

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 20-0176 BLA
and 20-0176 BLA-A

RAYMOND ROWE)
)
 Claimant-Respondent)
 Cross-Petitioner)
)
 v.)
)
 BEECH FORK PROCESSING,)
 INCORPORATED)
)
 and)
)
 SECURITY INSURANCE COMPANY OF)
 HARTFORD c/o ARROWPOINT CAPITAL)
 SECURITY COMPANY)
)
 Employer/Carrier-)
 Petitioners)
 Cross-Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED: 02/25/2021

DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Larry A. Temin,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for
Employer/Carrier.

William M. Bush (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judges, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal and Claimant cross-appeals Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2018-BLA-06176) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on July 21, 2017.

The administrative law judge credited Claimant with at least twenty-two years of underground coal mine employment based on the parties' stipulation and found he established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304.¹ He therefore found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge also found Employer failed to rebut the presumption that Claimant's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) and awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established he has complicated pneumoconiosis and is therefore entitled to the irrebuttable presumption at Section 411(c)(3). Claimant filed a response brief in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging affirmance of the administrative law judge's finding that Claimant invoked the Section 411(c)(3) presumption.

On cross-appeal, Claimant argues that if the case is remanded, the administrative law judge should be directed to consider his potential entitlement to benefits under the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2018). The Director agrees with Claimant's assertion.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

¹ Employer conceded Claimant has simple clinical pneumoconiosis arising out of coal mine employment. Hearing Tr. at 12.

evidence, and in accordance with applicable law.² 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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he 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 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). 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. The administrative law judge must weigh together the evidence at subsections (a), (b), and (c) to determine if a claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389 (6th Cir. 1999); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The administrative law judge found the chest x-rays do not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a),³ while the medical opinions establish

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as Claimant’s last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 12; Employer’s Exhibit 4 (Claimant’s Dep. at 30-31).

³ The record contains four interpretations of two chest x-rays dated November 10, 2017, and November 5, 2018. Director’s Exhibits 9, 13; Employer’s Exhibit 1; Claimant’s Exhibit 2. As the administrative law judge noted, all the physicians reading the x-rays are dually-qualified as B readers and Board-certified radiologists. Decision and Order at 4, 10. Drs. DePonte and Adcock interpreted the November 10, 2017 x-ray as positive for small opacities, but they did not identify any large opacities. Director’s Exhibits 9, 13. Dr. Kendall interpreted the November 5, 2018 x-ray as positive for small opacities and negative for large opacities. Employer’s Exhibit 1. In contrast, Dr. DePonte interpreted the November 5, 2018 x-ray as positive for both small and large opacities, identifying the coalescence of a 12 mm large opacity in the right upper lung zone and an 11 mm large opacity in the left mid lung zone. Claimant’s Exhibit 2. She stated the opacities are category A large opacities of complicated pneumoconiosis. *Id.* The administrative law judge found the November 10, 2017 x-ray negative for complicated pneumoconiosis and the November 5, 2018 x-ray inconclusive because of the conflicting interpretations from equally-qualified physicians. Decision and Order at 10-11. He therefore concluded the preponderance of the x-ray evidence does not establish complicated pneumoconiosis. *Id.*

complicated pneumoconiosis at 20 C.F.R. §718.304(c). Weighing all the evidence, the administrative law judge gave greatest weight to the medical opinion evidence diagnosing complicated pneumoconiosis and found it is not undermined by any contrary evidence,⁴ thus entitling Claimant to the irrebuttable presumption of total disability due to pneumoconiosis.

Employer argues the administrative law judge erred in finding the opinions of Drs. Shah and Sikder sufficient to establish the existence of complicated pneumoconiosis. Employer's Brief at 7-11. We reject this contention.

The administrative law judge addressed the opinions of Drs. Sikder, Shah, and Rosenberg. Drs. Shah⁵ and Sikder⁶ opined Claimant has complicated pneumoconiosis

at 11. We affirm, as unchallenged on appeal, the administrative law judge's finding that the x-ray evidence does not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The administrative law judge correctly noted there is no biopsy evidence in the record. Decision and Order at 10; 20 C.F.R. §718.304(b).

⁵ Dr. Shah examined Claimant and diagnosed COPD, emphysema, interstitial lung disease, and diffuse dust-related fibrosis. Director's Exhibit 10 at 5. She concluded Claimant has advanced simple pneumoconiosis based on Dr. DePonte's interpretation of the November 10, 2017 x-ray. *Id.* Dr. Shah later revised her opinion after reviewing, inter alia, Dr. Sikder's treatment records and the other x-rays in evidence, concluding Claimant has complicated pneumoconiosis based on Dr. DePonte's interpretation of the November 5, 2018 x-ray identifying large opacities. Claimant's Exhibit 1 at 14-15. She stated Dr. DePonte's identification of large opacities was confirmed by the CT scans that also evidenced opacities of the size and in the location identified as complicated pneumoconiosis by Dr. DePonte and Dr. Sikder. *Id.* at 9, 13-16.

⁶ The record contains treatment records from Dr. Sikder, which include reports of two computed tomography (CT) scans. Dr. Sikder stated that a CT scan taken in May 2017 showed a diffuse interstitial process with an 11 mm lesion in Claimant's right upper lobe, a 12 mm lesion in his right apex, and extensive calcified lymph nodes. Claimant's Exhibit 3 at 1. Dr. Sikder reported another CT scan taken in August 2017 showed increased interstitial fibrosis with multiple enlarging nodules. *Id.* at 4. Dr. Sikder also reported that an x-ray taken in December 2017 showed pulmonary fibrosis. *Id.* at 7. She diagnosed Claimant with "progressive CWP/PMF" [coal workers' pneumoconiosis/progressive massive fibrosis] as well as chronic obstructive pulmonary disease (COPD) and fibrotic lung. *Id.* at 8.

while Dr. Rosenberg⁷ opined he does not. The administrative law judge found Dr. Shah based her opinion on a review of all the evidence, including Dr. DePonte's interpretation of the November 5, 2018 x-ray and Dr. Sikder's treatment records. Decision and Order at 11-12. He further acknowledged Dr. Sikder is Claimant's treating physician in accordance with 20 C.F.R. §718.104(d).⁸ Decision and Order at 11. Noting Dr. Sikder periodically evaluated and treated Claimant since 2017 for his pulmonary condition, and administered objective tests such as computed tomography (CT) scans and x-rays, the administrative law judge found "she has obtained superior and relevant information" about Claimant's condition. *Id.* at 11-12. In contrast, the administrative law judge found Dr. Rosenberg did not have a complete picture of Claimant's condition as he did not review Dr. DePonte's interpretation of the November 5, 2018 x-ray or Claimant's treatment records in which the CT scans are discussed. *Id.* at 12. Determining Drs. Shah and Sikder had a more complete picture of Claimant's condition and their opinions are better supported by the evidence of record, the administrative law judge found the medical opinion evidence establishes the existence of complicated pneumoconiosis.

We reject Employer's assertion that Dr. Shah's opinion is insufficient to establish complicated pneumoconiosis. Dr. Shah testified the CT scans Dr. Sikder reviewed are "consistent with the large opacities seen in coal workers' pneumoconiosis." Claimant's Exhibit 1 at 14. She explained the lesions observed on the CT scans "turn into progressive massive fibrosis and they are seen as a large opacity [in] categories described as A, B or C depending on its size." *Id.* at 14. Dr. Shah testified she would diagnose complicated pneumoconiosis based on Dr. DePonte's interpretation of the November 5, 2018 x-ray showing a category A large opacity because Dr. DePonte acknowledged that a CT scan may reveal other large opacities and the report of the CT scan corroborated Dr. DePonte's findings. *Id.* at 9, 13, 16; 33; *see also* Claimant's Exhibit 2 at 1. The administrative law

⁷ Dr. Rosenberg examined Claimant and diagnosed simple clinical pneumoconiosis due to coal mine dust exposure based on Dr. Adcock's interpretation of the November 10, 2017 x-ray. Employer's Exhibit 1 at 3. He concluded Claimant does not have progressive massive fibrosis. *Id.* He did not review the CT scans or Dr. Sikder's treatment records.

⁸ An administrative law judge may give controlling weight to a treating physician's opinion based on the nature and duration of her relationship with the miner and the frequency and extent of her treatment. 20 C.F.R. §718.104(d)(1)-(4). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade").

judge found Dr. Shah diagnosed complicated pneumoconiosis based on Dr. DePonte's identification of category A large opacities on the November 5, 2018 x-ray, corroborated by the CT scans in the treatment records, as well as Dr. Sikder's diagnosis. Decision and Order at 11; Claimant's Exhibit 1 at 16. Noting Dr. Shah explained the basis for her diagnosis, which is supported by evidence in the record, the administrative law judge permissibly found her opinion well-documented and reasoned. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 11.

We further reject Employer's assertion that the administrative law judge erred in relying on Dr. Shah's opinion because it is based on an inconclusive x-ray. Dr. Shah acknowledged Dr. Kendall did not identify large opacities on the November 5, 2018 x-ray, but she relied on Dr. DePonte's reading of this x-ray, which identified large opacities. As the administrative law judge noted, Dr. Shah explained the CT scans referenced in Dr. Sikder's treatment notes and Dr. Sikder's finding of complicated pneumoconiosis confirmed Dr. DePonte's findings of large opacities.⁹ Decision and Order at 7. Contrary to Employer's assertion, inconclusive x-ray evidence does not necessarily conflict with a medical opinion diagnosing complicated pneumoconiosis. *Whitaker Coal Corp. v. Osborne*, 526 F. App'x 567 (6th Cir. 2013).

We also reject Employer's contention that the administrative law judge erred in finding Dr. Sikder's diagnosis of progressive massive fibrosis equivalent to complicated pneumoconiosis, and thus corroborative of Dr. Shah's opinion. Employer's Brief at 8-10. The administrative law judge noted Dr. Sikder reviewed x-rays and CT scans which revealed progressing fibrosis and nodules approximately 12 mm in size, and she attributed them to "CWP/PMF." Decision and Order at 11; Claimant's Exhibit 3 at 8. He permissibly concluded Dr. Sikder's diagnosis of "CWP/PMF" is equivalent to a diagnosis of complicated pneumoconiosis. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) ("Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors); *Lisa See Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1359 (4th Cir. 1996) (noting complicated pneumoconiosis is known "by its more dauntingly descriptive name, 'progressive massive fibrosis'"); *see also* 65 Fed. Reg. 79,920, 79,951 (Dec. 20, 2000) (the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis."). Therefore, the administrative law judge permissibly found Dr. Sikder's diagnosis of coal workers pneumoconiosis/progressive massive fibrosis and her identification of two lesions greater

⁹ We further note Employer does not assign error to Dr. Shah's consideration of the CT scans in Dr. Sikder's treatment notes or to the consideration of the CT scan reports by the administrative law judge or Dr. Sikder herself.

than 1 cm in diameter sufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304.¹⁰ See *Usery*, 428 U.S. at 7; *Rutter*, 86 F.3d at 1359; see also 65 Fed. Reg. at 79,951. Noting Dr. Sikder obtained superior and relevant information about Claimant's condition, the administrative law judge permissibly found her opinion well-documented and reasoned. See *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Thus we reject Employer's assertion that Dr. Sikder's opinion is insufficient to establish complicated pneumoconiosis.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. See *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Gray*, 176 F.3d at 387; *Crisp*, 866 F.2d at 185. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As the administrative law judge's bases for crediting Dr. Shah's and Dr. Sikder's opinions over Dr. Rosenberg's is rational and supported by substantial evidence, we affirm his finding that Claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). See *Banks*, 690 F.3d at 489; *Gray*, 176 F.3d at 387; *Crisp*, 866 F.2d at 185; see also *Eastover Mining Co. v. Williams*, 338 F.3d 501, 511 (6th Cir. 2003); Decision and Order at 12. We also affirm his finding that all of the relevant evidence, when weighed together, establishes the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. See *Gray*, 176 F.3d at 389; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 12.

We further affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. See *v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.203(b). Consequently, we affirm his finding that Claimant invoked the irrebuttable presumption of

¹⁰ We also reject Employer's contention that Claimant is required to establish that the lesions Dr. Sikder observed would appear on x-ray as an opacity greater than one centimeter in diameter. A diagnosis of progressive massive fibrosis equates to a diagnosis of massive lesions at 20 C.F.R. §718.304(b) and the United States Court of Appeals for the Sixth Circuit does not require an administrative law judge to make an "equivalency" determination when massive lesions are diagnosed. See *Gray v. SLC Coal Co.*, 176 F.3d 382, 389-390 (6th Cir. 1999).

total disability due to pneumoconiosis and the award of benefits.¹¹ 20 C.F.R. §718.304; Decision and Order at 12.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

¹¹ In view of our disposition of the case at 20 C.F.R. §718.304, we need not address Claimant's argument in his cross-appeal regarding Section 411(c)(4).