

BRB No. 08-0787 BLA

C.R.T.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 07/23/2009
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (06-BLA-5201) of Administrative Law Judge Daniel L. Leland rendered on a subsequent 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). This case is before the Board for the second time.¹ In the original Decision and Order, the administrative law

¹ Claimant filed his first application for benefits on February 5, 1987, and filed a second application on October 19, 1999. Both claims were denied based on claimant's failure to establish total respiratory disability, an essential element of entitlement.

judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718, and credited employer's stipulation that claimant worked in qualifying coal mine employment for twenty-one years. The administrative law judge found that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). In addition, the administrative law judge found that the newly submitted evidence of record was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, because the evidence did not establish that the miner suffered from complicated pneumoconiosis. Accordingly, because total respiratory disability was not established, the element of entitlement previously adjudicated against claimant, the administrative law judge determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Benefits were, therefore, denied.

Claimant appealed, and the Board affirmed, as unchallenged, the administrative law judge's determinations regarding length of coal mine employment and that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). However, the Board, citing 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), and the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,² in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), held that the administrative law judge erred in according greater weight to the computerized tomography (CT) scan evidence and the medical opinion evidence, than to the x-ray evidence, in finding that complicated pneumoconiosis was not established. Consequently, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a)-(c) tends to establish whether claimant has a chronic lung disease that manifests itself with opacities greater than one centimeter. After doing that, the Board instructed the administrative law judge to consider the evidence together, specifically explaining the basis for the weight assigned to any conflicting evidence, before determining whether the evidence as a whole

Director's Exhibits 1, 2. Claimant subsequently filed a third application for benefits on August 27, 2004, which is pending on appeal. Director's Exhibit 4.

² Because the miner's last coal mine employment occurred in West Virginia, 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 (1989) (*en banc*); Director's Exhibit 5.

establishes complicated pneumoconiosis. *C.R.T. v. Island Creek Coal Co.*, BRB No. 07-0464 BLA (Feb. 21, 2008) (unpub.).³

On remand, the administrative law judge found that while the x-ray evidence supported a finding of complicated pneumoconiosis, it was outweighed by the contrary findings on CT scan and medical opinion evidence. Consequently, the administrative law judge found that the opacities seen on x-ray did not represent findings of complicated pneumoconiosis. Hence, the administrative law judge determined that the newly submitted evidence, as a whole, failed to establish complicated pneumoconiosis and, therefore, failed to establish invocation of the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 718.304. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in crediting the CT scan and medical opinion evidence over the x-ray evidence to find that complicated pneumoconiosis was not established at Section 718.304, and that claimant was not thereby entitled to the irrebuttable presumption of totally disabling pneumoconiosis.⁴ Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

³ With respect to claimant's procedural argument, the Board affirmed the administrative law judge's rejection of claimant's request to obtain computerized tomography (CT) scan readings in response to the three CT scan readings employer submitted thirty-three days prior to the formal hearing, pursuant to 20 C.F.R. §725.456(b)(2) and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-196 (1986). Hence, the Board rejected claimant's argument that the administrative law judge abused his discretion in denying claimant an opportunity, post-hearing, to develop and submit rebuttal evidence. *C.R.T. v. Island Creek Coal Co.*, BRB No. 07-0464 BLA, *slip op.* at 3 (Feb. 21, 2008) (unpub.).

⁴ Claimant incorrectly argues that the administrative law judge erred in weighing the CT scan and medical opinion evidence with the x-ray evidence because the CT scan and medical opinion evidence is relevant to legal pneumoconiosis, not clinical pneumoconiosis. Claimant's Brief at 15. The CT scan and medical opinion evidence is relevant to showing whether the large opacities seen on claimant's x-ray are opacities due to complicated pneumoconiosis, rather than another disease process. *See* 20 C.F.R. §718.304. Thus, the issue before the administrative law judge was whether clinical pneumoconiosis, in its complicated form, existed in this case, not whether legal pneumoconiosis, as defined at 20 C.F.R. §718.201, was present.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) of the Act, as implemented by Section 718.304 of the regulations, provides 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(a)-(c). While Section 718.304(a), (b), and (c) sets forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must, in every case, review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). Furthermore, the Fourth Circuit has held that evidence under one prong of Section 718.304 can diminish the probative value of evidence under another prong if the two forms conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, *citing Lester*, 993 F.2d at 1145, 17 BLR at 2-117. Specifically, while the law is clear that Section 718.304(a) "sets out an entirely objective scientific standard, *i.e.*, an opacity on an x-ray greater than one centimeter," which serves as "the benchmark to which evidence under the other [subsections] is compared," it is incumbent upon the administrative law judge to examine and review other evidence, *i.e.*, physician's testimony, medical report, or other evidence, that demonstrates whether claimant has a chronic lung disease that manifests itself with opacities greater than one centimeter or that they are the result of a disease process unrelated to claimant's exposure to coal mine dust. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100.

In addressing the issue of complicated pneumoconiosis pursuant to Section 718.304, the administrative law judge, pursuant to the Board's remand instructions, first found that the x-ray evidence supported a finding of complicated pneumoconiosis at Section 718.304(a). The administrative law judge found that complicated pneumoconiosis was not established at Section 718.304(b) and (c) because there was no biopsy evidence in this living miner's claim and because the weight of the CT scan and medical opinion evidence did not find complicated pneumoconiosis. However, the

administrative law judge concluded that the x-ray evidence was not dispositive on the issue of complicated pneumoconiosis. Rather, the administrative law judge found that the CT scan evidence and the medical opinion evidence, that did not find complicated pneumoconiosis, outweighed the affirmative x-ray evidence. The administrative law judge noted that both Drs. Castle and Crisalli explained that CT scans were a superior method of diagnosing pneumoconiosis.⁵ Further, the administrative law judge found that both Drs. Castle and Crisalli, “provided sound reasons for concluding that the lesions in the miner’s lungs represented tuberculosis or histoplasmosis, not complicated pneumoconiosis.”⁶ Decision and Order on Remand at 4. The administrative law judge concluded, therefore, on weighing the x-ray, CT scan and medical opinion evidence together, that complicated pneumoconiosis was not established and claimant was not thereby entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304.

After careful consideration of the arguments on appeal, the administrative law judge’s decision denying benefits and the newly submitted evidence, we conclude that the administrative law judge properly found that complicated pneumoconiosis was not established and that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304. The administrative law judge’s decision denying benefits is, accordingly, affirmed.

Contrary to claimant’s argument, the administrative law judge did not err in crediting the CT scan interpretations of Drs. Wheeler, Scatarige, and Repsher, on the issue of complicated pneumoconiosis, even though they did not find that the CT scan evidence showed simple pneumoconiosis, contrary to the weight of the x-ray and medical opinion evidence, as the issue before the administrative law judge was whether the large opacities identified on x-ray were, in fact, the result of complicated pneumoconiosis and not some other disease process. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100. Contrary to claimant’s argument, the fact that these doctors did not find simple

⁵ Dr. Castle testified on deposition that CT scans provide a better view of lung tissue than chest x-rays because they are a more sensitive imaging device and are more likely to pick up lesions that are present and to define lesions that are present. Employer’s Exhibit 6 at 13-14. Similarly, Dr. Castle testified on deposition that CT scans give a better definition of changes in the lungs than chest x-rays. Employer’s Exhibit 7 at 22.

⁶ The administrative law judge noted that both Drs. Castle and Crisalli testified that the partial calcification of the lesions and their location in claimant’s lungs revealed a disease process typical of tuberculosis or histoplasmosis. Decision and Order on Remand at 4; Employer’s Exhibits 6 and 7.

pneumoconiosis on the CT scans does not render the CT scan evidence on the issue of complicated pneumoconiosis unreliable. As fact-finder, the weight to accord the evidence is within the purview of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1985). Here, the administrative law judge properly credited the CT scans, interpreted by Drs. Repsher, Scatarige and Wheeler, as showing that the large opacities seen on x-ray were due to “healed tuberculosis,” “calcified granulomata compatible with TB or histoplasmosis,” or “conglomerate granulomatous disease ... with histoplasmosis,” and not complicated pneumoconiosis. Decision and Order on Remand at 2; Employer’s Exhibits 2 and 5. In crediting the CT scans, the administrative law judge noted that both Drs. Crisalli and Castle explained that the CT scan evidence was a better diagnostic tool of coal workers’ pneumoconiosis than the x-ray evidence. Further, the administrative law judge noted that both Drs. Crisalli and Castle explained, in their opinions, why they believed the lesions seen on x-ray represented tuberculosis or histoplasmosis. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Employer’s Exhibits 6, 7. Thus, because the administrative law judge properly determined that the CT scan evidence and the medical opinion evidence, finding that claimant did not have complicated pneumoconiosis, outweighed the x-ray evidence, the administrative law judge properly determined that the new evidence as a whole failed to establish complicated pneumoconiosis,⁷ *see* 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-34, and failed to establish a change in an applicable condition of entitlement at Section 725.309.

⁷ Claimant argues that Dr. Blake’s interpretation of the September 16, 2005 CT scan shows coal workers’ pneumoconiosis and possibly shows progressive massive fibrosis, and therefore, supports a finding of complicated pneumoconiosis. The administrative law judge addressed Dr. Blake’s interpretation, but properly found that it was equivocal and that the evidence as a whole failed to establish complicated pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1985); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Similarly, claimant’s argument that the administrative law judge did not fully consider Dr. Ranavaya’s opinion, finding complicated pneumoconiosis, is rejected. The administrative law judge considered the opinion and found that it was based solely on x-ray. Claimant has not pointed to any other factors on which it was based. Therefore, the administrative law judge properly considered and rejected the opinion of Dr. Ranavaya. *See* Decision and Order on Remand at 4; Claimant’s Brief at 17; *see Anderson*, 12 BLR at 1-113; *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985).

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge