BRB No. 08-0233 BLA

C. R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TAZEWELL COAL EQUIPMENT	)	DATE ISSUED: 10/29/2008
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

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 appeals the Decision and Order – Denying Benefits (06-BLA-5704) of Administrative Law Judge Larry W. Price (the administrative law judge) on a subsequent 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 initially credited claimant with eighteen years of qualifying coal mine employment and found that employer was the responsible operator. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the newly submitted evidence established pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the element of entitlement previously adjudicated against claimant, and therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Turning to the merits of the case, the administrative law judge found that simple pneumoconiosis was established at 20 C.F.R. §718.202(a) and that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). The administrative law judge found, however, that the evidence failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). The administrative law judge further found that the evidence of record failed to establish complicated pneumoconiosis and therefore failed to establish invocation of the irrebuttable presumption of totally disabling 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. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish complicated pneumoconiosis and therefore erred in finding that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at 20 C.F.R. §718.304.[1] Specifically, claimant argues that the administrative law judge failed to explain why he found the x-ray readings of complicated pneumoconiosis by Dr. Alexander, a dually qualified Board-certified radiologist and B reader, less persuasive than the negative CT scan reading by Dr. Fino, a B reader. Claimant further asserts that the administrative law judge erred in not crediting the other evidence of complicated pneumoconiosis, *i.e.*, the opinions of treating doctors. Employer responds, urging affirmance of the administrative law judge's Decision and Order – Denying Benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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 applicable law, they are binding upon this Board and

[1] Claimant does not contend that the administrative law judge erred in finding that the evidence failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). That finding is therefore affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984).

may not be disturbed.[2] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Section 411(c)(3) of the Act 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) and would be classified as Category A, B, or C in the International Classification of Radiographs of the Pneumoconiosis by the International Labor Organization, (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). All relevant evidence must be weighed prior to invocation; where the record contains evidence in more than one category, the various categories of evidence must be weighed against each other before the presumption can be invoked. 20 C.F.R. §718.304; *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1992).

In finding that the evidence did not establish complicated pneumoconiosis overall at Section 718.304, the administrative law judge concluded that the preponderance of the x-ray evidence established the existence of Category A large opacities indicative of complicated pneumoconiosis at Section 718.304(a). However, the administrative law judge found that the two biopsies of record did not establish complicated pneumoconiosis at Section 718.304(b), as neither report found a chronic dust disease of the lung which would appear as a greater than one centimeter opacity if it were seen on x-ray,[3] and the other evidence, *i.e.*,

[2] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Claimant does not challenge the administrative law judge's finding that the biopsy evidence did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(b). Thus, we affirm the finding. *Skrack*, 6 BLR at 1-711.

CT scan readings, physicians' opinions, and treatment records, did not establish complicated pneumoconiosis at Section 718.304(c), as it did not establish a chronic dust disease of the lung that would show as a greater than one centimeter opacity if seen on a chest x-ray. Decision and Order at 6-7. Further, the administrative law judge noted that Drs. Fino and Hippensteel, Board-certified pulmonologists, who examined claimant and reviewed the x-ray evidence, CT scan reports, biopsy reports and treatment records, opined that the Category A opacities, identified by Drs. Forehand and Alexander on x-ray, were not, in fact, large individual opacities but were areas of coalescence. *Id*. at 9-10. The administrative law judge, therefore, concluded that a weighing of all of the relevant evidence at Section 718.304(a)-(c), did not establish complicated pneumoconiosis at 20 C.F.R. §718.304.

The administrative law judge is charged with weighing the evidence and making credibility findings and his findings will not be disturbed if they are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Contrary to claimant's argument, the administrative law judge was not required to find complicated pneumoconiosis established at Section 718.304 because he found that the x-ray evidence established complicated pneumoconiosis at subsection (a). Rather, he was required to weigh all the evidence relevant to complicated pneumoconiosis together, *Lester*, 993 F.2d 1145, 17 BLR 2-117, before determining whether complicated pneumoconiosis was established.

In this case, the administrative law judge permissibly found that Dr. Fino, based in part on his reading of a CT scan, persuasively explained that the large opacity seen by Drs. Alexander and Forehand on x-ray was not, in fact, a single large opacity indicative of complicated pneumoconiosis, but was in fact the coalescence of several smaller nodules. *See Scarbro*, 220 F.3d at 2-256, 22 BLR at 2-101 (x-ray loses force if other evidence affirmatively shows that the opacities are not what they seem to be); *Gray*, 176 F.3d at 389, 21 BLR at 2-625-626 (medical opinion that an opacity on an x-ray is really a group of adjacent simple nodules is sufficient to keep the irrebuttable presumption from being triggered). Further, the administrative law judge properly found that claimant's treatment records did not establish complicated pneumoconiosis at Section 718.304(c) as Dr. Antoun merely concluded that findings on biopsy, x-ray, and CT scan were compatible with claimant's history of coal mine employment, not that they showed complicated pneumoconiosis. *See* 20 C.F.R. §718.304. Likewise, the administrative law judge properly found that the evidence in Dr. Sheikh's treatment records did not support his finding of complicated pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Instead, the administrative law judge permissibly credited the opinions of Drs. Fino and Hippensteel, who found that the Category A opacities seen by Drs. Alexander and Forehand on x-ray, were, in fact, an area of coalescence, not one large opacity, inasmuch as their opinions were well-reasoned. *Clark*, 12 BLR at 1-155; *see Lester*, 993 F.2d at 1144, 17 BLR at 2-117 (positive x-ray evidence that is contradicted by medical opinion and biopsy evidence is insufficient to trigger irrebuttable presumption). Consequently, in light

of the foregoing, we affirm the administrative law judge's finding that the evidence, as a whole, failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304.

Accordingly, the administrative law judge's Decision and Order – 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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BETTY JEAN HALL
Administrative Appeals Judge