

BRB No. 05-0569 BLA

TRACY H. CHAMP)
)
 Claimant-Respondent)
)
 v.)
)
 VISION COAL COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/22/2006
 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/Carrier (Carrier) appeals the Decision and Order – Awarding Benefits (03-BLA-6092) of Administrative Law Judge Edward Terhune Miller on a miner’s 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). Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant¹ established the existence of complicated pneumoconiosis and, therefore, was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits, commencing as of November 1, 2000.

On appeal, carrier contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304. Claimant has not filed a response brief. The Director, Office of Workers’ Compensation Programs, responds, urging affirmance of the administrative law judge’s award of benefits.²

To establish entitlement to benefits under Part 718 in a living miner’s claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b).

¹Claimant is Tracy H. Champ, the miner, who filed his claim for benefits on April 17, 2001. Director’s Exhibit 2.

²We affirm the administrative law judge’s findings of thirteen years of coal mine employment and that claimant’s complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,³ 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 (4th Cir. 1999).

Pursuant to Section 718.304, carrier asserts that the administrative law judge’s finding of the existence of complicated pneumoconiosis is irrational and not supported by substantial evidence. The administrative law judge noted that the record contains a total of five x-ray interpretations of four films taken on November 30, 2000, August 22, 2001, September 10, 2002, and June 18, 2003. Dr. Aycoth, who is a B reader⁴ and Board-certified radiologist, found the existence of simple and complicated pneumoconiosis on the November 30, 2000 x-ray. Director’s Exhibit 13. Dr. Binns, a B reader and Board-certified radiologist, found the existence of simple pneumoconiosis and no large opacities on the August 22, 2001 x-ray. Employer’s Exhibit 1. Dr. Forehand, a B reader, did not find the existence of simple or complicated pneumoconiosis on the August 22, 2001 x-

³The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant’s coal mine employment occurred in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 3.

⁴A “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 given on behalf of or by the Appalachian Laboratory 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., Inc. of Virginia 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).

ray. Director's Exhibit 19. Dr. Subramaniam,⁵ an A reader, found the existence of simple and complicated pneumoconiosis on the September 10, 2002 x-ray. Director's Exhibit 13. Dr. Castle, who is a B reader, did not find the existence of simple pneumoconiosis or large opacities consistent with complicated pneumoconiosis, but noted a 3 x 5 centimeter mass in claimant's right upper lobe on the June 18, 2003 x-ray. Employer's Exhibit 2.

The administrative law judge stated that Dr. Aycoth, a B reader and Board-certified radiologist, and Dr. Subramaniam, an A reader, found the existence of complicated pneumoconiosis. Decision and Order at 7-8. The administrative law judge next stated that Dr. Binns, who is a dually qualified reader, found the existence of simple pneumoconiosis, and concluded that there were no large opacities. *Id.* at 8. The administrative law judge stated, however, that Dr. Binns "did note a 'coalescence of opacities in the right and possibly left upper' lobe" and that while this physician "did not note the size of these coalescences [he] found that '[v]olume loss and left upper lobe density are believed related to scarring from old disease, but comparison with other studies is recommended to help exclude a nodule or small mass in the left upper' zone." *Id.* (quoting Employer's Exhibit 1). The administrative law judge noted that while the record contains no evidence of an old lung disease, three other physicians have found large opacities in both upper lung zones. Decision and Order at 8.

Regarding Drs. Forehand and Castle, the administrative law judge stated that while these physicians, both B-readers, did not find evidence of pneumoconiosis on the x-rays they interpreted, neither physician read the x-ray as entirely negative. First, the administrative law judge noted that Dr. Forehand found apical scarring possibly consistent with tuberculosis on the August 22, 2001 x-ray. Director's Exhibits 14, 19. However, the administrative law judge stated that "[a] skin test for tuberculosis was negative."⁶ Decision and Order at 8. Second, the administrative law judge noted that on

⁵The administrative law judge noted that "Dr. Subramaniam did not specifically document the size of the opacity he observed on Claimant's x-ray," but that he did describe the opacity as a Category A. Decision and Order at 8. Therefore, citing 20 C.F.R. §718.304(a), the administrative law judge inferred that Dr. Subramaniam observed an opacity greater than one centimeter in diameter because he classified the opacity seen as Category A. *Id.* Carrier does not contest the administrative law judge's determination that Dr. Subramaniam's x-ray is a finding of the existence of complicated pneumoconiosis pursuant to Section 718.304(a).

⁶In his July 17, 2003 opinion, Dr. Castle noted that claimant had a tuberculosis skin test, which was negative. Employer's Exhibit 2.

the June 18, 2003 x-ray Dr. Castle found “a 3 x 5 centimeter mass in the right upper lobe of uncertain etiology which could represent old granulomatous disease,” possibly cancer or tuberculosis. Employer’s Exhibit 2. The administrative law judge found Dr. Castle’s conclusions regarding the etiology of the large opacity to be “unpersuasive,” because they were unexplained and contrary to the conclusions of four other doctors of record. The administrative law judge found Dr. Castle’s x-ray interpretation to be “credible evidence of the existence of a large opacity in excess of 1 cm.” Decision and Order at 8. The administrative law judge was not persuaded by the etiology given by Drs. Forehand and Castle for the abnormalities they found on two of claimant’s x-rays for the reasons stated above. Therefore, the administrative law judge found that while Drs. Forehand and Castle did not find the existence of pneumoconiosis on the x-rays they interpreted, these physicians found abnormalities that are not inconsistent with a diagnosis of complicated pneumoconiosis.

Additionally, the administrative law judge considered Dr. Ahmed’s interpretation of a September 25, 2002 CT scan on which this physician found complicated pneumoconiosis Category A and documented opacities measuring between five to ten millimeters. Citing *Scarbro*, the administrative law judge stated that “[n]o physician of record opined on the equivalency of a 10 mm. (1 cm.) opacity documented on a CT-Scan and an opacity greater than 1 cm. as viewed on an x-ray.” *Id.* The administrative law judge, nonetheless, found that Dr. Ahmed’s CT scan interpretation was further evidence of the existence of large opacities in claimant’s lungs. *Id.*

The administrative law judge next considered together all of the radiological and medical opinion evidence contained in the record and concluded that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. Decision and Order at 8. In doing so, the administrative law judge noted that Drs. Aycoth, Subramaniam, Ahmed, and Castle documented an opacity greater than one centimeter in claimant’s upper lung zone. *Id.* The administrative law judge further noted that Dr. Binns found “a coalescence of small opacities and acknowledged that another mass could exist.” *Id.* at 8-9. The administrative law judge stated that “Dr. Forehand was the only physician of record whose opinion directly conflicted with the evidence of a large opacity,” but the administrative law judge found this physician’s opinion to be unpersuasive because he is not a Board-certified radiologist and because he “excluded the possibility of pneumoconiosis and suggested possible tuberculosis without explanation.”⁷ *Id.* at 9.

⁷The administrative law judge did not discredit Dr. Forehand’s x-ray interpretation solely because he is not a Board-certified radiologist. The administrative law judge also found that Dr. Forehand’s determination, that the apical scarring he saw on the August

In finding that the “most persuasive medical evidence links the large opacities in claimant’s lungs to coal dust exposure, the administrative law judge noted that Drs. Aycoth, Subramaniam, Ahmed, and Binns, two of whom are dually qualified x-ray readers, linked the opacities in claimant’s lungs to pneumoconiosis. *Id.* Furthermore, the administrative law judge stated that while Drs. Castle and Forehand opined that claimant does not have pneumoconiosis, both physicians found claimant’s x-rays to be “abnormal but neither explained why they concluded that the abnormality was inconsistent with pneumoconiosis or whether the abnormalities could otherwise be related to Claimant’s documented coal dust exposure.” *Id.*

In challenging the administrative law judge’s finding of the existence of complicated pneumoconiosis, carrier first asserts that the administrative law judge erred in according any weight to the x-ray reading of Dr. Subramaniam because this physician is only an A reader. In considering Dr. Subramaniam’s x-ray interpretation, the administrative law judge correctly noted that this physician is an A reader and stated that this “is not a material affirmative qualification as an x-ray interpreter.” Decision and Order at 5. Contrary to carrier’s assertion, however, the regulations do not require an administrative law judge to disregard x-ray interpretations rendered by physicians who are not B readers or Board-certified radiologists. 20 C.F.R. §§718.102, 718.202(a)(1); *see generally Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985) (regulations provide that where the x-ray evidence is in conflict, consideration *shall* be given to the reader’s radiological qualifications). Therefore, the administrative law judge permissibly credited Dr. Subramaniam’s interpretation of the September 10, 2002 x-ray because there are no conflicting interpretations of this same x-ray in the record and because Dr. Subramaniam’s reading is consistent with Dr. Aycoth’s reading of an earlier x-ray.⁸ *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Additionally, there is no merit in carrier’s contention that the administrative law judge improperly accorded great weight to Dr. Ahmed’s CT scan interpretation because this physician’s qualifications are not in the record. The administrative law judge noted that Dr. Ahmed’s qualifications are not in the record. However, the administrative law judge did not accord Dr. Ahmed’s CT scan interpretation great weight, but merely found Dr. Ahmed’s CT scan interpretation to be

22, 2001 x-ray was due to tuberculosis, is unpersuasive because the record contains a negative skin test for tuberculosis. Decision and Order at 8.

⁸Dr. Subramaniam read the September 10, 2002 x-ray and Dr. Aycoth read the November 30, 2000 x-ray as showing small opacities with a profusion of 2/1 and large opacities classified as Category A. Director’s Exhibit 13.

“further evidence of the existence of large opacities in Claimant’s lungs.” Decision and Order at 8.

Finally, carrier asserts that the administrative law judge erred in substituting his opinion for Dr. Binns’s opinion when he stated that this physician’s opinion supported a finding that claimant’s upper lungs contain large opacities. In considering Dr. Binns’s interpretation of the August 22, 2001 x-ray, the administrative law judge did not state that Dr. Binns observed a large opacity in claimant’s upper lung. Rather, the administrative law judge stated that “Dr. Binns concluded that there were no large opacities” on claimant’s August 2001 x-ray and found that Dr. Binns’s finding that another mass could exist was not inconsistent with the opinions of four other physicians of record, Drs. Aycoth, Subramaniam, Castle, and Ahmed, that document an opacity greater than one centimeter in claimant’s upper lung zone. *Id.* Based on the foregoing, we reject carrier’s assertions⁹ and affirm the administrative law judge’s finding that claimant established the existence of complicated pneumoconiosis, as it is supported by substantial evidence. *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *see Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-248-49 (2003).

⁹Carrier relies on a January 3, 2001 biopsy report to support its assertion that the weight of the evidence does not establish the existence of complicated pneumoconiosis. Dr. Patel’s biopsy report indicated that no tumor cells were seen, but was silent as to the presence or absence of pneumoconiosis. Director’s Exhibit 13. Carrier’s reliance on Dr. Patel’s biopsy report is misplaced because, as 20 C.F.R. §718.106(c) states, “[a] negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis.”

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge