BRB No. 06-0181 BLA

FREDDIE R. JORDAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MILL BRANCH CORPORATION	)	DATE ISSUED: 11/20/2006
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Steven H. Theisen (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (2004-BLA-6829) of Administrative Law Judge Richard T. Stansell-Gamm 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). The administrative law judge found that the parties stipulated to a coal mine employment history of at least twenty-eight years. Decision and Order at 4. In considering the merits of entitlement, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In reaching this conclusion, the administrative law judge also found that claimant failed to establish the existence of complicated pneumoconiosis and was not, therefore, entitled to the irrebutable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. *See* 20 C.F.R. §718.202(a)(3). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray and medical opinion evidence and further erred in failing to find that claimant established the existence of complicated pneumoconiosis. Claimant additionally argues that the evidence of record establishes that claimant's pneumoconiosis arose out of coal mine employment and that he was totally disabled thereby. Employer responds, urging that the denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief pursuant to this appeal.[1]

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).

Claimant initially contends that the administrative law judge erred in failing to find that the x-ray evidence of record supported a finding of simple pneumoconiosis pursuant to Section 718.202(a)(1). Claimant argues that the administrative law judge failed to consider the quality of the x-ray reports, particularly with regard to x-ray interpretations rendered by Dr. Patel, who rendered positive x-ray interpretations for the existence of simple pneumoconiosis, Director's Exhibit 14; Claimant's Exhibit 2, and Dr.

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Claimant makes the general assertion that the administrative law judge failed to "evaluate the impact" of claimant's coal mine employment history on his condition. Because claimant must establish the existence of coal workers' pneumoconiosis based upon medical evidence, we reject claimant's assertion. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Scatarige, who reviewed the same x-ray films and rendered negative interpretations, Employer's Exhibits 2, 5.

In finding that the x-ray evidence of record did not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a) (1), the administrative law judge found the record consisted of a total of five separate x-rays. Of these x-rays, the administrative law judge found that the February 19, 2004 x-ray and August 11, 2004 x-ray were negative for the existence of the disease as negative readings of these films were unchallenged. Decision and Order at 7; Director's Exhibit 15; Employer's Exhibit 1. The administrative law judge further found that the September 1, 2003 x-ray supported a finding of pneumoconiosis because the physician rendering the positive interpretation of the film, Dr. DePonte, possessed dual-qualifications as a B-reader and board-certified radiologist,[2] and thus possessed credentials superior to those of Dr. Abrahams, a B-reader, who rendered a negative interpretation of the film. Decision and Order at 7; Director's Exhibits 15, 17. The administrative law judge further found that the October 23, 2003 and April 19, 2004 x-rays were "inconclusive" for the existence of the disease as the physicians who rendered contrary positive and negative interpretations, Drs. Patel and Scatarige, were equally qualified. Decision and Order at 7; Director's Exhibit 14; Claimant's Exhibit 2; Employer's Exhibits 2, 5.

Because the administrative law judge has considered all of the x-ray evidence of record and has given due consideration to the qualitative as well as the quantitative aspects of the x-ray evidence, *see* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), we affirm the administrative law judge's determination that the x-ray evidence fails to support a finding of pneumoconiosis pursuant to Section 718.202(a)(1).[3] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267,

[2] A B-reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[3] Claimant also makes the general assertion that the administrative law judge erred in excluding the positive x-ray interpretation rendered by Dr. Alexander, Claimant's Exhibit 3; Claimant's Brief at 24. Claimant does not, however, provide support for this contention. In considering the x-ray of Dr. Alexander, the administrative law judge

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).

Claimant further contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, *see* 20 C.F.R. §718.202(a)(3). Claimant argues that because he found the x-ray evidence supportive of a finding of a large opacity, the administrative law judge erred in his ultimate conclusion that the weight of the evidence did not support a finding of complicated pneumoconiosis. Claimant argues that large opacities are the "hallmark" of complicated pneumoconiosis. Claimant's Brief at 17.

Section 411(c)(3)(A) of the Act, as implemented by Section 718.304(a), provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) an x-ray of the miner's lungs show at least one opacity greater than one centimeter in diameter; (B) a biopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). In *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, went on to state that although the clauses in (A), (B), and (C), provide three different ways to establish the existence of complicated pneumoconiosis for purposes of invoking the irrebuttable presumption, the clauses were intended to describe a single, objective condition. Thus, the court stated that, in applying the standards set forth in each prong, equivalency determinations must be performed to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. The court further stated that because prong (A) sets 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. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Scarbro*, 220 F.3d 250, 22 BLR 2-93. In addition, in determining whether complicated pneumoconiosis has been established, the administrative law judge must in every case review the evidence under each prong and must also look at all of the relevant evidence presented. *Scarbro*,

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found that the x-ray was not offered as rebuttal evidence under 20 C.F.R. §725.414(a)(2)(ii), but was instead offered as evidence pursuant to claimant's case-in-chief. As such evidence was, therefore, in excess of the evidentiary limitations, the administrative law judge excluded the evidence. 20 C.F.R. §725.414(a)(2)(i). As claimant has failed to brief the issue in terms of relevant law, we have no substantial issue to review in this regard, and we affirm the administrative law judge's determination. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

220 F.3d 250, 22 BLR at 2-93; *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). Moreover, the introduction of evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, the administrative law judge must examine all of the relevant evidence on this issue, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31; *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In the instant case, the administrative law judge found that the preponderance of the relevant x-ray evidence established the presence of a large pulmonary opacity. Decision and Order at 10. The administrative law judge then turned to "other medical studies or tests which might identify large opacities such [as] CT scans or biopsy reports," and concluded that, in the absence of such evidence, no probative medical evidence existed to contradict the x-ray finding of a large opacity. Decision and Order at 10. Turing to the other evidence, *i.e.*, "physician x-ray comments, pulmonary tests and medical opinion[s] based on evaluation and treatment," the administrative law judge found that Dr. DePonte, who read an x-ray as demonstrating a large opacity, Director's Exhibit 17, indicated that the opacity could be pneumoconiosis, but could also be carcinoma. Decision and Order at 10. The administrative law judge further found that Dr. Patel, who rendered the other large opacity reading, stated that the mass was granuloma or developing neoplasm. The administrative law judge concluded, therefore, that because neither of the physicians who diagnosed a large opacity by x-ray diagnosed the origin of the large mass, the x-ray comments of the physicians failed to affirmatively establish that the large opacity was the result of pneumoconiosis. Decision and Order at 11. In considering the pulmonary testing, *i.e.*¸ the pulmonary function studies and arterial blood gas studies, the administrative law judge found that none of the tests of record demonstrated that the large mass was attributable to pneumoconiosis. Decision and Order on 13. Turning his attention to the medical opinion evidence, the administrative law judge found the opinions of Dr. Castle, who opined that the mass was not complicated pneumoconiosis, Employer's Exhibit 14, and Dr. Rasmussen, who rendered a contrary opinion, Director's Exhibit 14; Claimant's Exhibit 2, were of minimal probative value. The administrative law judge found that Dr. Castle's opinion was based on equivocal x-ray interpretations and further found that Dr. Rasmussen's diagnosis was inconsistent with the underlying x-ray evidence upon which he relied. Decision and Order at 17. Accordingly, the administrative law judge found the medical opinion evidence insufficient to affirmatively demonstrate that the large pulmonary opacity seen was due to a chronic dust disease of the lung. Decision and Order at 17. In summary, the administrative law judge found that the evidence failed to establish the existence of complicated pneumoconiosis and claimant failed, therefore, to establish entitlement to the irrebutable presumption of totally disabling pneumoconiosis due to pneumoconiosis pursuant to 20 C.F.R. §718.304 as the relevant evidence of record failed to demonstrate

that the large opacity seen on x-ray was related to a chronic dust disease of the lung. *Id*; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114.

We reject claimant's assertions that the administrative law judge erred in failing to find the existence of complicated pneumoconiosis as the assertions are tantamount to requests that the Board reweigh the evidence of record. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). While both Dr. DePonte and Dr. Patel observed size A opacities, the administrative law judge, in a permissible exercise of his discretion, concluded that the physician's findings did not affirmatively conclude that such evidence was consistent with a chronic dust disease of the lung arising out of coal mine employment. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114. The administrative law judge recognized that while both physicians indicated that while the opacity could represent complicated pneumoconiosis, both physicians' opinions also "presented equally viable alternative diagnoses of cancer or malignancy." Decision and Order at 11. Accordingly, the administrative law judge permissibly recognized that the equivocal nature of these physicians' conclusions undermined their credibility on the issue of complicated pneumoconiosis. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Moreover, contrary to claimant's assertion, the administrative law judge permissibly found Dr. Rasmussen's opinion entitled to little weight on the issue of complicated pneumoconiosis as the x-ray upon which Dr. Rasmussen based his conclusion did not state that claimant suffered from complicated pneumoconiosis, but instead, indicated that the mass was of indeterminate origin. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We, therefore, affirm the administrative law judge's determination that claimant has failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 and has thus failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). *See Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561; *Scarbro*, 220 F.3d 250, 22 BLR 2-93.

Lastly, claimant asserts that the administrative law judge erred in his determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (4). Specifically, claimant asserts that the administrative law judge erred in concluding that Dr. Castle, who opined that claimant did not suffer from pneumoconiosis, possessed superior qualifications to those of Dr. Rasmussen, who rendered a contrary opinion. Claimant further argues that the administrative law judge's

finding that claimant did not suffer from pneumoconiosis pursuant to Section 718.202(a)(4) is tainted by his erroneous finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant further argues that Dr. Rasmussen relied upon more than an x-ray reading to make his diagnosis of pneumoconiosis.

In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (4), the administrative law judge found that the record consisted of the opinions of Drs. Rosenberg and Castle, who found that claimant did not suffer from pneumoconiosis, Director's Exhibit 15; Employer's Exhibit 1, and Dr. Rasmussen, who diagnosed the presence of the disease, Director's Exhibit 14; Claimant's Exhibit 2. The administrative law judge permissibly found that Dr. Rasmussen's diagnosis of clinical pneumoconiosis "ha[d] insufficient probative weight due to an incorrect documentary foundation," specifically because the opinion rested "principally on the belief that the chest x-ray evidence was positive for the existence of the disease." Decision and Order at 18-19; *see Clinchfield Coal Co. v. Fuller*, 180 F.2d 622, 21 BLR 2-654 (4th Cir. 1999); *Tedesco v. Director, OWCP*, 18 BLR 1-103(1994). In addition, the administrative law judge found Dr. Rasmussen's diagnosis of legal pneumoconiosis to be better documented and reasoned than his diagnosis of clinical pneumoconiosis, but the administrative law judge concluded that Dr. Rasmussen's opinion was outweighed by the contrary opinions of Drs. Castle and Rosenberg based, in part, on the latter physicians' better credentials. Decision and Order at 19. This was permissible. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. We, therefore, affirm the administrative law judge's determination that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and affirm the finding that the weight of the relevant evidence fails to establish the presence of the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Because the administrative law judge has addressed all of the relevant evidence of record and properly concluded that such evidence failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we must affirm the denial of benefits.[4]

[4] In light of our affirmance of the administrative law judge's determination that claimant has failed to establish the existence of pneumoconiosis, we need not address claimant's assertions regarding the cause of pneumoconiosis, total respiratory disability, and disability causation as such findings are moot. *See Trent*, 11 BLR 1-26; *Perry v. Director, OWCP*, 9 BLR 1-1; *see generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Accordingly, the administrative law judge's Decision and Order-Denial of 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