BRB No. 07-0513 BLA

S.M. (Widow of and o/b/o deceased miner J.M.)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/31/2008
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 Living Miner's Benefits and Awarding Survivor's Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits and Awarding Survivor's Benefits (2005-BLA-00073 and 2005-BLA-00074) of Chief Administrative Law Judge John M. Vittone (the administrative law judge) on claims 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).[1] The administrative law judge credited

[1] Claimant is the widow of the miner who died on May 14, 2000. The miner filed a claim for benefits on June 19, 1997. Director's Exhibit 1. After an initial award by the

the miner with over ten years of coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the presence of simple pneumoconiosis which arose out of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b). In addition, the administrative law judge found that the evidence established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)[2] and that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, therefore, found that claimant was entitled to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis. 20 C.F.R. §718.304; *see* 20 C.F.R. §718.205(c)(3). Accordingly, the administrative law judge awarded benefits on both the miner's claim and the survivor's claim.

On appeal, employer challenges the administrative law judge's finding that the x-ray evidence establishes complicated pneumoconiosis at Section 718.304(a), and that claimant was, therefore, entitled to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's Decision and Order awarding benefits.[3] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

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 applicable law, they are binding upon this Board and may not be

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district director, the claim was forwarded, pursuant to employer's request, to the Office of Administrative Law Judges for a hearing. The miner died due to metatastic prostate carcinoma prior to the hearing on his claim. *See* Director's Exhibit 47. Claimant filed a survivor's claim on June 29, 2000. Director's Exhibit 44. On March 6, 2001, the district director found claimant entitled to survivor's benefits. Director's Exhibit 51. Employer requested a hearing, and the two cases were consolidated and forwarded to the Office of Administrative Law Judges for consideration. A hearing was held on March 14, 2006.

[2] The administrative law judge did not find complicated pneumoconiosis established at 20 C.F.R. §718.304(b) by the biopsy evidence or at 20 C.F.R. §718.304(c) by the CT scan and medical opinion evidence of record.

[3] Employer has filed a brief in reply to claimant's response brief, reiterating its contentions on appeal.

[4] The administrative law judge's length of coal mine employment finding is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710. (1983).

disturbed.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of 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*).

In order to establish entitlement to benefits in a survivor's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any of these elements precludes a finding of 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*). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption related to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, creates an irrebuttable presumption that the miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis if (A) an x-ray of the miner's lungs show at least one opacity greater than one centimeter in diameter; (B) a biopsy or autopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). In *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit stated that although the clauses in (A), (B), and (C), provide three different ways to establish the existence of complicated pneumoconiosis and thereby invoke the irrebuttable presumption, these clauses were intended to describe a single, objective condition. Thus, the court stated that, in applying the standard set forth in each prong, equivalency determinations must be performed to make certain that regardless of which diagnostic technique is used, the

[5] Because all of the miner's coal mine employment occurred in Arizona, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

same underlying condition triggers the irrebuttable presumption. The court further stated that because prong (A) sets out an entirely objective scientific standard, *i.e.*, an opacity on x-ray greater than one centimeter, x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999). Claimant is not entitled to the irrebuttable presumption because he provides a single piece of relevant evidence, however. Rather, the irrebuttable presumption is applicable because the miner has or had a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis. To make such a determination, the administrative law judge must consider and weigh all of the relevant evidence at Section 718.304(a)-(c). *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *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).

In this case, the administrative law judge found, after weighing the relevant evidence at Section 718.304(a)-(c), that the readings of the miner's March 16, 1998 x-ray established complicated pneumoconiosis at Section 718.304(a).[6] The administrative law judge credited the readings of Drs. Wiot and Preger who both found Category A opacities, noting that the physicians were dually qualified B readers and Board-certified radiologists.[7] Decision and

[6] Dr. Wiot interpreted the film as showing "Large Opacities: A." Dr. Wiot further stated that while he was required to "classify [the film] as consistent with coal workers' pneumoconiosis, [he had] a strong concern that this represents only a manifestation of an old inflammatory disease, with the question of a malignancy present." *Id.* Dr. Wiot also noted the possibility of "old granulomatous disease rather than pneumoconiosis." *Id*. Dr. Preger interpreted the March 16, 1998 x-ray as showing "Large Opacities: A." Director's Exhibit 11. Dr. Preger also indicated that there was a "need to compare prior films to exclude malignancy" and that tuberculosis was "improbable." *Id*. Dr. Shipley read the film as demonstrating "no parenchymal or pleural abnormalities consistent with pneumoconiosis" and that what the film showed was "probably not pneumoconiosis," but instead "might be fungal or active tuberculosis," and was "most consistent with granulomatous." Director's Exhibit 29. Dr. Wheeler read the same film as showing "no parenchymal or pleural abnormalities consistent with pneumoconiosis" and stated that there were findings "compatible with tuberculosis." Director's Exhibit 30.

[7] 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 Company, Inc. 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). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as

Order at 16. The administrative law judge rejected the readings of Drs. Shipley and Wheeler, of the same x-ray, as "probably" not showing pneumoconiosis because they were speculative. Weighing the February 13, 1998 CT scan, which was interpreted as negative by Dr. Sheppeck, whose qualifications were not in the record, and as negative by Dr. Repsher, a B reader, the administrative law judge found that the CT scan did not outweigh the readings of the March 16, 1998 x-ray, which were made by dually-qualified physicians. The administrative law judge also accorded less weight to the CT scan interpretations because CT scans, unlike x-rays, are not subject to ILO guidelines. The administrative law judge concluded, therefore, that that the CT scan was less probative of the existence of complicated pneumoconiosis than the readings of the March 16, 1998 x-ray. Finally, the administrative law judge rejected the medical opinions suggesting that tuberculosis or related granulomatous disease could have caused the large opacities seen on x-ray. The administrative law judge noted that these medical opinions were not reasoned, as the evidence of record was negative for tuberculosis, except for a positive skin test in 1978, and that the biopsy evidence was negative for granulomatous disease. 20 C.F.R. §718.304(b), (c). Accordingly, on weighing all the relevant evidence at Section 718.304(a)-(c), the administrative law judge found that the x-ray evidence outweighed the other evidence and that complicated pneumoconiosis was established based on x-ray evidence. 20 C.F.R. §718.304(a).

Employer contends that the administrative law judge erred in finding that the x-ray evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(a) because the administrative law judge's analysis of the x-ray evidence, CT-scan evidence and medical opinion evidence was flawed. First, employer argues that the administrative law judge erred in finding that the x-ray evidence established the existence of complicated pneumoconiosis at Section 718.304(a) because the administrative law judge did not consider the interpretations of Drs. Wiot and Preger in their entirety. Employer contends that, despite a positive reading for complicated pneumoconiosis, Dr. Wiot explained that the mass he categorized as a large opacity could represent a malignancy and that other findings on the film suggested old granulomatous disease, rather than complicated pneumoconiosis. Director's Exhibit 27 at 168. Employer also argues that Dr. Preger, in his interpretation of the same March 16, 1998 x-ray, recognized that while some abnormalities were consistent with complicated pneumoconiosis, other abnormalities on the film were inconsistent with the disease and that a comparison of this film to prior films was needed in order to exclude a malignancy.[8] Director's Exhibit 11. Employer further contends that the administrative law judge erred in crediting the interpretations of Drs. Wiot and Preger, without explaining why their interpretations were less speculative than the interpretations of the same x-ray by Drs. Wheeler and Shipley, who found that the x-ray probably did not show complicated

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having a particular expertise in the field of radiology.

[8] The record includes numerous x-rays taken between 1974 and 2000, showing various abnormalities in the miner's lungs. Decision and Order at 8-14.

pneumoconiosis. Thus, employer contends that the administrative law judge erred in finding that the x-ray interpretations of Drs. Wiot and Preger established complicated pneumoconiosis at Section 718.304(a). We agree.

As employers contends, Dr. Wiot stated that while he was required to classify the mass seen on the miner's lungs as a large opacity, he had a "strong concern that this [mass] represent[ed] only a manifestation of old inflammatory disease, with the question of a malignancy present." Director's Exhibit 27 at 167. In addition, Dr. Wiot stated that the "decision as to what is going on in this patient [could] not be based on this single [x-ray] study alone…[but that] [r]eview of mulitiple studies would be necessary to make a final determination." *Id*. Likewise, Dr. Preger diagnosed "Large Opacities: A," but noted that other abnormalities were present and that prior films should be compared to this film to exclude malignancy. Director's Exhibit 11. The administrative law judge, however, failed to consider all of the doctors' qualifying statements in assessing the credibility of their x-ray readings. *See Melnick*, 16 BLR at 1-37. In addition, as employer contends, the administrative law judge must provide a reasonable basis for finding the interpretations of Drs. Wiot and Preger to be credible while finding that the interpretations of Drs. Wheeler and Shipley were speculative. *See* The Administrative Procedure Act, 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) and 30 U.S.C. §932(a) (the APA), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. We thus vacate the administrative law judge's determination that the x-ray evidence established complicated pneumoconiosis pursuant to Section 718.304(a).

Employer also argues that the administrative law judge erred in finding that the March 16, 1998 x-ray interpretations showing complicated pneumoconiosis pursuant to Section 718.304(a), were more probative than the February 13, 1998 CT scan showing that the miner did not have complicated pneumoconiosis. *See* 20 C.F.R. §718.304(c). Employer contends that the administrative law judge failed to consider statements by Drs. Renn and Hippensteel regarding the probative value of CT scan evidence versus x-ray evidence. We agree.

As employer contends, in considering the CT scan evidence, the administrative law judge failed to address the statements by both Drs. Renn and Hippensteel that chest CT scans are more credible than chest x-rays in distinguishing between pneumoconiosis and granulomatous disease.[9] Director's Exhibits 35, 36. The administrative law judge's failure

[9] Dr. Renn stated that CT scans are a "much better procedure" than a "plain chest radiograph" because the CT scan is a "three-dimensional view," while the normal chest x-ray is a "two dimensional view." Director's Exhibit 35. Dr. Hippensteel testified that CT scans are more valuable than chest x-rays for diagnosing pneumoconiosis because CT scans are "more sensitive[] for the specifics of abnormalities." Employer's Exhibit 36.

to consider this relevant evidence pertaining to the credibility of x-rays and CT scan evidence constitutes error.[10] *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979); *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). Further, the administrative law judge's finding that the CT scan evidence was less credible than the x-ray evidence constitutes an impermissible substitution of an administrative law judge's expertise for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Accordingly, the case must be remanded for the administrative law judge to again weigh the x-ray evidence with the CT scan evidence. *See* 20 C.F.R. §718.304(a), (c).

Finally, employer argues that the administrative law judge erred in crediting the interpretations of the March 16, 1998 x-ray to establish complicated pneumoconiosis at Section 718.304(a) over the opinions of Drs. Repsher, Tuteur, Renn, Hippensteel and Caffrey,[11] *see* 20 C.F.R. §718.304(c), who found that tuberculosis and/or granulomatous

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[10] We note that in reaching his determination that the CT scan evidence was not as credible as the March 16, 1998 x-ray evidence, the administrative law judge relied, in part, on the unpublished Board case of *Tapley v. Bethenergy Mines Inc.*, BRB No. 04-0790 BLA (May 26, 1995) (unpub.). In *Tapley*, the Board held that the administrative law judge acted within his discretion in excluding CT scan evidence proferred by the employer, in part, because employer provided no evidence pertaining to the relevance of the CT scans. The facts in *Tapley* are easily distinguishable from this case, because in this case the record contains specific medical statements, those of Drs. Renn and Hippensteel, attesting to the credibility and medical relevance of CT scans.

[11] Dr. Repsher opined that that the miner did not have coal workers' pneumoconisis, but that there was tuberculosis of "unclear activity." Director's Exhibit 19. Dr. Repsher also stated that while there was no biopsy evidence of tuberculosis, the miner likely suffered from the disease despite the negative smears and cultures. Employer's Exhibit 10. Dr. Tuteur opined that there was no evidence of large opacities on x-ray and that the CT scan evidence supported a finding of an "infectious granulomatous disease such as tuberculosis…" Director's Exhibit 35. Dr. Tuteur reiterated his tuberculosis diagnosis in later opinions. Employer's Exhibits 1, 8. Dr. Renn opined that, within a reasonable degree of medical certainty, the miner suffered from tuberculosis and that it was possible for tuberculosis to be misdiagnosed as pneumoconiosis on x-ray. Director's Exhibit 36; Employer's Exhibit 19. Dr. Hippensteel indicated that he was not certain that the miner had ever suffered from tuberculosis. Director's Exhibit 37; Employer's Exhibits 15, 36. Dr. Caffrey opined that, while he couldn't make a diagnosis of coal workers' pneumoconiosis, he was "unable to confirm or deny the existence of granulomatous disease." Director's Exhibit 40.

disease was probably the cause of the large opacity seen on the x-ray. Employer asserts that the administrative law judge improperly shifted the burden to employer when he rejected the opinions of the physicians that the miner did not have complicated pneumoconiosis because the physicians could not definitively say whether the miner had tuberculosis and/or granulomatous disease. Employer's Brief at 31. Employer asserts that the administrative law judge impermissibly substituted his judgment for that of the medical experts and selectively analyzed these physicians' opinions. Further, employer argues that the administrative law judge impermissibly credited the opinions of Drs. Hansen and Arnold,[12] as supportive of the x-ray evidence, as neither doctor opined that the miner had a lesion that would have measured greater than one centimeter on x-ray. *See* 20 C.F.R. §718.304(c). We agree.

Claimant is only entitled to invocation of the irrebuttable presumption if he has a "chronic dust disease of the lung." *See Lester*, 993 F.2d at 1146, 17 BLR at 2-117. In the instant case, the administrative law judge erred in failing to recognize that, notwithstanding his finding that the opinions of Drs. Hoffman, Repsher, Tuteur, Renn, Hippensteel, Naeye and Caffrey did not definitively establish that the miner had tuberculosis and/or granulomatous disease, none of these physicians opined that the miner suffered from a chronic dust disease of the lungs.

Contrary to the administrative law judge's determination, and as employer asserts, Drs. Renn, Hippensteel and Tuteur specifically explained that the absence of positive tuberculosis tests did not detract from their conclusions regarding the presence of granulomatous disease. Moreover, contrary to the administrative law judge's determination, the physicians who ruled out the presence of complicated pneumoconiosis explained that the progression of the miner's disease was the result of a condition, osseous metastic disease, unrelated to coal workers' pneumoconiosis. Director's Exhibits 42, 48, 49; Employer's Exhibits 18, 30. As employer argues, the administrative law judge failed to consider the specific medical conclusions reached by these physicians, that claimant suffered from tuberculosis and/granulomatous disease. Thus, his findings regarding these physicians' opinions reflect a selective analysis and a partial mischaracterization of the evidence. *See White v. New White Coal Co.*, 23 BLR 1-1 (2004); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984). In addition, we note that, in determining that the opinions of Drs. Hansen and Arnold were the most credible, the administrative law judge failed to recognize that neither physician found the presence of a lesion greater than one centimeter, if read on x-ray. The law is clear

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[12] Dr. Hansen performed a skin test and opined that the miner did not suffer from tuberculosis. Director's Exhibit 27. The physician also diagnosed complicated pneumoconiosis based on a chest x-ray. Dr. Arnold performed a bronchoscopy, which he termed negative for granulomatous disease. Dr. Arnold also opined that the miner suffered from silicosis due to his mining history. Director's Exhibit 48; Claimant's Exhibit 11.

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." *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-562. On remand, the administrative law judge must reconsider all of the relevant medical opinions of record in order to determine whether claimant has established complicated pneumoconiosis at Section 718.304(c). The administrative law judge must then weigh that evidence, along with the evidence at Section 718.304(a) and (b), before determining whether complicated pneumoconiosis is established at Section 718.304, overall.

If, on remand, the administrative law judge determines that the weight of the relevant evidence of record fails to support a finding of complicated pneumoconiosis, and that claimant is not, therefore, entitled to the irrebuttable presumption that the miner is totally disabled due to pneumoconiosis and that his death is due to pneumoconiosis, he must then determine whether the evidence supports a finding of a totally disabling respiratory impairment due to pneumoconiosis on the miner's claim, 20 C.F.R. §718.204(b), (c), and whether pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c). 20 C.F.R. §718.205(c)(1), (2), and (5).

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits and Awarding Survivor's Benefits is affirmed in part, and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge