BRB No. 09-0325 BLA

J.F. Claimant-Petitioner v. FAITH COAL SALES, INCORPORATED and AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/08/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (05-BLA-6075) of Administrative Law Judge Larry S. Merck (the administrative law judge) denying

benefits on a claim filed on July 1, 2004 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 second time. In the original Decision and Order, the administrative law judge accepted the parties' stipulation that claimant worked for 26 years in coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge also noted that employer conceded the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Further, the administrative law judge found that the evidence established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge additionally found that the evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (c), thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's unchallenged length of coal mine employment finding and his findings that claimant has pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b). *J.F. v. Faith Coal Sales, Inc.*, BRB No. 07-0426 BLA, slip op. at 2 n.2 (Feb. 29, 2008)(unpub.). However, the Board vacated the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and (c), and remanded the case to the administrative law judge for further consideration of the evidence. *J.F.*, slip op. at 5-8. The Board instructed the administrative law judge to initially consider whether claimant, as the party proffering a CT scan dated January 27, 2005, established its medical acceptability under 20 C.F.R. §718.107 and, thereby, established its admissibility into the record. *J.F.*, slip op. at 7-8. The Board also instructed the administrative law judge that if he found that the evidence does not establish the presence of complicated pneumoconiosis, then he must determine whether the evidence establishes that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). *J.F.*, slip op. at 8.

On remand, the administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a)-(c) and, thus, he found that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[1] The administrative law judge also found that the evidence did not establish that claimant was totally disabled at

[1] The administrative law judge found that claimant established that his pneumoconiosis arose out of coal mine employment. Decision and Order on Remand at 16.

20 C.F.R. §718.204(b)(2)(i)-(iv).[2] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and (c). Claimant also contends that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of

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[2] The administrative law judge also found that the issue of total disability due to pneumoconiosis was moot, as claimant failed to establish that he was totally disabled. Decision and Order on Remand at 18.

[3] Because the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) and his finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether a claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *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*).

Claimant argues that the administrative law judge erred in finding that the x-ray evidence did not establish the presence of complicated pneumoconiosis. Specifically, claimant asserts that the administrative law judge erred in failing to consider Dr. Buck's reading of the February 6, 2006 x-ray, as "[it] is still relevant and probative on the issue…of the existence of complicated coal workers (sic) pneumoconiosis." Claimant's Brief at 4 (unpaginated). Claimant maintains that the x-ray readings of Drs. Baker and Buck support a finding of complicated pneumoconiosis.

The record consists of four interpretations of four x-rays dated February 12, 2003, July 30, 2004,[5] January 27, 2005, and February 6, 2006. Dr. Grimes, whose credentials are not contained in the record, classified the small opacities on the February 12, 2003 x-ray as ru, profusion 3/3, extent ru, rm, lu, and lm, but he did not classify the large opacities on this x-ray in accordance with the ILO classification system. Director's Exhibit 23. Dr. Baker, a B reader, classified the large opacities on the July 30, 2004 x-ray as Category B. Director's Exhibit 11. Dr. Dahhan, a B reader, classified the large opacities on the January 27, 2005 x-ray as Category 0. Director's Exhibit 26. Dr. Buck, whose credentials are not contained in the record, read the February 6, 2006 x-ray as "consistent with complicated coal worker's pneumoconiosis" and "[c]oal worker's pneumoconiosis with nodular interstitial changes in the upper lung fields and pleural and parenchymal scarring suggestive of complicated early progressive massive fibrosis." Claimant's Exhibit 2.

The administrative law judge noted his previous findings that Dr. Baker's reading of the July 30, 2004 x-ray was positive for complicated pneumoconiosis, that Dr.

[5] Dr. Barrett, a B reader and a Board-certified radiologist, read the July 30, 2004 x-ray for quality only. Director's Exhibit 12.

Dahhan's reading of the January 27, 2005 x-ray was negative for complicated pneumoconiosis, and that Dr. Grimes's reading of the February 12, 2003 x-ray was inconclusive.[6] Decision and Order on Remand at 5-6. The administrative law judge then found that the preponderance of the x-ray evidence did not establish the presence of complicated pneumoconiosis, by stating:

> In sum, after weighing the x-ray evidence, I find that one x-ray is inconclusive for complicated pneumoconiosis. Additionally, one B-reader interpreted an x-ray as negative for complicated pneumoconiosis and one B-reader interpreted an x-ray as positive for complicated pneumoconiosis. Accordingly, I find the x-ray evidence in equipoise as to the existence of complicated pneumoconiosis.

Decision and Order on Remand at 7.

However, as claimant asserts, the administrative law judge did not consider Dr. Buck's reading of the February 6, 2006 x-ray. Dr. Buck, as previously noted, read the February 6, 2006 x-ray as "consistent with complicated coal worker's pneumoconiosis" and "[c]oal worker's pneumoconiosis with nodular interstitial changes in the upper lung fields and pleural and parenchymal scarring suggestive of complicated early progressive massive fibrosis." Claimant's Exhibit 2. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Nevertheless, because Dr. Buck did not diagnose large opacities greater than one centimeter in diameter and classify them as Category A, B, or C, Claimant's Exhibit 2, we hold that the administrative law judge's error in failing to consider Dr. Buck's reading of the February 6, 2006 x-ray was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Further, because the administrative law judge reasonably found that that the x-ray interpretations of Drs. Baker and Dahhan were in equipoise, *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993)(holding that when evidence is equally balanced, claimant must lose), we reject claimant's assertion that the administrative law

[6] The administrative law judge specifically noted his previous findings that "the classification of type 'ru' does not definitively describe the size of opacities in a manner that allows for a determination of whether [c]laimant has or does not have complicated pneumoconiosis" and that "this classification denotes a range of possible sizes of opacities up to one centimeter in diameter, which could include opacities large enough to qualify as complicated pneumoconiosis." Decision and Order on Remand at 6.

judge erred in failing to find that the x-ray evidence established the presence of complicated pneumoconiosis, based on Dr. Baker's x-ray reading.[7]

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Claimant also argues that the administrative law judge erred in finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). The record contains Dr. Tiu's interpretation of the January 27, 2005 CT scan[8] and the reports of Drs. Baker, Hall, and Dahhan. Dr. Tiu interpreted the January

[7] Dr. Grimes, as previously noted, did not classify the large opacities on the February 12, 2003 x-ray in accordance with the ILO classification system. Director's Exhibit 23. In its prior Decision and Order, the Board addressed employer's challenge to the administrative law judge's finding that Dr. Grimes's x-ray reading was inconclusive on the issue of complicated pneumoconiosis. The Board held that "Dr. Grimes's x-ray interpretation diagnosing only simple pneumoconiosis is relevant to whether complicated pneumoconiosis exists." *J.F. v. Faith Coal Sales, Inc.*, BRB No. 07-0426 BLA, slip op. at 5 (Feb. 29, 2008)(unpub.). Hence, the Board instructed the administrative law judge, on remand, to reconsider Dr. Grimes's x-ray reading in light of the doctor's credentials, if any. In his Decision and Order on Remand, however, the administrative law judge relied on his prior finding that Dr. Grimes's x-ray reading was inconclusive regarding the issue of complicated pneumoconiosis. Decision and Order on Remand at 7. Nevertheless, we hold that the administrative law judge's error in finding that Dr. Grimes's x-ray reading was inconclusive with respect to the issue of complicated pneumoconiosis was harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the administrative law judge reasonably found that the x-ray interpretations of Drs. Baker and Dahhan were in equipoise, *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), thereby establishing that the x-ray evidence was insufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

[8] The record also contains Dr. Grimes's interpretation of a CT scan dated August 17, 2004. Director's Exhibit 24. Dr. Grimes interpreted this CT scan as showing findings consistent with pneumoconiosis with diffuse reticular fibrosis. *Id.* Dr. Grimes further observed that "[t]here is a reticular nodular parenchymal pattern in both upper lobes, some of which is partially calcified." *Id.* The administrative law judge did not consider Dr. Grimes's interpretation of the August 17, 2004 CT scan under 20 C.F.R. §718.304(c). No party contends that the administrative law judge erred in failing to consider this CT scan.

27, 2005 CT scan as showing findings of "complicating pneumoconiosis." Claimant's Exhibit 1. Regarding the reports, Dr. Baker diagnosed "Coal Workers (sic) Pneumoconiosis 1/0 with B opacity with progressive massive fibrosis: abnormal chest x-ray & coal dust exposure." Director's Exhibit 11. Dr. Baker also diagnosed chronic bronchitis related to coal dust exposure and cigarette smoking. Dr. Hall, claimant's treating physician, diagnosed pneumoconiosis. Claimant's Exhibit 3. Dr. Dahhan diagnosed Category II simple coal workers' pneumoconiosis, based on radiological findings. Director's Exhibit 26. The administrative law judge initially found that the CT scan evidence did not establish the presence of complicated pneumoconiosis. The administrative law judge then found that the medical opinion evidence did not establish the presence of complicated pneumoconiosis.[9] Hence, the administrative law judge found that the medical evidence did not establish the presence of complicated pneumoconiosis at Section 718.304(c).

Claimant asserts that the administrative law judge erred in finding that Dr. Tiu's interpretation of the January 27, 2005 CT scan was insufficient to establish the presence of complicated pneumoconiosis. Specifically, claimant maintains that "[t]he report [of Dr. Tiu] contains all the diagnostic criteria necessary to establish the presence of complicated coal workers' pneumoconiosis or massive fibrosis." Claimant's Brief at 3 (unpaginated).

In interpreting the January 27, 2005 CT scan, Dr. Tiu observed:

> Conglomerate massive fibrosis in both upper lobes is associated with multiple parenchymal and some pleural micronodules. Cluster of calcification within one of these conglomerate fibrosis was identified and is accompanied by the presence of several calcified right hilar and subcarinal lymph nodes. In addition, several micronodules were seen scattered in both lung fields. The largest of these rounded micronodules measures 1 cm and some of these nodules contain irregular central calcifications. There is also mild hyperaeration of both lung fields associated with multiple dilated bronchial airways predominantly seen in both lower lobes.

[9] The administrative law judge gave little weight to Dr. Baker's opinion that claimant has clinical and legal pneumoconiosis because it was not well-documented or well-reasoned. Decision and Order on Remand at 10-11. The administrative law judge also gave little probative weight to Dr. Hall's opinion that claimant has clinical pneumoconiosis because it was not well-documented or well-reasoned. *Id*. at 15. Further, the administrative law judge gave little weight to Dr. Dahhan's opinion that claimant has clinical pneumoconiosis because it was not well-documented or well-reasoned. *Id*. at 12. Claimant does not challenge the administrative law judge's findings regarding the medical opinion evidence at 20 C.F.R. §718.304(c).

Claimant's Exhibit 1. Dr. Tiu's impression was that "[the] [f]indings [were] compatible with complicating pneumoconiosis seen in conjunction with pulmonary emphysema and bronchiectasis." *Id*. Dr. Tiu's impression was also that "[t]here are several scattered micrododules with irregular calcifications seen scattered in both lung fields, which probably represents multiple pulmonary granulomas, although one cannot fully exclude the possibility of pulmonary metastasis." *Id*.

In his first Decision and Order, the administrative law judge found that Dr. Tiu interpreted the January 27, 2005 CT scan as positive for complicated pneumoconiosis. The administrative law judge further found that "[a]s Dr. Tiu is a highly qualified physician who interpreted the CT scan for the purpose of determining whether [c]laimant has pneumoconiosis, I find the CT scan to be in accord with acceptable medical procedures." Decision and Order at 10. Consequently, the administrative law judge found that Dr. Tiu's CT scan interpretation was probative in establishing the presence of complicated pneumoconiosis. The administrative law judge therefore found that claimant established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

In its prior Decision and Order, the Board vacated the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c) and remanded the case for further consideration. The Board instructed the administrative law judge to initially consider whether claimant, as the party offering Dr. Tiu's CT scan interpretation, established its medical acceptability under 20 C.F.R. §718.107. Further, the Board disagreed with employer's assertion that Dr. Tiu's CT scan interpretation cannot be considered evidence of complicated pneumoconiosis because it lacked an A, B, or C classification. Rather, the Board held that "[t]he absence of an A, B, or C classification, applicable to conventional x-rays, would not preclude the administrative law judge from considering Dr. Tiu's CT scan interpretation as a diagnosis by 'other means' pursuant to 20 C.F.R. §718.304(c), if the administrative law judge explains his determination that it yields results equivalent to an x-ray or biopsy/autopsy diagnosis." *J.F.*, slip op. at 7-8.

In his Decision and Order on Remand, the administrative law judge initially found that Dr. Tiu's interpretation of the January 27, 2005 CT scan was medically acceptable and relevant. Decision and Order on Remand at 9. The administrative law judge then found that Dr. Tiu's interpretation of this CT scan did not establish the presence of complicated pneumoconiosis at Section 718.304(c). *Id*.

An administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In this case, the administrative law judge indicated that claimant does not have a condition which would yield results equivalent to

the criteria set forth in prongs (A) or (B) of Section 718.304. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge specifically stated that "[a]lthough Dr. Tiu found massive fibrosis in both upper lobes, noted several micronodules that measure 1 cm, and opined that his findings were compatible with complicated pneumoconiosis, there is no evidence of record that any opacity exceeded one cm." Decision and Order on Remand at 9. Thus, the administrative law judge permissibly found that the CT scan evidence did not establish the presence of complicated pneumoconiosis at Section 718.304(c), based on Dr. Tiu's interpretation of the January 27, 2005 CT scan. *Gray*, 176 F.3d at 390, 21 BLR at 2-630. Consequently, we reject claimant's assertion that the administrative law judge erred in finding that Dr. Tiu's CT scan interpretation was insufficient to establish the presence of complicated pneumoconiosis. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Furthermore, because the administrative law judge properly found that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (b), and (c), we affirm the administrative law judge's finding that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[10]

In light of our affirmance of the administrative law judge's findings that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and that the evidence did not establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

[10] In view of our affirmance of the administrative law judge's unchallenged finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b), we decline to address claimant's contention that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Larioni*, 6 BLR at 1-1278.

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