

BRB No. 07-0489 BLA

J.N.)
)
 Claimant-Petitioner)
)
 v.)
)
 RAIDERS RUN MINING,)
 INCORPORATED)
) DATE ISSUED: 02/28/2008
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-6247) of Administrative Law Judge Paul H. Teitler denying benefits on 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). This case involves a claim filed on April 8, 2003. After crediting claimant with at least sixteen years of coal mine employment, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(1), 718.304. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living 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).

Claimant argues that the administrative law judge erred in finding that claimant did not establish the existence of complicated pneumoconiosis, and therefore was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304.¹

Claimant initially 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). The record contains six interpretations of four x-rays dated September 29, 2004, November 24, 2004, February 2, 2005, and June 7, 2006.

¹ Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

Although Dr. Rasmussen, a B reader, and Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's September 29, 2004 x-ray as positive for complicated pneumoconiosis, Director's Exhibit 13; Employer's Exhibit 3 at 10-11, Dr. Wiot, a B reader and Board-certified radiologist, interpreted this x-ray as negative for complicated pneumoconiosis.² Employer's Exhibit 2. Although the administrative law judge noted that Drs. Patel and Wiot were each dually qualified as B readers and Board-certified radiologists,³ the administrative law judge acted within his discretion in according greater weight to Dr. Wiot's negative interpretation based upon his additional status as a former C reader and as a professor in the field of radiology. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 7.

The remaining x-ray interpretations of record are negative for complicated pneumoconiosis.⁴ We, therefore, 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

Claimant also argues that the administrative law judge erred in finding that Dr. Rasmussen's opinion did not establish the existence of complicated pneumoconiosis

² Dr. Gaziano, a B reader, interpreted claimant's September 29, 2004 x-ray for film quality only. Director's Exhibit 14.

³ Because Dr. Rasmussen is not a Board-certified radiologist, the administrative law judge implicitly found that Dr. Rasmussen was not as qualified as Drs. Patel and Wiot. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

⁴ Dr. Binns, a B reader and Board-certified radiologist, interpreted claimant's November 24, 2004 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 22. Dr. Zaldivar, a B reader, interpreted claimant's February 2, 2005 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 23. Dr. Castle, a B reader, interpreted claimant's June 7, 2006 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 1.

⁵ Claimant argues that the administrative law judge erred in considering x-ray evidence that was not in the record. Although employer withdrew its submission of two interpretations of a September 24, 2004 x-ray, *see* Transcript at 6, the administrative law judge nevertheless listed this evidence in his summary of the x-ray evidence. *See* Decision and Order at 4. However, in his consideration of whether the x-ray evidence established the existence of complicated pneumoconiosis, the administrative law judge did not consider this excluded evidence. *See* Decision and Order at 6-8.

pursuant to 20 C.F.R. §718.304(c). In a report dated November 18, 2004, Dr. Rasmussen diagnosed complicated pneumoconiosis based upon x-ray evidence of the disease. Director's Exhibit 10. The administrative law judge permissibly found that the September 29, 2004 x-ray that Dr. Rasmussen relied upon as positive for complicated pneumoconiosis was interpreted by Dr. Wiot, the best qualified physician of record, as negative for complicated pneumoconiosis, thus calling into question the reliability of Dr. Rasmussen's opinion. *See generally Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 8.

The administrative law judge also credited the opinions of Drs. Zaldivar and Castle, that claimant did not suffer from complicated pneumoconiosis, over Dr. Rasmussen's contrary opinion, based upon the superior qualifications of Drs. Zaldivar and Castle.⁶ *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Decision and Order at 8; Director's Exhibit 10; Employer's Exhibits 3-5. Consequently, 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).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See 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). As claimant raises no other challenge to the administrative law judge's decision, we affirm the denial of benefits.

⁶ The administrative law judge correctly noted that while Dr. Rasmussen is Board-certified in Internal Medicine, Drs. Zaldivar and Castle are Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 8; Employer's Exhibits 3-5.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge