BRB No. 05-0466 BLA

DONALD L. STAFFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRANDON ENTERPRISES, LLC	)	
	)	DATE ISSUED: 12/15/2005
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Donald L. Stafford, Jonesville, Virginia, *pro se*.

Sarah Y. M. Kirby (Sands Anderson Marks & Miller), Radford, Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits of Administrative Law Judge Stephen L. Purcell (04-BLA-5242) in a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] The administrative law judge credited claimant with 23.39 years of coal mine employment based on employer's concession. Considering the merits of the case, the administrative law judge found that the relevant evidence overwhelmingly supports employer's concession that claimant established the existence of simple pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.202, 718.203(b). The administrative law judge further found that the record contains no evidence supportive of a finding of total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i) – (b)(2)(iv). Lastly, the administrative law judge found that the x-ray evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, benefits were denied. In response to claimant's appeal, employer urges the Board to affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and is in accordance with law. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief. The Director asserts reversible error in the administrative law judge's finding at 20 C.F.R. §718.304, and requests a remand of the case.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

The administrative law judge found that the record evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i) – (b)(2)(iv). The administrative law judge properly determined that the sole pulmonary function study and the sole blood gas study, both dated January 31, 2002, Director's Exhibit 15, resulted in non-qualifying values. 20 C.F.R. §§718.204(b)(2)(i), 718.204(b)(2)(ii); *see* Director's Exhibit 15. The administrative law judge also correctly noted that the record contains no evidence that

[1]Claimant filed the instant claim on July 2, 2001. Director's Exhibit 1.

claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

The administrative law judge next considered the two medical opinions of record and found them insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Dr. Rasmussen examined claimant and diagnosed, by report dated January 31, 2002, complicated coal workers' pneumoconiosis Category A due to coal mine dust exposure, and chronic bronchitis due to coal mine dust exposure and cigarette smoking. Director's Exhibit 15. Dr. Rasmussen opined, however, that claimant has normal lung function and retains the pulmonary capacity to resume his last coal mine job, but added, "Return to a dusty environment is medically contraindicated in [claimant's] case. In addition he is at increased risk for relatively rapid progression of his pulmonary impairment. He, therefore, does not retain the medical conditions to resume his last regular coal mine employment."[2] *Id.* Claimant was also examined by Kellie Brooks, a nurse practitioner, on December 22, 2003, who assessed claimant as having complicated coal workers' pneumoconiosis. Claimant's Exhibit 3.

The administrative law judge properly found that Dr. Rasmussen's opinion is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) as the physician opined that claimant's lung function is normal and he retains the pulmonary capacity to resume his last coal mine job. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge further properly determined that Dr. Rasmussen's opinion that a return to a dusty environment is medically contraindicated in claimant's case, does not amount to a finding of total disability under the Act. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). The administrative law judge next addressed the report of Kellie Brooks. The administrative law judge stated:

> Ms. Brooks, who is not a physician, failed to address whether the Claimant retained the requisite capacity to return to his previous coal mine employment. Consequently, the Claimant has failed to establish total disability through medical opinion evidence.

Decision and Order at 5. The record supports the administrative law judge's determination that the report of Kellie Brooks is not probative of the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). *See* Claimant's Exhibit 3.

[2]Dr. Rasmussen noted claimant's usual coal mine employment as a continuous miner operator and discussed the physical demands of this work, characterizing it as "[c]onsiderable heavy manual labor." Director's Exhibit 15.

Based on the foregoing, we affirm the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i) - (b)(2)(iv).

The Director challenges the administrative law judge's finding that the x-ray evidence of record is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304(a). The administrative law judge correctly noted that the record contains nineteen interpretations of six x-rays, dated January 13, 2004, April 24, 2003, January 8, 2003, January 31, 2002, March 4, 2001, and February 22, 2001. Decision and Order at 5; *see* Director's Exhibits 15, 17, 39, 41, 42; Claimant's Exhibits 1, 2; Employer's Exhibits 1-5. The administrative law judge found that of the nineteen x-ray readings, six are negative for pneumoconiosis, and thirteen are positive, including four that show the presence of complicated pneumoconiosis Category A. Decision and Order at 5. Weighing this x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge found:

> The record contains 19 interpretations of 6 x-rays. Six of these interpretations are negative for the existence of pneumoconiosis. These six interpretations are against the weight of the x-ray evidence and the Employer's concession of pneumoconiosis. Consequently, I entitle these x-rays to little weight. Of the remaining 13 interpretations, 4 are positive for the existence of Category A opacities. These 4 positive interpretations were made by Drs. Alexander, Cappiello, DePonte, and Patel, all of whom are dually qualified B readers and Board certified radiologists. At the same time, Drs. Wheeler, Halbert, Scott, and Navani, all of whom are also dually qualified, interpreted these x-rays as negative for complicated pneumoconiosis. It is the Claimant's burden to prove by a preponderance of the evidence that he suffers from complicated pneumoconiosis. Although there are four positive x-ray findings of complicated pneumoconiosis, these same x-rays have been found negative for complicated pneumoconiosis by highly qualified physicians. Consequently, I find that the opinions of Drs. Wheeler, Halbert, Scott, and Navani are entitled to at least as much weight as the opinions of Drs. Alexander, Cappiello, DePonte, and Patel.

Decision and Order at 6. The administrative law judge thereby determined that the x-ray evidence of record is insufficient to invoke the irrebuttable presumption provided at 20 C.F.R. §718.304(a). The Director argues that the administrative law judge committed reversible error by (1) mischaracterizing Dr. Navani's x-ray reading as negative, *see* Director's Exhibit 15; (2) mischaracterizing the readings rendered by Drs. DePonte and Cappiello; and (3) "failing to apply the mandatory limitations when considering the x-ray evidence of record." Director's Brief at 2.

In order to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304, claimant must establish that he suffers from a chronic dust disease of the lung. 30 U.S.C. §921(c)(3). A chronic dust disease of the lung may be established by any one of three methods enumerated in the statutory provision and in the regulation at 20 C.F.R. §718.304: (1) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter), and would be classified as category A, B, or C under any one of three classification systems; (2) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (3) when diagnosed by means other than the previous two methods, would be a condition which could reasonably be expected to yield the same results. *See* 20 C.F.R. §718.304(a)-(c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption provided 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 the conflicts, and make a finding of fact. 20 C.F.R. §718.304; s*ee Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). In the instant case, the administrative law judge properly determined that the record contains only x-ray evidence relevant to invocation of the irrebuttable presumption at 20 C.F.R. §718.304.[3] Decision and Order at 5.

We agree with the Director's contentions asserting reversible error in the administrative law judge's finding at 20 C.F.R. §718.304(a). The administrative law judge mistakenly indicated that Dr. Navani rendered an x-ray reading that is negative for complicated pneumoconiosis. *See* Decision and Order at 5. Dr. Navani reviewed Dr. Patel's January 31, 2002 x-ray but rendered a "Roentrographic Quality Reading" only. Director's Exhibit 15. Further, while the administrative law judge correctly referred to the fact that Dr. Cappiello read the April 24, 2003 x-ray as positive for complicated pneumoconiosis Category A, *see* Claimant's Exhibit 2, he did not recognize that Dr. Cappiello read the January 31, 2002 x-ray as negative for complicated pneumoconiosis.[4]

[3]The administrative law judge properly determined that the report of Kellie Brooks cannot support claimant's burden at 20 C.F.R. §718.304. Decision and Order at 5 n.5. Ms. Brooks is not a physician, and while her December 22, 2003 report notes a history of complicated coal workers' pneumoconiosis and includes an assessment of the disease, it contains no *diagnosis*, such as is required in 20 C.F.R. §718.304(a) – (c).

[4]The Director, Office of Workers' Compensation Programs (the Director), mistakenly asserts that the administrative law judge failed to recognize that Dr. DePonte, who read the January 8, 2003 x-ray as positive for simple pneumoconiosis and

Decision and Order at 5, 6; *see* Director's Exhibit 39. Lastly, the administrative law judge failed to make explicit findings regarding the parties' compliance with the mandatory evidentiary limitations provided at 20 C.F.R. §725.414. While the administrative law judge, at the hearing, indicated that he had "quickly reviewed" the evidence summary submitted by employer's counsel and believed that "they do meet the limitations under the regulations," he ended this sentence with the question to employer's counsel, "is that in fact correct?" Hearing Transcript at 9-10. The administrative law judge thereby rendered no ruling on employer's, or any party's compliance with the evidentiary limitations. On remand, the administrative law judge must determine what evidence, designated by the parties, is properly admissible under the limitations provided at 20 C.F.R. §725.414. 20 C.F.R. §§725.414, 725.456(b)(1); *Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-61-62 (2004)(*en banc*).

---

complicated pneumoconiosis Category A, *see* Director's Exhibit 17, also read an x-ray as negative for complicated pneumoconiosis. Director's Brief at 2. The Director's argument does not take into account that claimant initially submitted, as Claimant's Exhibit 1, only Dr. DePonte's interpretation of the March 4, 2001 x-ray, finding simple pneumoconiosis but noting "[n]o large opacities." At the hearing, claimant withdrew that document and was allowed to submit in its place, as Claimant's Exhibit 1, Dr. Alexander's reading of the January 13, 2004 x-ray, finding simple pneumoconiosis and complicated pneumoconiosis Category A. Hearing Transcript at 6-8; *see* Claimant's Exhibit 1. The record contains no other x-ray reading by Dr. DePonte.

Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.304 and his denial of benefits. We remand the case for the administrative law judge to apply the mandatory evidentiary limitations contained at 20 C.F.R. §725.414 and to consider fully the record evidence regarding claimant's entitlement to benefits under 20 C.F.R. §718.304.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits, is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge