BRB No. 11-0350 BLA

JAMES L. THORNSBERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 02/28/2012
Employer-Petitioner	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5188) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim filed on March 9, 2009, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] Adjudicating this claim pursuant to 20 C.F.R.

[1] Claimant filed his first claim for benefits on April 7, 1999. Director's Exhibit 1. Administrative Law Judge Pamela Lakes denied benefits in a Decision and Order issued on January 30, 2001, based on her determination that claimant did not establish the

Part 718, the administrative law judge credited claimant with thirty years of underground coal mine employment. Considering the newly submitted evidence, the administrative law judge found that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and, therefore, a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge also determined that claimant established the existence of pneumoconiosis under Section 718.202(a), after considering all of the evidence of record. The administrative law judge then considered whether claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. The administrative law judge found that claimant established the existence of complicated pneumoconiosis and was entitled to the Section 718.304 presumption. Accordingly, the administrative law judge awarded benefits.

The administrative law judge also determined, in the alternative, that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as claimant had more than fifteen years of underground coal mine employment, his claim was filed after January 1, 2005 and was pending on March 23, 2010, and claimant established that he has a totally disabling respiratory impairment.[2] The administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304 and that employer did not rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to employer's appeal.[3]

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existence of pneumoconiosis. *Id*. Claimant filed a second application for benefits on March 18, 2002, but later withdrew the claim. *Id*.

[2] 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 adopted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of underground coal mine employment and a totally disabling respiratory impairment are established.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of thirty years of qualifying coal mine employment. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.304, the administrative law judge considered whether claimant established the existence of complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis. Section 411(c)(3) of the Act, as implemented by Section 718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis, if claimant 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).[5] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 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. *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 (1991) (en banc); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C), would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

[5] The record in this case does not include any biopsy evidence relevant to 20 C.F.R. §718.304(b).

Pursuant to Section 718.304(a), the administrative law judge specifically found that, because the x-ray readings submitted in connection with the instant claim are in equipoise, they did not support a finding of complicated pneumoconiosis.[6] Decision and Order at 29. However, the administrative law judge further determined that the x-ray readings did not preclude a finding of complicated pneumoconiosis under Section 718.304(c). *Id*. The administrative law judge stated, "[n]otably, the notations on the ILO readings submitted in connection with [claimant's] most recent claim overwhelmingly confirm the existence of a large mass in his right lung." *Id*. In addition, the administrative law judge found that, although Drs. Scott, Wiot and Shipley did not identify any large opacities consistent with pneumoconiosis on the ILO form, they noted abnormalities consistent with a large mass in the upper lobe of claimant's right lung. Decision and Order at 29; Director's Exhibits 26-28; Employer's Exhibit 2.

The administrative law judge then determined, pursuant to Section 718.304(c), that "the CT scan evidence submitted in connection with the instant claim unanimously confirms the existence of a large mass in [claimant's] upper right lung." Decision and Order at 27. In support of this determination, the administrative law judge noted that all four of the physicians who read the CT scans – Drs. McReynolds, Mullens, Cobb and Wheeler – detected a mass in the upper lobe of claimant's right lung.[7] *Id.*; Director's

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[6] The administrative law judge determined that the x-ray evidence was in equipoise under 20 C.F.R. §718.202(a)(1), as equally qualified physicians disagreed as to whether the films dated March 19, 2009, April 17, 2009 and August 7, 2009 were positive for either simple or complicated pneumoconiosis. Decision and Order at 21. The administrative law judge also addressed the narrative x-ray interpretations contained in claimant's treatment records and stated that, although they did not "include any findings of pneumoconiosis, they did not preclude such a finding" and that "these narrative x-ray readings establish neither the presence nor the absence of pneumoconiosis." *Id*.

[7] Dr. McReynolds read the March 17, 2009 scan as containing opacities consistent with silicosis/coal workers' pneumoconiosis with progressive massive fibrosis, nodular pleural disease bilaterally, and granulomatous disease. Director's Exhibit 17. Dr. Wheeler, a dually-qualified radiologist, concluded that this CT scan was more consistent with granulomatous disease than coal workers' pneumoconiosis because the pattern was asymmetrical and peripheral, and involved the upper and lower lobes, with many nodules involving the pleura. Employer's Exhibit 1. Dr. Mullens interpreted the August 4, 2009 CT scan as consistent with coal workers' pneumoconiosis/silicosis with progressive massive fibrosis and no significant change since the March 17, 2009 CT scan. Claimant's Exhibit 3. Dr. Cobb read the February 9, 2010 CT scan as showing coal workers' pneumoconiosis/silicosis with progressive massive fibrosis and no significant change since the previous CT scan. *Id*.

Exhibit 17; Claimant's Exhibit 3; Employer's Exhibit 1. The administrative law judge further indicated that Dr. Wheeler's conclusion, that the mass measured 5x3 centimeters, established that it would appear as greater than one centimeter in diameter on a chest x-ray. Decision and Order at 27. The administrative law judge stated that the CT scan readings were consistent with the narrative x-ray evidence and the ILO x-ray readings in which Drs. Alexander, Navani, DePonte and Forehand classified the mass as a category A opacity of pneumoconiosis. *Id.* at 27-28; Director's Exhibits 11, 14; Claimant's Exhibits 1, 2, 5, 6. However, the administrative law judge discredited Dr. Wheeler's opinion, as Dr. Wheeler's attribution of the mass to granulomatous disease, rather than pneumoconiosis, was equivocal and inconsistent with the clinical testing that was negative for tuberculosis and histoplasmosis. Decision and Order at 28-29.

Based upon these findings, the administrative law judge concluded that the overwhelming preponderance of the evidence, including the x-ray, CT scan, and medical opinion evidence, established the existence of complicated pneumoconiosis, i.e., a mass in the upper lobe of claimant's right lung that would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. Decision and Order at 31. Accordingly, the administrative law judge determined that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304. *Id.* at 32.

Employer contends that the administrative law judge's decision to discredit the negative x-ray readings by Drs. Wiot, Shipley and Scott as speculative was "illogical" in light of her determination that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Employer's Brief at 9. Employer further maintains that the administrative law judge improperly shifted the burden of proof to employer to establish that the opacities seen on x-ray were due to something other than pneumoconiosis. We reject employer's arguments.

The administrative law judge acted within her discretion in finding that, although the x-ray readings, standing alone, were in equipoise and, therefore, insufficient to establish the existence of complicated pneumoconiosis under Section 718.304(a), they did not preclude a finding of complicated pneumoconiosis at Section 718.304(c). *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33; Decision and Order at 29. The administrative law judge also reasonably concluded that the x-ray evidence confirmed the presence of a large mass in claimant's right lung and that "the dispute [in this case] centers on the etiology of this mass." Decision and Order at 27; *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. The administrative law judge indicated correctly that Drs. Wiot, Shipley and Scott described the opacities as being of "uncertain etiology" that "could," or "may," "possibly" represent pneumonia or old granulomatous infections like tuberculosis or fungal disease. Decision and Order at 24 n.20, 28, 29 n.26, 30 n.27; Director's Exhibits 26-29; Employer's Exhibit 2. Within a reasonable exercise of the administrative law judge's discretion, she found that the notations by Drs. Wiot,

Shipley and Scott attributing these lesions to pneumonia, histoplasmosis or tuberculosis, were speculative, as the record does not include any medical history to support these diagnoses. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); Decision and Order at 16, 29.

With respect to the administrative law judge's consideration of the CT scan evidence at Section 718.304(c), employer argues that the administrative law judge erred in discrediting Dr. Wheeler's reading of the March 17, 2009 CT scan and in crediting the CT scan interpretations of Drs. McReynolds, Mullens and Cobb. Employer contends that the administrative law judge failed to consider that Dr. Wheeler is a Board-certified radiologist, B reader and professor of radiology at Johns Hopkins Medical Center, while the qualifications of Drs. McReynolds, Mullens and Cobb are not of record. Employer also asserts that claimant did not establish that the CT scan readings by Drs. McReynolds, Mullens and Cobb were medically acceptable and relevant, pursuant to 20 C.F.R. §718.107(b), and argues that the administrative law judge erred in relying on Dr. Wheeler's statement to find that claimant met his burden.

Employer's allegations of error are without merit. Pursuant to Section 718.107(a), "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration." 20 C.F.R. §718.107(a). Section 718.107(b) provides that, "[t]he party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). In the present case, the administrative law judge acted within her discretion in finding that the statements of Drs. Wheeler and Hippensteel satisfied the requirements of Section 718.107(b) for all of the CT scans of record. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 135-136 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc); Decision and Order at 14, 19, 21. Both Drs. Wheeler and Hippensteel reported that CT scans are considered more accurate than x-rays in identifying the presence or absence of pneumoconiosis. Employer's Exhibits 1, 5 at 12. Because Drs. Wheeler and Hippensteel attested to the acceptability and relevance of CT scan technology as a whole, the administrative law judge rationally determined that the March 17, 2009, August 4, 2009 and February 9, 2010 CT scans were medically acceptable and relevant to establishing the presence of complicated pneumoconiosis in this case. *See Webber*, 23 BLR at 135-136.

In addition, contrary to employer's contention, the administrative law judge acknowledged Dr. Wheeler's qualifications as a Board-certified radiologist and B reader, but acted within her discretion in according less weight to Dr. Wheeler's reading of the March 17, 2009 CT scan and greater weight to the readings by Drs. McReynolds,

Mullens and Cobb. *See Melnick*, 16 BLR at 1-33-34. The administrative law judge permissibly accorded little weight to Dr. Wheeler's conclusion, that the large mass on the March 17, 2009 CT scan was compatible with granulomatous disease, rather than complicated pneumoconiosis, as it was inconsistent with the negative test results for tuberculosis and histoplasmosis, claimant's medical history and the lack of any known exposure to tuberculosis or birds. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; Decision and Order at 22, 28; Claimant's Exhibit 4.

Moreover, the administrative law judge rationally found that Dr. Wheeler's interpretation of the March 17, 2009 CT scan was entitled to diminished weight because he did not review claimant's August 4, 2009 and February 9, 2010 CT scans, which were interpreted as positive for coal workers' pneumoconiosis/silicosis, with progressive massive fibrosis, by Drs. Mullens and Cobb, who compared their readings to Dr. McReynolds's reading of the March 17, 2009 scan. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 22. Lastly, there is no inconsistency between the administrative law judge's crediting of Dr. Wheeler's statement regarding the acceptability of CT scans in general and her decision to discredit his conclusion that a particular CT scan, dated March 17, 2009, was compatible with granulomatous disease, rather than complicated pneumoconiosis, in light of the other evidence of record. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284. We affirm, therefore, the administrative law judge's determination that the preponderance of the CT scan evidence was positive for coal workers' pneumoconiosis/silicosis, with progressive massive fibrosis.

Employer next argues that the administrative law judge erred in discrediting the opinions of Drs. Hippensteel and Ghio, that claimant does not have clinical pneumoconiosis in any form, and in according greater weight to the opinion of Dr. Baron, that claimant has complicated pneumoconiosis. We disagree. The administrative law judge considered that in Dr. Hippensteel's June 29, 2010 report, he opined that claimant does not have pneumoconiosis based, in part, upon his determination that Dr. McReynolds's positive CT scan reading was incorrect, as he did not consider whether claimant had granulomatous disease. Decision and Order at 23, 30-31; Employer's Exhibit 3. However, the administrative law judge accurately determined that Dr. McReynolds had reported "findings indicative of granulomatous disease" in addition to "silicosis/[coal worker's pneumoconiosis] with progressive massive fibrosis." Decision and Order at 23, *quoting* Claimant's Exhibit 3. The administrative law judge therefore reasonably concluded that Dr. Hippensteel's opinion was not entitled to significant weight. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 23, 31.

Similarly, the administrative law judge rationally found that Dr. Ghio's medical opinion, ruling out the presence of complicated pneumoconiosis, lacks probative value

because he did not review claimant's x-rays or CT scans, but relied upon conclusions drawn by the physicians who opined that the abnormalities observed are the result of an infectious process. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; Decision and Order at 23, 31. Moreover, the administrative law judge correctly found that Dr. Ghio's contention, that Drs. Wiot and Shipley conclusively determined that claimant's radiological abnormalities are attributable to granulomatous lung disease, is contradicted by Dr. Wiot's concession that the etiology of claimant's x-ray abnormalities "cannot be determined based on this [x-ray] study" and Dr. Shipley's statement that claimant's x-ray abnormalities were of "uncertain nature." Decision and Order at 23, *quoting* Director's Exhibits 26-29; Employer's Exhibit 4.

Regarding Dr. Baron's diagnosis of coal workers' pneumoconiosis, with progressive massive fibrosis, the administrative law judge rationally determined that it was well-reasoned and well-documented, as it was based upon relevant data, including: three examinations of claimant; a review of clinical test results, including two narrative x-ray readings, the March 17, 2009 and August 4, 2009 CT scans, an echocardiogram, a pulmonary function test, a negative tuberculosis skin test, two negative histoplasma antibody tests; and a review of CT scan reports and claimant's medical and employment histories.[8] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 16-18, 23; Claimant's Exhibit 4. The administrative law judge also acknowledged Dr. Baron's status as a treating physician and cited 20 C.F.R. §718.104(d)(5) in support of her finding that Dr. Baron's "ongoing relationship with claimant allowed him to develop an in-depth understanding of [claimant's] pulmonary condition."[9] Decision and Order at 23. However, rather than according Dr. Baron's opinion controlling weight because he is a treating physician, the administrative law judge rationally found that Dr. Baron's opinion was better supported by the underlying documentation than the opinions of Dr. Hippensteel and Ghio. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 23.

[8] The administrative law judge rendered her findings regarding the extent to which Dr. Baron's opinion was reasoned and documented under 20 C.F.R. §718.202(a)(4), but referred to his opinion again when considering the medical opinion evidence relevant to 20 C.F.R. §718.304. Decision and Order at 16-18, 23, 30.

[9] Pursuant to 20 C.F.R. §718.104(d)(5), "the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Finally, we reject employer's contention that the administrative law judge erred in shifting the burden of proof to employer by requiring employer's experts to identify the cause of the lesions they observed in order to establish that they were not the large opacities of complicated pneumoconiosis. The administrative law judge findings constituted permissible credibility determinations, based on the evidence of record, rather than a shift in the burden of proof. *See Melnick*, 16 BLR at 1-33-34.

We affirm, therefore, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, based upon the preponderance of the CT scan evidence, as supported by the x-ray readings of Drs. Alexander, Navani, DePonte and Forehand, and the medical opinion of Dr. Baron. Thus, we also affirm the administrative law judge's findings that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 and demonstrated a change in an applicable condition of entitlement under Section 725.309(d).[10] 20 C.F.R. §§718.304, 725.309(d)(2), (3); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004).

[10] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant satisfied his burden of establishing that his complicated pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Skrack*, 6 BLR at 1-711; Decision and Order at 17. In addition, in light of our affirmance of the award of benefits, we decline to address employer's arguments regarding the administrative law judge's application of amended Section 411(c)(4), 30 U.S.C. §921(c)(4).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge