BRB No. 13-0399 BLA

JIMMY O. JEFFREY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEER RUN MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/26/2014
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Edwin H. Pancake (Maroney, Williams, Weaver & Pancake, PLLC), Charleston, West Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-56275) of Administrative Law Judge Drew A. Swank on a claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[2] The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and credited the parties' stipulation that claimant worked in underground coal mine employment for seventeen years. The administrative law judge found that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Because total respiratory disability was not established, the administrative law judge also found that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In addition, the administrative law judge found that the evidence of record was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, because the evidence did not establish that claimant suffered from complicated pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that the evidence was insufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.[3]

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[1] Claimant, Jimmy O. Jeffrey, filed his application for benefits on January 28, 2011. Director's Exhibit 3.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if the claimant establishes that he suffers from a totally disabling respiratory or pulmonary impairment and worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established seventeen years of underground coal mine employment, but failed to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), total respiratory disability pursuant to 20 C.F.R. §718.204(b), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 9-10, 13-15, 17.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) of the Act, as implemented by Section 718.304 of the regulations, 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(a)-(c). While Section 718.304(a), (b), and (c) sets forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d at 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Claimant maintains that the positive x-ray interpretation of Dr. Groten and the medical opinion of Dr. Rasmussen, based upon his own positive x-ray interpretation, are sufficient to establish the presence of complicated pneumoconiosis at Section 718.304. Claimant asserts that neither of these doctors has a pecuniary interest in the outcome of this case, whereas the evidence submitted on behalf of employer is "suspect" because it was rendered by physicians who possess a pecuniary interest and are "routinely used by employers." Citing *Conley v. Roberts & Schaefer Co.*, 7 BLR 1-307 (1984), claimant also argues that where, as here, the evidence is conflicting and presents true doubt, the administrative law judge must resolve the conflict in claimant's favor. Claimant's Brief at 3-4 [unpaginated]. Claimant's arguments lack merit.

It is well established that reports prepared in the course of litigation are probative evidence and are not presumptively biased. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992). Because claimant has identified no proof in the record

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

demonstrating that the evidence submitted by employer was "unfairly slanted" in favor of employer, we reject claimant's argument that this evidence is "suspect." *See Melnick*, 16 BLR at 1-35, 1-36.

We also reject claimant's argument that the administrative law judge was required to apply the true doubt rule to resolve any conflict in the evidence in claimant's favor on the issue of complicated pneumoconiosis. The United States Supreme Court overruled the application of the true doubt rule on the ground that it contravenes Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), which requires that the burden of proof remain with claimant at all times. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

As claimant merely summarized the favorable evidence but did not identify any substantive error of law or fact in the administrative law judge's weighing of the evidence relevant to the issue of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 by a preponderance of the evidence. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992)(en banc); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge