BRB No. 11-0699 BLA

DONNIE LEE MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY	)	DATE ISSUED: 07/24/2012
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05591) of Administrative Law Judge Ralph A. Romano, with respect to a claim filed June 15, 2006, pursuant to the provisions of 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] The administrative law judge credited

[1] In relevant part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable

claimant with 35.62 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of both simple and complicated pneumoconiosis, arising out of coal mine employment. The administrative law judge further found, therefore, that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.[2]

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 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, provides that there is 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

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presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] The administrative law judge determined that amended Section 411(c)(4) "is not applicable here because this case contains evidence of complicated pneumoconiosis." Decision and Order at 14.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established 36.25 years of coal mine employment and his finding that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

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 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 show 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, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §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 that pneumoconiosis is not present, resolve any conflict, 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); *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).

I. 20 C.F.R. §718.304(a)

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered thirteen readings of four x-rays dated March 30, 2004, July 12, 2006, July 25, 2007 and August 16, 2007. Dr. Pathak, a B reader, interpreted the March 30, 2004 film as positive for simple pneumoconiosis, but did not note the presence of any large opacities consistent with complicated pneumoconiosis. Employer's Exhibit 11. Dr. Ranavaya, a B reader, indicated that the July 12, 2006 x-ray was positive for complicated pneumoconiosis, while Dr. Zaldivar, also a B reader, did not detect any large opacities. Director's Exhibit 12; Employer's Exhibit 10. The July 25, 2007 film was interpreted as negative for complicated pneumoconiosis by Dr. Zaldivar and Dr. Repsher, a B reader. Employer's Exhibits 1, 2. Drs. Alexander and Ahmed, both dually-qualified as B readers and Board-certified radiologists, read this x-ray as positive for complicated pneumoconiosis. Claimant's Exhibits 4, 7. Dr. Ahmed interpreted the August 16, 2007 film as positive for simple pneumoconiosis and noted that the mass in the upper lobe of claimant's left lung could be complicated pneumoconiosis, but he could not rule out a malignancy. Claimant's Exhibit 3. Dr. Alexander read this x-ray as positive for complicated pneumoconiosis, while Drs. Scott and Scatarige, who are dually-qualified radiologists,

[5] In this case, the administrative law judge determined correctly that there is no biopsy evidence relevant to 20 C.F.R. §718.304(b). Decision and Order at 15.

read it as negative for complicated pneumoconiosis. Claimant's Exhibits 3, 6; Employer's Exhibit 5. Dr. Gaziano, a B reader, interpreted this film as positive for complicated pneumoconiosis. Claimant's Exhibit 1.

Considering both the quantity of the readings and the qualifications of the readers, the administrative law judge determined that the March 30, 2004 x-ray was negative for complicated pneumoconiosis, that the July 12, 2006 x-ray was in equipoise, and that the July 25, 2007 x-ray was positive for complicated pneumoconiosis. Decision and Order at 12-14. Regarding the August 16, 2007 film, the administrative law judge stated:

> I accord the most weight to Dr. Alexander's August 16, 2007 x-ray interpretation because he is a dually-qualified physician. Additionally, Dr. Gaziano's interpretation buttresses Dr. Alexander's findings. I accord less weight to Dr. Ahmed's equivocal interpretation . . . Additionally, despite their impressive credentials, I give less weight to the interpretations of Drs. Scott and Scatarige because their comments concerning tuberculosis and histoplasmosis are out of line with the treatment records. While both physicians diagnosed simple pneumoconiosis, they further stated that there were factors favoring tuberculosis and histoplasmosis rather than coal workers' pneumoconiosis. The treatment records date back to 2001 and do not mention the possibility of histoplasmosis or tuberculosis.

Id. at 13-14. The administrative law judge concluded that the preponderance of the x-ray evidence was positive for complicated pneumoconiosis under 20 C.F.R. §718.304(a). *Id*. at 14-15.

Employer argues that the administrative law judge improperly determined that the July 25, 2007 x-ray was positive for complicated pneumoconiosis, "based on an unacceptable head counting of the opinions." Employer's Brief at 11. Employer states that, because all B readers are equally qualified to detect the presence of pneumoconiosis, the administrative law judge was required to explain why the positive readings of dually-qualified radiologists Drs. Alexander and Ahmed were entitled to greater weight than the negative readings of Drs. Zaldivar and Repsher, who are B readers.

Employer's contentions are without merit. Both the Board and the United States Court of Appeals for the Fourth Circuit have recognized that an administrative law judge may give greater weight to an x-ray interpretation rendered by a physician who is both a B reader and a Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Thus, we affirm the administrative law judge's determination that the July 25, 2007 x-ray is positive for complicated

pneumoconiosis, based on the preponderance of readings performed by dually-qualified radiologists.

With respect to the August 16, 2007 x-ray, employer maintains that the administrative law judge's weighing of the evidence was internally inconsistent, as he credited the dually-qualified readers when analyzing the June 25, 2007 x-ray, but did not do so when analyzing the August 16, 2007 x-ray. Employer further contends that the administrative law judge improperly discounted the opinions of Drs. Scott and Scatarige, based on information in claimant's treatment records. Employer also argues that the administrative law judge made a "substantial error" in finding that Dr. Scatarige attributed the mass in claimant's left lung to tuberculosis. Employer's Brief at 14.

We reject employer's assertions. Employer is correct in maintaining that, when summarizing Dr. Scatarige's interpretation of the August 16, 2007 x-ray, the administrative law judge stated that Dr. Scatarige "noted the 2 cm mass in the left apex and attributed it to *coal workers'* tuberculosis." Decision and Order at 13 (emphasis added). However, when weighing Dr. Scatarige's opinion, the administrative law judge clarified that Dr. Scatarige's interpretation was entitled to less weight because he opined "that there were factors favoring tuberculosis and histoplasmosis rather than coal workers' pneumoconiosis." *Id*. Therefore, any error in the administrative law judge's initial summary of Dr. Scatarige's opinion is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In addition, we hold that, contrary to employer's contention, the administrative law judge was consistent in his discussion of the physicians' qualifications when weighing the July 25, 2007 and August 16, 2007 films. The administrative law judge gave added weight to Dr. Alexander's positive interpretation of the August 16, 2007 x-ray, as he did when considering the July 25, 2007 x-ray, because Dr. Alexander is a dually-qualified radiologist. Decision and Order at 12-13. The administrative law judge acknowledged the "impressive credentials" of Drs. Scott and Scatarige, but acted within his discretion in giving their interpretations of the August 16, 2007 x-ray less weight, as there is no evidence that claimant has suffered from tuberculosis or histoplasmosis. *Id*. at 13; *see Westmoreland Coal Co., v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). Consequently, we affirm the administrative law judge's findings that the August 16, 2007 x-ray was positive for simple and complicated pneumoconiosis and that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

II. 20 C.F.R. §718.304(c)

The administrative law judge determined that the CT scan evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20

C.F.R. §718.304(c), as the readings of the January 9, 2001 scan were in equipoise, and there was no credible positive interpretation of the March 7, 2007 CT scan.[6] Decision and Order at 15-16. The administrative law judge further found that the treatment records were insufficient to establish the existence of complicated pneumoconiosis because they did not contain a definitive diagnosis of the disease.[7] *Id*. at 16.

The administrative law judge determined, however, that Dr. Gaziano's medical opinion supported a finding of complicated pneumoconiosis. *Id*. at 17. The administrative law judge determined that Dr. Gaziano's opinion was entitled to greater weight than the treatment records and CT scans, as the treatment records and CT scans "did not completely rule out the possibility of complicated pneumoconiosis," and Dr. Gaziano's opinion was supported by the x-ray evidence. *Id*. The administrative law judge concluded, therefore, that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Id*. The administrative law judge also determined, based upon a weighing of all of the evidence relevant to 20 C.F.R. §718.304, that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. *Id*.

[6] The administrative law judge discredited the readings of the January 9, 2001 CT scan by Drs. Alexander and Scatarige, as Dr. Alexander's interpretation was equivocal and Dr. Scatarige's identification of healed tuberculosis, histoplasmosis, or sarcoidosis, as the source of the opacities he viewed, was unsupported by the record. Decision and Order at 15; Claimant's Exhibit 7; Employer's Exhibit 6. The administrative law judge found that the positive reading of this scan by Dr. Ahmed, and the negative reading by Dr. Scott, were in equipoise. Decision and Order at 15; Employer's Exhibit 6. Regarding the March 7, 2007 CT scan, the administrative law judge accorded little weight to the readings by Drs. Ahmed and Scott, as they were equivocal. Decision and Order at 16; Employer's Exhibit 6; Claimant's Exhibit 7. The administrative law judge discredited Dr. Scatarige's interpretation because the treatment records did not support his identification of inflammatory disease as the cause of the conditions observed on the scan. Decision and Order at 16; Employer's Exhibit 6. Lastly, the administrative law judge accorded little weight to Dr. Alexander's finding of complicated pneumoconiosis, as no other physician detected large opacities in claimant's right lung. Decision and Order at 16; Claimant's Exhibit 7.

[7] There are treatment records from Drs. Crisalli and Yousaf. In Dr. Crisalli's December 13, 2007 report, he stated that the apical density in claimant's left lung was "suggestive of complicated coal [workers'] pneumoconiosis," but recommended a CT scan to rule out lung cancer. Claimant's Exhibit 2. Dr. Yousaf treated claimant for chest pain related to chronic coronary insufficiency. Employer's Exhibit 15.

Employer asserts that the administrative law judge made inconsistent findings in his weighing of the x-ray evidence against the other evidence of record, particularly the treatment records. Employer also argues that the administrative law judge did not consider the CT scan evidence at 20 C.F.R. §718.304(a), as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), or Dr. Ahmed's statement that CT scans would assist in resolving the conflict in the x-ray evidence. Employer further contends that the administrative law judge must perform an equivalency determination regarding the CT scan interpretations of record.

These allegations of error are without merit. The administrative law judge relied on claimant's treatment records to discredit the x-ray interpretations of Drs. Scott and Scatarige at 20 C.F.R. §718.304(a), because the physicians attributed their findings to tuberculosis or histoplasmosis when there was no evidence in the treatment records of either of these diseases. *See* Decision and Order at 13-14. The administrative law judge's determination that "the treatment records fall short of actually diagnosing complicated pneumoconiosis" does not conflict with this finding. *Id*. at 16. In addition, contrary to employer's contention, the APA does not require the administrative law judge to consider the CT scan evidence in conjunction with the chest x-ray evidence at 20 C.F.R. §718.304(a). Rather, the administrative law judge must consider the CT scan evidence of record under 20 C.F.R. §718.304(c), *and* when he weighs all of the evidence relevant to the existence of complicated pneumoconiosis together, as he did in this case. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(en banc)(Boggs, J., concurring); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting).

In addition, the administrative law judge acted within his discretion in finding that the CT scan evidence did not outweigh the x-ray evidence, as it confirmed neither the presence nor absence of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. Further, an equivalency determination is not required if the administrative law judge determines that the evidence relevant to 20 C.F.R. §718.304(b), (c), is insufficient to establish the existence of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Regarding the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §718.304(c), employer maintains that the administrative law judge did not fully consider Dr. Crisalli's opinion under 20 C.F.R. §718.104. Employer also contends that the administrative law judge erred in giving more weight to Dr. Gaziano's opinion than to the contrary opinions of Drs. Scott and Scatarige. Employer asserts that the administrative law judge further erred in giving less weight to the opinions of Drs. Zaldivar and Repsher because he "neglect[ed] any discussion by Drs. Repsher or Zaldivar

of factors other than the chest x-rays in reaching their medical conclusion[s]." Employer's Brief at 18. Lastly, employer maintains that the administrative law judge did not adequately explain why the medical opinion evidence outweighed the treatment records and CT scan evidence.

With respect to Dr. Crisalli's opinion, the administrative law judge considered it under the criteria in 20 C.F.R. §718.104(d) and found, "[t]he extent, nature, duration, and frequency of Dr. [Crisalli's] treatment of the [c]laimant are all of very high quality." Decision and Order at 16. The administrative law judge rationally determined that his opinion was entitled to little weight, however, given its equivocal nature. *Id*. at 16; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341(4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988). Accordingly, the administrative law judge was not required to explain why he did not find that Dr. Crisalli's opinion supported the opinions in which Drs. Zaldivar and Repsher ruled out the presence of complicated pneumoconiosis. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127.

Concerning the administrative law judge's reliance upon Dr. Gaziano's opinion, the administrative law judge rationally found that Dr. Gaziano's diagnosis of complicated pneumoconiosis was well-reasoned and well-documented, because it was "based on evidence such as physical examinations, symptoms, and other adequate data that supports the physician's conclusions," and was adequately explained. Decision and Order at 17; *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge also acted within his discretion in discrediting the opinions of Drs. Zaldivar and Repsher because they relied upon negative x-ray findings, which were contrary to the administrative law judge's determination that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62. In addition, by stating that he accorded more weight to the medical opinion evidence because it was consistent with his determination concerning the x-ray evidence, the administrative law judge provided a valid rationale for his finding. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). We affirm, therefore, the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c), and based on the evidence as a whole at 20 C.F.R. §718.304.

Finally, we affirm, as unchallenged on appeal, the administrative law judge's finding that the presumption set forth in 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose from his coal mine employment, was invoked and not rebutted. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 18.

Consequently, we affirm the administrative law judge's determination that claimant is entitled to benefits, as he invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis at 20 C.F.R. §§718.304, 718.203(b).

Accordingly, the administrative law 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