



BRB Nos. 20-0318 BLA
and 20-0319 BLA

WANDA S. SUTTON)
(o/b/o and Widow of ERMAL G. SUTTON))

Claimant-Respondent)

v.)

SKYLINE ENTERPRISES OF VIRGINIA,)
INCORPORATED)

and)

TRAVELERS INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 06/29/2021

DECISION and ORDER

Appeal of Decision and Order – Awarding Benefits of Evan H. Nordby,
Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City,
Tennessee, for Employer and its Carrier.

Ann Marie Scarpino (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 Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Evan H. Nordby's Decision and Order Awarding Benefits (2018-BLA-05097, 2018-BLA-05098) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹ This case involves a miner's claim filed on January 11, 2016,² and a survivor's claim filed on December 27, 2016.

In the miner's claim, the administrative law judge credited the Miner with 20.59 years of coal mine employment and found Claimant established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). He further found the Miner's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203. Because the Miner was determined to be entitled to benefits at the time of his death, the administrative law judge found Claimant automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).³

¹ Employer's appeal in the miner's claim was assigned BRB No. 20-0318 BLA, and its appeal in the survivor's claim was assigned BRB No. 20-0319 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

² The Miner died on November 12, 2016. Survivor's Claim (SC) Director's Exhibit 5. Claimant, the Miner's widow, is pursuing his claim on behalf of his estate.

³ Section 422(l) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

On appeal, Employer asserts in the miner's claim that the administrative law judge erred in finding complicated pneumoconiosis established.⁴ Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits.

The 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 evidence, and in accordance with applicable law.⁵ 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).

Miner's Claim

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yielded one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yielded 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).⁶ *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 20.59 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29.

⁵ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibits 10, 11.

⁶ Employer argues the administrative law judge erred in finding the Miner's coal mine employment took place in underground coal mines or "substantially similar" surface coal mine employment. Employer's Brief at 4-9. There is no requirement, however, that Claimant establish the dust conditions of the Miner's coal mine employment in order to invoke the Section 411(c)(3) presumption.

The administrative law judge found the x-ray and medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c); Decision and Order at 29-32. He found the computed tomography (CT) scan evidence, standing alone, does not establish complicated pneumoconiosis because it lacks the necessary equivalency determination under prong (c). He nevertheless concluded the CT scan diagnoses of large masses consistent with pneumoconiosis support the later x-ray interpretations of large Category A and B opacities of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 29-32. Finally, he found the biopsy reports do not establish complicated pneumoconiosis.⁷ 20 C.F.R. §718.304(b), (c); Decision and Order at 29. Weighing all of the evidence, the administrative law judge found the contrary evidence of record does not undermine the x-ray and medical opinion evidence of complicated pneumoconiosis, thus entitling Claimant to the irrebuttable presumption that the Miner was totally disabled due to pneumoconiosis. *Id.*

X-Ray Evidence – 20 C.F.R. §718.304(a)

Employer argues the administrative law judge erred in weighing the x-ray evidence. Employer's Brief at 9-12. We disagree. The administrative law judge considered eight interpretations of three x-rays dated December 8, 2015, April 13, 2016, and August 5, 2016. Decision and Order at 9-14, 29-30. He noted all the readers are dually qualified as Board-certified radiologists and B readers. *Id.*

December 8, 2015 x-ray

Dr. DePonte interpreted the December 8, 2015 x-ray as positive for complicated pneumoconiosis, Category A, whereas Dr. Adcock read it as negative for the disease. Miner's Claim (MC) Exhibits 30, 34. While Dr. Adcock stated there are no large opacities consistent with pneumoconiosis, he identified pleural abnormalities consistent with pneumoconiosis measuring five to ten millimeters in the right lung and three to five millimeters in the left lung.⁸ MC Director's Exhibit 34. He also identified opacities of

⁷ The record does not contain autopsy evidence. Rather, it contains a lung biopsy report that the administrative law judge found does not address pneumoconiosis, but confirms the absence malignant cells. Decision and Order at 29; MC Claimant's Exhibit 4.

⁸ Dr. DePonte similarly identified pleural abnormalities consistent with pneumoconiosis measuring five to ten millimeters in the right lung. MC Director's Exhibit 30.

simple pneumoconiosis measuring between 1.5 and 3 millimeters in both mid lung zones and the left lower lung zone. *Id.*

In resolving these conflicting readings, the administrative law judge noted the record includes 2006 CT scans interpreted by Dr. Hill that predate this x-ray. Decision and Order at 29-32. Dr. Hill read a February 23, 2006 CT scan as revealing an “elliptical mass-like density that measures approximately [four by two and one-half centimeters]” in the right lung that “may represent [an] area of atelectatic lung from recent pneumonitis in conjunction with pneumoconiosis.” MC Claimant’s Exhibit 7. He also identified a two centimeter “vague nodular density” in the right lung “with smaller areas of nodularities and fibrosis” that is “most likely from pneumoconiosis.” *Id.* Dr. Hill further read a May 31, 2006 CT scan and compared it to the February 23, 2006 CT scan. *Id.* He stated the “vague nodular density” in the right upper lung “appears to have decreased slightly in size” to one and one-half centimeters, but continued to note the presence of “fibrotic scarring with pleural thickening bilaterally likely from pneumoconiosis.” *Id.*

The administrative law judge concluded these CT scan readings, standing alone, do not establish complicated pneumoconiosis because there is no medical opinion specifically stating the nodular densities identified on the scans would appear on x-ray measuring at least one centimeter in diameter. *Scarbro*, 220 F.3d at 256; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999); Decision and Order at 30, 32. Notwithstanding, he permissibly found this evidence establishes the presence of large masses consistent with pneumoconiosis as early as 2006. *Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 32.

Because pneumoconiosis is a progressive and irreversible disease, the administrative law judge permissibly found the 2006 CT scan testing revealing large densities of pneumoconiosis supports Dr. DePonte’s later identification of a Category A large opacity on the December 8, 2015 x-ray, and undermines Dr. Adcock’s opinion that there are no large opacities consistent with pneumoconiosis. *Cox*, 602 F.3d at 284-85 (administrative law judge properly found that the x-ray evidence, when considered in light of the other evidence, including CT scan evidence, was sufficient to establish complicated pneumoconiosis); *Scarbro*, 220 F.3d at 256; *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 32.

April 13, 2016 and August 5, 2016 x-rays

The administrative law judge next weighed the conflicting readings of the April 13, 2016 and August 5, 2016 x-rays. Dr. Miller interpreted the April 13, 2016 x-ray as positive

for complicated pneumoconiosis, Category A, and Dr. DePonte interpreted it as positive for the disease, Category B. MC Director's Exhibits 29, 31. Dr. Adcock interpreted the x-ray as negative for large opacities of pneumoconiosis; he no longer identified opacities of simple pneumoconiosis, but continued to identify pleural abnormalities consistent with pneumoconiosis measuring five to ten millimeters in the right lung and three to five millimeters in the left lung. MC Director's Exhibit 32. Finally, Dr. Simone read the x-ray as negative for complicated pneumoconiosis while identifying opacities of simple pneumoconiosis in the mid and upper zones of both the right and left lungs. MC Employer's Exhibit 17. He further stated there are "no large opacities" but identified a ten millimeter nodule in the mid right lung zone without discussing its origin. *Id.*

As for the August 5, 2016 x-ray, Drs. Adcock and Ramakrishnan interpreted it as negative for large opacities of pneumoconiosis. MC Claimant's Exhibit 1; MC Employer's Exhibit 1. Both physicians, however, identified small opacities as well as pleural abnormalities consistent with pneumoconiosis in various zones in both the right and left lungs. *Id.*

The administrative law judge again noted the record contains a CT scan that immediately predates these x-rays. Decision and Order at 29-32. Dr. Egner read a January 29, 2016 CT scan as revealing "multiple bilateral pulmonary nodules scattered throughout both lungs" with the largest nodule in the right lung measuring 1.8 x 1.3 centimeters and a large nodule in the left lung measuring 0.7 centimeters. MC Claimant's Exhibit 5. He stated these nodules are "unchanged" from an August 14, 2008 CT scan he previously reviewed. *Id.* He concluded that, given the Miner's history, the nodules are "likely related to fibrosis/pneumoconiosis." *Id.*

Although the administrative law judge found Dr. Egner's January 29, 2016 CT scan reading, standing alone, does not establish complicated pneumoconiosis because it lacks an equivalency determination, he permissibly found it establishes the presence of large masses consistent with pneumoconiosis as far back as August 2008.⁹ *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 29-32; MC Claimant's Exhibit 5. Because pneumoconiosis is a progressive and irreversible disease, the administrative law judge permissibly found this CT scan supports Dr. DePonte's later identification of a

⁹ The administrative law judge explained Dr. Egner conducted a serial CT scan comparison and indicated the Miner's condition was "unchanged" between the August 14, 2008 CT scan and the January 29, 2016 CT scan. Decision and Order at 29-32; MC Claimant's Exhibit 5.

Category B opacity and Dr. Miller's identification of a Category A opacity on the April 13, 2016 x-ray. *Cox*, 602 F.3d at 284-85; *Scarbro*, 220 F.3d at 256; *Adkins*, 958 F.2d at 51-52; *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 32. He also rationally found this CT scan undermines the opinions of Drs. Adcock, Simone, and Ramakrishnan that the x-rays they read do not reveal large opacities related to pneumoconiosis. *Id.*

Employer argues the administrative law judge erred in relying on the CT scan evidence to resolve the conflict in the x-rays. Employer's Brief at 9-12. It asserts that, absent a medical opinion that the masses observed on CT scan would appear on x-ray measuring one centimeter, or an opinion linking the masses to the opacities seen on the x-rays, the administrative law judge cannot weigh the CT scan evidence in conjunction with the x-rays in the manner the administrative law judge did in this case. *Id.* In doing so, it asserts he substituted his opinion for that of medical experts. *Id.*

Contrary to Employer's argument, the Fourth Circuit requires the administrative law judge to perform equivalency determinations based on his evaluation of all the medical evidence of record. *Blankenship*, 177 F.3d at 243. Thus the absence of a specific statement of equivalency by a physician is not a bar to establishing complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 258 (while a physician who identified a 1.7 cm lesion on biopsy did not provide an equivalency determination, there was "no reason to believe that nodules of 1.7 centimeters would not produce x-ray opacities greater than one centimeter"); *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 364-65 (4th Cir. 2006) (diagnosis of a "massive" opacity "becomes a proxy for the tissue mass characteristic of complicated pneumoconiosis" and satisfies the "statutory ground for application of the presumption"). The administrative law judge's analysis in this case is consistent with the Fourth Circuit's requirement that a finding of complicated pneumoconiosis must be based on an analysis of all relevant medical evidence. *Cox*, 602 F.3d at 287. Moreover, the administrative law judge did not rely solely on CT scans that lack an equivalency determination under prong (c); rather, he found these scans support the clear diagnoses of large opacities of complicated pneumoconiosis on x-ray at prong (a).

Because it is supported by substantial evidence, we affirm the administrative law judge's conclusion that the positive x-ray readings of Drs. DePonte and Miller outweigh the contrary x-ray readings of Drs. Adcock, Simone, and Ramakrishnan, and Claimant established complicated pneumoconiosis through x-ray evidence. *Cox*, 602 F.3d at 284-85; *Scarbro*, 220 F.3d at 256; *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); 20 C.F.R. §718.304(a); Decision and Order at 32.

Medical Opinions – 20 C.F.R. §718.304(c)

The administrative law judge next weighed the medical opinion evidence, 20 C.F.R. §718.304(c), which includes Dr. Ajjarapu’s opinion that the Miner had complicated pneumoconiosis and the opinions of Drs. Rosenberg¹⁰ and Dahhan that he did not have the disease. MC Director’s Exhibits 29, 35; MC Employer’s Exhibit 7. He found Dr. Ajjarapu’s opinion well-reasoned and documented, and the opinions of Drs. Rosenberg and Dahhan unpersuasive. Decision and Order at 29-32. Employer argues the administrative law judge erred in weighing the opinions of Drs. Ajjarapu and Rosenberg.¹¹ Employer’s Brief at 13-15. We disagree.

In his initial report, Dr. Rosenberg opined the Miner “did not suffer from clinical coal workers’ pneumoconiosis or progressive massive fibrosis,” although he acknowledged the Miner’s treatment records include “a wide range of chest x-ray readings from negative to complicated disease.” MC Employer’s Exhibit 6. He concluded by stating “serial chest x-rays taken over time need to be reviewed,” but reiterated the Miner did not have “definite [clinical coal workers’ pneumoconiosis.]” *Id.* After reviewing additional evidence, Dr. Rosenberg issued a supplemental report and stated the CT scans more likely indicate “the presence of scattered solitary nodules seen in association with chronic granulomatous disease rather than centrilobar micronodules seen with coal workers pneumoconiosis.” MC Employer’s Exhibit 7. He further noted the “improvement in parenchymal changes over time is not consistent” with coal workers’ pneumoconiosis. *Id.* He again stated, however, that the Miner’s “chest x-rays and CT scans taken over time need to be reviewed.” *Id.*

The administrative law judge found Dr. Rosenberg needed to review additional chest x-rays and CT scans over time to fully exclude pneumoconiosis. Decision and Order at 30-31. Because Dr. Rosenberg did not review this necessary evidence, the administrative law judge permissibly found his “reference to the need to review the radiographic evidence taken over time undermine[s] the probative weight to be given [the opinion] on the issue of complicated pneumoconiosis as well as the presence of simple clinical pneumoconiosis.” *Id.*; see *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. Ajjarapu reviewed Dr. DePonte’s April 13, 2016 positive x-ray reading. MC Director’s Exhibit 29. She opined the Miner developed complicated pneumoconiosis because of his work in the mines. *Id.* She explained coal mine dust inhalation “eventually

¹⁰ The administrative law judge and Employer incorrectly refer to Dr. Rasmussen, who did not submit a medical opinion. The correct doctor is Dr. Rosenberg.

¹¹ Because it is unchallenged, we affirm the administrative law judge’s finding that Dr. Dahhan’s opinion is unpersuasive. *Skrack*, 6 BLR at 1-711; Decision and Order at 31.

causes macules and nodules to form in the lung tissue and these can be seen as opacities” on x-ray. *Id.* She further explained that over time “these opacities coalesce to become larger ones and progress to massive pulmonary fibrosis.” *Id.* She also cited the demonstrated “severe pulmonary impairment” on pulmonary function testing to support her opinion. *Id.* The administrative law judge permissibly found her opinion well-reasoned and documented because it is based on “the Miner’s coal mine employment history, medical conditions and treatment history, symptoms and medications, as well as his never smoking history.” Decision and Order at 31; *see Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Because it is supported by substantial evidence, we affirm the administrative law judge’s conclusion Claimant established complicated pneumoconiosis through Dr. Ajarapu’s medical opinion.¹² 20 C.F.R. §718.304(c); Decision and Order at 30-32. We also affirm his finding that all the relevant evidence considered together establishes the Miner had complicated pneumoconiosis. *Cox*, 602 F.3d at 283; 20 C.F.R. §718.304; Decision and Order at 32.

We further affirm, as unchallenged, the administrative law judge’s finding that the Miner’s complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 32-32. Consequently, we affirm the award of benefits in the miner’s claim.

Survivor’s Claim

The administrative law judge determined Claimant established all the necessary elements for automatic entitlement to survivor’s benefits. 30 U.S.C. §932(*l*); Decision and Order at 35. Because we have affirmed the award of benefits in the miner’s claim and Employer raises no specific challenge to the award of benefits in the survivor’s claim, we

¹² The administrative law judge also considered treatment records from Dr. Isber. Decision and Order at 31-32. He found these records “do not reflect treatment or diagnosis of complicated pneumoconiosis,” but nonetheless noted the doctor set forth the results of the CT scans. *Id.* He found the opinion credible in establishing complicated pneumoconiosis. *Id.* Because we affirm the administrative law judge’s finding that Claimant established complicated pneumoconiosis through the x-rays and Dr. Ajarapu’s medical opinion, we need not address Employer’s argument that the administrative law judge erred in crediting Dr. Isber’s opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Employer’s Brief at 14-17.

affirm it. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013)

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with the majority decision in result only. Claimant may invoke the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more 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). *See* 20 C.F.R. §718.304.

As the United States Court of Appeals for the Fourth Circuit has explained, “[p]rongs (a), (b), and (c) are stated in the disjunctive; therefore, a finding of statutory complicated pneumoconiosis may be based on evidence presented under a single prong. But the [administrative law judge] must in every case review the evidence under each prong . . . for which relevant evidence is presented to determine whether complicated pneumoconiosis is present.” *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th

Cir. 2010), quoting *E. Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-56 (4th Cir. 2000).

Prior to coming to his conclusion that Claimant established complicated pneumoconiosis, the administrative law judge weighed the items from the different statutory categories of evidence relevant to complicated pneumoconiosis in a manner consistent with the analyses in *Cox* and *Scarbro*. Thus his analysis is consistent with the mandate that “all relevant evidence shall be considered” as understood under those cases. *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56. Consequently, I concur that we should affirm the award of benefits.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge