

BRB No. 12-0394 BLA

STEPHEN LEONARD MEADOWS)
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 Claimant-Respondent)
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 v.)
)
 FRAY MINING, INCORPORATED) DATE ISSUED: 04/25/2013
)
 and)
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY)
)
 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 of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Himmel (Two Rivers Law Group PC), Christiansburg, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/Carrier (employer) appeals the Decision and Order (2010-BLA-05408) of Administrative Law Judge Christine L. Kirby, awarding benefits on a claim filed on May 5, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with at least twenty-three years of underground coal mine employment, based on the stipulation of the parties. The administrative law judge found that the x-ray evidence and medical opinion

evidence established that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). Based on her consideration of all of the relevant evidence, the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge's finding that claimant suffers from complicated pneumoconiosis is neither rational, nor supported by substantial evidence.¹ Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if 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, 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.

¹ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Contrary to employer's assertion, the administrative law judge properly noted that the amendments were applicable, based on the filing date of this claim, although she did not rely on them in awarding benefits. Employer states that it reserves the right to challenge the applicability of the amendments on appeal, but its assertion regarding the legality of the PPACA is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); Employer's Brief in Support of Petition for Review at 15.

² Because claimant's last coal mine employment was in Virginia, the Board will apply the law 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); Director's Exhibit 3.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *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).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered eleven readings of three x-rays dated March 26, 2009, June 9, 2009, and January 26, 2011. Decision and Order at 6. The March 26, 2009 x-ray was read by Dr. Miller, dually qualified as a Board-certified radiologist and B reader, as positive for simple and complicated pneumoconiosis, Category B; read by Dr. Alexander, also dually qualified, as positive for simple and complicated pneumoconiosis, Category A; and read by Drs. Scott and Wheeler, also dually qualified, as negative for simple and complicated pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 2; Employer's Exhibits 1, 7.

In the "comments" section of the ILO classification form, Dr. Wheeler noted a three centimeter mass in the lower posterior right upper lung, "compatible with conglomerate granulomatous disease," and "minimal ill[-]defined infiltrate or fibrosis" in the subapical upper lobes and pleura, "compatible with granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Employer's Exhibit 1. Dr. Wheeler indicated that a CT scan and clinical correlation were needed for an exact diagnosis but stated:

Disease in upper lungs and apices is not [coal workers' pneumoconiosis] with large opacity because[:] 1) pattern is asymmetrical; 2) in high position in lungs; 3) involves pleura which has no alveoli; 4) high profusion of nodules is needed to form large opacities; and 5) he is young. NIOSH and MSHA became active controlling dust levels in mines in early 1970s with a mandate to prevent [coal workers' pneumoconiosis].

Id.

The June 9, 2009 x-ray was read by Dr. Miller as positive for simple and complicated pneumoconiosis, Category B; read by Dr. Alexander as positive for simple and complicated pneumoconiosis, Category A; read by Dr. Forehand, a B reader, as positive for simple and complicated pneumoconiosis; and read by Drs. Scott and Wheeler as negative for simple and complicated pneumoconiosis. Director's Exhibits 9, 10; Claimant's Exhibit 3; Employer's Exhibits 2, 8. In the "comments" section of the ILO

form, Dr. Wheeler identified a “6x3 [centimeter] mass” in the right upper lung and a “lobulated 5 [centimeter] mass in lower left apex or two 2.5 [centimeter] masses compatible with granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis] or cancer.” Employer’s Exhibit 2. Dr. Wheeler also stated:

Masses in upper lungs are not large opacities of [coal workers’ pneumoconiosis] because any background nodules are peripheral and low profusion. Large opacities merge from small nodules of [coal workers’ pneumoconiosis] which typically are symmetrical in central, mid and upper lung. [Coal workers’ pneumoconiosis] does not involve pleura and involves periphery lungs and apices only when spilling over from extensive central lung disease. Also he is young. NIOSH and MSHA became active controlling dust levels in mines in early 1970s mandated [sic] to prevent [coal workers’ pneumoconiosis]. His exact diagnosis should have been made with biopsy or microbiology when lung symptoms first developed.

Id.

Lastly, the January 26, 2011 x-ray was interpreted by Dr. Alexander as positive for complicated pneumoconiosis, Category B, and by Dr. Wheeler as negative for simple and complicated pneumoconiosis. Claimant’s Exhibit 1; Employer’s Exhibit 6.

In weighing the conflicting x-ray interpretations for complicated pneumoconiosis, the administrative law judge gave less weight to Dr. Wheeler’s negative readings of the March 26, 2009 and June 9, 2009 x-rays because she considered his comments on the ILO forms, regarding claimant’s age and the dust control levels in the mines, to be “problematic.” Decision and Order at 6. The administrative law judge found that the March 26, 2009 and June 9, 2009 x-rays were positive for complicated pneumoconiosis, based on a preponderance of the positive readings by the dually qualified radiologists and the B reader, and further determined that the readings of the January 26, 2011 x-ray were in equipoise. *Id.* The administrative law judge concluded that claimant established the existence of complicated pneumoconiosis based on a preponderance of the x-ray evidence at 20 C.F.R. §718.304(a). *Id.*

Relevant to 20 C.F.R. §718.304(c), the administrative law judge considered the conflicting medical opinions of Drs. Forehand and Fino.³ Dr. Forehand examined

³ There is no biopsy evidence to be weighed at 20 C.F.R. §718.304(b). Relevant to 20 C.F.R. §718.304(c), the administrative law judge noted that the treatment record “is not helpful in reaching a determination as to the presence” of complicated pneumoconiosis. Decision and Order at 8. The administrative law judge further noted

claimant on June 9, 2009, on behalf of the Department of Labor, and diagnosed complicated pneumoconiosis with progressive massive fibrosis, based on claimant's chest x-ray and history of coal mine employment. Director's Exhibit 9. Dr. Fino prepared a report on July 18, 2011, based on his review of certain medical records, and opined that claimant had neither simple nor complicated pneumoconiosis. Employer's Exhibit 4. The administrative law judge found that Dr. Forehand's opinion was reasoned and documented but gave "diminished weight" to Dr. Fino's opinion, insofar as Dr. Fino stated in his July 18, 2011 report that "a majority of [claimant's] chest x-ray readings were negative for [simple and complicated] pneumoconiosis," contrary to the administrative law judge's credibility finding with respect to Dr. Wheeler, and her determination that the x-ray evidence, as a whole, established complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 8; Employer's Exhibit 4. Based on Dr. Forehand's opinion, the administrative law judge found that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Id.* at 9. Weighing all of the relevant evidence together, the administrative law judge concluded that claimant satisfied his burden to establish that he has complicated pneumoconiosis. *Id.* at 10.

Employer asserts on appeal that the administrative law judge erred in giving less weight to Dr. Wheeler's negative readings of the March 26, 2009 and June 9, 2009 x-rays, "because of added language which does not affect or reduce the rationale for his overall opinion" that claimant does not suffer from complicated pneumoconiosis.⁴ Employer's Brief in Support of Petition for Review at 10. We disagree.

that while the record contains CT scan evidence, because neither claimant nor employer proffered evidence addressing whether CT scans were medically acceptable for diagnosing pneumoconiosis, that evidence would not be considered. *See* 20 C.F.R. §718.107; Decision and Order at 8.

⁴ Employer states that Dr. Wheeler made "accurate observations that the claimant is young (the claimant is 55) and that NIOSH and MSHA have had mandates in place to control dust levels in mines since the early 1970s. He did not state that these factors made it impossible for the claimant (or any miner) to contract [coal workers' pneumoconiosis]. He merely listed these observations, in addition to four other separate and medically objective criteria" to support his opinion that claimant does not have complicated pneumoconiosis. Employer's Brief in Support of Petition for Review at 9-10 n.3.

The administrative law judge acted with her discretion in finding that some of Dr. Wheeler's explanations for excluding complicated pneumoconiosis on the ILO forms were "problematic." Decision and Order at 19; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). We affirm the administrative law judge's rational decision to assign little weight to Dr. Wheeler's opinion as she found that he "makes assumptions that are wholly unsupported by any evidence of record" that claimant does not have complicated pneumoconiosis, based on claimant's age and the fact that he "worked in the mines after NIOSH and MSHA became active in controlling dust levels." Decision and Order at 7; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Furthermore, contrary to employer's assertion, the fact that Dr. Wheeler gave additional explanations for his opinion does not undermine the administrative law judge's valid credibility determination. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

In addition, we reject employer's assertion that the administrative law judge's "acknowledgment that the readings of the most recent x-ray in evidence are in equipoise should carry more probative weight in determining whether the x-ray evidence as a whole preponderates to establish complicated [pneumoconiosis]." ⁵ Employer's Brief in Support of Petition for Review at 10. Contrary to employer's suggestion, the administrative law judge was not required to base his findings in this case solely on a review of the most recent x-ray. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a). *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-65 (4th Cir. 1992); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997).

With respect to 20 C.F.R. §718.304(c), employer argues that the administrative law judge erred in rejecting Dr. Fino's assessment of the x-ray evidence and his overall opinion that claimant does not have complicated pneumoconiosis. The administrative law judge, however, observed correctly that, in rendering his opinion, Dr. Fino relied on Dr. Wheeler's negative x-ray readings for complicated pneumoconiosis, which were not credited by the administrative law judge. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 8. Contrary to employer's assertion, the administrative law judge permissibly rejected Dr. Fino's

⁵ Employer notes that the January 26, 2011 x-ray is at least nineteen months more recent than the March 26 and June 9, 2009 x-rays. Employer's Brief in Support of Petition for Review at 10.

opinion to the extent that it was at odds with her specific findings of fact. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Because the administrative law judge permissibly concluded that Dr. Forehand's diagnosis of complicated pneumoconiosis was reasoned and documented, and consistent with her findings regarding the credibility of the x-ray evidence, we affirm the administrative law judge's findings at 20 C.F.R. §718.304(c), and her overall determination that claimant satisfied his burden to establish the existence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Decision and Order at 10. We also affirm, as unchallenged on appeal, the administrative law judge's determination that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 10. Thus, we affirm the administrative law judge's findings that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and that he is entitled to benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge