BRB No. 12-0247 BLA

GORDON F. CHARLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROKEN HILL MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 01/24/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-05619) of Administrative Law Judge Lystra A. Harris rendered on a miner's 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 July 21, 2008.[1] Director's Exhibit 2.

In a Decision and Order issued on January 25, 2012, the administrative law judge credited claimant with twelve years of coal mine employment, pursuant to the parties' stipulation.[2] The administrative law judge found that the evidence established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.[3]

On appeal, employer asserts that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence in finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[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

[1] The record reflects that claimant filed an earlier claim that he subsequently withdrew. Therefore, that claim is considered not to have been filed. 20 C.F.R. §725.306(d); Director's Exhibits 2, 39.

[2] The record reflects that claimant's coal mine employment was in Kentucky and Ohio. Director's Exhibit 6. 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).

[3] A recent amendment to the Act, which became effective on March 23, 2010, does not apply to this case, as claimant established fewer than fifteen years of coal mine employment. *See* Pub. L. No. 111-148, §1556(a), (c); 30 U.S.C. §921(c)(4).

[4] We affirm, as unchallenged, the administrative law judge's finding of twelve years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer argues that the administrative law judge erred in finding that claimant established that he suffers from complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis 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 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 found at 20 C.F.R. §718.304. 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, 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).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered nine readings of five x-rays dated July 30, 1997, April 14, 2008, August 26, 2008, February 18, 2010, and May 6, 2011, and considered the readers' radiological qualifications.[5] The

[5] Dr. Wheeler, a Board-certified radiologist and B reader, read a July 30, 1997 x-ray as negative for pneumoconiosis. The next x-ray in the record, dated April 14, 2008, was also read by Dr. Wheeler as negative for pneumoconiosis. Employer's Exhibits 3, 4. Drs. DePonte and Alexander, both Board-certified radiologists and B readers, read an August 26, 2008 x-ray as positive for both simple pneumoconiosis and a Category A large opacity. Claimant's Exhibit 2; Director's Exhibit 13. Dr. Wiot, who possesses the same radiological qualifications, read the same x-ray as positive for simple pneumoconiosis, but negative for large opacities. Employer's Exhibit 1. Dr. DePonte read a February 18, 2010 x-ray as positive for both simple pneumoconiosis and a Category B large opacity. Claimant's Exhibit 1. Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 15. Dr. DePonte read a May 6, 2011

administrative law judge found that the July 30, 1997 x-ray was negative for the existence of pneumoconiosis, that the April 14, 2008 and August 26, 2008 x-rays were equivocal as to the existence of simple and complicated pneumoconiosis, and that the February 18, 2010 and May 6, 2011 x-rays were positive for Category B large opacities of complicated pneumoconiosis. Decision and Order at 6-8. Finding that the credible x-ray evidence established that, "by 2010, [c]laimant's condition ha[d] worsened to the point where he ha[d] developed complicated pneumoconiosis," the administrative law judge accorded greatest weight to the 2010 and 2011 x-rays to conclude that claimant established the existence of complicated pneumoconiosis. Decision and Order at 8.

Relevant to the issue employer raises on appeal, the administrative law judge discounted Dr. Wheeler's negative readings of the April 14, 2008, February 18, 2010, and May 6, 2011 x-rays. In weighing the conflicting x-ray readings, the administrative law judge found that Dr. Wheeler's opinion, that claimant's four-centimeter lung mass is not pneumoconiosis, but is compatible with conglomerate granulomatous disease, and that histoplasmosis or mycobacterium avium complex are more likely than tuberculosis, was speculative and entitled to little weight. Decision and Order at 7-8. Specifically, the administrative law judge noted that, on each x-ray classification form, Dr. Wheeler checked a box indicating the presence of tuberculosis, but he also placed a question mark over the box and stated that tuberculosis was not a likely diagnosis. Decision and Order at 8; Employer's Exhibits 4, 15, 18. Contrary to employer's assertion, the administrative law judge permissibly found that, because Dr. Wheeler checked the box marked tuberculosis, but still "appear[ed] to be questioning his own diagnoses," his opinion as to the nature of the mass was equivocal and entitled to little weight. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); Decision and Order at 7; Employer's Exhibits 4, 15, 18. Thus, we affirm the administrative law judge's determination to discount Dr. Wheeler's uncontradicted negative reading of the April 14, 2008 x-ray, and to accord less weight to Dr. Wheeler's negative readings of the February 18, 2010 and May 6, 2011 x-rays, than to Dr. DePonte's Category B positive readings of complicated pneumoconiosis. Therefore, we affirm the administrative law judge's findings that the February 18, 2010 and May 6, 2011 x-rays are positive for the existence of complicated pneumoconiosis.

We further reject employer's contention that the administrative law judge erred in according greater weight to the February 18, 2010 and May 6, 2011 positive x-rays than

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x-ray as positive for both simple pneumoconiosis and a Category B large opacity. Claimant's Exhibit 8. Finally, Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 18.

to the July 30, 1997 negative x-ray. Employer's Brief at 16-17. Contrary to employer's assertion, in light of the administrative law judge's finding that "the x-ray evidence demonstrates that . . . [c]laimant's condition has been getting progressively worse," the administrative law judge permissibly found that Dr. Wheeler's 1997 negative x-ray reading, while credible, was outweighed by the more recent, positive x-rays from 2010 and 2011. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993); Decision and Order at 8. As employer raises no other arguments, we affirm the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

The administrative law judge next considered five medical opinions, along with readings of multiple CT scans, a digital x-ray, and claimant's medical treatment records, pursuant to 20 C.F.R. §718.304(c).[6] The administrative law judge noted that the medical treatment records, which range from 1990 through January 2010, contain the results of a bronchoscopy and a needle biopsy, both performed on March 19, 2008. The record reflects that neither test referenced the presence, or absence, of complicated pneumoconiosis.[7] The administrative law judge further noted that the medical treatment notes contain many references to complicated pneumoconiosis. Decision and Order at 18. The administrative law judge permissibly found, however, that the medical treatment notes, standing alone, did not establish the existence of complicated pneumoconiosis, because they are insufficiently reasoned and documented. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 18.

The administrative law judge also found that the five designated CT scan interpretations of record did not establish the presence, or absence, of complicated pneumoconiosis, pursuant to 20 C.F.R. §§718.107, 718.304(c).[8] *See Martin v. Ligon*

[6] The administrative law judge correctly found that neither party offered affirmative autopsy or biopsy evidence for consideration pursuant to 20 C.F.R. §§718.304(b), 725.414(a)(2)(i), (a)(3)(i). Decision and Order at 9.

[7] The bronchoscopy revealed histiocytes and columnar respiratory epithelial cells, but was negative for organisms, fungal elements, acid fast bacilli, and malignant cells. Decision and Order at 14-15; Director's Exhibit 15. The computerized tomography (CT)-guided fine-needle aspirate biopsy of the mass in claimant's right lung revealed "atypical cells." Director's Exhibit 15. A surgical biopsy was recommended, but was declined by claimant. *Id.*

[8] Specifically, the administrative law judge found that one CT scan was positive for complicated pneumoconiosis, two were negative for complicated pneumoconiosis, one was in equipoise, and one was not sufficiently complete to render it credible. Decision and Order at 12-14, 17.

Preparation Co., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 12-14, 17. Further, the administrative law judge found the conflicting readings of the one digital x-ray of record to be equivocal, and thus insufficient to establish the presence, or absence, of complicated pneumoconiosis. *See Holdman*, 202 F.3d at 882, 22 BLR at 2-42; *Griffith*, 49 F.3d at 186-87, 19 BLR at 2-117; Decision and Order at 17-18. Thus, the administrative law judge concluded, as was within her discretion, that the treatment records, CT scans, and digital x-ray evidence of record did not establish the presence, or absence, of complicated pneumoconiosis.[9] *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 18.

The administrative law judge next considered the medical opinions of Drs. Agarwal, Habre, Baker, Hippensteel, and Wheeler. Decision and Order at 9-12. Dr. Agarwal diagnosed clinical pneumoconiosis with progressive massive fibrosis, noting a Category A large opacity. Director's Exhibit 13 at 23-29. Dr. Habre diagnosed claimant with progressive massive fibrosis, with a Category B large opacity. Claimant's Exhibit 1 at 1-3. Dr. Baker opined that claimant suffers from coal workers' pneumoconiosis 1/2, with Category B opacities associated with progressive massive fibrosis. Claimant's Exhibit 8. Dr. Hippensteel opined that claimant does not have complicated pneumoconiosis and "may not even have simple pneumoconiosis," and that the small and large abnormalities observed radiographically are "likely related to sarcoidosis." Employer's Exhibit 11. Finally, Dr. Wheeler opined that claimant does not have complicated pneumoconiosis, and that the four-centimeter mass in his right lung is "very likely histoplasmosis." Employer's Exhibit 12 at 8, 30.

The administrative law judge accorded "slightly less weight" to the diagnoses of complicated pneumoconiosis by Drs. Agarwal and Habre, as they based their opinions on a history of fifteen years of coal mine employment, rather than the twelve years found by the administrative law judge. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); Decision and Order at 15. The administrative law judge also discounted Dr. Baker's diagnosis of complicated pneumoconiosis because it was based, in part, on a positive biopsy result for pneumoconiosis that claimant communicated to him, and which is not contained in the record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(en banc); Decision and Order at 15. The administrative law judge additionally found that aspects of Dr. Hippensteel's opinion, attributing the large lung masses to sarcoidosis rather than to pneumoconiosis, were not well-reasoned. Decision and Order at 16-17;

[9] As employer does not challenge the administrative law judge's determinations regarding the treatment notes, CT scans, and digital x-ray evidence, they are affirmed. *Skrack*, 6 BLR at 1-711.

Employer's Exhibit 11 at 11. Finally, the administrative law judge found Dr. Wheeler's opinion that claimant does not have pneumoconiosis, but has findings more typical of granulomatous disease, not well-reasoned. Decision and Order at 16. Thus, the administrative law judge concluded that the medical opinion evidence did not establish the presence, or absence, of complicated pneumoconiosis. Decision and Order at 18.

Contrary to employer's assertion, we hold that the administrative law judge acted within her discretion in discounting the opinions of Drs. Hippensteel and Wheeler, that claimant does not suffer from complicated pneumoconiosis. Specifically, the administrative law judge permissibly discounted Dr. Hippensteel's opinion, in part, because Dr. Hippensteel did not specify which x-rays and CT scans supported his diagnosis of sarcoidosis, and did not adequately explain why the fact that hilar lymphadenopathy is not commonly associated with pneumoconiosis means that it could not be associated with pneumoconiosis in this case. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 16. The administrative law judge further accorded less weight to the opinion of Dr. Hippensteel because he relied, in part, on the absence of x-ray abnormalities until long after claimant left coal mine employment, and claimant's lack of a significant respiratory impairment, to conclude that claimant does not suffer from complicated pneumoconiosis. Decision and Order at 16; Employer's Exhibit 11 at 10. The administrative law judge rationally found that, because the record contains no x-rays or CT scans dating between the 1997 negative x-ray, and the 2008 x-ray showing a Category A opacity, there is nothing to support Dr. Hippensteel's conclusion that the x-ray abnormalities progressed too rapidly to be caused by pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 16. The administrative law judge further correctly observed that a finding of complicated pneumoconiosis under the Act does not require the existence of a respiratory or pulmonary impairment. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c); Decision and Order at 16. Therefore, the administrative law judge permissibly discounted Dr. Hippensteel's opinion. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

The administrative law judge also permissibly discounted the opinion of Dr. Wheeler. Specifically, the administrative law judge found that Dr. Wheeler did not adequately explain why he concluded that the presence of peripheral nodules involving the pleura, "a telltale . . . granulomatous disease" that is not typically seen with pneumoconiosis, necessarily meant that the large nodule in claimant's case was not complicated pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 16; Employer's Exhibit 12 at 12. The administrative law judge additionally discounted Dr. Wheeler's opinion, that the abnormalities observed on claimant's x-ray are not lesions of complicated pneumoconiosis, because he relied, in part, on the lack of records from 1997 through 2008 showing a gradual development of pneumoconiosis. Employer's Exhibit 12 at 13.

As the administrative law judge correctly noted, the record contains no objective medical studies dating between 1997 and 2008. In light of the administrative law judge's finding that the x-rays demonstrate that claimant's condition has been getting progressively worse, the administrative law judge reasonably found that Dr. Wheeler's opinion, that there was no evidence of progression, was not persuasive. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 16. Therefore, the administrative law judge permissibly concluded that Dr. Wheeler's opinion was not well-reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 16. We therefore reject employer's allegations of error, and affirm the administrative law judge's determinations to discount the opinions of Drs. Wheeler and Hippensteel, that claimant does not suffer from complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(c).

Weighing together all of the evidence under 20 C.F.R. §718.304(a)-(c), the administrative law judge found that the x-ray evidence establishes the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), and "outweighs the evidence" under 20 C.F.R. §718.304(b) and (c). Decision and Order at 18. The administrative law judge reasoned that the x-rays contain the most recent evidence, and show a progression to the development of complicated pneumoconiosis by 2010. The administrative law judge further noted that while the other evidence of record did not establish complicated pneumoconiosis, "no physicians' opinions were credited that opined the [c]laimant did not suffer from complicated pneumoconiosis," and the treatment records, digital x-rays, and CT scans did not establish the presence, or the absence, of the disease. Decision and Order at 18. Thus, the administrative law judge concluded that the evidence under 20 C.F.R. §718.304(b) and (c) is "insufficient to overcome the x-ray evidence under [20 C.F.R. §718.304(a)]." Decision and Order at 18.

Employer argues that the administrative law judge shifted the burden to employer to establish the absence of complicated pneumoconiosis. Employer's Brief at 19. We reject employer's argument, as the instances cited by employer constitute permissible credibility determinations, rather than a shift in the burden of proof. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. A review of the Decision and Order reflects that the administrative law judge properly placed the burden on claimant to establish the existence of complicated pneumoconiosis. Decision and Order at 3, 8, 18, 19.

In sum, contrary to employer's contention, the administrative law judge's finding of complicated pneumoconiosis was based upon a thorough, integrated consideration of all of the available medical evidence, an approach that was proper under *Gray*. *See Gray*, 176 F.3d at 389, 21 BLR at 2-628-29; Employer's Brief at 18, 20. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that all of the relevant evidence, when considered together, established the existence of complicated

pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby enabling claimant to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Finally, because it is unchallenged on appeal, we also affirm the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack*, 6 BLR at 1-711; Decision and Order at 19.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge