BRB No. 07-0668 BLA

S.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL COMPANY	)	
	)	DATE ISSUED: 05/28/2008
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (00-BLA-0727) of Administrative Law Judge Stuart A. Levin denying benefits 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). This case is before the Board for the fourth time.[1] In the most recent appeal, the Board affirmed in part, and vacated in part,

[1] In the prior appeals, the Board affirmed, as unchallenged, Administrative Law Judge Richard E. Huddleston's finding of thirteen and one-third years of coal mine employment, and his findings that claimant established the existence of simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), *see* [*S.M.*] *v. Eastern Coal Corp.*, BRB No. 97-1262 BLA (May 20,

Administrative Law Judge Richard E. Huddleston's award of benefits, and remanded the case for further consideration. [*S.M.*] *v. Eastern Coal Corp.*, BRB No. 04-0940 BLA (Sept. 28, 2005)(unpub.). Specifically, the Board vacated Judge Huddleston's finding of the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and instructed him, on remand, to evaluate the evidence in each category of 20 C.F.R. §718.304(a) and (c),[2] before weighing all relevant evidence together to determine whether invocation of the irrebuttable presumption of total disability due to pneumoconiosis was established. *Id.* Regarding the evaluation of the x-ray evidence at 20 C.F.R. §718.304(a), the Board instructed Judge Huddleston to provide a detailed analysis for his crediting or discrediting of each x-ray interpretation, and to articulate which x-ray interpretations he ultimately relied upon to support his finding of the existence or absence of complicated pneumoconiosis. *Id.* In addition, the Board instructed Judge Huddleston to consider the numerous medical opinions in the record in which the physicians noted the possibility of tuberculosis or sarcoidosis, but did not find the existence of complicated pneumoconiosis, when reassessing the credibility of the opinions of Drs. Repsher, Rosenberg and Broudy. *Id.* The Board further instructed Judge Huddleston to reconsider the credibility of the opinions of Drs. Nadorra and Younes in light of the inaccurate smoking histories upon which they relied, and to provide a detailed rationale for his findings. *Id.* Finally, the Board instructed Judge Huddleston to address the impact that the negative interpretations of the November 17, 1999 computerized tomography (CT) scan may have on the credibility of the x-ray evidence. *Id.*

Subsequent to the Board's decision, Judge Huddleston retired, and the case was reassigned, without objection, to Administrative Law Judge Stuart A. Levin (the administrative law judge). In a Decision and Order on remand dated April 10, 2007, the administrative law judge found, pursuant to 20 C.F.R. §718.304, that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant

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1998)(unpub.), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See* [*S.M.*] *v. Eastern Coal Corp.*, BRB No. 04-0940 BLA (Sept. 28, 2005)(unpub.). The complete procedural history of this case is set forth in the Board's prior decisions and is incorporated herein by reference.

[2] The record does not contain any biopsy evidence relevant to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

to 20 C.F.R. §718.304. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not 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).

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(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 (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

In evaluating the evidence relevant to the existence of complicated pneumoconiosis, the administrative law judge initially found that the x-ray evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order on Remand at 7. The administrative law judge further noted, however, that the United States Court of Appeals for the Sixth Circuit[3] has acknowledged that x-rays are generally considered to be the 'least accurate method' of diagnosing complicated pneumoconiosis, and has held that all relevant evidence must be weighed prior to invoking the irrebuttable presumption. *Gray v. SLC Coal Co.*, 176 F.3d 382, 398-90, 21 BLR 2-615, 2-629 (6th Cir. 1999). The administrative law judge then considered the medical opinions and CT scan interpretations pursuant to 20 C.F.R. §718.304(c). Decision and Order on Remand at 7. The administrative law judge discredited, as unreasoned, the opinions of Drs. Nadorra and Younes, the only opinions diagnosing the existence of complicated pneumoconiosis, and further found, correctly, that all three of the CT scan interpretations were negative for the existence of the disease. Decision and Order on Remand at 9-10. Weighing all relevant evidence together, the administrative law judge concluded that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. Decision and Order on Remand at 10.

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

Claimant initially contends that, having found the x-ray evidence supportive of the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), the administrative law judge erred in failing to invoke the irrebuttable presumption of total disability due to pneumoconiosis. Claimant's Brief at 13-14. Claimant asserts that, rather than determining whether the remaining evidence of record supported the x-ray evidence of complicated pneumoconiosis, the administrative law judge should have examined whether the remaining evidence ruled out the existence of complicated pneumoconiosis. Claimant's Brief 15-16. Contrary to claimant's argument, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. *Gray*, 176 F.3d at 388, 21 BLR at 2-626. Before determining whether invocation of the irrebuttable presumption has been established, the administrative law judge shall first determine whether the evidence in each category under 20 C.F.R. §718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then, as the administrative law judge did here, must weigh together all relevant evidence pursuant to 20 C.F.R. §718.304(a)-(c). *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003); *Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1991) (*en banc*). We, therefore, reject claimant's argument that the administrative law judge applied an improper standard in evaluating the evidence pursuant to 20 C.F.R. §718.304.

Claimant next contends that the administrative law judge erred in his evaluation of the CT scan evidence pursuant to 20 C.F.R. §718.304(c). Specifically, claimant asserts that the administrative law judge should have discredited the negative interpretations provided by Drs. Broudy, Repsher, and Rosenberg because these physicians did not diagnose simple pneumoconiosis, in contrast to the prior finding in this case that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1), which was affirmed by the Board in [*S.M.*] *v. Eastern Coal Corp.*, BRB No. 97-1262 BLA (May 20, 1998)(unpub.). Claimant's Brief at 15. Claimant's contention is without merit.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge noted, correctly, that the record contains three readings of a November 17, 1999 CT scan, by Drs. Broudy, Repsher, and Rosenberg, each of whom interpreted the scan as negative for both simple and complicated pneumoconiosis. Decision and Order on Remand at 10; Director's Exhibit 76; Employer's Exhibits 9, 14. Noting that a CT scan is a "sophisticated and sensitive test," and that the CT scan in the instant case is among the most recent evidence, the administrative law judge permissibly concluded that the uniformly negative interpretations weighed against a finding of complicated pneumoconiosis. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Woodward v. Director, OWCP***,** 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order on Remand at 10. Contrary to claimant's argument, unlike the situation that is

present when a physician's opinion that pneumoconiosis is not a cause of a miner's total disability is affected by his opinion that the miner does not have pneumoconiosis, no clear link exists between the credibility of a physician's opinion regarding the presence of simple pneumoconiosis and his determination that complicated pneumoconiosis is not present. *See generally Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Thus, although it may have been within the administrative law judge's discretion to consider such a factor when determining the credibility of the CT scan readings by Drs. Broudy, Repsher, and Rosenberg, *see generally Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985), claimant has not demonstrated that the administrative law judge was required to discredit their CT scan interpretations on the ground suggested by claimant.

Finally, claimant challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Claimant specifically contends that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Nadorra and Younes, that claimant has complicated pneumoconiosis, and further failed to provide consistent and rational explanations for crediting and discrediting the opinions of employer's experts. We disagree.

In considering the medical opinion evidence, the administrative law judge properly noted that Drs. Broudy, Repsher, Rosenberg, Cooper, Harrison, Abernathy, Lane, and Vuskovich opined either that claimant has only simple pneumoconiosis or no pneumoconiosis at all, while, by contrast, only Drs. Nadorra and Younes, claimant's treating physicians, diagnosed the existence of complicated pneumoconiosis. Decision and Order on Remand at 10. Evaluating Dr. Nadorra's opinion, the administrative law judge permissibly concluded, contrary to claimant's contentions, that despite Dr. Nadorra's lengthy experience as claimant's treating physician, Dr. Nadorra neither explained the basis for his diagnosis of complicated pneumoconiosis, nor documented the evidence he relied upon in reaching his conclusion. The administrative law judge therefore reasonably determined that Dr. Nadorra's opinion was not well reasoned and was entitled to diminished weight. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order on Remand at 9; Claimant's Exhibit 6; Claimant's Brief at 18.

Reviewing Dr. Younes' opinion, the administrative law judge found that, while the physician also treated claimant, because Dr. Younes based his opinion, in part, on

claimant's statement that he was a non-smoker, in contrast to the average recorded smoking history for claimant of approximately twenty pack years, Dr. Younes' opinion was also entitled to diminished weight. Decision and Order on Remand at 10; Director's Exhibit 76. Contrary to claimant's argument that his smoking history is irrelevant, because the regulation at 20 C.F.R. §718.304 defines complicated pneumoconiosis as "a chronic dust disease of the lung," it is important that a physician have accurate knowledge of any other causes, apart from coal dust exposure, that could result in a chronic disease of the lung, prior to rendering a conclusion on whether or not a claimant suffers from complicated pneumoconiosis. *See Gray*, 176 F.3d at 388, 21 BLR at 2-627; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). Thus, we affirm the administrative law judge's determination to accord diminished weight to Dr. Younes' opinion as based, in part, on an inaccurate smoking history. *See Williams*, 338 F.3d at 514, 22 BLR at 2-649*; Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

Regarding the administrative law judge's consideration of the remaining medical opinions, we initially reject, for the reasons set forth above, claimant's assertion that the administrative law judge was required to discredit the medical opinions of Drs. Broudy, Repsher, Rosenberg, Harrison, and Vuskovich, that claimant does not have complicated pneumoconiosis, because they did not diagnose simple pneumoconiosis, contrary to the prior finding in this case. Moreover, in light of our holding that the administrative law judge permissibly discredited, as poorly reasoned, the only medical opinions supportive of a finding of complicated pneumoconiosis, we need not address claimant's remaining contention that the administrative law judge inconsistently evaluated the contrary opinions of employer's experts. As Drs. Broudy, Repsher, Rosenberg, Cooper, Harrison, Abernathy, Lane, and Vuskovich did not diagnose complicated pneumoconiosis, and, thus, cannot support claimant's burden of proof to establish the existence of the disease pursuant to 20 C.F.R. §718.304, any error or inconsistency in the administrative law judge's evaluation of these opinions is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge properly considered all of the relevant evidence together pursuant to 20 C.F.R. §718.304(a)-(c), and permissibly concluded that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the probative evidence, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Gray,* 176 F.3d at 388, 21 BLR at 2-626; *Braenovich*, 22 BLR at 1-245.

Accordingly, the administrative law judge's Decision and Order on Remand denying 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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JUDITH S. BOGGS
Administrative Appeals Judge