BRB No. 12-0535 BLA

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| TERRY L. MULLINS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| GLAMORGAN COAL | ) | DATE ISSUED: 07/30/2013 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2010-BLA-05590) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on July 8, 2009,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge noted that employer did not contest the district director's finding of twenty-five years of coal mine

[1] Claimant filed an initial claim on March 2, 2005, which was denied by Administrative Law Judge Larry W. Price on October 16, 2007, on the grounds that claimant failed to establish any of the requisite elements of entitlement or the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Director's Exhibit 1. Claimant took no further action until filing the current claim on July 7, 2009. Director's Exhibit 3.

employment. The administrative law judge considered the newly submitted evidence and found that claimant established the existence of simple and complicated pneumoconiosis.[2] Weighing all of the record evidence, the administrative law judge determined that claimant satisfied his burden to prove that he has complicated pneumoconiosis and was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that claimant has complicated pneumoconiosis and the weight he accorded the conflicting evidence.[3] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a 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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

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[2] Based on the filing date of this subsequent claim, the administrative law judge also considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Amended Section 411(c)(4) provides for a rebuttable presumption of total disability due to pneumoconiosis, if claimant establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). Because the evidence did not establish that claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge found that claimant could not invoke the amended Section 411(c)(4) presumption, and considered the evidence relevant to whether claimant established complicated pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 4-5.

[3] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that "although claimant failed to prove any of the elements of entitlement" in his prior claim, "there is no dispute that [c]laimant now established that he has simple pneumoconiosis," thereby demonstrating a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

[4] Because claimant's coal mine employment was in Virginia, 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, 1-202 (1989) (en banc); Director's Exhibit 7.

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 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. 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. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Director, OWCP v. Eastern Coal Corp.* [*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).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered six readings of two analog x-rays dated September 3, 2009 and November 7, 2009. Decision and Order at 5-6, 10-11. The September 3, 2009 x-ray was read by Drs. DePonte and Alexander, both dually-qualified as Board-certified radiologists and B readers,[5] as positive for simple and complicated pneumoconiosis, Category B. Director's Exhibit 12; Claimant's Exhibit 3. Dr. Scott, also a dually-qualified radiologist, read the September 3, 2009 x-ray as negative for simple and complicated pneumoconiosis.[6] Director's Exhibit 15. In the "comments" section of the ILO form, Dr. Scott noted:

[5] A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology. A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[6] Dr. Barrett read the September 3, 2009 x-ray for quality purposes only. Director's Exhibit 12.

> Infiltrates/fibrosis apices with 4 cm mass left apex and 3 cm mass right apex. Changes probably [tuberculosis], unknown activity or atypical [tuberculosis]. No background of small opacities to suggest silicosis/[coal workers' pneumoconiosis] and strong localization to apices.

*Id*. The November 7, 2009 x-ray was read by Dr. DePonte as positive for simple and complicated pneumoconiosis, Category B, and read by Dr. Scott as negative for simple and complicated pneumoconiosis. Director's Exhibits 13, 14. In the "comments" section of the ILO classification form, Dr. Scott noted four centimeter masses in both apices which he indicated was "probable healed granulomatous disease such as [tuberculosis]," although he also noted that the disease could still be active. Director's Exhibit 13.

In resolving the conflict in the x-ray evidence, the administrative law judge found that "the majority of the readings by Drs. DePonte and Alexander outweigh the minority view of Dr. Scott." Decision and Order at 10. The administrative law judge also considered Dr. Scott's diagnosis of "probable" tuberculosis to be "a qualified, inconclusive opinion." *Id*. The administrative law judge further found that because "there is no evidence of tuberculosis in this record . . . not only does Dr. Scott render a minority view . . . his equivocal opinion would be considered to be speculative." *Id*. Thus, the administrative law judge concluded that the x-ray evidence supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id*.

Employer asserts that the administrative law judge erred in giving less weight to Dr. Scott's readings because they are "no less speculative than the opinion of Dr. DePonte that the September 3, 2009 x-ray showed masses 'typical' for complicated pneumoconiosis." Employer's Brief in Support of Petition for Review at 5. Contrary to employer's argument, however, the United States Court of Appeals for the Fourth Circuit has held that an administrative law judge may reject, as speculative and equivocal, the opinions of employer's experts, who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions, such as tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis, if they fail to point to evidence in the record indicating that the miner suffers or suffered from any of the alternative diseases. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287. Because the administrative law judge found that there is no evidence in the record that claimant was ever treated for tuberculosis, we see no error in his decision to assign Dr. Scott's opinion less weight. *Id.*; *see also 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).

Furthermore, as the administrative law judge performed both a quantitative and qualitative analysis of the x-ray evidence, taking into consideration the radiological

qualifications of the physicians, we affirm his finding that the x-ray evidence supports a finding of complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 10. Thus, we affirm the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), based on the preponderance of the positive readings. Decision and Order at 10-11.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the following: four readings of two digital x-rays, dated December 17, 2009 and September 21, 2011; Dr. Fino's reading of a computerized tomography (CT) scan taken on June 16, 2009; and the medical reports of Drs. Habre, Castle, and Fino.[7] Decision and Order at 6-10, 11-12. The December 17, 2009 digital x-ray was read by Dr. Alexander, a dually-qualified radiologist, as positive for simple and complicated pneumoconiosis, Category B. Claimant's Exhibit 1. Dr. Fino, a Board-certified pulmonologist and B reader, read the December 17, 2009 digital x-ray, obtained in conjunction with his examination, as positive for simple pneumoconiosis and noted "odd looking mass type lesions in both upper lung zones," but opined that the x-ray changes did not look like classic complicated pneumoconiosis. Director's Exhibit 13. The September 21, 2011 digital x-ray was read by Dr. Alexander as positive for simple and complicated pneumoconiosis, Category B. Claimant's Exhibit 4. Dr. Castle, a Board-certified pulmonologist and B reader, read the September 21, 2011 x-ray as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Employer's Exhibit 1. In the "comments" section of the ILO classification form, Dr. Castle noted, "Partially calcified lesions in both upper zones with pleural attachments and [questionable] cavity consistent with granulomatous disease." *Id.*

The June 16, 2009 CT scan was read by Dr. Fino as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibit 13. Dr. Fino noted "solid masses" of 2-3 centimeters in the upper portion of the right lung and 2.5 centimeters in the upper portion of the left lung, but stated "I cannot state with any degree of reasonable certainty that this is complicated pneumoconiosis." *Id.*

Dr. Habre examined claimant on September 3, 2009, on behalf of the Department of Labor, and diagnosed complicated coal workers' pneumoconiosis, based on Dr. DePonte's positive x-ray reading and claimant's history of twenty-three years of

[7] There is no biopsy evidence to be weighed at 20 C.F.R. §718.304(b).

underground coal mining.[8] Director's Exhibit 12. Dr. Castle prepared an October 4, 2011 report, testified in an October 12, 2011 deposition, and prepared a February 27, 2012 supplemental report, based on a September 21, 2011 physical examination and a review of medical records. Employer's Exhibits 1, 2, 4. In his October 4, 2011 report, Dr. Castle opined that claimant "probably does have radiographic evidence of simple coal workers' pneumoconiosis," but that claimant did not have radiographic or other findings of complicated coal workers' pneumoconiosis. Employer's Exhibit 1. Rather, Dr. Castle noted CT scans that demonstrated the presence of calcified granulomas in the spleen, which he stated was indicative of granulomatous disease rather than pneumoconiosis. *Id.* At his October 12, 2011 deposition, Dr. Castle testified that his review of "a number of radiographic reports from other individuals, as well as CT scans of the chest" all demonstrated "typical features" of granulomatous disease, including "the location, the calcification, the appearance, the pleural thickening, the pleural attachments and . . . calcifications in the spleen[,] which Dr. Castle said were a hallmark of someone who was "infected with histoplasmosis a long time ago." *Id.* at 18-19. Dr. Castle explained that histoplasmosis is "endemic" in the Mississippi River basin, but is "virtually always asymptomatic," and is contracted by inhaling spores from the fecal matter of birds or bats. *Id.* at 22-23. He noted that claimant was given a blood test for histoplasmosis that came back negative, but Dr. Castle indicated that the test was not a reliable indicator of histoplasmosis in all cases. *Id.* at 26-27. Dr. Castle concluded that claimant does not have complicated pneumoconiosis, "based upon the radiographic findings, as well as the absence of any physical findings or any physiological abnormalities that would be consistent with complicated disease." *Id.* at 31.

Dr. Fino examined claimant on December 17, 2009, at which time he obtained a digital x-ray, reviewed a June 16, 2009 CT scan, obtained pulmonary function and arterial blood gas testing, and reviewed certain medical records provided by employer. In his January 24, 2010 report, Dr. Fino opined that claimant does not have complicated pneumoconiosis, "primarily because there are no abnormalities on spirometry, on oxygen transfer, on lung volumes, or on a rather extensive exercise test that would suggest pulmonary fibrosis consistent with complicated pneumoconiosis that would cause impairment." Director's Exhibit 13. Dr. Fino indicated that he was "worried about a progressive granulomatous condition or sarcoidosis" and recommended that claimant undergo a biopsy for a definitive diagnosis. *Id.*

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[8] The administrative law judge did not indicate that he gave any weight to Dr. Habre's opinion; he noted employer's assertion that it is '"useless' . . . as it merely parrots Dr. DePonte's x-ray reading and provides no additional support" for the diagnosis of complicated pneumoconiosis. Decision and Order at 8, *quoting* Employer's Post-Hearing Brief.

Dr. Fino testified on November 15, 2011, and noted that he agreed with Dr. Castle that the presence of calcified granuloma in claimant's spleen was "classic for the fungal disease of histoplasmosis." Employer's Exhibit 3 at 13. Dr. Fino explained that he attributed claimant's large masses to granulomatous disease, either histoplasmosis or sarcoidosis, based on the location of the masses in the "very upper part" of the upper lung zones, since complicated pneumoconiosis occurs in the central or lower portions of the upper lung zones. *Id.* Dr. Fino indicated that the location of the masses in the "very upper part" of the upper lung zones explained why claimant does not have any respiratory impairment, as "the top part of the lungs don't really participate as much in terms of ventilation and oxygenation as do the rest of the lungs.'' *Id.*

The administrative law judge found that Dr. Alexander was "best qualified" to interpret the digital x-ray evidence and found that it was positive for complicated pneumoconiosis. Decision and Order at 11. He also gave little weight to the opinions of Drs. Castle and Fino because he determined that their bases for excluding complicated pneumoconiosis were not sufficiently explained. *Id.* at 11-13.

Employer argues that there was no rational basis for the administrative law judge to conclude that a radiologist is better qualified to interpret a digital x-ray, since Drs. Fino and Castle are B readers and testified to their training and experience in the interpretation of x-rays in the treatment of their pulmonary patients. Employer's Brief in Support of Petition for Review at 10. Employer contends that the requirement to consider the radiological qualifications set forth at 20 C.F.R. §718.202(a)(1) is applicable to analog x-rays and not digital x-rays, which are considered "other evidence" under 20 C.F.R. §718.107. *Id.*

Contrary to employer's assertion, the administrative law judge properly concluded that the digital x-ray interpretations "are within the province of radiology," and acted within his discretion in crediting Dr. Alexander's positive readings for complicated pneumoconiosis of the digital x-rays over the negative readings by Drs. Fino and Castle, based upon Dr. Alexander's superior radiological qualifications. *See Adkins,* 958 F.2d at 52, 16 BLR at 2-65-66; *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 11. Consistent with the administrative law judge's analysis, the Department of Labor recently proposed revisions to the regulations governing the admission and weighing of chest x-rays to include digital x-ray readings, and to provide that they be weighed based on the readers' radiological credentials:

> By adopting quality standards for digitally acquired chest X-rays, the Department intends that interpretations of film and digital X-rays . . . will be put on equal footing both for admission into evidence and for the weight accorded them.

78 Fed. Reg. 35,575, 35,577 (proposed June 13, 2013) (explaining standards to be codified at 20 C.F.R. §§718.102, 718.202(a)(1), and 718.304). We, therefore, affirm the administrative law judge's finding that the digital x-ray evidence supports a finding of complicated pneumoconiosis and reject employer's arguments.

Employer also contends the administrative law judge erred in giving less weight to the opinions of Drs. Castle and Fino at 20 C.F.R. §718.304(c). Employer asserts that the administrative law judge imposed an "unreasonable standard" on employer's doctors to support their diagnosis of histoplasmosis with extraordinary corroborating evidence. Employer's Brief in Support of Petition for Review at 15. We disagree.

The administrative law judge noted that, "although histoplasmosis is described as a disease prevalent in the Mississippi Valley, and . . . [c]laimant lives in this area, there is no other evidence that specifically relates exposure to [claimant]." Decision and Order at 12. The administrative law judge further observed that the histoplasmosis blood test administered by Dr. Castle was negative and that claimant's treatment records make no mention of histoplasmosis. *Id*. at 7, 12. Thus, contrary to employer's argument, the administrative law judge permissibly rejected the opinions of Drs. Castle and Fino because he did not find a factual basis in the record to support their opinions that claimant's masses are due to histoplasmosis and not complicated pneumoconiosis.[9] *See Cox*, 602 F.3d at 287, 24 BLR at 2-286; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

The administrative law judge also rationally found that, while Drs. Castle and Fino stated that granulomas found in claimant's spleen were hallmark indicators of histoplasmosis, they "do not express any [scientific] basis for this" and do not explain why a diagnosis of histoplasmosis in the spleen and pneumoconiosis of the lungs are "mutually exclusive." Decision and Order at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc). Additionally, the administrative law judge permissibly rejected the opinions of Drs. Castle and Fino, that the pleural thickening observed on claimant's x-ray and CT scans was not consistent with complicated pneumoconiosis, as he found that they did not provide any explanation for their conclusions or present "medical literature to substantiate this position." Decision and Order at 11; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because the administrative law judge acted within his discretion in rendering

[9] The administrative law judge observed that "[t]here is no testimony to infer whether [claimant] was exposed to birds or bats. Decision and Order at 12. He also found that employer's experts "do not set forth what the [sic] level of such hypothetical exposure to birds or bats would be necessary to have caused histoplasmosis to an extent that it would produce such large lesions consistent with the sizes they document." *Id*.

his credibility determinations with respect to Drs. Castle and Fino, we affirm his finding that claimant established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(c), based on Dr. Alexander's positive digital x-ray reading. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993).

The administrative law judge discussed the prior claim evidence and noted that while it was insufficient, at that time, to show that claimant had complicated pneumoconiosis, employer's experts also did not substantiate their assertions that claimant had granulomatous disease. Decision and Order at 14. The administrative law judge assigned controlling weight to the newly submitted analog and digital x-ray evidence establishing that claimant has complicated pneumoconiosis. *Id*. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 13; *see Cox*, 602 F.3d at 287, 24 BLR at 2-287; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. We further affirm, as unchallenged by employer, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983). Thus, we affirm the administrative law judge's determination that claimant established his entitlement to benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge