BRB No. 11-0256 BLA

JAMES OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
and	)	
	)	
Self-Insured through SUN COAL COMPANY, INCORPORATED, c/o WELLS FARGO	)	DATE ISSUED: 11/15/2011
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLC), Washington, D.C., for employer/carrier.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5302) of Administrative Law Judge John P. Sellers, III (the administrative law judge) on a subsequent claim filed on April 15, 2008, pursuant to the provisions of 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). The administrative law judge found that claimant established thirty-three years of coal mine employment.[1] The administrative law judge also found that the new evidence established the existence of complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act,[2] 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Further, on weighing all the evidence of record pursuant to Section 718.304, the administrative law judge found that the existence of complicated pneumoconiosis was established and that claimant was entitled to invocation of the Section 411(c)(3) presumption. The administrative law judge, therefore, found that claimant established total respiratory disability and disability causation, elements of entitlement previously adjudicated against claimant. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in weighing the evidence pursuant to Section 718.304 and, therefore, erred in finding that claimant established the existence of complicated pneumoconiosis, and invocation of the Section 411(c)(3) presumption of totally disabling pneumoconiosis. Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge's Decision and Order is supported by substantial evidence and should be affirmed.

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,

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-three years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Claimant's prior claim, filed on August 2, 1994, was denied on October 3, 1996 by Administrative Law Judge Gerald M. Tierney. Judge Tierney denied the claim because, although claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) he failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and, therefore, failed to establish disability causation pursuant to 20 C.F.R. §718.204(c). Administrative Law Judge's Exhibit 13.

and in accordance with applicable law.[3] 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides, in pertinent part, an irrebuttable presumption of totally disabling pneumoconiosis:

> If a miner is suffering or suffered from a *chronic dust disease of the lung* which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

30 U.S.C. §921(c)(3) (emphasis added). A determination of whether complicated pneumoconiosis has been demonstrated is, however, a finding of fact and the administrative law judge must consider and weigh all relevant evidence before making a finding on the issue. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Complicated Pneumoconiosis

In finding complicated pneumoconiosis established pursuant to Section 718.304, the administrative law judge first considered the evidence relevant to each subsection of Section 718.304. Considering the x-ray evidence pursuant to subsection (a), the

[3] 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. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

administrative law judge found that, while "it [is] clear that there are masses in the [c]laimant's lung which are over [one] centimeter in size [,]" the evidence is inconclusive as to "whether the masses . . . are in fact large opacities associated with a *chronic dust disease of the lung*, or some form of granulomatous disease such as tuberculosis or histoplasmosis." Decision and Order at 20-21 (emphasis added). Specifically, the administrative law judge found that, although Dr. Vaezy, a B reader, opined that the large opacity seen on claimant's x-ray was due to complicated pneumoconiosis, both Drs. Wheeler and Scatarige, B readers and Board-certified radiologists, opined that granulomatous disease was the "more likely" cause and suggested that histoplasmosis was an alternative cause. The administrative law judge found, therefore, that because the x-ray evidence was inconclusive as to the cause of claimant's large opacities, claimant failed to establish the existence of complicated pneumoconiosis pursuant to subsection (a). The administrative law judge went on to note, however, that while the x-ray evidence did not independently establish the existence of complicated pneumoconiosis pursuant to subsection (a), it could support other evidence of complicated pneumoconiosis pursuant to subsection (c), as all three x-ray readers found large opacities in claimant's lungs and differed only as to the cause of those opacities.[4] Decision and Order at 21.

Turning to subsection (c), the administrative law judge found that, while the CT scan evidence showed large masses in claimant's lungs, it failed to establish the existence of complicated pneumoconiosis, because it was "inconclusive as to the exact nature of the masses appearing in the [c]laimant's lungs." Decision and Order at 22. Considering the medical opinion evidence pursuant to subsection (c), however, the administrative law judge found that it established the existence of complicated pneumoconiosis, based on the opinions of Drs. Harrison and Vaezy. Specifically, the administrative law judge found that Dr. Harrison's finding of complicated pneumoconiosis was persuasive, because Dr. Harrison had looked at a series of x-rays, from 1998 to 2000, that showed the progression of simple coal workers' pneumoconiosis into complicated coal workers' pneumoconiosis. In addition, the administrative law judge noted that Dr. Harrison's opinion was particularly credible because of the thoroughness of his discussion of claimant's symptomotology, and because he considered the fact that claimant's skin test was negative for tuberculosis. Decision and Order at 24-25. Regarding Dr. Vaezy's opinion, finding complicated pneumoconiosis, the administrative law judge found it persuasive because it was based, not only on claimant's x-ray and coal mine employment history, but also on the results of claimant's physical examination and pulmonary function study

[4] The administrative law judge found that the existence of complicated pneumoconiosis could not be established pursuant to subsection (b) of 20 C.F.R. §718.304, as the record did not contain biopsy or autopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 21.

and claimant's symptoms and medical history. Further, the administrative law judge noted that, although Dr. Vaezy found that claimant reported a "family" history of tuberculosis, he did not report a "personal" history of tuberculosis. The administrative law judge concluded that Dr. Vaezy's report was supported by claimant's skin test, which was negative for tuberculosis. Decision and Order at 20. Concerning Dr. Dahhan's opinion, that claimant does not have complicated pneumoconiosis, the administrative law judge accorded it little weight because Dr. Dahhan did not fully discuss claimant's reported respiratory symptoms. The administrative law judge also accorded less weight to Dr. Dahhan's opinion because he did not, himself, diagnose tuberculosis or histoplasmosis, even though he relied on Dr. Scatarige's x-ray, which suggested that claimant's large opacity could be due to those diseases. The administrative law judge found, therefore, on weighing the CT scan and medical opinion evidence pursuant to subsection (c), that the existence of complicated pneumoconiosis was established thereunder, based on the opinions of Drs. Harrison and Vaezy.

Further, on weighing all the relevant evidence, the administrative law judge concluded that, while the new x-ray and CT scan evidence did not independently establish the existence of complicated pneumoconiosis, it did, along with the earlier x-ray evidence, support the opinions of Drs. Harrison and Vaezy, finding complicated pneumoconiosis. The administrative law judge, therefore, found the existence of complicated pneumoconiosis established pursuant to Section 718.304, based on his consideration of all the relevant evidence.

Employer contends, however, that since the administrative law judge found that the x-ray and CT scan evidence was insufficient to establish complicated pneumoconiosis, he erred in crediting the medical opinion evidence, which relied, in part, on x-ray and CT scan evidence to find complicated pneumoconiosis estabished. On the contrary, the Director asserts that, in weighing medical opinions, "[t]he test is . . . one of credibility: whether the physician's opinion is reasoned and documented, and comports with acceptable medical procedures." Director's Brief at 2. The Director contends, therefore, that the administrative law judge, after considering all of the relevant evidence, properly credited the opinions of Drs. Harrison and Vaezy and found that they established the existence of complicated pneumoconiosis pursuant to subsection (c) and Section 718.304 overall.

In evaluating the physicians' opinions pursuant to subsection (c), the administrative law judge properly credited the opinions of Dr. Harrison and Dr. Vaezy, over the contrary opinion of Dr. Dahhan, because he found their opinions to be better reasoned and documented. First, the administrative law judge properly found Dr. Harrison's opinion, finding complicated pneumoconiosis, to be better reasoned because

Dr. Harrison looked at the progression of claimant's x-rays from 1998 to 2000[5] and explained how they showed that claimant's simple coal workers' pneumoconiosis had progressed into complicated pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Specifically, the administrative law judge noted that Dr. Harrison opined that the earlier x-rays showed a reticular pattern in the upper half of both lung zones, which was quite mild, but that there seemed to be progressive changes between the March 10, 1998 and November 5, 2000 films, with increased conglomerate densities in the apices. Decision and Order at 24. Second, the administrative law judge properly found that Dr. Harrison's opinion was better reasoned than Dr. Dahhan's opinion, because Dr. Harrison provided an "extensive history of [claimant's] present illness which goes into far greater detail than either Dr. Vaezy or Dr. Dahhan." Decision and Order at 24. *See Clark*, 12 BLR at 1-155; *Stark*, 9 BLR at 1-37. In particular, the administrative law judge noted that "Dr. Harrison's history of illness tracks the history of [claimant's] symptoms, noting their onset and causation[,]" while "Dr. Dahhan's entire description of [c]laimant's symptoms consists of three sentences, and does not delve into the history of the symptoms at all." Decision and Order at 24. Third, the administrative law judge properly found that Dr. Harrison's opinion was more persuasive because Dr. Harrison "obtained information regarding the [c]laimant's negative skin test for tuberculosis[,]" which refuted x-ray evidence suggesting that tuberculosis was the cause of the large masses seen on claimant's x-ray. *See Clark*, 12 BLR at 1-155; *Stark*, 9 BLR at 1-37. Decision and Order at 24.

The administrative law judge properly credited Dr. Vaezy's opinion, finding complicated pneumoconiosis, because it was based, not only on claimant's x-ray and lengthy coal mine employment history, but also on the results of claimant's examination and objective studies, as well as claimant's symptoms. *See Clark*, 12 BLR at 1-155. In particular, the administrative law judge noted that Dr. Vaezy's opinion was supported by his finding that, while the evidence showed that claimant had a family history of tuberculosis, there was no evidence of a "personal" history of tuberculosis.

Turning to Dr. Dahhan's opinion, finding that claimant does not have complicated pneumoconiosis, the administrative law judge properly accorded it less weight because, as previously discussed, Dr. Dahhan did not provide as extensive of an explanation of claimant's symptoms and their history as did Dr. Harrison. Further, the administrative law judge properly accorded less weight to Dr. Dahhan's opinion because, while Dr. Dahhan relied on Dr. Scatarige's x-ray finding, suggesting that tuberculosis and histoplasmosis, rather than complicated pneumoconiosis, were the causes of the large

[5] Dr. Harrison's report, dated September 3, 2004, includes comparisons of films between 1998 and 2000, which were part of claimant's treatment records. *See* 20 C.F.R. §725.414(a)(5); Director's Exhibits 6, 22.

mass seen on claimant's x-ray, Dr. Dahhan did not, himself, diagnose tuberculosis or histoplasmosis. *See Clark*, 12 BLR at 1-155; Decision and Order at 26. We, therefore, affirm the administrative law judge's finding that the existence of complicated pneumoconiosis was established at Section 718.304(c), based on the opinions of Drs. Harrison and Vaezy.

Further, after weighing together all of the relevant evidence at Section 718.304(a) and (c), the administrative law judge rationally determined that the opinions of Drs. Harrison and Vaezy were more probative and reliable than the x-ray and CT scan evidence, for the reasons discussed above. *See Clark*, 12 BLR at 155. The administrative law judge, therefore, properly found that complicated pneumoconiosis was established at Section 718.304 overall, and that claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[6]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] In light of the foregoing, we need not consider whether claimant is entitled to consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).