BRB No. 13-0148 BLA

DAVID E. NAPIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/10/2013
PROGRESS FUELS CORPORATION	)	
	)	
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 Remand of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2009-BLA-5186) of Administrative Law Judge Paul C. Johnson, Jr., awarding benefits on a claim filed on February 27, 2008, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the second time.[1]

In the initial decision, the administrative law judge credited claimant with twenty-nine years of coal mine employment,[2] as stipulated by the parties, and found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(3), 718.203(b), 718.304(a), and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[3] *Napier v. Powell Mountain Coal Co., Inc.*, BRB No. 10-0434 BLA (April 15, 2011) (unpub.). Specifically, the Board held that the administrative law judge did not sufficiently weigh together the x-ray evidence, which was positive for complicated pneumoconiosis at 20 C.F.R §718.304(a), with the other evidence of record, including the computerized tomography (CT) scan and x-ray readings contained in the treatment notes, at 20 C.F.R. §718.304(c). The Board instructed the administrative law judge on remand to weigh together all relevant evidence before making a determination

[1] The procedural history of this claim is set forth in the Board's prior decision. *Napier v. Powell Mountain Coal Co., Inc.*, BRB No. 10-0434 BLA (April 15, 2011) (unpub.).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Tr. at 22; Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-nine years of coal mine employment and that he is entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). *Napier*, BRB No. 10-0434 BLA, slip op. at 5 n.5; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The Board further affirmed, as unchallenged, the administrative law judge's findings that complicated pneumoconiosis was not established at 20 C.F.R. §718.304(b), (c). *Napier*, BRB No. 10-0434 BLA, slip op. at 3 n.2.

as to the existence of complicated pneumoconiosis. The Board also instructed the administrative law judge that if, on remand, he found that claimant is not entitled to the irrebuttable presumption at 20 C.F.R. §411(c)(3), 30 U.S.C. §921(c)(3), he must consider whether claimant could establish entitlement through use of the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4]

On remand, in a decision issued on November 26, 2012, the administrative law judge found that claimant established the existence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.[5]

On appeal, employer argues that the administrative law judge erred in his evaluation of the CT scan and x-ray readings contained in claimant's medical treatment notes, in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments and affirm the award of benefits.

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).

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[4] Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[5] Because the administrative law judge found claimant entitled to benefits pursuant to 20 C.F.R. §718.304, he did not consider whether claimant is entitled to benefits pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4).

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 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. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33 (1991) (en banc).

In considering the x-ray evidence relevant to the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), the administrative law judge considered three interpretations of two x-rays taken on April 8, 2008 and August 4, 2008. Decision and Order on Remand at 3, 5-6; Claimant's Exhibits 1, 3; Director's Exhibit 11. Dr. Vaezy, a B reader, interpreted the April 8, 2008 x-ray as positive for simple pneumoconiosis, but negative for large opacities of complicated pneumoconiosis. Director's Exhibit 11. Dr. Wiot, a B reader and Board-certified radiologist, interpreted the August 4, 2008 x-ray as positive for complicated pneumoconiosis, Category "B." Claimant's Exhibit 3. Dr. Miller, a B reader and Board-certified radiologist, also interpreted the August 4, 2008 x-ray as positive for complicated pneumoconiosis, Category "A." Claimant's Exhibit 1.

In weighing the conflicting x-ray interpretations, the administrative law judge permissibly credited the readings of complicated pneumoconiosis by Drs. Wiot and Miller over the reading of simple pneumoconiosis by Dr. Vaezy, based on their superior qualifications. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order on Remand at 5-6. The administrative law judge accorded "particular weight" to Dr. Wiot's positive reading for complicated pneumoconiosis, based on his additional qualifications as a professor in radiology and as a developer of the National Institute of Occupational Safety and Health (NIOSH) International Labour Organization (ILO) standards. Decision and Order on Remand at 6. Finally, the administrative law judge noted that the August 4, 2008 x-ray, is the most

recent x-ray of record. Decision and Order on Remand at 6. Weighing the x-ray evidence together, the administrative law judge permissibly relied on the preponderance of the positive readings for complicated pneumoconiosis by the most highly qualified readers, including that of Dr. Wiot, "a pre-eminent expert in the radiological interpretation of pneumoconiosis," in conjunction with the recency of the August 4, 2008 x-ray that he and Dr. Miller read, to conclude that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); Decision and Order on Remand at 6. As it is supported by substantial evidence, we affirm the administrative law judge's finding that the preponderance of the x-ray evidence establishes the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a).

Considering the x-ray evidence at 20 C.F.R. §718.304(a) together with the other medical evidence of record at 20 C.F.R. §718.304(c), as instructed, including the CT scan and x-ray interpretations contained in the treatment notes, the administrative law judge found that it did not change his conclusion that complicated pneumoconiosis is established. Decision and Order on Remand at 6. Specifically, the administrative law judge correctly noted that claimant's treatment notes contain three x-ray interpretations dating from 2001, 2004, and 2006, which are not reported on ILO classification forms, and which do not identify the presence of complicated pneumoconiosis.[6] Decision and Order on Remand at 6. The administrative law judge further correctly noted that the 2001 x-ray was read by Dr. Dahhan, a B reader, and the 2004 and 2006 x-rays were read by physicians whose radiological qualifications are unknown. Decision and Order on Remand at 6. Contrary to employer's argument, the administrative law judge acted within his discretion in concluding that the fact that "the earlier x-rays did not show complicated pneumoconiosis does not negate the later x-ray that does, given both the superior credentials of the physicians who interpreted the x-ray of August 4, 2008 and its recency." *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Chaffin*, 22 BLR at 1-302; *Worhach*, 17 BLR at 1-108; Decision and Order on Remand at 6-7. We, therefore affirm the administrative law judge's finding that the x-

[6] Dr. Dahhan, a B reader, interpreted a December 20, 2001 x-ray as showing increased interstitial markings with no acute abnormalities. Director's Exhibit 13 at 120. Dr. Kumar, whose qualifications are unknown, interpreted an October 15, 2004 x-ray as showing no active disease. Director's Exhibit 13 at 87. Dr. Pampati, whose qualifications are unknown, interpreted a March 2, 2006 x-ray as showing no acute infiltrate, small reticular nodular density scattered throughout the lung, and no significant change since the previous examination. Director's Exhibit 13-85.

ray readings contained in the treatment notes are of diminished probative value, and do not undermine the positive x-ray evidence at 20 C.F.R. §718.304(a) .

Employer next renews its argument that the administrative law judge erred in declining to consider, on remand, two CT scan interpretations also contained in the treatment notes. Employer's Brief at 3-4. Previously, the Board held that the administrative law judge acted properly in not considering the CT scans readings, because he found that there was no evidence in the record to show that they were a medically relevant and acceptable means of diagnosing pneumoconiosis, pursuant to 20 C.F.R. §718.107(b). *See Napier*, BRB No. 10-0434 BLA, slip op at 4 n.4; Director's Exhibit 13. On remand, employer argued to the administrative law judge that the standard set forth at 20 C.F.R. §718.107(b) had been met, because the CT scans had been ordered by claimant's physicians, to aid in the diagnosis and treatment of claimant's condition, and had not been shown to be unreliable. Employer's Remand Brief at 6. On remand, the administrative law judge rejected employer's argument, and declined to consider the CT scans, finding that as the proponent of the CT scans, employer must make an affirmative showing of reliability, and cannot simply rely on a lack of evidence that the CT scans are unreliable. Decision and Order on Remand at 3-4.

On appeal, employer argues, for the first time, that 20 C.F.R. §718.107(b) does not apply to tests contained in treatment records, because the quality standards set forth in the regulations are inapplicable to tests that were not developed for the purpose of litigation. The Director responds, asserting that, because the administrative law judge must still be persuaded by the evidence, the administrative law judge did not err in requiring employer to submit proof of the reliability of the CT scan interpretations. Director's Brief at 2. Moreover, on the evidence in this record, and in light of the administrative law judge's permissible determination to accord greatest weight to the most recent radiological interpretations by the most highly qualified readers, employer has not shown error in the administrative law judge's determination. The issue before the administrative law judge was whether the 2004 and 2007 CT scan interpretations were sufficiently reliable, despite the inapplicability of the quality standards.[7] The CT scans, dating from November 2004

[7] The comments to the revised regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 CFR [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

and November 2007, predate the August 4, 2008 x-ray upon which the administrative law judge relied, and there is no evidence in the record as to the radiological qualifications of the readers. Director's Exhibit 13. Therefore, we reject employer's assertion that the administrative law judge erred in declining to consider the CT scan evidence, in finding that claimant established the existence of complicated pneumoconiosis.

As employer raises no further arguments with respect to the administrative law judge's evaluation of the evidence, we affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34. We, therefore, affirm the administrative law judge's award of benefits.

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65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Accordingly, the administrative law judge's Decision and Order on Remand 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