray evidence does not support a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(a).

Decision and Order on Remand at 9.

In so finding, the administrative law judge, pursuant to the Board's remand instructions, considered the comments of Dr. Wheeler, a dually-qualified reader, on the post-November 2000 x-rays read by him. The administrative law judge noted that, on every x-ray, Dr. Wheeler indicated that the large opacities he observed were not opacities of complicated pneumoconiosis. On several x-rays, Dr. Wheeler commented that the large abnormalities observed were "compatible with conglomerate granulomatous disease more likely than large opacities of coal workers' pneumoconiosis because [the] background [of] small nodular infiltrates are [of a] low profusion." Employer's Exhibit 29. On other x-rays, Dr. Wheeler found that the large abnormalities observed were "compatible with conglomerate [TB] or histoplasmosis, possibly with [coal workers' pneumoconiosis]." Employer's Exhibit 29.

The administrative law judge, in discussing the readings of Dr. Repsher, a B reader, of the August 2, 2002, February 6, 2002, and February 9, 2005 x-rays, noted that Dr. Repsher consistently and definitively found that claimant did not have any abnormalities consistent with pneumoconiosis. The administrative law judge noted that Dr. Repsher stated that the abnormalities observed by him were "most compatible with far advanced healed TB." Decision and Order on Remand at 8; Director's Exhibit 25; Employer's Exhibit 36. Consequently, the administrative law judge rationally found that the preponderance of the post-November 2000 x-ray evidence failed to establish that claimant had a "chronic dust disease of the lung." He, therefore, properly found that the x-ray evidence failed to establish complicated pneumoconiosis at Section 718.304(a).[6] *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Cranor v. Peabody Coal Co.*, 22 BLR at 1-5; *Melnick*, 16 BLR at 1-37.

Complicated Pneumoconiosis – 20 C.F.R. §718.304(c)

The administrative law judge next addressed the CT scan and medical opinion evidence as "other evidence" at Section 718.304(c). Regarding the CT scan evidence, the administrative law judge noted that the Board instructed him to consider the totality of Dr. Wheeler's interpretation of the May 21, 2001 CT scan. In so doing, the administrative law judge found that Dr. Wheeler's reading of large opacities was

[6] The administrative law judge also reconsidered, as instructed by the Board, the readings of x-rays taken in April 1995, January 1998, November 1998 and April 2000. The administrative law judge rationally found that these readings did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), based on the comments made by Dr. Wheeler on these x-rays. Decision and Order on Remand at 3-5.

consistent with x-ray findings of possible Category A pneumoconiosis.[7] Nonetheless, the administrative law judge permissibly found that Dr. Wheeler's CT scan interpretation did not establish complicated pneumoconiosis, because Dr. Wheeler commented that the large abnormalities seen were "compatible with conglomerate granulomatous disease, [TB] or histoplasmosis, more likely than large opacities of [coal workers' pneumoconiosis] because [the] small background nodular infiltrates in [the] upper lobes are [of a] very low profusion." Employer's Exhibit 29. The administrative law judge further noted that Dr. Wheeler stated that "[coal workers' pneumoconiosis] is possible because of [claimant's] age but [his] lung disease is most likely conglomerate granulomatous disease." Employer's Exhibit 29. Based on Dr. Wheeler's comments, the administrative law judge permissibly found that Dr. Wheeler's CT scan reading did not support a finding of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117. The administrative law judge, therefore, found that the CT scan evidence did not establish complicated pneumoconiosis.

Turning to the medical opinion evidence and claimant's treatment records, the administrative law judge properly found that the weight of this evidence did not establish complicated pneumoconiosis at Section 718.304(c). The administrative law judge noted that Dr. James diagnosed complicated pneumoconiosis, based on claimant's significant coal mine employment history and an x-ray showing a large opacity. The administrative law judge, however, noted that Drs. Repsher, Tuteur, Renn and Castle opined that the abnormalities on the x-ray and CT scan evidence they reviewed were due to tuberculosis [TB], and possible cancer, rather than complicated pneumoconiosis. Decision and Order on Remand at 10-12. Specifically, the administrative law judge noted that Dr. Repsher stated that claimant had had at least two positive TB skin tests, was treated for TB in 2000 and 2004, and had an increased risk of developing TB, due to his age and Navajo heritage. Decision and Order on Remand at 10. The administrative law judge also noted that Dr. Tuteur acknowledged that a number of significant factors supported a diagnosis of TB over a diagnosis of complicated pneumoconiosis, including positive TB tests and an x-ray showing TB. Decision and Order on Remand at 11. The administrative law judge also found that claimant's voluminous treatment records, while containing a reference to a history of pneumoconiosis, did not contain sufficient evidence to qualify them as documented or reasoned opinions upon which to base a diagnosis of complicated pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Remand at 12. The administrative law judge, therefore, rationally determined that the "other evidence" did not establish complicated pneumoconiosis at Section 718.304(c). *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117.

[7] The administrative law judge noted that Dr. Wheeler observed a three-centimeter oval mass in the left upper lobe, a two-centimeter mass in the left lower lobe, and a three-centimeter mass in the right upper lobe. Employer's Exhibit 29.

In conclusion, therefore, the administrative law judge rationally found that on weighing the x-ray, CT scan, and medical opinion evidence together, the existence of complicated pneumoconiosis was not established at Section 718.304. *See Melnick*, 16 BLR at 1-37.

Total Disability – Section 718.204(b)

Because the administrative law judge permissibly found that claimant failed to establish invocation of the irrebuttable presumption of totally disabling pneumoconiosis, 30 U.S.C. §921(c)(3), the administrative law judge considered whether claimant established total disability at Section 718.204(b). Considering the relevant evidence, the administrative law judge properly found that total disability was not established at Section 718.204(b)(2)(i), because only one of the six pulmonary function studies yielded qualifying values. 20 C.F.R. §718.204(b)(2)(i); *see Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Further, the administrative law judge properly found that total disability was not established at Section 718.204(b)(2)(ii) and (iv), because none of the blood gas studies was qualifying and none of the medical opinions found that claimant had a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(ii) and (iv). *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). The administrative law judge, therefore, properly concluded that claimant failed to establish total disability at Section 718.204(b).[8] 20 C.F.R. §718.204(b)(2). Because claimant failed to establish total disability, an essential element of entitlement, the administrative law judge properly found that claimant was not entitled to benefits. *See Gee*, 9 BLR at 1-5.

[8] The administrative law judge also properly found that total disability could not be established at Section 718.204(b)(2)(iii), because there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Living Miner's 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