BRB No. 13-0072 BLA

DONNIE J. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	
	)	
	)	DATE ISSUED: 08/14/2013
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Frank K. Newman (Cole, Cole, Anderson & Newman, P.S.C.), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-05733) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on June 15, 2010. Director's Exhibit 2.

After crediting claimant with more than twenty-seven years of coal mine employment,[1] of which at least fifteen years were underground, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis and, thus, failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that the evidence did not establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to invoke the rebuttable presumption of total disability due to pneumoconiosis, at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Finally, the administrative law judge found that the evidence did not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the medical evidence when she found that claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, or the existence of simple pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response to claimant's appeal.[3]

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[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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).

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, 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).

[3] Claimant does not challenge the administrative law judge's finding that he did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 10-11. Accordingly, we affirm that finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Therefore, we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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 under 20 C.F.R. Part 718 in a miner's claim, a 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).

Claimant argues that the administrative law judge erred in finding that the evidence does not establish the existence of complicated pneumoconiosis, and therefore, erred in finding that claimant is not entitled to 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 an opacity 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 reveal 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 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 pursuant to 20 C.F.R. §718.304 has been established. *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).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Claimant specifically argues that the administrative law judge erred in finding that Dr. Alexander's positive interpretation of a July 29, 2010 x-ray did not establish the existence of complicated pneumoconiosis. Although Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant's July 29, 2010 x-ray as positive for complicated pneumoconiosis, Category "B," Dr. Wheeler, who is also a B

reader and Board-certified radiologist, interpreted this x-ray as negative for complicated pneumoconiosis, and stated that the masses seen on x-ray were more compatible with conglomerate granulomatous disease. Director's Exhibits 8, 22.

In evaluating the relative weight of the x-ray evidence in light of the physicians' radiological qualifications, the administrative law judge rationally determined that the readings of the July 29, 2010 x-ray were "in equipoise." Decision and Order at 14; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *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, 319-20, 17 BLR 2-77, 2-87 (6th Cir. 1993). Contrary to claimant's argument, the administrative law judge properly considered that there is no evidence in the record that claimant suffers from tuberculosis or histoplasmosis, conditions included by Dr. Wheeler among the possible causes for the lesions identified on x-ray. Decision and Order at 14 n.16; Claimant's Brief at 4, 6-7. However, the administrative law judge permissibly concluded that, because Dr. Wheeler carefully explained why he believed the lesions were not large opacities of pneumoconiosis, the lack of evidence in the record to support some of the alternative diagnoses he listed did not undercut his opinion. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 14 n.16. Further, while the administrative law judge found that comments made by Dr. Barrett, who reviewed the July 29, 2010 x-ray for quality only, "appear[ed] to question the finding of complicated pneumoconiosis," the administrative law judge did not rely on those comments to discount Dr. Alexander's positive x-ray reading.[4] Nor, as claimant asserts, did the administrative law judge erroneously accord greater weight to Dr. Wheeler's x-ray reading as more recent than Dr. Alexander's reading. Claimant's Brief at 7. Rather, the administrative law judge found that Dr. Alexander's positive reading for category "B" large opacities was countered by Dr. Wheeler's negative reading, and that, therefore, claimant failed to meet her burden to establish the existence of complicated pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 14.

[4] Noting that, in the comment portion of his quality review, Dr. Barrett wrote: "nodular fibrosis + large opacities?" the administrative law judge stated that, "it appears that Dr. Barrett's notes call into question the finding of complicated pneumoconiosis." Decision and Order at 12. Claimant asserts that a close reading of Dr. Barrett's report reveals that there is not a question mark at the end of Dr. Barrett's notation. Claimant's Brief at 8; Director's Exhibit 8. However, as the administrative law judge did not rely on Dr. Barrett's comments to discount Dr. Alexander's positive x-ray reading, error, if any, in the administrative law judge's characterization of Dr. Barrett's comments is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The administrative law judge also considered interpretations of x-rays taken on May 2, 2006, August 21, 2008, and November 29, 2010, accurately noting that none of these interpretations was positive for large opacities of complicated pneumoconiosis. Decision and Order at 12-13; Director's Exhibits 12, 24. As a review of the discussion and analysis provided by the administrative law judge indicates that she conducted a proper qualitative analysis of the conflicting x-ray readings, *see Gray*, 176 F.3d at 388-90, 21 BLR at 2-626-27; *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 319-20, 17 BLR at 2-87, we reject claimant's allegations of error and affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Turning to the pathology evidence relevant to the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the opinions of Drs. Mesia and Oesterling.[5] Dr. Mesia examined five lung tissue fragments, ranging from less than 0.1 to 0.3 cm in greatest dimension, obtained during a May 1, 2007 biopsy. Director's Exhibit 12 at 112. Dr. Mesia diagnosed "Peribronchial tissue and lung parenchymal tissue with fibrosis and anthracotic pigment." Director's Exhibit 12 at 112. Dr. Oesterling examined three slides containing lung tissue specimens, noting the presence of "black pigment . . . of coal dust origin" in at least one tissue fragment. Employer's Exhibit 1. Dr. Oesterling also identified "modest black pigment within a matrix of fibrous tissue" in another fragment, but clarified that it "[did] not demonstrate nodularity or any other indication that this is due to the dust." *Id.* Dr. Oesterling concluded that, "based on these minute tissue fragments there [was] insufficient evidence to warrant a diagnosis of interstitial lung disease. Thus [he could not] make the diagnosis of coal workers' pneumoconiosis." Employer's Exhibit 1. The administrative law judge found that complicated pneumoconiosis was not established based on the pathology evidence. Decision and Order at 15, 16.

Substantial evidence supports the administrative law judge's finding that complicated pneumoconiosis was not established by the pathology evidence, as neither pathologist identified "massive lesions" in the lung, or any other condition such as progressive massive fibrosis or complicated pneumoconiosis. 20 C.F.R. §718.304(b); *see Gray*, 176 F.3d at 387, 21 BLR at 2-624; Decision and Order at 16; Director's Exhibit 12; Employer's Exhibit 1. Thus, we affirm the administrative law judge's finding that claimant did not establish complicated pneumoconiosis by pathology evidence pursuant to 20 C.F.R. §718.304(b). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

[5] The administrative law judge properly found that Dr. Mesia's credentials are not in the record, and that Dr. Oesterling is Board-certified in Anatomic and Clinical Pathology. Decision and Order at 15; Director's Exhibit 12 at 112; Employer's Exhibit 1.

Claimant next contends that the medical opinion evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Claimant asserts that both Drs. Vaezy and Alam, claimant's treating physicians, diagnosed complicated pneumoconiosis and, therefore, the administrative law judge erred in failing to find that claimant established the existence of the disease. Claimant's Brief at 4-6, 10-13. We disagree. The administrative law judge found that, in medical reports and progress notes dated November 23, 2009 and April 7, 2010, Dr. Vaezy noted that claimant's x-rays and computerized tomography (CT) scans showed the presence of large opacities, and in a report dated September 8, 2011, Dr. Vaezy diagnosed progressive massive fibrosis. Decision and Order at 9, 17, 20; Claimant's Exhibit 1. The administrative law judge noted that Dr. Alam also diagnosed complicated pneumoconiosis, in a report dated July 29, 2010. Decision and Order at 9, 17, 20-21; Director's Exhibit 8.

The administrative law judge permissibly discounted the diagnosis of complicated pneumoconiosis by Dr. Vaezy because it was based on x-rays, a CT scan, and a blood gas study that are not contained in the record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(en banc); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575-6, 22 BLR 2-107, 1-120 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 9-10, 17, 20. The administrative law judge further acted within her discretion in finding Dr. Alam's diagnosis of complicated pneumoconiosis to be "not well-reasoned" because it was based on Dr. Alexander's positive x-ray reading, which the administrative law judge permissibly found did not support the existence of complicated pneumoconiosis. *See Gray*, 176 F.3d at 389-90, 21 BLR at 2-627-29; *Williams*, 338 F.3d at 514, 22 BLR at 2-648-49; *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Decision and Order at 14, 19-20.

Claimant asserts that the administrative law judge failed to consider that the record includes multiple x-ray readings contained in claimant's medical treatment notes, and CT scan interpretations, that support the opinions of Drs. Vaezy and Alam. Claimant's Brief at 5, 9. Contrary to claimant's contention, as none of the x-ray readings contained in the medical treatment notes is positive for large opacities, they do not support the opinions of Drs. Vaezy and Alam as to the existence of complicated pneumoconiosis. Director's Exhibits 11, 12. In regard to the CT scan evidence, the administrative law judge found that there is no evidence in the record that the CT scan evidence is medically acceptable or relevant to a determination of whether a miner suffers from complicated pneumoconiosis, as required by 20 C.F.R. §718.107(b). Decision and Order at 19. Consequently, the administrative law judge permissibly declined to consider the CT scan evidence. *See* 20 C.F.R. §718.107(b); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc).

Finally, claimant contends that the administrative law judge should have accorded controlling weight to the opinions of Drs. Vaezy and Alam based on their status as claimant's treating physicians. We disagree. An administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom,* 342 F.2d 486, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Williams,* 338 F.3d at 513, 22 BLR at 647. Because the administrative law judge permissibly found that the opinions of Drs. Vaezy and Alam were not sufficiently reasoned and documented to support a finding of complicated pneumoconiosis, the administrative law judge's analysis was consistent with 20 C.F.R. §718.104(d)(5). As the administrative law judge provided valid reasons for discounting the opinions of Drs. Vaezy and Alam, the only physicians to diagnose complicated pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(c).

Based on the foregoing discussion, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis, and thus, is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See* 20 C.F.R. §§718.202(a)(3), 718.304; *Martin,* 400 F.3d at 305, 23 BLR at 2-283. We have also affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement under 20 C.F.R. Part 718. Therefore, we affirm the denial of benefits. In light of these holdings, we need not address the administrative law judge's additional finding that claimant did not establish the existence of either simple clinical pneumoconiosis, or legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), (4), as entitlement to benefits is precluded. *See Trent,* 11 BLR at 1-27; *Perry,* 9 BLR at 1-2.

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