BRB No. 11-0226 BLA

CLINT E. JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 11/29/2011
	)	
Employer-Petitioner	)	
	)	
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 Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05663) of Administrative Law Judge Robert B. Rae, rendered on a claim filed on August 3, 2007, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). In a Decision and Order dated November 23, 2010, the administrative law judge credited claimant with at least twenty-five years of coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis and that claimant

invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in discounting the negative biopsy and medical opinion evidence for complicated pneumoconiosis. Claimant responds, asserting that employer's appeal should be dismissed because employer did not file a "Petition for Review," as required by 20 C.F.R. §802.211. Alternatively, claimant contends that the award of benefits should be affirmed. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to employer's appeal, unless specifically requested to do so by the Board. Employer has filed a reply brief, asserting that its brief satisfies the requirements of 20 C.F.R. §802.211, insofar as it includes a concise statement of the issues on appeal and supporting arguments.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities

[1] We conclude that employer's brief satisfies the requirements of 20 C.F.R. §802.211. We affirm, as unchallenged, the administrative law judge's acceptance of the parties' stipulation that claimant worked at least twenty-five years in coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

(greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found 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 any conflicts, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

In this case, the administrative law judge found that claimant established the existence of complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a), and we affirm that finding, as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Pursuant to 20 C.F.R. §718.304(b), the administrative law judge also found that, while the record includes negative biopsy evidence for complicated pneumoconiosis, the biopsy evidence does not detract from the probative value of the positive x-ray evidence.[3] Decision and Order at 17. Under 20 C.F.R. §718.304(c), the administrative law judge also assigned little weight to the opinions of Drs. Jarboe and Vuskovich, that claimant does not have complicated pneumoconiosis. *Id*. Thus, the administrative law judge determined, based on his consideration of all of the evidence, that claimant established the existence of complicated pneumoconiosis. *Id*.

Employer contends that the administrative law judge failed to explain why the negative biopsy evidence does not cause the probative value of the positive x-ray evidence "to lose force." Employer's Brief at 11, *quoting* Decision and Order at 17.

[3] The administrative law judge noted that, on April 25, 2007, claimant underwent a transbronchial biopsy of the left upper lung to determine if he had cancer. Decision and Order at 15. A biopsy report prepared by Dr. David indicated that the sample "consist[ed] of a few tan pink irregular soft tissue fragments averaging 0.2 [centimeters] in greatest dimension and aggregating 0.6 x 0.6 x 0.2 [centimeters]." Decision and Order at 15, *quoting* Director's Exhibit 8. The biopsy slides were reported to show granuloma with anthracotic pigments, but no evidence of acute inflammatory infiltrates or tumors. Director's Exhibit 8. The administrative law judge also noted that the biopsy slides were reviewed by Dr. Caffrey, who opined that there was evidence of simple pneumoconiosis, but not complicated pneumoconiosis. Decision and Order at 8; Director's Exhibit 20.

Employer contends that because biopsy evidence is generally considered more probative than x-ray evidence for establishing the presence or absence of pneumoconiosis, it was error for the administrative law judge to discount the negative biopsy evidence in this case. Employer's Brief at 11. Contrary to employer's argument, however, the administrative law judge correctly observed that a "negative [biopsy] result does not constitute conclusive evidence that the miner does not have pneumoconiosis." Decision and Order at 8, *citing* 20 C.F.R. §718.106(c). The administrative law judge permissibly concluded that because the size of the lung sample measured less than two centimeters in diameter, the biopsy results were not determinative since the "[t]he size of the sample provided would obviously preclude" a finding of complicated pneumoconiosis. *Id*. at 12 n. 9. Thus, we affirm the administrative law judge's decision to accord less weight to the negative biopsy evidence. *See Gray*, 176 F.3d at 382, 21 BLR at 2-615; *see also Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We also reject employer's argument that the administrative law judge erred in discounting the medical opinions of Drs. Jarboe and Vuskovich, that claimant does not have complicated pneumoconiosis. Employer's Brief in Support of Petition for Review at 11-12. The administrative law judge properly noted that Dr. Jarboe, a B reader and Board-certified internist, examined claimant on January 10, 2008, and reported that claimant did not have complicated pneumoconiosis, based on his negative reading of an x-ray dated January 10, 2008. Decision and Order at 7; 14 n.10; Director's Exhibit 18. The administrative law judge permissibly found that because Dr. Alexander, "[a] more qualified physician," re-read the January 10, 2008 x-ray as positive for complicated coal workers' pneumoconiosis,"[4] Dr. Jarboe's opinion was entitled to less weight.[5] Decision and Order at 14-15, 17; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255,

[4] The administrative law judge found that Dr. Alexander is dually qualified as a Board-certified radiologist and B reader. Decision and Order at 5; Claimant's Exhibit 3.

[5] The administrative law judge gave less weight to Dr. Jarboe's opinion, in part, because he found that Dr. Jarboe did not discuss the biopsy results. Employer asserts that, insofar as the biopsy results were negative for complicated pneumoconiosis, it was not necessary for Dr. Jarboe to specifically address that evidence. Because the administrative law judge gave a proper, alternate reason for assigning Dr. Jarboe's opinion less weight, we consider the administrative law judge's error, if any, to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983).

5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

With regard to Dr. Vuskovich's opinion, the administrative law judge found that Dr. Vuskovich reviewed claimant's medical records and prepared a report dated May 7, 2009, wherein he opined that claimant "'probably ha[s] simple [coal workers' pneumoconiosis] and healed histoplasmosis,' without further support, amplification, or clarification" of the basis for his medical conclusion. Decision and Order at 13, *quoting* Employer's Exhibit 5. Although Dr. Vuskovich suggested in his report that the positive x-ray readings for complicated pneumoconiosis were not credible because complicated pneumoconiosis "is frequently confused with cancer," the administrative law judge noted that Dr. Vuskovich did not address the fact that claimant had a negative biopsy for cancer. Decision and Order at 13. The administrative law judge also found that Dr. Vuskovich did not adequately explain or substantiate his "hypothesis that [claimant's] problems could be due to the fact that his son has some chickens around the property." *Id*.; *see* Employer's Exhibit 5.

We conclude that the administrative law judge acted within his discretion in finding that Dr. Vuskovich's opinion was entitled to less weight "because his alternative diagnoses for the disease process seen on [c]laimant's x-ray[s] are equivocal and unsupported by the record." Decision and Order at 12; *see Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010). Thus, we affirm the administrative law judge's finding that Dr. Vuskovich's opinion is "not substantive" and that it does not detract from the probative value of the positive x-ray evidence for complicated pneumoconiosis.[6] Decision and Order at 13; s*ee Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Because the administrative law judge's finding of complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a), is supported by a substantial evidence, and since he weighed all of the contrary medical evidence, prior to concluding that claimant satisfied his burden of proof, we affirm the administrative law judge's finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. *See Gray*, 176 F.3d at 382, 21 BLR at 2-615; *Lester*, 993 F.2d at 1145-

[6] We reject employer's argument that the administrative law judge erred in crediting Dr. Rasmussen's opinion, that claimant has complicated pneumoconiosis, as the administrative law judge specifically found that Dr. Rasmussen's opinion did not add any additional support for a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order at 15.

46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34; *Truitt*, 2 BLR at 1-199. Further, because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack*, 6 BLR at 1-711; Decision and Order at 16.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge