



BRB No. 14-0213 BLA

RICHARD CAROSI)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TOP GUN, INCORPORATED)	DATE ISSUED: 02/27/2015
)	
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer/Carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-06232) of Administrative Law Judge Adele Higgins Odegard, on a claim filed on December 16, 2009, pursuant to the provisions of the Black Lung Benefits Act,

as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established twenty-six years of underground coal mine employment and she adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The

administrative law judge determined that claimant established the existence of complicated pneumoconiosis, based on the analog x-ray evidence at 20 C.F.R. §718.304(a). Pursuant to 20 C.F.R. §718.304(c), the administrative law judge found that the digital x-ray evidence supported a finding of complicated pneumoconiosis. The administrative law judge determined that the positive analog and digital x-ray readings for complicated pneumoconiosis outweighed the contrary negative CT scan evidence and the medical opinions of Drs. Castle and Fino, who attributed claimant's radiological findings to other causes. Based on her consideration of all of the relevant evidence, the administrative law judge concluded that claimant established complicated pneumoconiosis by a preponderance of the evidence and that he 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 contends that the administrative law judge erred in crediting the positive x-ray interpretations for complicated pneumoconiosis of the Board-certified radiologists over the negative x-ray readings and opinions of the Board-certified pulmonologists that claimant does not suffer from the disease. Employer also contends that the administrative law judge improperly shifted the burden of proof to employer to establish that claimant does not have complicated pneumoconiosis, and failed to explain the bases for her findings in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).¹ Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to employer's appeal.

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'Keeffe 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

¹ We affirm, as unchallenged by employer on appeal, the administrative law judge's finding of twenty-six years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

² The record indicates that claimant's coal mine employment was in West Virginia. Hearing Transcript at 27. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

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. 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. Although a finding of complicated pneumoconiosis may be based on evidence presented under a single prong, 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 as to the presence of complicated pneumoconiosis. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *E. Associated Coal Corp. v. Director, OWCP [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).

Under 20 C.F.R. §718.304(a), the administrative law judge considered ten interpretations of four analog x-rays.³ The December 9, 1988 x-ray was read as negative for pneumoconiosis by Dr. Castle, a B reader. Employer's Exhibit 6. The December 30, 2009 x-ray was read as positive for complicated pneumoconiosis, Category B, by Dr. Forehand, a Board-certified allergist and immunologist.⁴ Director's Exhibit 12. The same film was read as positive for complicated pneumoconiosis, Category A, by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, but as negative by Dr. Castle. Claimant's Exhibit 5; Employer's Exhibit 6. The June 29, 2010 x-ray was read by Dr. Miller, a dually qualified radiologist, as positive for simple and complicated pneumoconiosis, Category A, while Dr. Castle read the film as negative. Claimant's Exhibit 3; Employer's Exhibit 6. Dr. Miller and Dr. Alexander each read the February 10, 2012 x-ray as positive for simple and complicated pneumoconiosis, Category A, but

³ The administrative law judge noted that the "medical treatment records include various [x]-ray interpretations and reports" indicating that claimant has densities in his lungs, but she gave them "little weight" in determining whether claimant has complicated pneumoconiosis because "there is no evidence that they were classified under the ILO system" as required by 20 C.F.R. §718.304(a). Decision and Order at 6 n.7.

⁴ Although Dr. Forehand's curriculum vitae states he is a B reader, the administrative law judge observed that Dr. Forehand specifically indicated on the ILO form that he completed for the December 30, 2009 x-ray that he was not a B reader and, thus, the administrative law judge concluded that "the record does not support that Dr. Forehand has this credential." Decision and Order at 17 n.14.

Dr. Fino, a B reader, and Dr. Castle read the film as negative for pneumoconiosis. Claimant's Exhibits 1, 2; Employer's Exhibits 10, 11.

The administrative law judge gave little weight to the December 9, 1988 x-ray, "as it was taken over [twenty] years before any of the other [x]-rays submitted in this claim." Decision and Order at 10. In resolving the conflict in the readings of the remaining x-rays, the administrative law judge gave greatest weight to readings by the dually qualified radiologists. *Id.* at 8-10. The administrative law judge found that the December 30, 2009 x-ray was positive for complicated pneumoconiosis, based on Dr. Alexander's "superior radiological credentials," in comparison to Dr. Castle's credentials. *Id.* at 9. She determined that the June 29, 2010 x-ray was positive for pneumoconiosis because "Dr. Miller's radiological credentials are stronger than those of Dr. Castle." *Id.* She further found that the February 10, 2012 x-ray was positive for complicated pneumoconiosis, "giving most weight to the interpretations of Dr. Miller and Dr. Alexander, based on their credentials." *Id.* Thus, the administrative law judge concluded that claimant established complicated pneumoconiosis by the preponderance of the analog x-ray evidence pursuant to 20 C.F.R. §718.304(a).

Employer asserts that the administrative law judge should have credited the negative x-ray readings of Drs. Castle and Fino because they are B readers and pulmonary specialists, who reviewed "all evidence of record" in rendering their conclusions. Employer's Brief in Support of Petition for Review at 5. We disagree. The regulation at 20 C.F.R. §718.202(a)(1), which applies to x-ray interpretations for the existence of both simple and complicated pneumoconiosis, requires that an administrative law judge resolve conflicts in x-ray readings by considering the radiological qualifications of the readers of the x-rays. 20 C.F.R. §718.202(a)(1). In this case, the administrative law judge properly analyzed the x-ray evidence in accordance with the regulatory requirement and permissibly assigned greater weight to the positive readings for complicated pneumoconiosis by Drs. Alexander and Miller, based on the fact that they are Board-certified radiologists, whereas Drs. Castle and Fino are not radiologists. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc); *Melnick*, 16 BLR at 1-36-37; *Scheckler v. Clinchfield Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 8-10. The administrative law judge rationally determined, based on her consideration of the radiological qualifications, that the three most recent x-rays were positive for complicated pneumoconiosis. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66. Therefore, because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

In her consideration of other evidence under 20 C.F.R. §718.304(c),⁵ the administrative law judge found that there was a digital x-ray dated December 1, 2011, which was read as positive for complicated pneumoconiosis, Category A, by Dr. Alexander, and as negative by Dr. Castle. Decision and Order at 21; Claimant's Exhibit 9; Employer's Exhibit 4. The administrative law judge observed that "Dr. Alexander has stronger radiological credentials than Dr. Castle" and, based on Dr. Alexander's positive reading, she determined that the December 1, 2011 digital x-ray was supportive of a finding of complicated pneumoconiosis. Decision and Order at 21. Although employer contends that the administrative law judge did not give proper consideration to Dr. Castle's status as a Board-certified pulmonologist, we conclude that the administrative law judge permissibly resolved the conflict in the readings, based on the radiological qualifications of the physicians, and permissibly determined that the digital x-ray was positive, based on the superior radiological credentials of Dr. Alexander, in comparison to those of Dr. Castle. See *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Melnick*, 16 BLR at 1-36-37; Decision and Order at 21. Thus, we affirm the administrative law judge's finding that the digital x-ray evidence is positive for complicated pneumoconiosis.

The administrative law judge next weighed readings of two CT scans from Bluefield Regional Medical Center. Decision and Order at 19-20. Dr. Castle interpreted a January 29, 2010 CT scan as showing a "left anterior lateral pleural[-]based nodule with questionable but probable calcification" and a "right posterior lateral pleural[-]based nodule with questionable but probable calcification." Employer's Exhibit 11. Dr. Castle indicated that the nodules were healed granulomatous disease because they were attached to the pleura and appeared calcified. He stated that "[i]t is also possible that this nodularity and scarring could be due to some other type of inflammatory process such as could occur following cardiac surgery or pneumonia." *Id.* The second CT scan, dated December 9, 2011, was initially read by Dr. Calhoun during claimant's hospitalization. He reported that there were "stable bilateral partially calcified subpleural upper lobe masses with surrounding fibrotic changes, stable subpleural nodules in the posterior lower lobes, and non-calcified nodules in the right middle lobe, compatible with occupational pneumoconiosis." Claimant's Exhibit 7. Dr. Fino read the December 9, 2011 scan at employer's request and also observed a background of simple pneumoconiosis, with a "2.5 x 2 [centimeter]" calcified mass in the upper portion of claimant's left lung, and two nodules each measuring "2 x 1 [centimeters]" in the upper portion of claimant's right lung. Employer's Exhibit 10. Dr. Fino stated that the masses were "all attached to the pleura, highly calcified, not central in location, and clearly not consistent with complicated coal workers' pneumoconiosis." *Id.*

⁵ There is no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

In evaluating the CT scan evidence, the administrative law judge observed that Dr. Calhoun's credentials are not contained in the record. Decision and Order at 20. Although the administrative law judge found that the CT scan evidence was "preponderantly negative for complicated pneumoconiosis," she gave it "limited probative value" because "the interpreting physicians are not Board-certified in radiology." *Id.* Employer contends, however, that the administrative law judge's rationale for according less weight to the CT scan evidence is irrational because the administrative law judge "ignores the ubiquity of pulmonologists interpreting CT scans" and overlooks Dr. Fino's testimony that he relies largely on his own CT scan interpretations in treating his patients. Employer's Brief in Support of Petition for Review at 20 n.4. Employer maintains that the administrative law judge makes an erroneous assumption that a Board-certified radiologist is more qualified than a pulmonologist to interpret a CT scan. Employer's assertions of error are rejected as without merit.

An administrative law judge has discretion to assess the credibility of, and the weight to accord to, the relevant evidence of record. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *see also 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). In this case, the administrative law judge observed correctly that, while Dr. Fino testified that he regularly interprets CT scans in the course of his practice, he also explained that "there are times he wants a second opinion and 'will hunt down a radiologist.'" Decision and Order at 20, *quoting* Employer's Exhibit 13 at 21. We see no error in the administrative law judge's reliance on the radiological qualifications of the physicians in determining the weight to accord the conflicting radiological evidence. *See* 20 C.F.R. §718.202(a)(1); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (en banc). Thus, we affirm her decision to accord less probative weight to the negative CT scan evidence, in comparison to the analog and digital x-ray evidence, which was read as positive by dually qualified Board-certified radiologists and B readers. *See Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 893-94; 22 BLR 2-409, 2-422-23 (7th Cir. 2002).

Lastly, the administrative law judge considered four medical opinions. Decision and Order at 17-18. Dr. Forehand examined claimant at the request of the Department of Labor on December 30, 2009. Director's Exhibit 12. The administrative law judge noted that Dr. Forehand is Board-certified in pediatrics and allergy and immunology and Board-eligible in pediatric pulmonary medicine. Decision and Order at 17; Director's Exhibit 12. The administrative law judge considered Dr. Forehand's opinion to be "less reliable than the other physicians of record based on his inferior credentials in the field of adult pulmonary disease." *Id.*

Dr. Habre examined claimant on March 5, 2012, and also diagnosed complicated pneumoconiosis. Claimant's Exhibit 6. The administrative law judge noted that Dr. Habre is Board-certified in internal medicine, pulmonary disease, critical care medicine and sleep medicine. Decision and Order at 11; Claimant's Exhibit 6. Because the administrative law judge found that Dr. Habre provided a "limited analysis" and "primarily reiterate[d] the findings contained in Dr. Alexander's interpretation" of the December 30, 2009 x-ray, she considered Dr. Habre's opinion to be of "limited probative value." Decision and Order at 11.

The administrative law judge noted that Dr. Castle is Board-certified in internal medicine and pulmonary disease; that he examined claimant on December 1, 2011, interpreted analog and digital chest x-rays, a CT scan, and also reviewed the medical record. Decision and Order at 11-13; Employer's Exhibits 4, 5, 9, 12. Dr. Castle opined that claimant does not have radiographic evidence consistent with complicated pneumoconiosis. Employer's Exhibit 9. The administrative law judge described correctly that Dr. Castle "excluded coal mine dust exposure as the cause of the nodules based on the timing of the arrival of the nodules, their appearance on [x]-ray and the location of the changes." Decision and Order at 17. In his initial report, Dr. Castle indicated that a series of x-rays taken prior to claimant's January 23, 2007 cardiac surgery were normal and did not show any nodularity. Employer's Exhibit 9 at 27. He testified that "four to six weeks" after claimant's surgery, an x-ray was taken which "now showed evidence of a nodule, particularly on the left side." Employer's Exhibit 9 at 26-27. Dr. Castle stated:

So in this time period, the only thing that happened was he had cardiac surgery, as a result of that [he] developed fluid around both lungs, and now as it *slowly resolved* it left some residual scar tissue, and I believe totally that what we're seeing on x-rays, this nodularity occurring attached to the pleural area, is due to scarring from his previous cardiac surgery and is not due to pneumoconiosis.

Employer's Exhibit 9 at 27 (emphasis added).

The administrative law judge, however, rejected Dr. Castle's opinion in light of her review of claimant's treatment record, which showed:

Three days later, not four to six weeks later, as stated by Dr. Castle, an [x]-ray was taken of the [c]laimant's chest which revealed a nodular density overlying the periphery of [c]laimant's left upper lung. I find that the notation regarding the presence of a lung nodule on January 26, [2007] undermines Dr. Castle's opinion that the [c]laimant's opacities slowly

resolved following his surgery, eventually leading to the formation of lung nodules.

Decision and Order at 18. Additionally, although Dr. Castle relied on the fact that claimant had not been diagnosed with pneumoconiosis during his 2007 hospitalization, the administrative law judge found that the x-rays “were taken during [c]laimant’s treatment for cardiac issues; [c]laimant was not being treated for lung disease during his hospital stay and there is no indication that the interpreting physicians were at all considering pneumoconiosis when evaluating [c]laimant’s [x]-rays.” *Id.*

Employer contends that Dr. Castle misstated only the date of the January 26, 2007 x-ray and that his opinion is otherwise credible and supported by his review of the record. We disagree. The administrative law judge rationally found that Dr. Castle’s explanation as to how claimant’s nodules resulted from scar tissue and developed over time is “inconsistent with the evidence contained in the record” from 2007.⁶ Decision and Order at 18; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because employer has not shown how the administrative law judge abused her discretion in determining the credibility of Dr. Castle’s opinion, we affirm the administrative law judge’s decision to accord it “minimal weight” regarding the existence of complicated pneumoconiosis. Decision and Order at 18; *see Hicks*, 138 F.3d at 532 n.9, 21 BLR at 2-335 n.9; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

With regard to Dr. Fino’s opinion, the administrative law judge noted that he is Board-certified in internal medicine and pulmonary disease and also a B reader. Decision and Order at 14; Employer’s Exhibit 8, Dr. Fino reviewed the medical record and opined that claimant does not have radiographic evidence of complicated pneumoconiosis. Employer’s Exhibits 7, 13. Dr. Fino specifically attributed claimant’s large opacities on x-ray to alternate diagnoses such as “old granulomatous disease, old tuberculosis, or histoplasmosis infection.” Employer’s Exhibit 13. The administrative law judge, however, determined that Dr. Fino’s opinion was “speculative” and “not well-reasoned”

⁶ Because the administrative law judge gave a valid reason for rejecting Dr. Castle’s opinion, we need not address employer’s contention that the administrative law judge failed to properly consider Dr. Castle’s alternate explanations that the nodules were calcified and that their location in the pleura was inconsistent with complicated pneumoconiosis. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

since he “did not review the results of [c]laimant’s tuberculosis and histoplasmosis tests”⁷ and because the “medical records do not indicate that [c]laimant ever suffered from any of the diseases listed by Dr. Fino.” Decision and Order at 18, *citing* Employer’s Exhibit 13 at 17.

Employer argues that in rejecting Dr. Fino’s opinion, the administrative law judge improperly shifted the burden of proof to employer to establish that claimant does not have complicated pneumoconiosis. We disagree. The Fourth Circuit has held that an administrative law judge has the discretion to discount, as speculative and unsupported, negative x-ray readings for complicated pneumoconiosis, where there is no evidence in the record that a miner was ever diagnosed with, or treated for, any of the alternative diseases or conditions put forward by the physicians as possible diagnoses for large masses present on the x-rays. *Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84. We therefore affirm the administrative law judge’s credibility findings with regard to Dr. Fino, as they are proper and in accordance with law. *Id.*; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

The administrative law judge gave greatest weight in this case to the analog and digital x-ray evidence establishing that claimant has complicated pneumoconiosis and specifically explained the weight accorded the contrary evidence. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. She properly considered all of the relevant evidence in the record in determining the presence of complicated pneumoconiosis and did not, as employer alleges, improperly shift the burden of proof. *Id.*; *Melnick*, 16 BLR at 1-33-34. Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that claimant established that he has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100-01. We also affirm, as unchallenged on appeal, the administrative law judge’s finding pursuant to 20 C.F.R. §718.203(b), that claimant’s complicated pneumoconiosis arose out of his coal mine employment. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 339, 24 BLR 2-1, 2-31-32 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22. Thus, we affirm the administrative law judge’s award of benefits.

⁷ The administrative law judge noted that, in July 2010, claimant had both a negative histoplasmosis test and a non-reactive “PPD” skin test for tuberculosis. Decision and Order at 17; Claimant’s Exhibit 8.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge