BRB No. 12-0014 BLA

WENDELL BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRODY MINING, LLC	)	DATE ISSUED: 10/18/2012
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Donald C. Wandling (Avis, Witten & Wandling, L.C.), Logan, West Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-5631) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed 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).[1] The administrative law judge credited claimant with

[1] Relevant to this claim, amended Section 411(c)(4) of the Act provides that, if a miner establishes at least fifteen years of underground coal mine employment, or coal

thirty-one years of coal mine employment, based on employer's stipulation. Decision and Order at 2-3; Hearing Transcript at 6. The administrative law judge found that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and, therefore, was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further determined that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so by the Board.[2]

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.[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 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

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mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 22. Because we have affirmed this finding, the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is not available in this case.

[3] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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).

Pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, the irrebuttable presumption is invoked when 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 (greater than one centimeter in diameter) 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, 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 United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis,[4] that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

Pursuant to 20 C.F.R. §718.304(c),[5] the administrative law judge considered whether the CT scans, PET scans and medical opinions supported a finding of complicated pneumoconiosis. Decision and Order at 15-20. With respect to the CT and PET scans of record, the administrative law judge stated:

> Drs. Narra, Miller, and McJunkin noted a possibility of pneumoconiosis while Drs. Sheils, Siegler and Cure found complicated pneumoconiosis. These physicians' opinions were based on a review of one or two CT or PET scans. Dr. Wiot found no pneumoconiosis. His conclusion was based upon reviewing four CT scans as well as the 2005 x-ray. Because Dr.

[4] The condition described by these criteria is referred to as "complicated pneumoconiosis," although that term does not appear in the statute or the regulations. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000), *citing Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 7, 11 (1976); *Double B Mining, Inc. v. Blankenship,* 177 F.3d 240, 242-43 (4th Cir.1999).

[5] We affirm the administrative law judge's findings that the x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), and that there is no biopsy evidence in the record relevant to 20 C.F.R. §718.304(b), as they are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13, 15.

> Wiot's opinion was based upon evidence that ranges from May of 2005 through June of 2008, Dr. Wiot had a more complete review than did any of the individual physicians reading or comparing one or two CT or PET scans. As such, his opinion is given more weight than those physicians.

Id. at 17. The administrative law judge also acknowledged that Dr. Marzouk, claimant's treating physician, determined that the CT and PET scans were positive for complicated pneumoconiosis, but accorded greater weight to Dr. Wiot's contrary readings, based upon his superior radiological qualifications. *Id.* at 18. Similarly, the administrative law judge found that the medical opinion evidence was insufficient to invoke the irrebuttable presumption, as Dr. Zaldivar's opinion, that the objective data did not support a diagnosis of complicated pneumoconiosis, outweighed Dr. Ranavaya's opinion, that claimant is suffering from the disease, as Dr. Zaldivar "considered more extensive data."[6] *Id.* at 19. The administrative law judge determined, therefore, that claimant failed to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. *Id.*

The administrative law judge then addressed claimant's argument, set forth in his post-hearing brief, that Dr. Wiot's x-ray and CT scan interpretations and Dr. Zaldivar's medical report lack credibility, as neither physician considered the report in which the West Virginia Occupational Pneumoconiosis Board (OPB) noted that a chest x-ray dated January 10, 2002, showed nodular fibrosis consistent with occupational pneumoconiosis. Decision and Order at 19-20. The administrative law judge stated, "[i]f the OPB did interpret a chest x-ray as showing the presence of pneumoconiosis in 2002, this would tend to refute the reasoning of Dr. Wiot and Dr. Zaldivar. If [c]laimant's pneumoconiosis in fact existed in 2002[,] the theory that the growth in opacities was too rapid would be negated." *Id.* at 19. The administrative law judge determined, however, that "no 2002 report by the OPB was offered into evidence" and that Employer's Exhibit 6, identified by claimant as the report, is actually a treatment note written by Dr. Marzouk. *Id.* The administrative law judge concluded, "the reports of Drs. Wiot and Zaldivar are accepted

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[6] Dr. Ranavaya examined claimant on September 30, 2008. Director's Exhibit 13. Based on claimant's chest x-ray and his history of coal mine employment, Dr. Ranavaya diagnosed complicated pneumoconiosis and stated the conglomerate opacities were most probably related to progressive massive fibrosis. *Id.* Dr. Zaldivar examined claimant on April 7, 2010 and reviewed claimant's treatment records, CT scans, the readings of the September 30, 2008 x-ray by Dr. Ranavaya, Dr. Wiot, and Dr. Gaziano, as well as Dr. Ranavaya's September 30, 2008 pulmonary function and blood gas studies. Employer's Exhibit 2. Dr. Zaldivar also prepared a supplemental report on May 5, 2010, based upon his review of Dr. Wiot's April 28, 2010 interpretation of claimant's CT scans. *Id.* Dr. Zaldivar agreed with Dr. Wiot that it is unlikely claimant could have inhaled sufficient dust over the past five years to cause such radiographic changes consistent with a diagnosis of complicated pneumoconiosis. *Id.*

on the existence of complicated pneumoconiosis because they are the most qualified physicians to offer such an opinion and, as the January 10, 2002 report referenced by claimant's brief is not in the record, their reasoning is consistent with the evidence of record." *Id*. at 20. The administrative law judge then reiterated his conclusion that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *Id*.

The sole argument raised by claimant on appeal is that the administrative law judge erred in finding that the OPB report is not in evidence, since employer submitted the report on May 6, 2010, as Employer's Exhibit 6. Claimant explains that, as the administrative law judge acknowledged, a 2002 report diagnosing nodular fibrosis consistent with pneumoconiosis "would tend to refute the reasoning" of Drs. Wiot and Zaldivar. Claimant's Brief at [2] (unpaginated), *quoting* Decision and Order at 19. Claimant also asserts that, if the medical opinions of Drs. Wiot and Zaldivar were discredited, the remaining evidence would be sufficient to establish that he has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis.

Claimant's contentions are without merit. The administrative law judge correctly found that he was not required to consider the 2002 report by the OPB under 20 C.F.R. §718.304, as it was not designated as either affirmative or rebuttal evidence by either party; it is not in the record; and, contrary to claimant's contention, Employer's Exhibit 6 contains progress notes written by Dr. Marzouk.[7] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007) (en banc); *Brasher v. Pleasant View Mining Co*., 23 BLR 1-141 (2006); Decision and Order at 19. Accordingly, the administrative law judge rationally determined that the opinions of Drs. Wiot and Zaldivar, that claimant does not have complicated pneumoconiosis, are entitled to probative weight, as they are consistent with the evidence of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 20. Thus, we affirm the administrative law judge's findings that claimant did not establish the existence of complicated pneumoconiosis and, therefore, did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Based upon our affirmance of the administrative law judge's findings under 20 C.F.R. §§718.204(b)(2) and 718.304, we also affirm the administrative law judge's determination that claimant has not established that he is totally disabled, a requisite element of entitlement. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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[7] Although employer referred to "Records from West Virginia Occupational Pneumoconiosis Claim" in a letter to claimant's counsel dated May 6, 2010, these records were not attached to the letter and employer did not list them on the Evidence Summary Form that it submitted on October 15, 2010. Employer's Exhibit 1.

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