

U.S. Department of Labor

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



BRB No. 20-0013 BLA

SAMUEL L. CUMMINGS, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	
)	DATE ISSUED: 11/24/2020
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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham, & Halbert, PLLC), Lexington, Kentucky, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Jerry R. DeMaio's Decision and Order Denying Benefits (2018-BLA-05696) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a

subsequent claim filed on January 10, 2017.¹

The administrative law judge found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,² 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge also found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Accordingly, he denied benefits.

On appeal, Claimant argues only that the administrative law judge erred in finding the evidence did not establish complicated pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, Claimant reiterates his previous contentions.³

The Benefits Review 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.⁴ 33 U.S.C. §921(b)(3), as

¹ Claimant filed a previous claim on March 20, 2000. Director's Exhibit 1. The district director denied the claim on June 26, 2000 because Claimant did not establish any element of entitlement. Director's Exhibit 40a. Claimant filed a second claim, but subsequently withdrew it. Director's Exhibit 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

² Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

³ We affirm, as unchallenged, the administrative law judge's finding that the evidence did not establish a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We, therefore, affirm the administrative law judge's finding that Claimant could not invoke the Section 411(c)(4) presumption.

⁴ The Benefits Review Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9-10.

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) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by 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, 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. In determining whether a claimant has invoked the irrebuttable presumption, the administrative law judge must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Section 718.304(a)

The administrative law judge considered interpretations of four x-rays taken on January 30, 2017, April 25, 2017, June 29, 2017, and August 13, 2018.⁵ As the administrative law judge noted, physicians dually qualified as B readers and Board-certified radiologists rendered all of the x-ray interpretations.⁶ Decision and Order at 6, 15.

1. The January 30, 2017 x-ray

Although Dr. Crum interpreted the January 30, 2017 x-ray as positive for complicated pneumoconiosis, Director’s Exhibits 13, 53, Drs. Tarver and Alexander

⁵ The administrative law judge also considered interpretations of earlier x-rays taken on January May 11, 2000 and November 10, 2003. Neither of these x-rays was interpreted as positive for complicated pneumoconiosis. The administrative law judge found these x-rays “too remote in time to be of significant probative value.” Decision and Order at 15.

⁶ Contrary to Claimant’s argument, the administrative law judge was not required to accord determinative weight to Dr. Crum’s x-ray interpretations because he has been a presenter for the Center for Disease Control and published research addressing complicated pneumoconiosis. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc); Claimant’s Brief at 32.

interpreted it as negative for the disease. Director's Exhibit 21; Claimant's Exhibit 4. The administrative law judge found this x-ray negative for complicated pneumoconiosis. Decision and Order at 15.

Claimant contends the administrative law judge failed to consider Dr. Crum's "rehabilitative report." Claimant's Brief at 13. Contrary to Claimant's contention, the administrative law judge considered both of Dr. Crum's reports. Decision and Order at 6, 15. Regardless, Dr. Crum's two reports are consistent in interpreting the January 30, 2017 x-ray as positive for complicated pneumoconiosis.⁷

Claimant also argues the administrative law judge erred in not addressing Dr. Alexander's comments accompanying his negative interpretation of the January 30, 2017 x-ray. Claimant's Brief at 13. Although Dr. Alexander commented that a CT scan might provide clarification, the administrative law judge accurately noted Dr. Alexander interpreted the January 30, 2017 x-ray as negative for complicated pneumoconiosis.⁸ Decision and Order at 6, 15; Claimant's Exhibit 4.

Claimant next notes Dr. Tarver specifically identified a "right mid lung calcified granuloma" on the January 30, 2017 x-ray, but failed to specifically identify the size or cause of the mass. Claimant's Brief at 14. Dr. Tarver, however, indicated the mass did not constitute a large opacity of complicated pneumoconiosis. Director's Exhibit 21. The administrative law judge therefore permissibly considered Dr. Tarver's x-ray interpretation negative for complicated pneumoconiosis. Decision and Order at 6, 15. We, therefore, affirm the administrative law judge's finding that the January 30, 2017 x-ray was negative for complicated pneumoconiosis.

2. The April 25, 2017 x-ray

Dr. Crum also interpreted the April 25, 2017 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 53. However, because Drs. Tarver and Miller interpreted the x-ray as negative for complicated pneumoconiosis, Claimant's Exhibit 5;

⁷ Dr. Crum initially interpreted the January 30, 2017 x-ray as revealing a "questionable" 1.1 centimeter large opacity. Director's Exhibit 13. In his second report, he again identifies a large opacity measuring approximately 1.1 centimeters. Director's Exhibit 53.

⁸ Claimant alleges Dr. Alexander indicated he was unable to make out the size of the opacity. Claimant's Brief at 14. Claimant's characterization is inaccurate. Dr. Alexander indicated he "did not identify a definite large opacity," not that he could not determine its size. Claimant's Exhibit 4.

Employer's Exhibit 2, the administrative law judge also found this x-ray negative for the disease. Decision and Order at 15.

Claimant asserts that Dr. Crum's positive interpretation should have been accorded greater weight than the contrary interpretations of Drs. Miller and Tarver. Claimant's Brief at 15-16. Claimant argues that Dr. Crum's interpretation "is more detailed and of higher quality." *Id.* at 16. Claimant's statements amount to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge accurately found the x-ray interpretations of Drs. Miller and Tarver negative for complicated pneumoconiosis.⁹ Decision and Order at 6, 15. We, therefore, affirm the administrative law judge's finding that the January 30, 2017 x-ray was negative for complicated pneumoconiosis.

3. The June 29, 2017 x-ray

Although Dr. Crum interpreted the June 29, 2017 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibit 6, Dr. Kendall interpreted it as negative. Director's Exhibit 23. Because equally qualified physicians interpreted the x-ray as both positive and negative for complicated pneumoconiosis, the administrative law judge found the interpretations of the x-ray "in equipoise." Decision and Order at 15.

Claimant asserts the administrative law judge "failed to address the inconsistencies and incomplete nature of Dr. Kendall's report." Claimant's Brief at 17. Contrary to Claimant's characterization, Dr. Kendall provided a complete x-ray report, indicating there was no evidence of pneumoconiosis. Director's Exhibit 23. Claimant has presented no evidence in support of his assertion that Dr. Kendall failed to classify all the abnormalities that he observed in accordance with the ILO requirements. Claimant's Brief at 17. We therefore affirm the administrative law judge's finding that the interpretations of the June 29, 2017 x-ray were in equipoise in regard to the presence of complicated pneumoconiosis.

4. The August 13, 2018 x-ray

Although Dr. Crum interpreted the August 13, 2018 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibit 7, Dr. Tarver interpreted the x-ray as

⁹ Claimant asserts that Dr. Miller's x-ray interpretation should not be taken as a "literal negative" for complicated pneumoconiosis but should be considered an uncertain determination as to the exact size of the mass. Claimant's Brief at 15. Dr. Miller, however, expressed no such uncertainty, finding a "coalescence of small opacities . . . that falls just shy of meeting the criteria for a large opacity of complicated pneumoconiosis." Claimant's Exhibit 5.

negative for the disease. Employer's Exhibit 5. Because equally qualified physicians interpreted the x-ray as both positive and negative for complicated pneumoconiosis, the administrative law judge found the interpretations of the x-ray "in equipoise." Decision and Order at 15.

Claimant contends the interpretations of Drs. Crum and Tarver "should be re-evaluated," with greater weight accorded Dr. Crum's more detailed and reasoned finding of complicated pneumoconiosis. Employer's Brief at 17-19. Claimant's statements again amount to a request to reweigh the evidence, which the Board cannot do. *Anderson*, 12 BLR at 1-113. The administrative law judge accurately noted Dr. Crum interpreted the August 13, 2018 x-ray as positive for complicated pneumoconiosis, while Dr. Tarver interpreted it as negative for the disease. We therefore affirm the administrative law judge's finding that the interpretations of the August 13, 2018 x-ray were in equipoise in regard to the presence of complicated pneumoconiosis.

The administrative law judge also considered Dr. Crum's deposition testimony, during which he explained the bases for his x-ray interpretations. The administrative law judge noted Dr. Crum acknowledged that his finding of a large A opacity was "borderline."¹⁰ Decision and Order at 16; Claimant's Exhibit 9 at 39. The administrative law judge also noted Dr. Crum diagnosed histoplasmosis.¹¹ Claimant's Exhibit 9 at 26. After considering the entirety of his testimony, the administrative law judge permissibly found it not "sufficient to outweigh the other [negative] x-ray readings." *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 16.

We also reject Claimant's contention that the administrative law judge erred in not addressing whether the x-ray evidence established simple pneumoconiosis. Claimant's Brief at 30-31. Neither the Act nor the regulations require an administrative law judge to assess whether the x-ray evidence establishes simple pneumoconiosis before addressing

¹⁰ Claimant argues that Dr. Crum's statement that his finding of a large A opacity was "borderline" does not undermine his ultimate finding that the x-ray evidence revealed complicated pneumoconiosis. Claimant's Brief at 27. Notably, the administrative law judge did not discredit Dr. Crum's interpretations on this basis. Rather, the administrative law judge found Dr. Crum's x-ray interpretations were called into question by negative interpretations rendered by equally qualified physicians.

¹¹ The administrative law judge also noted Claimant testified that a doctor told him in 1975 that he thought Claimant had histoplasmosis, but would be all right. Decision and Order at 4; Hearing Transcript at 21.

the existence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Moreover, Claimant cites no case law requiring such an assessment.

Claimant contends the administrative law judge erred in weighing the x-ray evidence by not considering Claimant's Exhibit 10.¹² Claimant's Brief at 24-26. We disagree. Claimant's Exhibit 10 consists of "a disc including photographs and a video taken at Dr. Crum's deposition." Decision and Order at 2. During the hearing, the administrative law judge informed Claimant's counsel that he would accord Claimant's Exhibit 10 only limited weight because there was a transcript of Dr. Crum's deposition testimony. Hearing Transcript at 5. He informed counsel he would only use it if "it [would] clarify a point or something." *Id.* Claimant has not explained how the photographs or video would clarify Dr. Crum's deposition testimony. The administrative law judge accepted that Dr. Crum interpreted Claimant's x-rays as positive for complicated pneumoconiosis. Consequently, we find no error in the administrative law judge not addressing the evidence contained in Claimant's Exhibit 10.¹³

We have affirmed the administrative law judge's finding that two of the x-rays were negative for complicated pneumoconiosis and the interpretations of the other two x-rays were "in equipoise." Because it is supported by substantial evidence, we therefore affirm the administrative law judge's finding the x-ray evidence did not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion).

¹² Employer also argues the administrative law judge erred in not addressing Claimant's Exhibit 11. Claimant's Exhibit 11 contains the 2011 Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses. Claimant asserts that Employer's physicians "seemingly ignored the Guidelines in their reports." Claimant's Brief at 26. However, because Claimant fails to cite any specific examples of their ignoring the Guidelines, we reject Claimant's contention.

¹³ The administrative law judge could not have used the photographs or video to measure the right middle lobe mass because the interpretation of medical evidence is for medical experts, not the administrative law judge. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Section 718.304(c)

The record also contains CT scans and medical opinions.¹⁴ The administrative law judge considered two CT scans taken on February 20, 2017 and March 22, 2017.

Dr. Sutkowski, a hospital radiologist, interpreted the February 20, 2017 CT scan as showing nonspecific nodular infiltrates consistent with microbacterial infection, a minimal ground glass opacity in the right upper lobe, a few subpleural nodules, benign calcified lymph nodes, and a few scattered granulomata. Claimant's Exhibit 2.

Dr. Tarver, a B reader and Board-certified radiologist, also interpreted the February 20, 2017 CT scan, finding it revealed calcified lymph nodes, likely due to histoplasmosis. Employer's Exhibit 1. He also found minimal atelectasis and scarring in the middle lobes, likely due to old granulomatous disease or post-bacterial infection. *Id.* Dr. Tarver specifically found no small nodules consistent with pneumoconiosis and no conglomerate masses. *Id.* Based on these two interpretations, the administrative law judge found the February 20, 2017 CT scan negative for complicated pneumoconiosis. Decision and Order at 16.

Claimant argues the administrative law judge erred in not considering Dr. Crum's review of Dr. Tarver's interpretation. Claimant's Brief at 20. Although Dr. Crum provided deposition testimony questioning Dr. Tarver's findings, Dr. Crum did not review the February 20, 2017 CT scan. Claimant's Exhibit 9 at 23-27. The administrative law judge reviewed Dr. Crum's deposition testimony, but permissibly found it did not "tip the scales in favor of his readings." *See Rowe*, 710 F.2d at 255; Decision and Order at 17. The administrative law judge therefore permissibly found the February 20, 2017 CT scan negative for complicated pneumoconiosis.¹⁵

The administrative law judge next considered interpretations of the March 22, 2017 CT scan. Although Dr. Crum interpreted it as positive for complicated pneumoconiosis, Dr. Tarver found it revealed no small nodules consistent with pneumoconiosis and no

¹⁴ The administrative law judge found the record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 14.

¹⁵ Even if the administrative law judge had credited Dr. Crum's questioning of Dr. Tarver's interpretation of the February 20, 2017 CT scan, there are no positive interpretations of this CT scan in the record. Therefore, this CT scan could not assist Claimant in establishing complicated pneumoconiosis.

conglomerate masses.¹⁶ Employer's Exhibit 1. Because equally qualified physicians provided conflicting interpretations, the administrative law judge found the interpretations of the CT scan to be "in equipoise". Decision and Order at 16.

Claimant argues the administrative law judge should have credited Dr. Crum's explanation for his findings and his criticism of Dr. Tarver's findings. Claimant's Brief at 21-23. Again, the administrative law judge considered Dr. Crum's testimony regarding the CT scan evidence, but permissibly found it insufficient to persuade him that Dr. Crum's interpretation was entitled to greater weight than Dr. Tarver's. *See Rowe*, 710 F.2d at 255; Decision and Order at 17. Claimant has not demonstrated the administrative law judge's credibility finding is unreasonable. Because it is supported by substantial evidence, we affirm the administrative law judge's finding the CT scan evidence did not establish complicated pneumoconiosis.

The administrative law judge also considered the medical opinions of Drs. Chavda, Majmudar, Tuteur, and Vuskovich. Although Drs. Chavda and Majmudar diagnosed complicated pneumoconiosis, the administrative law judge found their diagnoses were based on positive x-ray interpretations. Director's Exhibits 13, 17; Claimant's Exhibit 8. Because the administrative law judge found the x-ray evidence did not establish complicated pneumoconiosis, he permissibly questioned the documentation underlying their opinions. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423, 1-426 (1983); Decision and Order at 17.

Drs. Tuteur and Vuskovich opined that Claimant does not have complicated pneumoconiosis. Director's Exhibit 20; Employer's Exhibits 3, 4. The administrative law judge therefore found their opinions do not assist Claimant in establishing complicated pneumoconiosis.¹⁷ Because it is based on substantial evidence, we affirm the administrative law judge's finding that the medical opinions did not establish complicated pneumoconiosis. 20 C.F.R. §718.304(c).

¹⁶ Dr. Stautz also interpreted the March 22, 2017 CT scan, finding a normal angiography with some atelectasis within the lingula. Claimant's Exhibit 2. The administrative law judge noted Dr. Stautz did not address pneumoconiosis. Decision and Order at 16.

¹⁷ Other than the medical evidence already discussed, the administrative law judge found Claimant's treatment records do not contain evidence of complicated pneumoconiosis, and therefore do not assist Claimant in establishing complicated pneumoconiosis. Decision and Order at 18.

Because it is supported by substantial evidence, we therefore affirm the administrative law judge's finding that the evidence did not establish complicated pneumoconiosis. Consequently, we affirm the administrative law judge's finding that Claimant failed to invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304. Claimant makes no other assertion of error.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge