

BRB No. 12-0536 BLA

ALEX J. OWENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 06/27/2013
	)	
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 Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05734) of Administrative Law Judge Christine L. Kirby on a claim filed on June 30, 2009, 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 accepted the parties’ stipulation to at least 35.2 years of coal mine employment and found that the evidence of record established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304; 718.203(b). The administrative law judge found, therefore, that claimant was entitled to the irrebuttable presumption of totally

disabling pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and awarded benefits.

On appeal, employer challenges the administrative law judge's finding that complicated pneumoconiosis was established pursuant to Section 718.304 and that claimant was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act.<sup>1</sup> Claimant responds, urging affirmance of the administrative law judge's Decision and Order and asserting that employer is merely requesting a reweighing of the evidence. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in response to the 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 rational, supported by substantial evidence and in accordance with applicable law.<sup>2</sup> 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, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides an irrebuttable presumption of totally disabling pneumoconiosis if claimant 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; *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). Claimant is entitled to the irrebuttable presumption, however, not because he has provided a single piece of relevant evidence, but because he has a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993). Further, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. Rather, the administrative law judge must examine all of the evidence on the issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well

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<sup>1</sup> The administrative law judge's finding pursuant to 20 C.F.R. §718.203(b) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>2</sup> Because claimant's coal mine employment was in West 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 (1989)(en banc).

as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (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 (1991) (en banc).

### **Section 718.304(a)**

Employer first challenges the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304(a). The analog x-ray evidence consists of seven readings of three x-rays. The August 20, 2009 x-ray was read as positive for complicated pneumoconiosis by Drs. DePonte and Alexander, B readers and Board-certified radiologists, and negative for complicated pneumoconiosis by Dr. Scott, a B reader and Board-certified radiologist. The August 20, 2010 x-ray was read as positive for complicated pneumoconiosis by Dr. DePonte and as negative by Dr. Scott. The June 17, 2011 x-ray was read as positive for complicated pneumoconiosis by Dr. Alexander, but as negative by Dr. Scott. The administrative law judge determined that the August 20, 2009 x-ray was positive for complicated pneumoconiosis based on the preponderance of the positive x-ray readings. The administrative law judge determined that the August 20, 2010 x-ray and the June 17, 2011 x-rays were in equipoise as they were each read as both positive and negative by equally qualified physicians. Consequently, the administrative law judge stated, "[l]ooking at the chest x-ray evidence as a whole, I find that a preponderance of the chest x-ray evidence establishes that [c]laimant has complicated pneumoconiosis." Decision and Order at 12.

Employer contends, however, that the administrative law judge erred in finding complicated pneumoconiosis established because she impermissibly "counted heads" in making her finding and she failed to consider the fact that Dr. Scott was an associate professor of radiology in addition to being a B reader and Board-certified radiologist. Because the administrative law judge considered both the quantitative and qualitative nature of the conflicting x-ray readings, however, we reject employer's assertion that the administrative law judge's weighing of the x-ray evidence was based solely on a "head count." *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Further, contrary to employer's argument, the administrative law judge did not err in failing to accord additional weight to Dr. Scott based on his status as an associate professor of radiology. She properly considered the fact that Drs. DePonte, Alexander and Scott were all B readers and Board-certified radiologists. While the administrative law judge *may* give greater weight to the interpretations of a physician based upon his

academic qualifications, he is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc) (McGranery and Hall, JJ., concurring and dissenting), *citing Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick*, 16 BLR at 1-33; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Accordingly, we reject claimant's argument that Dr. Scott's negative x-ray readings merited additional weight.

In light of the forgoing, we affirm the administrative law judge's weighing of the x-ray evidence and her finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304(a).<sup>3</sup>

### **Section 718.304(c)**

Employer challenges the administrative law judge's finding that other evidence establishes complicated pneumoconiosis and supports the x-ray evidence of complicated pneumoconiosis. The digital x-ray evidence consists of two digital x-rays, each of which had two readings. A December 15, 2009 digital x-ray was read by Dr. Alexander as positive for complicated pneumoconiosis and read by Dr. Castle, a B reader, as showing granulomatous disease. An October 19, 2010 digital x-ray was read by Dr. Alexander as positive for complicated pneumoconiosis and by Dr. Hippensteel, a B reader, as negative for coal workers' pneumoconiosis.

In finding that the digital x-ray evidence established complicated pneumoconiosis, the administrative law judge accorded greater weight to the positive reading of Dr. Alexander because he was the only physician who is Board-certified in radiology. Decision and Order at 13. Employer contends, however, that the administrative law judge erred in considering the qualifications of the physicians in considering the digital x-ray pursuant to 20 C.F.R. §718.107(b), which, unlike 20 C.F.R. §718.202(a)(1), does not require consideration of radiological qualifications. Employer also contends that the administrative law judge erred in failing to consider the fact that Dr. Castle reviewed other evidence and examined claimant in assessing the weight to accord his x-ray interpretation.

We reject employer's argument that the administrative law judge erred in finding that the digital x-ray evidence is positive for complicated pneumoconiosis. The

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<sup>3</sup> The administrative law judge found that the existence of complicated pneumoconiosis cannot be established pursuant to 20 C.F.R. §718.304(b), as there is no biopsy evidence in this case. Decision and Order at 11.

administrative law judge is charged with assessing the credibility of evidence. *See Clark*, 12 BLR at 1-155. In this case, the administrative law judge rationally accorded greater weight to the interpretations of Dr. Alexander because he was the only physician who is Board-certified in radiology. *See Clark*, 12 BLR at 1-155. Moreover, the administrative law judge rationally determined that Dr. Castle's review of other evidence and examination of claimant did not enhance his interpretation of a digital x-ray. *See Clark*, 12 BLR at 1-155. Accordingly, we affirm the administrative law judge's finding that the digital x-ray evidence is positive for the existence of complicated pneumoconiosis.

Employer also contends that the administrative law judge erred in finding that the CT scan evidence supported the x-ray evidence establishing the existence of complicated pneumoconiosis. The CT scan evidence consists of eighteen interpretations of nine CT scans by Drs. Alexander, DePonte, Castle and Hippensteel. The administrative law judge noted that Drs. Alexander and DePonte (Board-certified radiologists and B readers) interpreted the scans as positive for complicated pneumoconiosis, while Drs. Castle and Hippensteel (B readers) interpreted them as showing granulomatous disease. The administrative law judge also noted that Drs. Castle and Hippensteel disagreed as to the specifics of the mass they saw. The administrative law judge concluded, therefore, that the CT scan evidence established the existence of complicated pneumoconiosis.

Employer contends, however, that the administrative law judge erred in crediting the positive CT scan readings of Drs. Alexander and DePonte over the contrary readings of Drs. Castle and Hippensteel. Contrary to employer's contention, however, the administrative law judge permissibly found that the positive CT scan evidence was more credible and properly accorded it greater weight. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Clark*, 12 BLR at 1-155. Accordingly, the administrative law judge determined that the CT scan evidence established the existence of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. That finding is, therefore, affirmed.

Employer further contends that the administrative law judge erred in crediting the opinions of Drs. Al-Khasawneh and Baker, who found complicated pneumoconiosis, over the contrary opinions of Drs. Castle and Hippensteel. The administrative law judge credited the opinions of Drs. Al-Khasawneh and Baker because she found them "well-reasoned" and "supported by the x-ray evidence as a whole."<sup>4</sup> Decision and Order at 14-

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<sup>4</sup> The administrative law judge noted that Dr. Al-Khasawneh's opinion was based on two physical examinations of claimant, claimant's symptoms, his medical and work histories, an electrocardiogram, pulmonary function test, and two x-rays. Director's Exhibit 10; Claimant's Exhibit 3. The administrative law judge found that Dr. Baker's opinion was based on a physical examination, symptoms, medical and work histories, a pulmonary function study, a blood gas study, and an x-ray. Claimant's Exhibit 4.

15. The administrative law judge accorded less weight to the contrary opinions of Drs. Castle and Hippensteel because they were “equivocal,” “speculative,” and “unsupported” by the more credible evidence. Decision and Order at 15-16.

Considering Dr. Castle’s opinion, that claimant does not have complicated pneumoconiosis, but instead has “old, healed granulomatous disease,” the administrative law judge stated:

I find this opinion to be internally inconsistent and equivocal and give it diminished weight. Dr. Castle states that [c]laimant cannot have coal workers’ pneumoconiosis because he has pleural involvement and calcifications, yet at the same time by diagnosing [c]laimant as having possible simple coal workers’ pneumoconiosis, he is conceding that the presence of pleural involvement and calcifications do not necessarily exclude a diagnosis of coal workers’ pneumoconiosis. If he is stating that such conditions are not “typically” present in cases of coal workers’ pneumoconiosis, he has failed to explain why he considers [c]laimant to represent a “typical” case and why [c]laimant could not be the atypical miner with coal workers’ pneumoconiosis.

Dr. Castle further stated in his deposition that the CT scans he reviewed were ‘indicative of a granulomatous process such as TB or fungus disease or sarcoid, or something like that.’ On cross examination, Dr. Castle stated that he thought the granulomatous disease [c]laimant had was histoplasmosis, but he did not test [c]laimant for it. He was therefore speculating that [c]laimant had histoplasmosis because he lived on a farm for a short while as a young man, but was not relying on any specific evidence to support this premise. Nor did he provide any specific evidence to support his further speculation that [c]laimant had TB, fungus disease or sarcoidosis.

As the Benefits Review Board has found, an administrative law judge may reject, as speculative and equivocal, the opinions of 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 these alternative diseases. *Griffith v. Dominion Coal Corp.*, BRB No. 10-0614 (July 29, 2011)(unpublished), citing *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269 (4th Cir. 2010). I also note that Dr. Castle did not discuss whether any of

the alternative diseases such as TB, fungus disease, histoplasmosis, or sarcoidosis could occur in conjunction with pneumoconiosis.

Decision and Order at 15.

Considering the opinion of Dr. Hippensteel, who found “localized granulomatous disease,” the administrative law judge stated:

He based this opinion, in part, on his interpretation of a chest x-ray as negative for coal workers’ pneumoconiosis. I note that the x-ray in question was not designated as evidence by [e]mployer. I also note that Dr. Hippensteel’s interpretation of the x-ray evidence is contrary to my findings of the chest x-ray evidence as a whole. I also find that Dr. Hippensteel’s explanation of [c]laimant’s condition as granulomatous disease “most likely” from sarcoidosis, but *possibly* also due to histoplasmosis, and also *possibly* simple pneumoconiosis is equivocal and speculative....

In fact, in his deposition he conceded that elevated ACE levels, on which he based his diagnosis of sarcoidosis, can also be found in other diseases besides sarcoidosis. He also conceded on cross-examination that calcification, which also lead him to believe that [c]laimant has sarcoidosis rather than coal workers’ pneumoconiosis, can also be seen in cases of coal workers’ pneumoconiosis, although it occurs in a minority of cases of the disease. He failed to explain why [c]laimant would not represent one of these minority cases....

Finally, Dr. Hippensteel did not discuss whether any of the alternative granulomatous diseases he discussed could occur in conjunction with pneumoconiosis. Accordingly, I give diminished weight to Dr. Hippensteel’s opinion for the reasons described and find that it is not well-reasoned.

Decision and Order at 16.

Whether a medical opinion is adequately reasoned is a determination committed to the discretion of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Here, the administrative law judge has explained her reasoning for finding the opinions of Drs. Castle and Hippensteel to be “equivocal,” “speculative” and “unsupported” by other credible evidence and, therefore, less credible than the opinions of Drs. Al-Khasawneh and Baker, which were reasoned and in keeping with the preponderance of the other

credible evidence showing the existence of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. The administrative law judge, therefore, properly found that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304(c).

Weighing all of the evidence together under 20 C.F.R. §718.304, the administrative law judge properly found that the positive analog and digital x-ray evidence, the positive CT scan evidence and the opinions of Drs. Al-Khasawneh and Baker outweighed the contrary evidence. Decision and Order at 17; *see Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84. Consequently, we affirm the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304 and that claimant is entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act.

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