BRB No. 11-0113 BLA

BERT JUNIOR BROCK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/27/2011
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Subsequent Claim Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Subsequent Claim Awarding Benefits (2009-BLA-05285) of Administrative Law Judge Robert B. Rae,[1] rendered pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with twenty-four years of coal mine employment, as stipulated by the parties, and adjudicated this subsequent claim[2] pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that, because the newly submitted x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and, therefore, is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the newly submitted x-ray evidence to be sufficient to establish the existence of complicated pneumoconiosis. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a brief in response to employer's appeal, unless specifically requested to do so by the Board.

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.[3] 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).

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

[1] In his Decision and Order on Subsequent Claim Awarding Benefits, which was issued on September 20, 2010, the administrative law judge mistakenly referenced claimant as "Bert Brock, Jr." in the caption of the case.

[2] Claimant filed an initial claim on November 21, 2002, which was denied by Administrative Law Judge Daniel J. Roketenetz on August 4, 2003, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed his current subsequent claim on March 4, 2008. Director's Exhibit 3.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 2.

pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *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*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because the evidence did not establish any of the elements of entitlement. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing at least one element of entitlement in order to have the administrative law judge review the subsequent claim on the merits. The administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement by establishing that he suffers from complicated pneumoconiosis.

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, 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) 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;[4] or (c) when diagnosed by other means, is a condition that 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. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

[4] The record does not contain any biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered seven readings of three newly submitted x-rays dated December 14, 2007, April 16, 2008 and September 4, 2008. Dr. Alexander, a dually qualified Board-certified radiologist and B reader, read the December 14, 2007 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 17. Dr. Scott, a dually qualified Board-certified radiologist and B reader, read the same film as negative for simple and complicated pneumoconiosis. Director's Exhibit 22. In the "Comments" section of the ILO form, Dr. Scott identified calcified and non-calcified granulomata due to histoplasmosis or tuberculosis. *Id*. He also reported a two and one-half centimeter mass in the lateral right apex: "probably post-infectious scarring – may have calcification." *Id*. Dr. Scott recommended a CT scan. *Id*.

Dr. Vaezy, a B reader, read the April 16, 2008 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 13. He marked this x-ray as a quality 1 film. *Id*. Dr. Scott read the same x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 23. He marked this x-ray as a quality 2 film. *Id*. In the "Comments" section of the ILO form, Dr. Scott noted a two and one-half centimeter density in the right apex, which was "probably granulomatous." *Id*. He opined that the density, calcified granulomata and small opacities identified on the x-ray are "probably due to histoplasmosis or [tuberculosis]." *Id*. Dr. Scott again noted that a CT scan "would help define [the] extent of changes and calcification." *Id*. Dr. Barrett, a dually qualified Board-certified radiologist and B reader, read the April 16, 2008 x-ray for quality purposes only, noting that it was a quality 1 film. Director's Exhibit 14.

Dr. Jarboe, a B reader, read the September 4, 2008 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 1. Dr. Wiot, a dually qualified Board-certified radiologist and B reader, read the same film as negative for simple and complicated pneumoconiosis. Employer's Exhibit 2. In a letter attached to the ILO form, Dr. Wiot stated:

> This is a very abnormal chest x-ray, but I do not feel the findings are those of coal workers[']s pneumoconiosis. There is a portacath in place with the tip in the superior vena cava. There are ill-defined densities noted in both upper lung fields which are not characteristic of coal workers['] pneumoconiosis. There is also an ill-defined density overlying the right second rib which has almost a nodular configuration. In view of the portacath and ill-defined changes seen here, this raises the question of diffuse malignancy.

Id. Dr. Wiot concluded the x-ray findings were not those of coal workers' pneumoconiosis. *Id*.

Weighing all of the x-ray readings together, the administrative law judge found that they "clearly support a finding of simple pneumoconiosis." Decision and Order at 14. As to the issue of the existence of complicated pneumoconiosis, the administrative law judge noted that Dr. Jarboe was the only physician who did not identify an opacity greater than one centimeter in diameter on claimant's x-rays, as Dr. Jarboe believed that the other physicians mistook the coalescence of nodules in claimant's right upper lung for one solid mass. *Id*. at 15. The administrative law judge, however, determined that Dr. Jarboe's opinion, that claimant did not have a large opacity, was entitled to less weight as "Dr. Jarboe is only a B reader" and is not a dually qualified radiologist, "like the other five doctors of record who interpreted [c]laimant's x-ray as showing a solid large mass." *Id*.

In resolving the conflict in the x-ray readings as to the etiology of the x-ray findings, the administrative law judge considered Dr. Scott's opinion, that claimant's two and one-half centimeter mass was "probably" due to either histoplasmosis or tuberculosis, to be "both equivocal and unsupported by the record, which shows no evidence relating to either of these diagnoses and fails to account for other relevant factors[,] such as [c]laimant's [twenty-four] years of heavy exposure to coal mine dust and the background of simple pneumoconiosis on x-ray." Decision and Order at 15. He also found Dr. Wiot's opinion, that claimant has a large mass related to cancer, to be unsupported by the treatment records. *Id*. In contrast, the administrative law judge found that both Dr. Vaezy and Dr. Alexander diagnosed claimant with a large opacity greater than one centimeter and attributed the etiology to coal dust exposure. He concluded that their opinions were reasoned and documented, and supported by claimant's work history, the treatment record and the background of simple pneumoconiosis, "which Dr. Jarboe testified is standard for the appearance of complicated [pneumoconiosis]." *Id*. Thus, the administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id*.

The administrative law judge also considered other evidence pursuant to 20 C.F.R. §718.304(c), consisting of claimant's treatment records[5] and the narrative reports of Drs.

[5] On August 30, 2005, claimant underwent a CT scan that showed several nodular densities in the upper lobes bilaterally, with the largest measuring 1.3 centimeters, which was "worrisome for metastatic disease." Director's Exhibit 15. Claimant had a bronchoscopy on September 16, 2005, that was negative for malignant cells. *Id*. A report dated September 28, 2005, indicates that an "attempted" biopsy showed results that were negative for cancer but consistent with granulomatous disease or coal workers' pneumoconiosis. *Id*. Claimant had three subsequent CT scans on June 13, 2006, September 25, 2006 and April 9, 2007, to monitor the progression of the mass and nodules. The final CT scan report of April 9, 2007, indicated that there was a "pattern of nodularity on a background of obstructive airways disease." *Id*. The radiologist

Vaezy and Jarboe. Decision and Order at 17-18. Dr. Vaezy examined claimant at the request of the Department of Labor on April 16, 2008 and diagnosed a Category A density by x-ray, coal workers' pneumoconiosis and bronchial asthma. Director's Exhibit 13. Dr. Jarboe examined claimant on September 24, 2008 and diagnosed simple coal workers' pneumoconiosis and probable bronchial asthma. Employer's Exhibit 1. In a deposition conducted on April 15, 2010, Dr. Jarboe discussed the radiographic findings and opined that claimant does not have complicated pneumoconiosis because the coalescence of nodules has yet to fuse together to form a large opacity. Employer's Exhibit 3.

The administrative law judge found Dr. Jarboe's medical opinion to be largely based on his x-ray interpretation, which was contradicted by all of the other x-ray readings that found a large opacity, and not merely a coalescence of small opacities. Decision and Order at 17. The administrative law judge concluded that, while the other evidence of record under subsection (c) was insufficient to establish the existence of complicated pneumoconiosis, it did not detract from his conclusion that claimant has a large opacity of complicated pneumoconiosis, based on the x-ray evidence under subsection (a). *Id*. at 18-19. Therefore, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id*. at 19.

Employer argues that the administrative law judge erred in rejecting Dr. Scott's negative x-ray readings for complicated pneumoconiosis, of the films dated December 14, 2007 and April 16, 2008. We disagree. The administrative law judge correctly observed that, while Dr. Scott opined that the large opacity was "probably" due to histoplasmosis or tuberculosis, neither of these conditions appears in the treatment records from Central Baptist Hospital and Stone Mountain Health Services, and they are not reported "in claimant's personal or family history of record."[6] Decision and Order at

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indicated that the pattern of only minimal progression in the radiological findings suggested a "benign disease," such as coal workers' pneumoconiosis, rather than cancer. *Id*.

[6] Employer argues that the administrative law judge "ignored the fact that Dr. Scott's readings of [granulomatous] disease is [sic] consistent" with claimant's treatment records, suggesting that granulomatous disease was considered as a possible diagnosis for claimant's radiological findings. Employer's Brief in Support of Petition for Review at 7. Contrary to employer's contention, however, the administrative law judge discussed the treatment records and permissibly concluded that they supported a finding that claimant's radiological findings were attributable to coal dust exposure, based on the final CT scan report of April 9, 2007. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703,

14 n. 11. Contrary to employer's contention, an administrative law judge may reject, as speculative and equivocal, the opinions of employer's experts, who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions, such as tuberculosis, histoplasmosis or cancer, if they fail to point to evidence in the record indicating that the miner suffers or suffered from any of the alternative diseases. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). Because the administrative law judge rationally found that Dr. Scott provided an "equivocal" opinion that is also "unsupported by the record," we affirm the administrative law judge's decision to accord less weight to Dr. Scott's negative readings for complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987).

We also reject employer's argument that the administrative law judge exceeded his authority and improperly acted as a medical expert in concluding that, "Dr. Wiot's opinion[,] that the opacity is related to cancer[,] was thoroughly tested in [c]laimant's treatment records and found to be a less likely cause than a more benign disease like [coal workers' pneumoconiosis]." Decision and Order at 15. The administrative law judge had discretion to evaluate the medical opinions, in light of claimant's treatment records, and draw his own inferences and conclusions from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We see no error in the administrative law judge's reasonable conclusion that cancer was ruled out as a likely cause for claimant's radiographic findings. *See Calfee v. Director, OWCP* , 8 BLR 1-7 (1985). As the administrative law judge rationally explained:

> The treatment records in this claim thoroughly explore the possibility that the large opacities in [c]laimant's lungs are due to cancer rather than [coal workers' pneumoconiosis]. The medical evidence in the claim indicates that cancer was a potential diagnosis for the condition causing the large opacities because of claimant's personal history and because of the questionable appearance of some of the nodules in his lungs. However, [c]laimant's treatment records show that[,] after a two-year period of continuous evaluation, his treating physicians found that cancer was not a likely diagnosis. They arrived at this conclusion after a needle biopsy that

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22 BLR 2-537 (6th Cir. 2002); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010)*Cox*, 602 F.3d at 285, 24 BLR at 2-284.

> was negative for cancer but consistent with granulomatous disease or [coal workers' pneumoconiosis] and after multiple CT scans that showed that the disease process was too stable in appearance to indicate malignancy. Ultimately, [c]laimant's treating physicians indicated in the records that the pattern of only minimal progression indicated a benign disease such as [coal workers' pneumoconiosis] rather than cancer.

Id. at 18; *see Clark*, 12 BLR at 1-155; *Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988). We, therefore, affirm the administrative law judge's decision to assign Dr. Wiot's opinion, that claimant's large opacity is due to cancer and not coal dust exposure, less weight, as it is "not well-reasoned or supported by the record as a whole."[7] Decision and Order at 15; *see Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Finally, we reject employer's assertion that the administrative law judge erred in relying on the opinions of Drs. Alexander and Vaezy, to find the existence of complicated pneumoconiosis established, because they indicated on the ILO forms they completed that other possible diseases could be present radiographically.[8] As discussed, *supra*, the administrative law judge reasonably concluded, based on his review of the treatment records, that claimant does not have cancer. S*ee Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Donovan*, 300 F.2d at 742. Because Drs. Alexander and Vaezy specifically found "an opacity greater than one centimeter" on x-ray, which they attributed to coal workers' pneumoconiosis, the administrative law judge reasonably found that their opinions were supportive of claimant's burden of proof at 20 C.F.R.

[7] Employer argues that the administrative law judge erred in not crediting the opinions of Drs. Scott and Wheeler, based on their qualifications. Contrary to employer's argument, the administrative law judge reasonably determined that the opinions of Drs. Scott and Wheeler were not credible, irrespective of their qualifications. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987).

[8] Employer alleges that the administrative law judge ignored Dr. Alexander's ILO form, pertaining to his reading of the December 14, 2007 x-ray, wherein he check-marked the symbol "pi" and commented, "other causes may be present and follow-up evaluation with chest x-ray or CT [scan] is recommended." Director's Exhibit 17. Employer also alleges that the administrative law judge ignored that Dr. Vaezy indicated, based on his reading of the April 16, 2008 x-ray, that he had concerns as to whether claimant had cancer. Director's Exhibit 13.

§718.304(a). Decision and Order at 15-16; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22.

Because the administrative law judge permissibly credited the x-ray readings by Drs. Alexander and Vaezy, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; We also affirm the administrative law judge's finding that the evidence relevant to 20 C.F.R. §718.304(c), while insufficient to establish complicated pneumoconiosis, does not outweigh the x-ray evidence pursuant to 20 C.F.R. §718.304(a), because x-rays "are the most direct and reliable" method of diagnosing complicated pneumoconiosis. Decision and Order at 19; *see Gray*, 176 F.3d at 389, 21 BLR at 2-628-29; *Clark*, 12 BLR at 1-155. We, therefore, affirm the administrative law judge's findings that claimant established the existence of complicated pneumoconiosis arising out of coal dust exposure pursuant to 20 C.F.R. §§718.304, 718.203, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Subsequent Claim Awarding 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