BRB No. 06-0137 BLA

WILLIAM BOYD BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MYSTIC ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/21/2006
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5735) of Administrative Law Judge Thomas M. Burke 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). The administrative law judge found twenty-two years of coal mine employment. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 1, 13. After determining that the instant claim was a subsequent claim,[1] the administrative law judge noted the proper standard and found that because employer conceded that claimant has pneumoconiosis, a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). *See* 20 C.F.R. §718.202, Decision and Order at 2-3; Hearing Transcript at 6-7; Director's Exhibit 1. Considering the record *de novo*, the administrative law judge concluded that employer did not rebut the presumption that the pneumoconiosis arose from the more than ten years of coal mine employment pursuant to 20 C.F.R. §718.203.[2] Decision and Order at 13. The administrative law judge further determined that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, or total disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 5-15. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Employer responds asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

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[1] Claimant filed his initial claim for benefits with the Department of Labor on February 10, 1997, which was denied by the district director on May 5, 1997 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on April 16, 2002, in which benefits were awarded by the district director on October 30, 2003. Director's Exhibits 3, 33. Employer requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 34.

[2] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibits 1, 4, 6, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§725.309, 718.202(a), 718.203, 718.204(b)(2), and 718.304(b), (c) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Considering the relevant evidence of record, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Specifically, claimant argues that the administrative law judge did not apply "the regulatory definition but simply looked to see whether the various physicians who evaluated the chest x-rays used the phrase complicated pneumoconiosis." Claimant's Brief at 5. We disagree. The pertinent regulations require the administrative law judge to evaluate the evidence in each category at 20 C.F.R. §718.304(a), (b), and (c), before weighing together the categories at 20 C.F.R. §718.304(a), (b) and (c) and determining whether invocation has been established. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Blankenship*, 177 F.3d 240, 22 BLR 2-554; *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)(*en banc*).

Initially, the administrative law judge considered all of the evidence of record and permissibly accorded greater weight to the more recent evidence. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*);

Casella v. Kaiser Steel Corp., 9 BLR 1-131 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); Decision and Order at 6; Director's Exhibit 1.

In considering the x-ray evidence pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered the five readings of the three more recent x-rays dated September 17, 2002, July 30, 2003 and December 13, 2004 and determined that the interpretations by Drs. Patel and Cappiello, finding size A large opacities, were "somewhat ambiguous and/or equivocal."[4] Decision and Order at 6-7. The administrative law judge further noted that Dr. Binns, in his x-ray interpretation, specifically noted that there were no large opacities present and that Dr. Zaldivar, who interpreted the July 30, 2003 x-ray, and Dr. Ahmed, who interpreted the December 13, 2004 x-ray, found the existence of simple pneumoconiosis only.[5] Decision and Order at 6-7. The administrative law judge, after noting that the "0/1" interpretation by Dr. Binns did not constitute a finding of pneumoconiosis, concluded that the preponderance of the x-ray evidence established the existence of simple pneumoconiosis and thus claimant did not meet his burden of establishing complicated pneumoconiosis pursuant to Section 718.304(a). Decision and Order at 7.

We reject claimant's argument that the administrative law judge failed to apply the proper standard in reviewing the chest x-rays. Substantial evidence supports the administrative law judge's conclusion that claimant failed to meet his burden of proof pursuant to Section 718.304(a). With respect to the x-ray interpretations by Drs. Patel and Cappiello, the administrative law judge acted within his discretion as fact-finder, in concluding that the findings by these physicians, of size A large opacities, which satisfied the statutory and regulatory definition of the congressionally defined medical condition commonly referred to as complicated pneumoconiosis, were equivocal.[6] *Gollie v. Elkay*

[4] Dr. Patel, who interpreted the September 17, 2002 x-ray, and Dr. Cappiello, who interpreted the December 13, 2004 x-ray, found the existence of "1/1" and "2/1" small opacities present, respectively. Director's Exhibit 17; Claimant's Exhibit 1.

[5] Dr. Binns not only read the September 17, 2002 x-ray for quality purposes but also interpreted the x-ray as "0/1" and opined that there are no large opacities present. Director's Exhibit 17; Decision and Order at 6.

[6] Dr. Patel stated on the x-ray form "LL Zone mass 2.5 in dia. DDX CAT A opacity, granuloma rheumatoid nodule, nodule scar (smaller in size compared with CXR 3/25/02 (Rh/Pulmonary Clinic)," which the administrative law judge concluded indicated various possible differential diagnoses. Decision and Order at 6; Director's Exhibit 17. Dr. Cappiello stated that "There is a 3 cm. long irregular mass density in the left lung

Mining Co., 22 BLR 1-306 (2003); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order at 6-7; Director's Exhibit 17; Claimant's Exhibit 1. Moreover, the administrative law judge rationally found that these interpretations were outweighed by the contrary x-ray readings of Drs. Binns, Zaldivar, and Ahmed, who found no large opacities to be present. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Blankenship*, 177 F.3d 240, 22 BLR 2-554; *Lester*, 993 F.2d 1143, 17 BLR 2-114; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; *Kuchwara*, 7 BLR 1-167; Decision and Order at 6-7; Director's Exhibits 17, 18; Claimant's Exhibit 1. Thus, the administrative law judge permissibly found that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a) by a preponderance of the x-ray evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 6-7; Director's Exhibits 17, 18; Claimant's Exhibit 1. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the x-ray evidence or his findings pursuant to Section 718.304(b) and (c), we affirm the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and we affirm the denial of benefits. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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base which may represent past surgical scarring but which may also represent a conglomerate mass of complicated pneumoconiosis." Claimant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge