BRB No. 01-0241 BLA

WILLIAM PARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0138) of Administrative Law Judge Robert J. Lesnick 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).[1] The administrative law judge credited claimant with at least twenty-three years of coal mine employment and considered the claim, filed on March 23, 1999, pursuant to the regulations set forth at 20 C.F.R. Part 718 (2000).[2] The administrative law judge determined that the x-ray and medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). However, he found the medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000). In addition, the administrative law judge found the medical evidence insufficient to establish the existence of complicated pneumoconiosis and, therefore, found that claimant

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001).

[2] The administrative law judge noted that claimant had filed a previous claim in April 1973 with the Social Security Administration, which was denied. Director's Exhibit 24. Following transfer of the claim to the Department of Labor, the district director found claimant entitled to benefits in decisions issued December 10, 1979 and September 20, 1982. *Id*. However, the district director further found that claimant was still employed and that in order to be entitled to benefits, claimant must terminate his employment within one year. Claimant continued to work and, therefore, in an order dated December 12, 1983, the district director denied benefits pursuant to 20 C.F.R. §725.503A(b) (2000). No further action was taken on this claim. *Id*.

failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in finding the medical evidence insufficient to establish the existence of complicated pneumoconiosis. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000). Citing the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999), claimant contends that the administrative law judge erred in failing to determine whether the notations by various physicians of "ax" irregularities on the ILO-U/C x-ray classification form were equivalent to a finding of complicated pneumoconiosis. Claimant's contention does not have merit.

[3] The parties do not challenge the administrative law judge's decision to credit claimant with at least twenty-three years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(c) (2000). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In finding the medical evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000), the administrative law judge considered the relevant evidence, including all of the x-ray readings which set forth notations of "ax" abnormalities pursuant to Section 718.304(a) (2000).[4] The administrative law judge found that the interpretations by physicians who found both simple pneumoconiosis and also marked the "ax" box under "other symbols" on the ILO-U/C form did not constitute evidence of complicated pneumoconiosis under Section 718.304(a) (2000) because the physicians did not note the existence of large opacities. Decision and Order at 9; *see* Claimant's Exhibits 1, 2; Employer's Exhibit 1. Specifically, the administrative law judge found that Drs. Pathak, Ahmed and Aycoth described the "ax" densities as "measuring up to 5 mm." *Id*.; Claimant's Exhibits 1-3. Consequently, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a) (2000).[5] *Id*.

Contrary to claimant's contention, the administrative law judge reasonably considered all of the relevant x-ray evidence of record and found that it was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a) (2001). In considering the x-ray evidence, the administrative law judge correctly stated that the record contains twenty-eight x-ray interpretations, of which only the readings of the May 10, 1999 film by Drs. Patel and Ranavaya were positive for the existence of complicated pneumoconiosis, because they noted Category A large opacities. Decision and Order at 9; Director's Exhibits 12, 13. However, the administrative law judge reasonably found that the majority of the x-ray interpretations were negative for complicated pneumoconiosis because the physicians did not indicate that large opacities were

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[4] The ILO-U/C x-ray form contains an area for physicians to note other abnormalities observed on x-ray films. Included is the symbol "ax" meaning "coalescence of small rounded pneumoconiotic opacities." *See,* e.g., Director's Exhibit 14.

[5] Section 718.304(a) states, in pertinent part:

> When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C.

20 C.F.R. §718.304(a) (2001); *see Handy v. Director, OWCP*, 16 BLR 1-73 (1990).

present, or classify the x-ray as required under Section 718.304(a) (2001). Decision and Order at 9; Director's Exhibits 14, 24; Claimant's Exhibits 1-3; Employer's Exhibits 1-3, 5, 8; 20 C.F.R. §718.304(a) (2001); *see Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Furthermore, contrary to claimant's contention, the administrative law judge properly found that the notation of "ax" on the ILO-U/C x-ray form by the physicians was not sufficient to establish the existence of complicated pneumoconiosis because the regulations require a diagnosis of large opacities by x-ray and, therefore, a diagnosis of the coalescence of opacities is not sufficient under Section 718.304(a). 20 C.F.R. §718.304(a) (2001); *Handy, supra*; *see also Melnick, supra*. Specifically, the administrative law judge found that Drs. Pathak and Ahmed, both of whom noted "ax" abnormalities, described the size of the densities as measuring "up to 5 mm" which is below the criteria of 1 centimeter as set forth at Section 718.304(a) (2001). Decision and Order at 9; Claimant's Exhibits 1, 2; 20 C.F.R. §718.304(a) (2001); *Handy, supra*. Similarly, the administrative law judge found that Dr. Aycoth opined that the opacities seen on claimant's October 20, 1999 x-ray film measured up to 3 millimeters. Decision and Order at 9; Claimant's Exhibit 3. Inasmuch as the administrative law judge has considered all of the relevant x-ray evidence, we affirm his finding that claimant has not established the existence of complicated pneumoconiosis pursuant to Section 718.304(a) (2001). *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Handy, supra*.

The administrative law judge further found that the record contains the medical opinions of Drs. Rasmussen, Zaldivar, Castle, Fino, Spagnolo and Wheeler, of which only Dr. Rasmussen diagnosed the existence of complicated pneumoconiosis, based on the x-ray interpretation of Dr. Patel. Decision and Order at 9; Director's Exhibits 9, 10. In weighing the medical opinion evidence, the administrative law judge found the opinion of Dr. Rasmussen, which noted normal physical findings and normal results on the objective studies, entitled to little weight because it was based on the x-ray report of Dr. Patel, which the administrative law judge found to be outweighed by the preponderance of the x-ray evidence of record. In addition, the administrative law judge found that Dr. Rasmussen did not have the benefit of reviewing the x-ray interpretations which were negative for the existence of complicated pneumoconiosis. Decision and Order at 9. Consequently, the administrative law judge rationally found the weight of the evidence was insufficient to support claimant's burden of establishing the existence of complicated pneumoconiosis pursuant to Section 718.304(c) (2000). Decision and Order at 9. We, therefore, affirm his finding that

the medical opinion evidence of record is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c) (2001). *Id*. Moreover, we affirm the administrative law judge's finding that claimant has thus failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(a)-(c) (2001). 20 C.F.R. §718.304 (2001); *Lester, supra; Melnick, supra*; *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge