**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0067 BLA

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| JERRY LEE BROCK | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CLOVERLICK COAL COMPANY, LLC | ) | DATE ISSUED: 01/10/2019 |
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| and | ) | |
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| AMERICAN INTERNATIONAL SOUTH/CHARTIS | ) | |
| | ) | |
| 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 Granting Claimant's Request for Modification of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Claimant's Request for Modification (2015-BLA-05840) of Administrative Law Judge Adele Higgins Odegard, rendered 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). Claimant filed this claim on June 19, 2009.[1]

In a Decision and Order issued on October 30, 2017, the administrative law judge credited claimant with at least fifteen years of underground coal mine employment,[2] and found that employer is the responsible operator. She also found that claimant has complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203. Consequently, claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and was awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator and in finding that claimant has complicated pneumoconiosis. Claimant has not filed a response. The Director, Office of Workers' Compensation

[1] The administrative law judge initially denied benefits in a Decision and Order issued on September 24, 2013. She found that the evidence did not establish that claimant has complicated pneumoconiosis at 20 C.F.R. §718.304, or a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Director's Exhibit 117. Claimant appealed to the Board, but later withdrew his appeal in order to pursue modification. *Brock v. Cloverlick Coal Co.*, BRB No. 14-0021 BLA (July 30, 2014) (Order) (unpub.).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 29.

Programs (the Director), filed a limited response urging affirmance of the determination that employer is the responsible operator.[3]

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).

## I. Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," it must have employed the miner for a cumulative period of not less than one year. 20 C.F.R. §725.494(c).[4] *See Boyd v. Island Creek Coal Co*., 8 BLR 1-458, 1-460 (1986). A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[5] 20 C.F.R. §725.101(a)(32).[6] In "determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." *Id*.

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[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at n.3.

[4] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits. 20 C.F.R §725.494(a)-(e).

[5] A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. 20 C.F.R. §725.101(a)(32).

[6] Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

The administrative law judge found that claimant began working for employer in February 2004 and suffered an injury in January 2005 that prevented him from returning to work.[7] Decision and Order at 32-34. She noted, however, that claimant testified "that he remained 'on the books' as an employee . . . for several months after his injury, and that [employer] paid his health insurance during this time." *Id*. at 33, *quoting* Hearing Transcript at 25. Thus, she found that claimant's employment relationship with employer lasted for more than one calendar year. *Id*. at 33. Further, she found that claimant had more than 125 "working days" with employer before his injury. *Id*. at 34. Specifically, she noted that claimant's Social Security Administration earnings statement establishes that "he was paid for about 51 weeks of employment before his injury." *Id*. Therefore, she found that claimant worked for employer for a cumulative period of not less than one year pursuant to 20 C.F.R. §725.494(c). *Id*.

Employer argues that the administrative law judge erred in finding that claimant worked for at least one calendar year for employer. Relying on *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555 (6th Cir. 2002), employer argues that any "periods of disability . . . for [a] work injury should be excluded in determining whether a miner worked at least one calendar year" for an operator. Employer's Brief at 4-5. As noted by both the administrative law judge and the Director, employer's reliance on *Hall* is misplaced. Director's Brief at 2-3. In *Hall*, the United States Court of Appeals for the Sixth Circuit held that "speculation" regarding whether a miner remained on the payroll beyond one calendar year was not "evidence that he was on the payroll." *Hall*, 287 F.3d at 563. Here, however, the administrative law judge did not speculate that claimant remained on the payroll; she found that the evidence establishes that he remained on employer's payroll, citing claimant's uncontradicted testimony "that he remained 'on the books' as an employee" for several months after his injury, and that he continued to receive employer-paid health insurance.[8] Decision and Order at 33, *quoting* Hearing Transcript at 25; *see Hall*, 287 F.3d at 563; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Elswick*, 2 BLR at 1-1113-14; 20 C.F.R. §725.101(a)(32). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer is the responsible operator.

[7] The record reflects that the date of claimant's injury was January 10, 2005. Director's Exhibits 10, 101.

[8] Employer does not challenge the administrative law judge's finding that claimant had 125 working days before he suffered his injury. Decision and Order at 34; Employer's Brief at 4. This finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

## II. Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), establishes an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities 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 yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *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).

The administrative law judge found that the x-ray and CT scan evidence establishes complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c).[9] Decision and Order at 10-28. Further, weighing all the relevant evidence together, she found that claimant established that he has complicated pneumoconiosis pursuant 20 C.F.R. §718.304. *Id*. at 21, 29.

Employer argues that the administrative law judge improperly relied on the "numerical superiority" of the positive x-ray readings to find complicated pneumoconiosis established at 20 C.F.R. §718.304(a). Employer's Brief at 2-3. Employer's argument has no merit.

The administrative law judge considered twelve interpretations of six x-rays dated June 17, 2009, July 7, 2009, December 2, 2009, March 19, 2012, January 16, 2012, and September 1, 2016.[10] Decision and Order at 9-10, 22-24. Contrary to employer's

[9] The administrative law judge found that the biopsy evidence under 20 C.F.R. §718.304(b) "neither establishes nor refutes the presence of" complicated pneumoconiosis. Decision and Order at 14. Because this finding is unchallenged, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[10] Dr. Alexander interpreted the June 17, 2009 x-ray as positive for a Category A large opacity, while Dr. Wheeler interpreted it as negative for complicated pneumoconiosis. Director's Exhibits 20, 94. Drs. Baker and Alexander both interpreted the July 7, 2009 x-ray as positive for a Category A large opacity, while Dr. Wheeler interpreted it as negative for complicated pneumoconiosis. Director's Exhibits 14, 22, 93. Dr. Miller interpreted the December 2, 2009 x-ray as positive for a Category A large opacity, while Dr. Wheeler interpreted it as negative for complicated pneumoconiosis.

argument, the administrative law judge properly performed both a qualitative and quantitative analysis of the x-ray evidence, taking into consideration the number of x-ray interpretations, the readers' radiological qualifications, the dates of the films, and the nature of the readings, when she resolved the conflict in the x-ray readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 12-14, 25-27.

The administrative law judge permissibly accorded greater weight to the readings by physicians with superior radiological qualifications as Board-certified radiologists and B readers. *See Staton*, 65 F.3d at 59-60; *Woodward*, 991 F.2d at 321; Decision and Order at 13. Further, she noted that the only dually-qualified radiologist to interpret any x-ray as negative for complicated pneumoconiosis was Dr. Wheeler, who read the June 17, 2009, July 7, 2009, December 2, 2009, and March 19, 2012 x-rays as negative for the disease. Decision and Order at 25-26, 29. The administrative law judge discredited Dr. Wheeler's readings of these x-rays because she found that his rationale for excluding complicated pneumoconiosis, as set forth in the comments section of his ILO forms, was not well-reasoned or supported by the record. *Id*. Because the administrative law judge's basis for discrediting Dr. Wheeler's x-ray readings is unchallenged, it is affirmed.[11] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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Director's Exhibits 23, 95. Dr. Miller interpreted the January 16, 2012 x-ray as positive for a Category A large opacity. Claimant's Exhibit 2. Dr. Alexander interpreted the March 19, 2012 x-ray as positive for a Category B large opacity, while Drs. Wheeler and Dahhan interpreted it as negative for complicated pneumoconiosis. Director's Exhibits 99, 105; Claimant's Exhibit 3. Dr. DePonte interpreted the September 1, 2016 x-ray as positive for a Category B large opacity. Claimant's Exhibit 1. Drs. Alexander, Wheeler, Miller, and DePonte are dually-qualified as B readers and Board-certified radiologists, while Drs. Baker and Dahhan are B readers. Director's Exhibits 14, 20, 22, 93-95, 99, 105; Claimant's Exhibits 1, 2.

[11] Even if employer's brief could be read as having raised a specific argument, we would hold that substantial evidence supports the administrative law judge's credibility determination. The administrative law judge noted that Dr. Wheeler indicated on the ILO forms that he excluded complicated pneumoconiosis based on claimant's age and the fact that claimant worked in the mines after dust control standards were imposed. Decision and Order at 25-26. The administrative law judge permissibly found that reasoning unpersuasive. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 25-26. The administrative law judge also noted that Dr. Wheeler "attributed some of the

Finally, the administrative law judge found that the three x-rays taken between 2012 and 2016 were positive for complicated pneumoconiosis, based on the readings by Drs. Miller, Alexander, and DePonte. Decision and Order at 13-14. She permissibly assigned greater weight to the March 19, 2012, January 16, 2012, and September 1, 2016 positive x-rays because they are more recent. *See Woodward*, 991 F.2d at 319-321; *Adkins*, 958 F.2d at 52-53; Decision and Order at 13-14. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence establishes complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

We also reject employer's argument that the administrative law judge erred in finding that the CT scan evidence establishes complicated pneumoconiosis at 20 C.F.R. §718.304(c). Employer's Brief at 3. Employer asserts that this evidence contains no diagnosis of a condition that would appear on x-ray measuring greater than one centimeter in diameter, or as "massive lesions," and thus does not establish a condition that could reasonably be expected to yield a result equivalent to 20 C.F.R. §718.304(a) or (b). *Id*. Contrary to employer's argument, the administrative law judge found that the June 28, 2016 and September 30, 2014 CT scans both include a diagnosis of progressive massive fibrosis.[12] Decision and Order at 17, 20. A diagnosis of progressive massive fibrosis has been held to be equivalent to a diagnosis of "massive lesions" under 20 C.F.R. §718.304(b). *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) ("Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors . . . ."); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006). Because employer does not challenge the administrative law judge's finding that the CT scan evidence establishes progressive massive fibrosis, and therefore "massive lesions,"

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abnormalities [on claimant's x-rays] to possible cancer." Decision and Order at 26. She permissibly discredited his x-ray readings because claimant's "treating pulmonologists have concluded that [claimant] does not have" lung cancer. Decision and Order at 29; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010). Finally, the administrative law judge noted that Dr. Wheeler excluded complicated pneumoconiosis based on the absence of simple pneumoconiosis on x-ray. Decision and Order 25, 29. The administrative law judge permissibly rejected this reasoning because all the other radiologists who interpreted claimant's x-rays diagnosed simple pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order 25, 29.

[12] Dr. Biosca interpreted the June 28, 2016 CT scan as positive for "coal workers' pneumoconiosis/silicosis with mild progressive massive fibrosis." Claimant's Exhibit 5. Dr. Mullens interpreted the September 30, 2014 CT scan as positive for "coal workers' pneumoconiosis with progressive massive fibrosis." Director's Exhibit 134.

we affirm her finding that claimant established complicated pneumoconiosis under 20 C.F.R. §718.304(c). Decision and Order at 20-21; *see Gray*, 176 F.3d at 387; *Skrack*, 6 BLR at 1-711.

We further affirm, as unchallenged by employer, the administrative law judge's determination, based on a weighing of all of the relevant evidence, that claimant established that he has complicated pneumoconiosis at 20 C.F.R. §718.304, and her finding that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; *Skrack*, 6 BLR at 1-711; Decision and Order 20-21, 29-30. Additionally, we affirm, as unchallenged on appeal, the administrative law judge's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order at 30-31.

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Request for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge