BRB No. 14-0174 BLA

LARRY WAYLAND ROARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FAIRBANKS COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 08/25/2014
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5630) of Administrative Law Judge Peter B. Silvain, Jr., awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on May 4, 2010.

The administrative law judge credited claimant with 32.97 years of coal mine employment,[1] and found that the evidence established the existence of complicated pneumoconiosis,[2] thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge permissibly found that the digital x-ray evidence supported a finding of complicated pneumoconiosis.

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. 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).

[1] Claimant's most recent coal mine employment was in Virginia. Director's Exhibit 7. Accordingly, 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 (1989) (en banc).

[2] The administrative law judge also found that the x-ray and medical opinion evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Decision and Order at 16, 19.

Complicated Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which, (A) when diagnosed by x-ray, yields an opacity 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 reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-214, 2-117-18 (4th Cir. 1993); *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). X-ray evidence that displays opacities greater than one centimeter in diameter loses its probative force only when other evidence affirmatively shows that the opacities are not there or are not what they appear to be. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

Section 718.304(a)

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eleven interpretations of five x-rays taken on April 30, 2010, July 8, 2010, April 26, 2011, September 23, and October 21, 2011. While Dr. DePonte, a B reader and Board-certified radiologist, interpreted the April 30, 2010 x-ray as positive for complicated pneumoconiosis, Director's Exhibit 17, Dr. Wiot, an equally qualified physician, interpreted the x-ray as negative for the disease. Director's Exhibit 18. Because the April 30, 2010 x-ray was interpreted as both positive and negative for complicated pneumoconiosis by equally qualified physicians, the administrative law judge found that this x-ray was "inconclusive for the presence or absence of complicated pneumoconiosis." Decision and Order at 18.

Drs. DePonte and Alexander, each dually qualified as a B reader and Board-certified radiologist, interpreted the July 8, 2010 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 14; Claimant's Exhibit 1. Dr. Wiot, an equally qualified physician, interpreted the same x-ray as negative for the disease. Director's

Exhibit 18. Because a majority of the best-qualified physicians interpreted the July 8, 2010 x-ray as positive for complicated pneumoconiosis, the administrative law judge found that the July 8, 2010 x-ray supported a finding of complicated pneumoconiosis. Decision and Order at 18.

Although Dr. Alexander, a B reader and Board-certified radiologist, interpreted the April 26, 2010 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibit 6, Dr. Rosenberg, a B reader, interpreted the x-ray as negative for the disease. Employer's Exhibit 1. The administrative law judge credited Dr. Alexander's positive interpretation of the April 26, 2010 x-ray, over Dr. Rosenberg's negative interpretation, based upon Dr. Alexander's superior radiological qualifications. Decision and Order at 18-19.

Finally, Dr. Deponte, a B reader and Board-certified radiologist, interpreted the September 23, 2011 and October 21, 2011 x-rays as positive for complicated pneumoconiosis, Claimant's Exhibits 4, 7, and Dr. Scott, an equally qualified physician, interpreted the same two x-rays as negative for the disease. Employer's Exhibits 3, 4. The administrative law judge accorded less weight to Dr. Scott's negative readings for complicated pneumoconiosis, because he found that the doctor's opinion, that claimant may have been suffering from a form of tuberculosis, was undermined by a negative tuberculosis test taken by claimant on April 13, 2011. Decision and Order at 19. The administrative law judge, therefore, found that the September 23, 2011 and October 21, 2011 x-rays supported a finding of complicated pneumoconiosis. Decision and Order at 19. Having found that four of the five x-rays are positive for complicated pneumoconiosis, the administrative law judge found that the overall weight of the x-ray evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.*

Employer argues that the administrative law judge failed to subject Dr. Alexander's positive x-ray interpretations to the same level of scrutiny that he applied to Dr. Scott's negative x-ray interpretations. While employer does not challenge the administrative law judge's finding that Dr. Scott's x-ray interpretations were undermined by claimant's negative test for tuberculosis in 2011, employer argues that the administrative law judge failed to take into account Dr. Alexander's "alternative diagnosis" of lung cancer when considering his positive interpretation of claimant's July 8, 2010 x-ray. Employer's Brief at 12. We disagree. In the "Comments" section of the x-ray report, Dr. Alexander explained that the large opacity in the right upper zone was consistent with Category A complicated pneumoconiosis, but noted that "lung cancer needs to be excluded." Claimant's Exhibit 1. Noting that there was "nothing in the treatment records to show that . . . [c]laimant ha[d] ever been diagnosed with lung cancer," and that Dr. Alexander's interpretation of the x-ray as showing a Category A opacity with a profusion of "2/1" had been corroborated by the equally qualified Dr.

DePonte, the administrative law judge permissibly credited Dr. Alexander's positive x-ray reading for complicated pneumoconiosis.[3] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010); Decision and Order at 18.

Employer also contends that the administrative law judge erred in his consideration of three x-ray interpretations contained in claimant's treatment records. Dr. Buck interpreted an April 5, 2007 x-ray as showing emphysema and mild diffuse interstitial fibrosis. Director's Exhibit 13. Dr. Pampati interpreted a July 21, 2009 x-ray as reflecting chronic obstructive pulmonary disease (COPD) and chronic changes in the lungs. *Id.* Finally, Dr. Patel interpreted an April 13, 2011 x-ray as reflecting COPD and fibrotic changes in the upper lobes. Claimant's Exhibit 3.

The significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in his role as fact-finder. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). In this case, the administrative law judge found that, because the x-ray interpretations in question showed abnormalities such as emphysema and COPD, they should not be considered to be negative for pneumoconiosis. Decision and Order at 17.

Employer argues that the administrative law judge "failed to explain why he chose to find that the x-ray readings at issue should not be treated as negative for pneumoconiosis." Employer's Brief at 8. We need not resolve this issue. Drs. Buck and Pampati interpreted x-rays taken on April 5, 2007 and July 21 2009. In finding that the x-ray evidence established the existence of complicated pneumoconiosis, the administrative law judge permissibly credited the most recent x-ray evidence (interpretations of x-rays taken on July 8, 2010, April 26, 2011, September 23, and October 21, 2011). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 19. Consequently, even if the 2007 and 2009 x-ray interpretations of Drs. Buck and Pampati are considered to be negative for complicated pneumoconiosis, employer fails to explain how those interpretations would undermine the administrative law judge's finding pursuant to 20 C.F.R. §718.304(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[3] Dr. Alexander subsequently interpreted an April 26, 2011 x-ray as positive for complicated pneumoconiosis, without any notation regarding the need to exclude lung cancer as a diagnosis. Claimant's Exhibit 6. Although employer notes that Dr. Alexander recommended "further evaluation" after diagnosing complicated pneumoconiosis on this x-ray, the doctor indicated that the additional testing was for the purpose of evaluating the "appearance of the left hilum." *Id.*

The administrative law judge also permissibly accorded the greatest weight to the x-ray interpretations provided by physicians who are dually qualified as B readers and Board-certified radiologists. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Because Dr. Patel's radiological qualifications are not found in the record, employer fails to explain how the doctor's interpretation of an April 13, 2011 x-ray, even if considered negative for complicated pneumoconiosis, would undermine the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

20 C.F.R. §718.304(c)

Employer contends that the administrative law judge erred in finding that the digital x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[4] The administrative law judge considered four interpretations of two digital x-rays, taken on April 5, 2007 and October 19, 2011. Dr. DePonte, a B reader and Board-certified radiologist, and Dr. Rosenberg, a B reader, interpreted the April 5, 2007 digital x-ray as negative for complicated pneumoconiosis. Claimant's Exhibit 9; Employer's Exhibit 5. Consequently, the administrative law judge found that this x-ray was negative for complicated pneumoconiosis. Decision and Order at 20.

Although Dr. DePonte, a B reader and Board-certified radiologist, interpreted the October 19, 2011 digital x-ray as positive for complicated pneumoconiosis, Claimant's Exhibit 10, Dr. Fino, a B reader, interpreted the x-ray as negative for the disease. Employer's Exhibit 2. The administrative law judge credited Dr. DePonte's positive interpretation of the October 19, 2011 digital x-ray, over Dr. Fino's negative interpretation, based upon Dr. DePonte's superior radiological qualifications. Decision and Order at 20. Because the negative April 5, 2007 x-ray was more than four years older than the October 19, 2011, positive x-ray, the administrative law judge found that the digital x-ray evidence established the existence of complicated pneumoconiosis. *Id.*

Employer argues that the administrative law judge erred in crediting Dr. DePonte's positive interpretation of the October 19, 2011 digital x-ray to support a finding of complicated pneumoconiosis, because the doctor "failed to state that the image would reveal an opacity greater than [one centimeter] on an analog chest x-ray, and failed to describe anything showing up with the image as a massive lesion." Employer's Brief at 17. The Director disagrees, arguing that Dr. DePonte's reading of a Category A large

[4] Because there is no biopsy evidence in the record, there was no evidence to consider pursuant to 20 C.F.R. §718.304(b).

opacity on the October 19, 2011 digital x-ray is sufficient to support a finding of complicated pneumoconiosis:

> [Dr. DePonte's] categorization is, in itself, a determination by Dr. DePonte that a Category A opacity (which must be greater than one centimeter) was present and thus . . . her reading of the digital chest x-ray 'diagnosed . . . a condition which could reasonably be expected to yield the results described in' [S]ection 718.304(a). Dr. DePonte is dually qualified as a Board-certified radiologist and a NIOSH-certified B-reader, and thus well qualified to make this diagnosis and de facto equivalency determination.

Director's Brief at 2-3.

We agree with the Director that Dr. DePonte's reading of a Category A large opacity on the October 19, 2011 digital x-ray constitutes substantial evidence of complicated pneumoconiosis. At the time that Dr. DePonte interpreted the October 19, 2011 digital x-ray as revealing a Category A large opacity, the doctor had already identified such an opacity on claimant's July 8, 2010 and September 23, 2011 analog x-rays, interpretations credited by the administrative law judge. Dr. DePonte also interpreted an analog x-ray taken two days after the October 19, 2011 digital x-ray as revealing a Category A large opacity, an interpretation that was also credited by the administrative law judge. Under these facts, we hold that the administrative law judge properly credited Dr. DePonte's interpretation of the October 19, 2011 x-ray as positive for complicated pneumoconiosis.[5] We, therefore, affirm the administrative law judge finding that the digital x-ray evidence established the existence of complicated pneumoconiosis.

Employer also challenges the administrative law judge's finding that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Employer specifically argues that the administrative law judge erred in relying upon the opinions of Drs. Al-Khasawneh, Baker, and Splan to support a finding of complicated pneumoconiosis when their respective opinions were based solely upon positive x-ray interpretations. Employer's Brief at 15. We need not resolve this issue since, even if the medical reports of these physicians were excluded, it would not

[5] Even if we were to hold that an equivalency determination was required in this case, we would not remand this case to the administrative law judge for further consideration of this issue, as employer has not explained how the digital x-ray evidence undercuts the weight of the analog x-ray evidence establishing the existence of complicated pneumoconiosis.

undermine the positive x-ray evidence credited by the administrative law judge.[6] *Larioni*, 6 BLR at 1-1278.

Finally, because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer did not rebut the presumption 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, 1-711 (1983).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[6] Drs. Rosenberg and Fino opined that claimant does not suffer from complicated pneumoconiosis. Employer's Exhibits 1, 2. The administrative law judge, however, found that the x-rays that Drs. Rosenberg and Fino relied upon to exclude the existence of complicated pneumoconiosis were interpreted as positive for the disease by better qualified physicians, thus calling into question the reliability of their medical opinions. Decision and Order at 22-23. Because employer does not challenge the administrative law judge's basis for according less weight to the opinions of Drs. Rosenberg and Fino, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).