

BRB No. 06-0632 BLA

EDDIE JUSTICE)
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 Claimant-Respondent)
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 v.) DATE ISSUED: 02/22/2007
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 FRAY MINING, INCORPORATED)
)
 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—Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Kirby (Sands Anderson Marks & Miller), Radford, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order—Awarding Benefits (04-BLA-6169) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed his claim for benefits on March 14, 2003. Director’s Exhibit 2. The administrative law judge credited claimant with 26.25 years of coal mine employment, and found that claimant has simple

pneumoconiosis, pursuant to the parties' stipulations. Decision and Order at 8; Director's Exhibits 34, 36; Transcript at 6. The administrative law judge also found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.304. The administrative law judge further found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b). However, because claimant established complicated pneumoconiosis pursuant to Section 718.304, the administrative law judge determined that claimant is entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis. Consequently, the administrative law judge awarded benefits effective April 2003, the month in which complicated pneumoconiosis was first diagnosed.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray evidence regarding the existence of complicated pneumoconiosis pursuant to Section 718.304(a). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, 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 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 claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis, including evidence of simple pneumoconiosis and of no pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-

117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered ten readings of four x-rays. The earliest x-ray, dated April 14, 2003, was read as positive for simple and complicated pneumoconiosis by Dr. Forehand, a B reader, Director's Exhibit 13, and reread as positive for simple, but negative for complicated pneumoconiosis by Dr. Scott, a Board-certified radiologist and B reader.¹ Employer's Exhibit 5. The August 30, 2004 x-ray was read by Drs. Pathak and Alexander, both Board-certified radiologists and B readers, as positive for both simple and complicated pneumoconiosis, Claimant's Exhibits 1, 2, but reread by Drs. Scatarige and Scott, also Board-certified radiologists and B readers, as negative for both simple and complicated pneumoconiosis. Employer's Exhibits 3, 4. The September 27, 2004 x-ray was read by Dr. Scott as positive for simple, but negative for complicated pneumoconiosis, Employer's Exhibit 2, and by Dr. Miller, also a Board-certified radiologist and B reader, as positive for both simple and complicated pneumoconiosis. Claimant's Exhibit 6. The January 17, 2005 x-ray was read as positive for simple, but negative for complicated pneumoconiosis by Dr. Scott, Employer's Exhibit 1, and positive for both simple and complicated pneumoconiosis by Dr. Miller. Claimant's Exhibit 7.

The administrative law judge initially stated that the numerical weight of the x-ray evidence was negative for complicated pneumoconiosis, because five Board-certified radiologists and B readers interpreted the x-rays as negative for complicated pneumoconiosis, while four Board-certified radiologists and B readers interpreted the x-rays as positive for complicated pneumoconiosis. Decision and Order at 5. Analyzing the x-ray evidence further, however, the administrative law judge found that claimant established complicated pneumoconiosis by a preponderance of the x-ray evidence. *Id.* In so finding, the administrative law judge discounted all of Dr. Scott's negative-for-complicated-pneumoconiosis readings, because Dr. Scott read the August 30, 2004 x-ray as negative for simple pneumoconiosis, a reading the administrative law judge found "inconsistent with the progressive, latent, and irreversible nature of pneumoconiosis." Decision and Order at 5, 10. Additionally, the administrative law judge accorded less weight to Dr. Scatarige's completely negative reading of the August 30, 2004 x-ray, as "contrary to the overwhelming preponderance of the x-ray evidence." Decision and

¹ The term "B reader" refers to a physician who has demonstrated designated levels of proficiency in classifying x-rays according to the ILO-UC standards by successful completion of an examination established by the National Institute of Safety and Health. See 42 C.F.R. §37.51. A "Board-certified radiologist" is a radiologist who is certified by the American Board of Radiology. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 213 n. 5 (1985).

Order at 5. Based on this weighing of the x-ray evidence, the administrative law judge found that claimant established the existence of complicated pneumoconiosis.

Employer argues that the administrative law judge erred in discounting all of Dr. Scott's readings that were negative for complicated pneumoconiosis because Dr. Scott also read one of claimant's four x-rays as negative for simple pneumoconiosis. Employer's Brief at 8. We agree. An administrative law judge must give valid reasons for discrediting a doctor's opinion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Here, the administrative law judge did not give a valid reason for discounting all of Dr. Scott's x-ray readings that were negative for complicated pneumoconiosis.

The administrative law judge stated that Dr. Scott's opinion that claimant's August 30, 2004 x-ray was completely negative for pneumoconiosis was inconsistent with the irreversible nature of pneumoconiosis, because Dr. Scott's negative reading occurred between the April 14, 2003 x-ray, which Dr. Scott read as positive for simple pneumoconiosis, and the September 27, 2004 and January 17, 2005 x-rays, which Dr. Scott also read as positive for simple pneumoconiosis. Granted, where, as here, it is undisputed that claimant has simple pneumoconiosis, an intervening x-ray reading that is negative for simple pneumoconiosis is inconsistent with the expected pattern of the disease simple pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65 (4th Cir. 1992). However, it does not follow that Dr. Scott's x-ray readings that were negative for complicated pneumoconiosis were necessarily unreliable. Absent an adequate explanation by the administrative law judge for discounting relevant x-ray evidence as to the existence of complicated pneumoconiosis, we cannot say that substantial evidence supports his finding. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.304(a) and remand this case for him to reconsider the x-ray evidence.

Employer argues further that the administrative law judge erred in characterizing Dr. Scatarige's negative reading of the August 30, 2004 x-ray as contrary to the preponderance of the x-ray evidence, when Dr. Scatarige's negative reading is "evidence that no complicated pneumoconiosis exists." Employer's Brief at 8. Since it is undisputed that claimant has simple pneumoconiosis, we discern no error by the administrative law judge in characterizing Dr. Scatarige's completely negative reading of the August 30, 2004 x-ray as inconsistent with the prevailing diagnoses of simple pneumoconiosis by x-ray in this record. But on remand, in determining whether the existence of complicated pneumoconiosis is established, the administrative law judge

should consider and weigh all relevant evidence, including Dr. Scatarige's negative x-ray reading. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

Contrary to employer's additional contention, the administrative law judge on remand need not defer to the numerical superiority of the negative x-ray interpretations by dually qualified readers. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-138 (2006)(*en banc*)(Boggs, J., concurring). If the administrative law judge on remand finds the existence of complicated pneumoconiosis established by the x-ray evidence pursuant to Section 718.304(a), he must weigh the x-ray evidence together with any other relevant evidence pursuant to Section 718.304(b),(c) to determine whether the existence of complicated pneumoconiosis is established. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge