BRB No. 09-0175 BLA

R.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BANDMILL COAL CORPORATION	)	
	)	DATE ISSUED: 09/22/2009
Employer-Respondent	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-5948) of Administrative Law Judge Robert D. Kaplan rendered on a miner's 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 credited claimant with thirty-two years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law

[1] The record indicates that claimant's coal mine employment was in Virginia and West Virginia. Director's Exhibits 3, 5. Accordingly, this case arises within the

judge found the evidence insufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence did not establish the existence of complicated pneumoconiosis, and that therefore, claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his evaluation of the x-ray evidence regarding the existence of complicated pneumoconiosis pursuant to Section 718.304(a). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[2]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989).

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

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jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's length of coal mine employment determination, as well as his findings that claimant did not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), (4), total disability pursuant to 20 C.F.R. §718.204(b), or invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(b), (c), are not challenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

or autopsy, yields massive lesions in the lung; 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 United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption found at Section 718.304, the administrative law judge must examine all the evidence relevant to the presence or absence of complicated pneumoconiosis, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and weigh together all of the evidence in making his finding. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (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*).

Pursuant to Section 718.304(a), the administrative law judge considered seven interpretations of two x-rays dated May 27, 2003, and February 14, 2007,[3] along with the

[3] The x-ray taken on May 27, 2003 was read by Dr. Ahmed, a Board-certified radiologist and B reader, as 2/2 q,t for simple pneumoconiosis, and as positive for Category "A" large opacities. Claimant's Exhibit 2. Dr. Scatarige, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis, and he noted the presence of masses that were consistent with tuberculosis, with a few peripheral nodules in claimant's right lung, and stated that there were no symmetrical small opacities to suggest coal workers' pneumoconiosis or silicosis. Employer's Exhibit 5. Dr. Wheeler, a Board-certified radiologist and B reader, read the May 27, 2003 x-ray as 0/1, or negative, for simple pneumoconiosis, and he stated that no large opacities were present. Dr. Wheeler noted a five-centimeter mass in the apex of claimant's right lung and a three-centimeter mass in the left upper lung. He reported "left apical pleural thickening compatible with conglomerate granulomatous disease[,] either histoplasmosis or TB." Employer's Exhibit 2. Dr. Wheeler further stated that "CWP is unlikely because nodular infiltrates are asymmetrical and mainly in apices, subapical upper lobes and lateral periphery RUL while CWP gives symmetrical small nodular infiltrates in central mid and upper lungs. Also [claimant] is young to have advanced CWP. . . ." *Id*. The February 14, 2007 x-ray was interpreted by Dr. Rasmussen, a B reader, as 1/2 r,q for

readers' radiological qualifications. With respect to the May 27, 2003 x-ray, the administrative law judge found that Dr. Ahmed's interpretation of Category "A" large opacities was outweighed by the negative interpretations of Drs. Wheeler and Scatarige. With respect to the February 14, 2007 x-ray, the administrative law judge found that Dr. Rasmussen's and Dr. Ahmed's interpretations of category "A" opacities were outweighed by the negative readings of Drs. Wheeler and Scatarige. Decision and Order at 11. In so finding, the administrative law judge rejected claimant's contention that the negative interpretations of Drs. Scatarige and Wheeler were speculative and essentially ignored that masses of sufficient size to support a finding of Category A large opacities were present. Specifically, the administrative law judge found that neither physician classified the masses as large opacities, and that both physicians explained their opinions that the x-rays did not reveal large opacities of complicated pneumoconiosis. Decision and Order at 11-12.

Claimant argues that the administrative law judge failed to consider the regulatory requirements for establishing complicated pneumoconiosis, but instead erroneously credited employer's doctor's speculative statements. Claimant's Brief at 6 (unpaginated). We disagree. In weighing the x-ray evidence pursuant to Section 718.304(a), the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in determining that the preponderance of the x-ray evidence did not establish the existence of large opacities. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Milburn Colliery Co. v. Hicks*, 138 F.3d

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simple pneumoconiosis, and as positive for "A" large opacities. Director's Exhibit 10. Dr. Ahmed read this x-ray as 2/2 r,q, with "A" large opacities. Claimant's Exhibit 2. Dr. Scatarige interpreted the February 14, 2007 x-ray as negative for pneumoconiosis. He stated that there were no central small opacities of coal workers' pneumoconiosis or silicosis. Dr. Scatarige further noted bilateral apical opacities and nodules, and indicated that there was "probably stable or healed TB" in the periphery of the right mid lung. Employer's Exhibit 5. Dr. Wheeler read the February 14, 2007 x-ray as 0/1, and specified that the x-ray was negative for any large opacities. Employer's Exhibit 1. He noted a five-centimeter mass in the right apex and a three-centimeter mass in the upper left apex. Dr. Wheeler stated that left apical pleural thickening and the small nodular infiltrates in the "apices, subapical upper lobes and lateral periphery RUL," were compatible with conglomerate granulomatous disease, histoplasmosis, or tuberculosis. Employer's Exhibit 1. Dr. Wheeler explained that the "[m]asses are not large opacities of CWP because they are apical and involving pleura. Nodules are unlikely to be CWP because that disease gives symmetrical small nodular infiltrates in central mid and upper lungs. Also [claimant] is quite young. MSHA and NIOSH became active controlling dust levels in mines in [the] early 1970s." *Id.* Dr. Gaziano reviewed the February 14, 2007 x-ray for quality purposes only. Director's Exhibit 10.

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); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Further, claimant's assertion that the administrative law judge should have rejected the negative x-ray interpretations submitted by employer because they were "speculations," lacks merit. Claimant's Brief at 6 (unpaginated). Contrary to claimant's contention, the fact that a physician has not identified a definitive alternate source for the x-ray findings does not necessarily undermine the physician's negative x-ray interpretation, since the burden of proof rests with claimant to establish the existence of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *Clinchfield Coal Co. v. Lambert*, 206 F. App'x 252, 255 (4th Cir. Nov. 17, 2006)(unpub.)(stating that *Scarbro* did not impose a burden on the party opposing entitlement to affirmatively establish that opacities are not there or are not what they seem to be, and emphasized that the burden of proof remains with claimant). Moreover, the Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Therefore, we reject claimant's allegation of error, and we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of large opacities, and therefore, did not establish invocation of the irrebuttable presumption pursuant to Section 718.304(a).

As noted above, we have affirmed the administrative law judge's findings that claimant did not otherwise establish invocation of the irrebuttable presumption pursuant to Section 718.304, as well as the findings that claimant did not establish the existence of simple pneumoconiosis pursuant to Section 718.202(a), or total disability pursuant to 718.204(b). *See* n. 2, *supra*. Therefore, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

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