BRB Nos. 13-0203 BLA
and 13-0203 BLA-A

RONALD K. DUFF	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
UNICORN MINING INCORPORATED	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE CORPORATION C/O CHARTIS	)	DATE ISSUED: 09/26/2013
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ronald K. Duff, Bledsoe, Kentucky, *pro se*.[1]

H. Brett Stonecipher and Tighe A. Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

[1] Ron Carson, 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. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, and employer/carrier (employer) cross-appeals the Decision and Order (11-BLA-5759) of Administrative Law Judge Adele Higgins Odegard denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on April 19, 2010.

After crediting claimant with at least fifteen years of underground coal mine employment,[2] the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge further found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. The administrative law judge, therefore, denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial

[2] 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, 1-202 (1989) (en banc).

[3] Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption. Decision and Order at 14.

of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. In its cross-appeal, employer contends that the administrative law judge erred in her characterization of the radiological qualifications of one of its physicians. Neither claimant, nor the Director, has filed a response to employer's cross-appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Complicated Pneumoconiosis

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 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. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Section 718.304(a)

The administrative law judge initially addressed whether the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge considered nine interpretations of two x-rays taken on April 6, 2010 and June 16, 2010. In considering the x-ray evidence, the administrative law judge properly noted that greater weight could be accorded to the x-ray interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 18.

After correctly noting that that all three interpretations of the April 6, 2010 x-ray are negative for complicated pneumoconiosis,[4] the administrative law judge considered the interpretations of the June 16, 2010 x-ray. Drs. Alexander and Miller, both of whom are B readers and Board-certified radiologists, interpreted the June 16, 2010 x-ray as positive for complicated pneumoconiosis. Director's Exhibits 10, 14. However, three equally qualified physicians, Drs. Shipley, Ahmed, and Groten, interpreted the same x-ray as negative for complicated pneumoconiosis. Claimant's Exhibits 5, 6; Employer's Exhibit 1. Dr. Meyer, a B reader, also interpreted the x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 2.

In weighing the conflicting x-ray evidence, the administrative law judge noted that Dr. Miller's interpretation of the June 16, 2010 x-ray was "qualified," because he could not exclude the possibility that the large right upper-lung opacity that he identified as complicated pneumoconiosis was actually a malignancy. Decision and Order at 19; Director's Exhibit 14 . Consequently, the administrative law judge found that Dr. Alexander was the only physician to "unequivocally" interpret the June 16, 2010 x-ray as positive for complicated pneumoconiosis. Decision and Order at 19. Because the administrative law judge found no basis to credit Dr. Alexander's positive x-ray interpretation over the negative x-ray interpretations rendered by three equally qualified physicians (Drs. Shipley, Ahmed, and Groten), she found that the x-ray evidence does not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.*

The administrative law judge acted within her discretion in discounting Dr. Miller's interpretation of the June 16, 2010 x-ray as equivocal. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Melnick*, 16 BLR

[4] Drs. Alexander and Wiot, both of whom are B readers and Board-certified radiologists, and Dr. Lockey, a B reader, interpreted the April 6, 2010 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 9; Employer's Exhibit 6.

at 1-37; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Moreover, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, and the actual readings. *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); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[5]

Section 718.304(c)

The record contains medical evidence supportive of a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[6] Specifically, Drs. Alam and Ajjarapu each diagnosed complicated pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 3. However, the administrative law judge accurately noted that both of their diagnoses are based upon positive interpretations of the June 16, 2010 x-ray. Decision and Order at 21, 23. Because she found that the weight of the x-ray evidence does not support a finding of complicated pneumoconiosis, the administrative law judge permissibly discounted the medical opinions of Drs. Alam and Ajjarapu. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); Decision and Order at 21, 23. Because there is no other medical evidence supportive of a finding of complicated pneumoconiosis, we affirm the administrative law judge's determination that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

The administrative law judge considered all of the relevant evidence, and substantial evidence supports her determination that claimant did not establish invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304. That determination is, therefore, affirmed.

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[5] In its cross-appeal, employer argues that the administrative law judge should have inferred, or taken judicial notice of the fact, that Dr. Meyer is not only a B reader, but also a Board-certified radiologist. In light of our affirmance of the administrative law judge's finding that the x-ray evidence does not support a finding of complicated pneumoconiosis, the administrative law judge's error, if any, in her characterization of Dr. Meyer's radiological qualifications is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Because there is no biopsy evidence in the record, there was no evidence to consider pursuant to 20 C.F.R. §718.304(b).

Total Disability

The administrative law judge correctly noted that all of the pulmonary function studies of record, namely the studies conducted on April 6, 2010, June 16, 2010, February 28, 2010, and January 30, 2012, are non-qualifying.[7] Decision and Order at 7; Director's Exhibits 9, 10; Claimant's Exhibits 1, 2. The administrative law judge also correctly noted that the only arterial blood gas study of record, a study conducted on June 16, 2010, is also non-qualifying. Decision and Order at 7; Director's Exhibit 10. Consequently, we affirm the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii).

Because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 7.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Alam, Broudy, and Lockey. Dr. Alam opined that claimant suffers from a totally disabling pulmonary impairment. Director's Exhibit 10. However, Drs. Broudy and Lockey each opined that claimant retains the respiratory capacity to perform his previous coal mine employment. Employer's Exhibits 3 at 16, 4 at 22.

Although Dr. Alam opined that claimant is totally disabled from a pulmonary standpoint, the administrative law judge permissibly discredited his opinion because he found that it was not well-reasoned.[8] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155

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

[8] The administrative law judge noted that Dr. Alam's opinion, that claimant is totally disabled from a pulmonary standpoint, was based, in part, on x-ray evidence of complicated pneumoconiosis, a finding that the administrative law judge noted was contrary to her determination that the x-ray evidence does not support a finding of complicated pneumoconiosis. Decision and Order at 13. Although Dr. Alam also cited claimant's non-qualifying FEV1 results, as well as an arterial blood gas study showing hypoxia at rest, in support of his assessment, the administrative law judge found that the doctor failed to explain how these factors supported his opinion. *Id.*

(1989) (en banc); Decision and Order at 13; Director's Exhibit 10. The administrative law judge also permissibly accorded greater weight to the opinions of Drs. Broudy and Lockey, that claimant was not totally disabled from a pulmonary standpoint, because he found that they were better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 13-14; Employer's Exhibits 3, 4. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because the medical evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of that affirmance, 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); Decision and Order at 14.

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