BRB No. 10-0116 BLA

BIRCHEL NOLAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 10/14/2010
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 - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Birchel Nolan, Asher, Kentucky, *pro se*.

Ronald E. Gilbertson (K&L Gates, LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order - Denial of Benefits (08-BLA-5583) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a claim filed pursuant to the provisions of 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 "at least" eight years of coal mine employment,[2] pursuant to the parties' stipulation. Decision and Order at 4. The administrative law judge found that the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Further, the administrative law judge found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). The administrative law judge, however, found that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not file a substantive response to claimant's appeal.

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded and they correctly state that the amendments to the Act do not affect this case, as there is no evidence, and no allegation that, claimant worked for at least fifteen years in qualifying coal mine employment.[3]

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[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 7. 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*).

[3] In order to be entitled to the rebuttable presumption of total disability due to pneumoconiosis that was reinstated by Section 1556 of Public Law No. 111-148, claimant must first establish that he worked "for fifteen years or more in one or more underground coal mines," or in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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). In this case, substantial evidence supports the administrative law judge's finding that claimant did not establish total disability. *See McFall,* 12 BLR at 1-177.

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1). Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by Section 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; 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 invocation of the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). In this case, claimant alleges no more than approximately eight or nine years of coal mine employment. Director's Exhibits 3, 20 at 5; Hearing Transcript at 14.

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered seven readings of three x-rays and considered the readers' radiological qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Dr. Wheeler, a Board-certified radiologist and B reader, read a February 2, 2006 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Drs. Miller and Alexander, both of whom are Board-certified radiologists and B readers, read the next x-ray, taken on December 4, 2006, as positive for a Category A large opacity. Director's Exhibit 15. Dr. Wheeler, however, read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Next, Dr. Ahmed, a Board-certified radiologist and B reader, and Dr. Baker, a B reader, read the February 15, 2007 x-ray as positive for a Category A large opacity. Director's Exhibits 11, 16. Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Director's Exhibit 14.

In analyzing the foregoing x-ray readings, the administrative law judge correctly noted that, where a physician interpreting an x-ray includes comments that potentially undermine the physician's x-ray diagnosis of a large opacity by suggesting alternative diagnoses, those comments are relevant evidence that must be considered at 20 C.F.R. §718.304(a). *See Melnick*, 16 BLR at 1-37. The administrative law judge noted accurately that, in this case, all four physicians who reported a large opacity in the upper zone of claimant's right lung included "comments with regard to the etiology of the large opacity observed on x-ray." Decision and Order at 15. Specifically, the administrative law judge considered Dr. Miller's comment that the December 4, 2006 x-ray reflected "[p]rogressive massive fibrosis/pneumoconiosis versus lung cancer. . . . A chest CT or comparison with old chest x-ray is recommended." Director's Exhibit 15. Further, the administrative law judge took into account Dr. Alexander's comment that the December 4, 2006 x-ray showed a "30x35 mm large opacity in right upper zone . . . most consistent with [C]ategory A complicated CWP, but lung cancer needs to be excluded." *Id.* Additionally, the administrative law judge reviewed Dr. Ahmed's comment that, on the February 15, 2007 x-ray, the "opacity in the right upper lung could represent a neoplastic process such as cancer; a comparison with a previous film or follow up CT scan could be useful for further evaluation." Director's Exhibit 16. Finally, the administrative law judge noted Dr. Baker's comment that the same x-ray reflected "abnormality RUL - ?Cancer/TB/PMF/fungi." Director's Exhibit 11.

Based upon his review of the physicians' comments regarding the large opacity in claimant's right lung, the administrative law judge reasonably found that "the comments . . . offer an alternative diagnosis -- with three physicians listing cancer and one physician suggesting cancer, TB, or fungi -- which detracts from the credibility of their x-ray interpretations of complicated pneumoconiosis." Decision and Order at 16; *see Melnick*, 16 BLR at 1-37. Further, the administrative law judge reasonably took into account that Dr. Wheeler, "a dually qualified physician[,] observed the mass in three different films

and did not find complicated pneumoconiosis. . . ."[4] Decision and Order at 16; *see Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29. As substantial evidence supports the administrative law judge's finding that a preponderance of the x-ray evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304(a), that finding is affirmed.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge noted accurately that the record contains no biopsy or autopsy evidence. Therefore, claimant cannot establish complicated pneumoconiosis under 20 C.F.R. §718.304(b).

Pursuant to 20 C.F.R. §718.304(c), the record contains the medical reports of Drs. Alam, Baker, and Rosenberg, and claimant's medical treatment records. Dr. Baker diagnosed claimant with complicated pneumoconiosis, based upon his reading of the February 15, 2007 x-ray. Director's Exhibit 11. The administrative law judge reasonably accorded "less weight" to Dr. Baker's diagnosis, because Dr. Baker was "equivocal in his narrative report regarding the etiology of the upper right lobe lesion."[5] Decision and Order at 18; *see Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Justice v. Island Creek Coal Co.*, 11 BLR 1-1-91 (1988). Dr. Alam, who is claimant's treating physician, stated that claimant has an abnormal chest x-ray "suggestive of accelerated pulmonary fibrosis secondary to coal workers' pneumoconiosis."[6] Claimant's Exhibit 2. The administrative law judge permissibly accorded Dr. Alam's opinion little weight, because Dr. Alam did not provide the documentation upon which he relied. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Dr. Rosenberg reviewed the medical evidence of record and stated that, while claimant's x-rays and CT scans were noted to be consistent with coal workers' pneumoconiosis and progressive massive fibrosis, that diagnosis was "unlikely" in view of claimant's exposure history, and the diagnosis was "not established with certainty." Employer's Exhibit 5 at 4. Finding Dr. Rosenberg's

[4] The administrative law judge considered Dr. Wheeler's comments that the mass in claimant's right lung was compatible with granulomatous disease, histoplasmosis, or tuberculosis. Decision and Order at 16; Director's Exhibit 14; Employer's Exhibits 1, 2.

[5] In his narrative medical report, Dr. Baker noted that the lesion in claimant's right upper lobe "could represent an A, possibly a B opacity," but alternatively, "could be due to cancer, tuberculosis, fungus, post-inflammatory changes and other etiologies aside from coal dust." Director's Exhibit 11 at 16.

[6] Dr. Alam stated that he saw claimant on May 29, 2008 for a physical examination, blood gas study, pulmonary function study, and chest x-ray. Claimant's Exhibit 2 at 1. The record does not contain any chest x-ray, pulmonary function study, or blood gas study conducted by Dr. Alam on that date.

report to be well-reasoned and documented, the administrative law judge permissibly accorded it probative weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, substantial evidence supports the administrative law judge's finding that claimant's medical treatment records did not contain evidence supportive of a finding of complicated pneumoconiosis.[7] Employer's Exhibits 3, 4. We therefore affirm the administrative law judge's finding that that the existence of complicated pneumoconiosis was not established pursuant to 20 C.F.R. §718.304(c), as well as his overall determination that claimant did not qualify for the irrebuttable presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.304.

Claimant may also attempt to establish total disability by means of medical evidence meeting the standards of 20 C.F.R. §718.204(b)(2)(i)-(iv). 20 C.F.R. §718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the administrative law judge correctly found that the only pulmonary function study and blood gas study of record, both of which were administered by Dr. Baker on February 15, 2007, produced non-qualifying values.[8] Director's Exhibit 11. Additionally, pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge accurately noted that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical reports of Drs. Alam, Baker, and Rosenberg. Dr. Baker opined that, based on the February 15, 2007 objective testing, "no impairment is present," and that claimant retains the respiratory capacity to perform the work of a coal miner.[9] Director's Exhibit

[7] The administrative law judge accurately noted that a reading of a CT scan dated February 22, 2006 did not diagnose complicated pneumoconiosis. Employer's Exhibit 3. Further, the administrative law judge properly found that the assessments of complicated coal workers' pneumoconiosis and progressive massive fibrosis, rendered by a nurse practitioner, were not supported by objective evidence, and did not constitute "a physician's well-reasoned diagnosis of complicated pneumoconiosis." Decision and Order at 17.

[8] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

[9] More specifically, Dr. Baker stated that claimant's pulmonary function study revealed "class 1 or 0% impairment," and that his blood gas study revealed "mild" or "minimal" impairment. Director's Exhibit 11 at 14-16. In the concluding section of his report, Dr. Baker opined that "no impairment is present." Director's Exhibit 11 at 17.

11. Dr. Rosenberg reviewed the medical evidence, including Dr. Baker's medical report, and opined that claimant "probably has a mild degree of airflow obstruction, without restriction, with only a mild oxygenation abnormality." Employer's Exhibit 5 at 4. Dr. Rosenberg concluded that, "from a functional perspective, [claimant] is not disabled from performing his previous coal mine job or other similarly arduous types of labor."[10] *Id*. Dr. Alam initially opined that claimant retains "full pulmonary capacity with an FEV1 of only 92% predicted and no hypoxemia at rest." Claimant's Exhibit 2. Later in the same report, however, Dr. Alam stated that claimant's "pulmonary condition . . . has caused significant disability . . . ." *Id.* Dr. Rosenberg, in an addendum to his initial report, reviewed Dr. Alam's report and indicated that, "from a pulmonary perspective, [claimant] is not disabled. This is illustrated by his FEV1 of 92% of predicted, without hypoxemia (as noted by Dr. Alam)." Employer's Exhibit 6 at 1-2. Dr. Rosenberg opined that there was "no objective basis" for Dr. Alam's conclusion that claimant has a disabling pulmonary condition. *Id*.

In weighing the medical reports, the administrative law judge permissibly accorded Dr. Alam's opinion "little weight," because Dr. Alam did "not explain [c]laimant's 'significant disability' in light of his initial statement" that claimant retains "'full pulmonary capacity.'" Decision and Order at 24; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, the administrative law judge permissibly took into account the fact that Dr. Alam did not indicate "the documentation upon which he relied to form his conclusions. . . ." *Id*. Thus, the administrative law judge reasonably determined that there was no basis to accord greater weight to Dr. Alam's opinion based on his status as claimant's treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); 20 C.F.R. §718.104(d)(5). As the only other medical opinion evidence stated that claimant is not totally disabled, the administrative law judge found that total disability was not established. Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), which is therefore affirmed. Further, substantial evidence supports the administrative law judge's finding that all the relevant evidence, weighed together, did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). That finding is also affirmed.

Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(1),(2). Because claimant failed to establish total disability, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112.

[10] The record reflects that Dr. Rosenberg reviewed claimant's and Dr. Baker's descriptions of claimant's coal mine employment as a roof bolter and miner operator. Employer's Exhibit 5 at 1-2.

Accordingly, the administrative law judge's Decision and Order - Denial of 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