BRB No. 10-0350 BLA

ROGER WILDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SENECA ENERGY, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 02/28/2011
	)	
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 Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

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

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Jonathan Rolfe (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-5118) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a miner's claim, filed on January 25, 2007, pursuant to 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). In a Decision and Order issued on January 28, 2010, the administrative law judge credited claimant with thirty-three years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1), but failed to establish total disability at 20 C.F.R. §718.204(b)(2). The administrative law judge also found that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, as the evidence did not establish that claimant suffers from complicated pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. [1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 4, 7.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, 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, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which 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, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. 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. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (*en banc*); *Truitt v. North American Coal Corp*., 2 BLR 1-199 (1979).

Claimant argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Claimant maintains that the films that were read as showing multiple opacities of simple pneumoconiosis or large masses supported a finding of complicated pneumoconiosis even though they were not classified in accordance with 20 C.F.R. §718.304(a).[3] Claimant's Brief in Support of Petition for Review at 4-6. Claimant contends, therefore, that the administrative law judge erred in failing to consider "evidence of large masses in a light most favorable to [claimant] . . . ." *Id*. at 4.

We reject claimant's arguments. Contrary to claimant's contention, diagnoses of masses, a coalescence of small opacities, or a high profusion of small opacities, do not equate to a diagnosis of complicated pneumoconiosis, as they are not in accordance with

[3] Claimant notes that, in interpreting the March 7, 2007 x-ray, "Dr. McLaughlin indicat[ed] large opacities of the 'A' category [while] . . . Drs. Broudy and Dineen read the same x-ray with large opacities, but each with an interpretation of '0' category in size," interpretations which claimant argues are "logically consistent with findings of additional large opacities . . . ." Claimant's Brief in Support of Petition for Review at 5.

the requirements set forth at 20 C.F.R. §718.304(a). 20 C.F.R. §718.304; *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). The administrative law judge correctly determined, therefore, that x-ray readings that did not include diagnoses of opacities greater than one centimeter in diameter, and classified as category A, B or C, were insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), regardless of the profusion of small opacities or the diagnosis of masses. *Id*. In addition, the administrative law judge acted within his discretion as fact-finder, in determining that three of the four films of record were negative for complicated pneumoconiosis, based on the readings by a majority of highly qualified readers.[4] Decision and Order at 10; *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). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.304(a). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294 (2003).

Claimant further argues that the administrative law judge's determination that he did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(b) was in error, as the biopsy evidence "indicate[s] multiple nodules and masses of various sizes and shapes within all zones of [claimant's] lungs." Claimant's Brief in Support of Petition for Review at 4. We disagree. The administrative law judge rationally determined that the biopsy evidence, consisting of the reports of Drs. Kumar

[4] Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eight readings of four x-rays, dated January 24, 2006, February 26, 2007, March 7, 2007 and July 29, 2008. Decision and Order at 5, 9-10. Dr. Baker, a B reader, read the January 24, 2006 film as positive for simple and complicated pneumoconiosis, while Dr. Wiot, dually qualified as a Board-certified radiologist and B reader, read the same film as "unreadable due to under-exposure." Director's Exhibit 43; Employer's Exhibit 3. Dr. Wheeler, also dually qualified as a Board-certified radiologist and B reader, and Dr. Baker both read the February 26, 2007 film as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibits 11, 28. Dr. McLaughlin, a B reader, read the March 7, 2007 film as positive for simple and complicated pneumoconiosis, Category A, while Drs. Broudy and Dineen, both B readers, read the same film as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibits 13, 27, 33. Dr. Rosenberg, a B reader, read the July 29, 2008 film as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibit 43.

and Caffrey, is negative for complicated pneumoconiosis.[5] The administrative law judge accurately found that "[n]either of the two physicians . . . found evidence of complicated pneumoconiosis or of progressive massive fibrosis . . . and neither stated that the macules they did find would show up on x-ray as an opacity greater than [one] centimeter in diameter." Decision and Order at 10. Accordingly, we affirm the administrative law judge's finding that the biopsy evidence is negative for complicated pneumoconiosis at 20 C.F.R. §718.304(b). *See Gray v. SLC Coal Co*., 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Relevant to 20 C.F.R. §718.304(c), claimant argues that the administrative law judge erred in declining to consider Dr. Wheeler's interpretations of two CT scans, dated July 18, 2005 and November 30, 2006, at 20 C.F.R. §718.304(c). Claimant's Brief in Support of Petition for Review at 6; Director's Exhibit 31. This contention is without merit. The administrative law judge correctly concluded that, pursuant to 20 C.F.R. §718.107(b), claimant did not submit any evidence showing that the CT scans are "medically acceptable and relevant to establishing or refuting" claimant's entitlement to benefits. Decision and Order at 6, *quoting* 20 C.F.R. §718.107(b). Accordingly, the administrative law judge acted within his discretion in omitting from consideration the CT scan evidence proffered by claimant. 20 C.F.R. §718.107(b); *see Webber v. Peabody Coal Co*., 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007) (*en banc*); *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); Director's Exhibit 31.

We also find no merit in claimant's contention that, because the CT scan readings contain diagnoses of large masses and numerous small nodules, they support a finding of complicated pneumoconiosis. Claimant's Brief in Support of Petition for Review at 6. The administrative law judge rationally concluded that, even "if the CT scan evidence were properly supported, it would not support a finding of complicated pneumoconiosis;

[5] Both Drs. Kumar and Caffrey examined slides of tissue obtained from a biopsy of the lower lobe of claimant's right lung. Dr. Kumar noted that "[s]ections show dust macules characterized by the accumulation [of] pigmented macrophages adjacent to respiratory bronchials." Director's Exhibit 33. He opined that "[t]here is no evidence of appreciable fibrosis. In addition, polarizable particles consistent with silica are identified in the dust macules. No granulomatous inflammation is present." *Id*. Dr. Caffrey noted that "[t]here is a mild amount of anthracotic pigment scattered throughout the lung tissue, and on slides labeled [three] and [four] there are three lesions of simple coal workers' pneumoconiosis, that is[,] anthracotic pigment with reticulin and with minimal focal emphysema." Director's Exhibit 32.

none of the offered CT scan evidence makes such a finding."[6] Decision and Order at 6 n.4; *see Marcum*, 11 BLR at 1-24.

Regarding the administrative law judge's consideration of the medical opinion evidence at 20 C.F.R. §718.304(c), claimant asserts that "Dr. Petsonk's report should be given a substantial amount of weight" on the issue of complicated pneumoconiosis.[7] Claimant's Brief in Support of Petition for Review at 9. Claimant also challenges the administrative law judge's decision to credit Dr. Baker's February 26, 2007 opinion, diagnosing only simple pneumoconiosis, over Dr. Baker's January 24, 2006 opinion, diagnosing complicated pneumoconiosis.[8] *Id*. at 7-8. Claimant argues that the reports should "at the very least carry equal weight and the early testing should not simply be discounted due to any later results or findings." *Id*. at 9.

Claimant's contentions are without merit. The administrative law judge acted within his discretion in finding that Dr. Petsonk's opinion was not reasoned or documented and, therefore, was entitled to no weight, because "there are no objective medical data to support the reported diagnosis of 'Category 2' pneumoconiosis or other conditions noted in the report." Decision and Order at 10; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge also permissibly assigned Dr. Baker's January 24, 2006 diagnosis of complicated pneumoconiosis diminished weight, because it was based on Dr. Baker's positive x-ray

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[6] In his reading of the July 18, 2005 CT scan, Dr. Wheeler noted the presence of a three by one and one-half centimeter mass, consistent with cancer, and a cluster of small nodules up to one and one-half centimeters in the right mid-lung, with smaller nodules scattered in the lower lungs "compatible with granulomatous disease[,] probably histoplasmosis." Director's Exhibit 31. After reviewing a November 20, 2006 CT scan, Dr. Wheeler concluded that there was "no pneumoconiosis." Director's Exhibit 31.

[7] In a letter dated November 4, 2005, Dr. Petsonk informed claimant that an x-ray revealed evidence of Category 2 pneumoconiosis, but did not attach the x-ray interpretation to the letter. Claimant's Exhibit 3.

[8] Dr. Baker first examined claimant on January 24, 2006, in connection with a state workers' compensation claim. Director's Exhibit 42. He diagnosed "pneumoconiosis, category 3/2, with pulmonary massive fibrosis with [Category A] opacities present." *Id*. Dr. Baker then examined claimant on February 26, 2007, at the request of the Department of Labor and diagnosed claimant with simple pneumoconiosis, based on an abnormal chest x-ray and coal dust exposure, and chronic obstructive pulmonary disease, but made no diagnosis of complicated pneumoconiosis. *Id*.

reading for complicated pneumoconiosis, which conflicted with the "many subsequent x-ray interpretations [which] were negative for complicated pneumoconiosis," and the administrative law judge's "finding that the x-ray evidence[,] taken as a whole[,] does not establish the existence of complicated pneumoconiosis." Decision and Order at 10-11; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

The administrative law judge also rationally found that the opinions of Drs. Broudy, Rosenberg, and Fino, that claimant does not have complicated pneumoconiosis, are entitled to greater probative weight than Dr. Baker's opinion, because they "are better supported by the objective medical evidence of record . . . ."[9] Decision and Order at 11; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Because the administrative law judge properly exercised his discretion in rendering his credibility determinations in this case, we affirm his finding that the medical opinion evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). We, therefore, affirm the administrative law judge's conclusion that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 on the ground that "each category of evidence is negative." Decision and Order at 11; *see Melnick*, 16 BLR at 1-33-34; *Truitt*, 2 BLR at 1-200.

Finally, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability under 20 C.F.R. §718.204(b)(2)(iv). Claimant contends that the administrative law judge should have treated Dr. Baker's statement, that claimant should have no further exposure to coal mine dust, as a diagnosis of total disability. Claimant's Brief in Support of Petition for Review at 8-9, *citing* Director's Exhibit 11; Decision and Order at 16. Contrary to claimant's assertion, a medical opinion advising claimant against further exposure to coal dust cannot establish the presence of a totally disabling respiratory impairment at 20 C.F.R.

[9]Dr. Broudy examined claimant on March 7, 2007, and diagnosed simple pneumoconiosis with profusion in all lung zones, and concluded that claimant suffered from a mild to moderate impairment in lung function. Director's Exhibit 13. Dr. Rosenberg examined claimant on July 29, 2008, and diagnosed simple pneumoconiosis, with opacities in all lung zones, without progressive massive fibrosis. Director's Exhibit 43. In a report dated August 13, 2008, Dr. Fino noted that he reviewed claimant's medical records, and opined that claimant suffers from simple pneumoconiosis with a mild obstructive ventilatory impairment. *Id.*

§718.204(b)(2)(iv). *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co*., 12 BLR 1-83, 1-88 (1988). Since the administrative law judge properly found that the record contains no medical opinion establishing that claimant suffers from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16; *see Clark*, 12 BLR at 1-155.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). We have affirmed, as rational and supported by substantial evidence, the administrative law judge's findings that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv), and failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Because claimant has not established total disability, a requisite element of entitlement, an award of benefits is precluded.[10] *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[10] The amended version of Section 411(c)(4), 30 U.S.C. §921(c)(4), provides that if a miner has at least fifteen years of qualifying coal mine employment and establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Because we have affirmed the administrative law judge's finding that claimant did not establish total disability, claimant is not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

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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REGINA C. McGRANERY
Administrative Appeals Judge