BRB No. 12-0270 BLA

DAVID M. MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/15/2013
	)	
GORDIE COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Maia S. Fisher (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5750) of Administrative Law Judge Linda S. Chapman awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on June 10, 2009.

After crediting claimant with 29.57 years of coal mine employment,[1] the administrative law judge found that the x-ray and medical opinion evidence established the existence of simple clinical pneumoconiosis[2] arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the evidence, as a whole, established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3),[3] and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has

[1] The record reflects that claimant's last coal mine employment was in Virginia. Hearing Transcript at 14-15, 18-19; Director's Exhibit 3. 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] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[3] The administrative law judge additionally found that the evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, she determined that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Decision and Order at 13-14.

[4] Employer does not challenge the administrative law judge's findings that claimant worked in underground coal mine employment for 29.57 years, and established the existence of simple clinical coal workers' pneumoconiosis arising out of coal mine employment. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

filed a limited response, urging the Board to reject employer's argument that the administrative law judge shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis.

Complicated Pneumoconiosis

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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; *E. 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, 2-561-62 (4th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). In determining whether a claimant has invoked 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 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34.

Section 718.304(a)

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered ten interpretations of three x-rays dated June 29, 2009, March 1, 2010, and March 2, 2011, and considered the readers' radiological qualifications.[5] *See Adkins v. Director, OWCP*,

[5] Dr. Miller, a Board-certified radiologist and B reader, and Dr. Forehand, a B reader, interpreted the June 29, 2009 x-ray as positive for Category A and B large opacities, respectively, while Dr. Wheeler, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 10; Employer's Exhibit 2; Claimant's Exhibit 1. Dr. Wheeler also read the March 1, 2010 x-ray as negative for pneumoconiosis, while Dr. Ahmed, a Board-certified radiologist and B reader, and Dr. Miller, interpreted the x-ray as positive for Category B large opacities; Dr. Alexander, a Board-certified radiologist and B reader, identified Category A large

958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). The administrative law judge found that the preponderance of the x-ray readings established the existence of complicated pneumoconiosis, based on the physicians' findings of Category A and B large opacities. Decision and Order at 3-5, 16. The administrative law judge noted that all of the physicians agree that claimant has a disease process causing masses larger than one centimeter in diameter, visible on x-ray. She further noted that Dr. Wheeler was the only physician who did not diagnose complicated pneumoconiosis based on claimant's x-rays. The administrative law judge discounted the negative readings of Dr. Wheeler because in rejecting a diagnosis of pneumoconiosis, Dr. Wheeler suggested that claimant may have granulomatous disease, and there was no evidence in the record that claimant was ever diagnosed with that disease. The administrative law judge also discounted Dr. Wheeler's negative readings because he failed to adequately explain the reasons for his diagnosis: why the location of the opacities, or the low profusion of background nodules supported a diagnosis of granulomatous disease; why granulomatous disease and pneumoconiosis could not coexist; or why claimant's youth precluded his contracting complicated pneumoconiosis.

Employer contends that the administrative law judge erred in discounting Dr. Wheeler's negative x-ray readings. Employer's Brief at 16-19. We disagree. Contrary to employer's contention, the administrative law judge was not required to give greater weight to Dr. Wheeler's readings, based on his qualifications and experience. *See Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting). The administrative law judge acted within her discretion in discounting Dr. Wheeler's readings as speculative and equivocal, as he identified granulomatous disease as the more likely cause of the large opacities on claimant's x-rays, when claimant tested negative for histoplasmosis and tuberculosis, and there was no evidence in the record that the claimant had ever been diagnosed with, or treated for, granulomatous disease. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010); Decision and Order at 18-20. Further, the administrative law judge permissibly found that Dr. Wheeler's opinion, that the profusion of background nodules was insufficient to cause large opacities, was "at odds with the reports by just

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opacities. Director's Exhibit 11; Employer's Exhibit 3; Claimant's Exhibits 5, 6. Dr. Hippensteel, a B reader, identified a Category B large opacity on the March 1, 2010 x-ray, but qualified that designation with a question mark. Employer's Exhibits 4, 8. The administrative law judge therefore accorded no weight to Dr. Hippensteel's designation of a large opacity. Decision and Order at 16, n.5. Finally, Dr. Miller interpreted the March 2, 2011 x-ray as positive for Category B opacities, while Dr. Wheeler interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 10; Claimant's Exhibit 1.

about every other physician who reviewed the films," and classified them as positive for small opacities at increased profusion levels.[6] Decision and Order at 19; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Claimant's Exhibits 3, 4. Moreover, employer does not challenge the administrative law judge's decision to accord less weight to Dr. Wheeler's negative x-ray readings on the ground that his view, that complicated pneumoconiosis would be rare in a miner of claimant's age, even if true, did not sufficiently explain his determination that claimant could not be one of those rare miners who contracted the disease. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Section 718.304(c)

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the medical opinions of Drs. Forehand, Hippensteel, and Spagnolo, and interpretations of a July 1, 2009 computerized tomography (CT) scan by Drs. Antoun and Hippensteel.[7] Dr. Forehand opined that claimant suffers from complicated pneumoconiosis, supporting this diagnosis with reference to claimant's work history, shortness of breath, abnormal breath sounds, and chest x-ray.[8] Director's Exhibit 10 at 4. In contrast, Drs. Hippensteel and Spagnolo opined that claimant does not have complicated pneumoconiosis. Dr. Hippensteel opined that "the evidence is strongly against [a diagnosis of] complicated coal workers' pneumoconiosis," though he could not rule out "a component of simple coal workers' pneumoconiosis." Employer's Exhibit 4 at 3. Dr. Spagnolo, who placed "great weight" on Dr. Wheeler's negative x-ray interpretations, opined that there is insufficient "clinical evidence to make the diagnosis of clinical or legal [coal workers'

[6] The administrative law judge noted that that "Dr. Miller described diffuse small opacities . . . on all three x-rays, with a profusion of 2/3, 2/2, and 2/2. Likewise, Dr. Forehand reported a profusion of 3/3, Dr. Ahmed a profusion of 3/2, and Dr. Alexander a profusion of 2/3." Decision and Order at 19.

[7] The administrative law judge noted that there was no biopsy evidence to consider pursuant to 20 C.F.R. §718.304(b). Decision and Order at 12, 19.

[8] Dr. Forehand further indicated that he considered alternative diagnoses of tuberculosis, cancer, hypersensitivity pneumonitis, histoplasmosis, autoimmune lung disease, and sarcoidosis, "but did not find evidence of any other cause." Director's Exhibit 10.

pneumoconiosis]." Employer's Exhibit 6 at 4. Both physicians relied, in part, on the absence of a pulmonary impairment in concluding that claimant does not have complicated pneumoconiosis, and opined that his symptoms are more consistent with granulomatous disease. Employer's Exhibits 4 at 2-3, 6 at 4.

In his reading of the July 1, 2009 CT scan, Dr. Antoun noted extensive nodular fibrosis with large conglomerate masses, opining that, "considering the patient's history of coal mining, the findings are most compatible with coal workers' pneumoconiosis, although other diagnostic possibilities cannot be completely ruled out." Director's Exhibit 12. In contrast, Dr. Hippensteel concluded that the CT scan findings "strongly favor" an origin of granulomatous disease, as opposed to coal workers' pneumoconiosis. Employer's Exhibit 4.

The administrative law judge discounted the medical opinions of Drs. Hippensteel and Spagnolo, that claimant does not suffer from complicated pneumoconiosis, because they based their opinions, in part, on the absence of a pulmonary impairment. Decision and Order at 20-21. The administrative law judge further discounted Dr. Spagnolo's opinion because he relied on the negative x-ray readings of Dr. Wheeler, which she had discounted. The administrative law judge discounted Dr. Hippensteel's opinion, finding that his diagnosis of tuberculosis or histoplasmosis was not supported by the record. Decision and Order at 20. The administrative law judge also accorded less weight to the two CT scan readings of record, finding that neither Dr. Antoun nor Dr. Hippensteel adequately explained the basis for his opinion concerning the etiology of the large opacities in claimant's lungs. *Id.* at 17.

Employer argues that the administrative law judge erred in discounting the medical opinions of Drs. Hippensteel and Spagnolo. We disagree. The administrative law judge gave less weight to the opinions of Drs. Hippensteel and Spagnolo, as she found that they indicated that they would not diagnose complicated pneumoconiosis in the absence of a respiratory impairment. The administrative law judge correctly noted that claimant need not demonstrate a pulmonary impairment to establish the existence of complicated pneumoconiosis under the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c); *see Scarbro*, 220 F.3d at 257, 22 BLR at 2-103; Decision and Order at 20-21. The administrative law judge also rationally attributed less weight to Dr. Spagnolo's opinion, to the extent that the physician relied on Dr. Wheeler's negative x-ray readings, which the administrative law judge had discounted. *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 20. Further, the administrative law judge permissibly discounted Dr. Hippensteel's opinion, noting that he speculated that the cause of the abnormalities seen on x-ray was tuberculosis or histoplasmosis, when there is no evidence in the record to suggest claimant was ever "diagnosed with, treated for, or exposed to tuberculosis or histoplasmosis." Decision and Order at 20; *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; Claimant's Exhibits 3, 4. Therefore, the administrative law judge acted within her discretion in discounting the opinions of Drs. Hippensteel and Spagnolo.[9] *See Scarbro*, 220 F.3d at 257-58, 22 BLR at 2-102-05.

Employer further contends that the administrative law judge did not sufficiently explain her finding of complicated pneumoconiosis, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Specifically, employer argues that the administrative law judge found that the CT scan evidence did not establish complicated pneumoconiosis, but later stated, inconsistently, that "a preponderance" of the CT scan evidence supported a finding of complicated pneumoconiosis, demonstrating that her decision is "irrational." Employer's Brief at 22. We disagree. Employer focuses on a portion of the administrative law judge's Decision and Order containing an editorial error, in which the administrative law judge stated that claimant established the existence of complicated pneumoconiosis "by a preponderance of the x-ray and CT scan evidence. . . ." Decision and Order at 21. Earlier in her decision, however, the administrative law judge explicitly found that the two conflicting CT scan readings were "not sufficient to establish the existence of complicated pneumoconiosis." Decision and Order at 17. Further, based on a review of the administrative law judge's decision as a whole, it is clear that she considered all of the evidence in finding that claimant established the existence of complicated pneumoconiosis based on the x-ray evidence, and she determined that the evidence in the other categories, including the CT scans, did not undercut the positive x-ray evidence. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; Decision and Order at 15, 17-21. We therefore reject employer's allegation of error.

Weighing together all of the evidence under 20 C.F.R. §718.304(a),(c), the administrative law judge found that claimant established "that he has a condition in his lungs that has resulted in the development of masses that appear on x-ray as larger than one centimeter in diameter, due to pneumoconiosis." Decision and Order at 21. Employer argues that the administrative law judge shifted the burden to employer to establish the absence of complicated pneumoconiosis. Employer's Brief at 5-7. We disagree. Throughout her Decision and Order, the administrative law judge maintained the burden of persuasion on claimant. Decision and Order at 14, 15, 16, 21. She found that the evidence established the existence of complicated pneumoconiosis, "based on the

[9] Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Hippensteel and Spagnolo, we need not address employer's remaining arguments regarding the weight the administrative law judge accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

findings of large masses that have been designated as [C]ategory A or B opacities on six ILO readings." *Id.* at 15-16. She further found that nothing in the record undercut the x-ray evidence establishing the existence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; Decision and Order at 16-21. As the administrative law judge properly maintained the burden of persuasion on claimant in finding that the evidence, as a whole, established the existence of complicated pneumoconiosis, we affirm her finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *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 judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge