BRB No. 12-0292 BLA

THOMAS O. WHITE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALFRED WHITED COAL COMPANY	)	DATE ISSUED: 03/15/2013
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5415) of Administrative Law Judge Linda S. Chapman, rendered on a claim filed on February 13, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). In a Decision and Order dated

February 7, 2012, the administrative law judge credited claimant with at least eighteen years of underground coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). In addition, the administrative law judge found that claimant established that he suffers from complicated pneumoconiosis and, thus, found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Alternatively, the administrative law judge determined that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] based on the filing date of the claim and the fact that claimant established fifteen years of underground coal mine employment and a totally disabling respiratory impairment. The administrative law judge also found that employer failed to rebut the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in weighing the evidence relevant to whether claimant suffers from complicated pneumoconiosis. Employer contends that the administrative law judge also erred in finding that claimant established fifteen years of qualifying coal mine employment for invocation of the amended Section 411(c)(4) presumption. Employer further challenges the administrative law judge's finding that it failed to rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. Employer has filed a reply brief reiterating its contentions.[2]

[1] Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[3] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

We first address employer's argument that the administrative law judge erred in finding that claimant suffers from complicated pneumoconiosis. 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;[4] 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, 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).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 6.

[4] The record contains no biopsy evidence pursuant to 20 C.F.R. §718.304(b).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge found that the record contained nine ILO classified readings of four x-rays dated January 10, 2009, February 26, 2009, January 14, 2010 and February 21, 2011. Decision and Order at 20. The January 10, 2009 x-ray was read as positive for simple and complicated pneumoconiosis, Category B, by Dr. DePonte, dually qualified as a Board-certified radiologist and B reader, and read as positive for simple and complicated pneumoconiosis, Category A, by Dr. Alexander, also dually qualified. Director's Exhibits 10, 12. The same x-ray was read as negative for pneumoconiosis by Dr. Wheeler, also dually qualified. Director's Exhibit 11. In the "Comments" section of the ILO form, Dr. Wheeler identified a three centimeter mass and a two centimeter mass in the right lung and a two centimeter mass in the left lung, compatible with granulomatous disease, histoplasmosis or mycobacterium avium complex more likely than tuberculosis. *Id*.

The February 26, 2009 x-ray was read as positive for simple and complicated pneumoconiosis, Category A, by Dr. Alexander, and read as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis, by Dr. Forehand, a B reader. Director's Exhibits 12, 17. The January 14, 2010 x-ray was read as positive for simple and complicated pneumoconiosis, Category B, by Dr. DePonte, but read as negative for pneumoconiosis by Dr. Fino, a B reader. Claimant's Exhibit 1; Employer's Exhibit 2. The same x-ray was read as negative for pneumoconiosis by Dr. Wheeler. Employer's Exhibit 1. In the "Comments" section of the ILO form, Dr. Wheeler identified a two centimeter mass in the right upper lung compatible with "granuloma or tumor." *Id*. The February 21, 2011 x-ray had one reading by Dr. DePonte as positive for simple and complicated pneumoconiosis, Category A. Claimant's Exhibit 2.

In resolving the conflict in the x-ray evidence, the administrative law judge gave controlling weight to the readings by the dually qualified physicians. Decision and Order at 19-20. She initially considered whether the x-rays were positive or negative for simple pneumoconiosis. *Id*. at 20. She found that the January 10, 2009 x-ray was positive for simple pneumoconiosis, given the preponderance of readings by Drs. DePonte and Alexander. *Id*. She found that the February 26, 2009 x-ray was positive for simple pneumoconiosis as it had no contrary readings. *Id*. The administrative law judge found that the January 14, 2010 x-ray was in equipoise and that the February 21, 2001 was positive for simple pneumoconiosis. *Id*. Because there were three positive x-rays and one x-ray in equipoise, the administrative law judge found that claimant established the existence of simple pneumoconiosis. *Id*.

As to the existence of complicated pneumoconiosis, the administrative law judge credited the five ILO classified readings for Category A or B opacities by Drs. DePonte and Alexander, over the two contrary negative readings for complicated pneumoconiosis by Dr. Wheeler. Decision and Order at 29. The administrative law judge found that

claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), by a preponderance of the x-ray evidence. *Id*.

Relevant to 20 C.F.R. §718.304(c), the administrative law judge noted that the record included digital x-ray readings and CT scan readings. Decision and Order at 29-32. Dr. Hippensteel read a digital x-ray taken on July 7, 2009 as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibit 13. In the "Comments" section of the ILO form, Dr. Hippensteel identified an "elevated right diaphragm with post[-]surgical scarring in the right side of the chest[.]" *Id*. Dr. Alexander reviewed the same digital x-ray and reported a one and one-half by three centimeter large opacity, Category A, compatible with complicated pneumoconiosis. Claimant's Exhibit 3. In the "Comments" section of the ILO form, Dr. Alexander also identified "post-surgical changes and scarring in the right lung with elevated and ill-defined diaphragm." *Id.*

Dr. Shook read a July 29, 2008 CT scan as revealing centrilobular emphysema with thickened linear opacities. Director's Exhibit 15. Dr. Knapp read an August 13, 2008 CT scan as also revealing centrilobular emphysema and sarcoidosis, most likely pneumoconiosis. *Id*. Dr. Wheeler read the same CT scan and reported that it showed no pneumoconiosis. Employer's Exhibit 1. However, he described a mass in the left upper lung, compatible with congestive heart failure or inflammatory disease, more likely than cancer. *Id*.

The administrative law judge also considered the medical opinions of Drs. Forehand, Hippensteel, Habre, Klayton and Fino. Decision and Order at 31-32. She observed correctly that the opinions of these doctors were predicated on x-ray findings. *Id*. Dr. Forehand examined claimant on February 26, 2009, and read an x-ray as positive for simple pneumoconiosis only and did not diagnose complicated pneumoconiosis. Director's Exhibit 17. Dr. Hippensteel examined claimant on July 7, 2009, and reviewed certain medical records. Director's Exhibit 13. He stated that the medical evidence does not "as a whole support a diagnosis of complicated coal workers' pneumoconiosis." *Id*. Dr. Habre examined claimant on January 14, 2010, and Dr. Klayton examined claimant on February 21, 2011. Both doctors diagnosed complicated pneumoconiosis based on Dr. DePonte's positive x-ray readings, discussed *supra*. Claimant's Exhibit 2. Dr. Fino did not examine claimant, but reviewed the January 14, 2010 x-ray three "different times, and [saw] no changes consistent with simple pneumoconiosis." *Id*. He further stated that there are no "changes consistent with complicated pneumoconiosis." *Id.*

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge found that "standing alone, the 'other medical evidence' does not establish that [claimant] has a process in his chest that has resulted in the development of a mass or masses that appear on x-ray as [C]ategory A, B or C opacity due to pneumoconiosis." Decision and Order at

29. The administrative law judge accorded no weight to the opinions of Drs. Fino and Forehand regarding the presence or absence of masses in claimant's lungs since they are not radiologists. *Id*. at 31. The administrative law judge further noted that, because Dr. Fino did not believe that claimant had underlying simple pneumoconiosis, contrary to her finding, and because Dr. Forehand did not have the opportunity to "consider the totality of the x-ray evidence," their opinions were entitled to little weight.[5] *Id*.

In weighing all of the evidence together as to the existence of complicated pneumoconiosis, the administrative law judge found that "the x-ray evidence in this claim clearly establishes that [claimant] has large masses in his lungs," based on the x-ray readings of Drs. DePonte, Alexander and Wheeler, and that the "dispute centers on the etiology of these masses." Decision and Order at 29-30. In addressing the cause of the radiological findings, the administrative law judge rejected Dr. Wheeler's opinion because she found that he did not sufficiently explain why he attributed the large masses on x-ray to granulomatous disease and not to pneumoconiosis. *Id*. at 30-31. The administrative law judge rejected Dr. Hippensteel's opinion, attributing the large masses identified by the radiologists to "postsurgical scarring," because she found that his opinion was speculative and inadequately explained. *Id*. The administrative law judge concluded:

> [Claimant] has established by [a] preponderance of the x-ray, CT scan and medical opinion evidence that he has a condition in his lungs that has resulted in the development of masses that appear on x-ray as larger than one centimeter in diameter, due to pneumoconiosis. The evidence offered by the Employer does not show that these masses are not there; indeed, all of the evidence confirms the presence of these masses. Nor does the medical evidence show that these masses are due to a process other than pneumoconiosis.

Id. at 32. Thus, the administrative law judge found that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found that, because claimant "has more than ten years of coal mine employment, he is entitled to the presumption, which has not been rebutted, that his pneumoconiosis arose from his coal mine employment." *Id*. at 22.

Employer argues that the administrative law judge erroneously shifted the burden of proof and failed to engage in a detailed analysis of the treatment records in this case,

[5] Because employer does not challenge the administrative law judge's credibility findings with regard to Dr. Forehand's opinion, they are affirmed on appeal. *Skrack*, 6 BLR at 1-711.

which employer argues support the opinions of its experts, that claimant's abnormalities on x-ray are due to alternate causes and not complicated pneumoconiosis. We disagree.

Initially, we reject employer's argument that the administrative law judge improperly shifted the burden of proof. The administrative law judge observed that, in accordance with the guidelines set forth by the United States Court of Appeals for the Fourth Circuit in *Cox* and *Scarbro*, she was required to consider whether the evidence, as a whole, indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray, and whether these opacities are due to pneumoconiosis. Decision and Order at 27-28; *Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The administrative law judge properly placed the burden on claimant in this case to establish the existence of Category A, B or C opacities on x-ray, and weighed all relevant evidence as to the cause of the radiographic abnormalities in considering whether they were due to pneumoconiosis. *Id*. at 28.

Contrary to employer's contention, the administrative law judge permissibly gave less weight to Dr. Fino's opinion, predicated on his own x-ray readings, that claimant does not have complicated pneumoconiosis, since Dr. Fino is not a radiologist. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc on recon.). The administrative law judge also rationally questioned the validity of Dr. Fino's opinion, noting that he "doubted Dr. Wheeler's report of a two [centimeter] abnormality in the right upper lung" and "did not otherwise discuss the findings of complicated pneumoconiosis by Dr. Alexander and Dr. DePonte." Decision and Order at 31; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We also reject employer's argument that the administrative law judge erred in her consideration of Dr. Wheeler's opinion. The administrative law judge noted correctly that Dr. Wheeler attributed claimant's x-ray findings to granulomatous disease, in part, because he believed that claimant "is simply too young to have developed complicated coal workers' pneumoconiosis, because NIOSH and MSHA started controlling dust levels in the mines before he began his coal mine employment." Decision and Order at 30; *see* Director's Exhibit 11. The administrative law judge permissibly concluded that Dr. Wheeler's opinion was of little probative value:

> Dr. Wheeler has not offered any evidence to support a conclusion that complicated pneumoconiosis has been successfully eradicated by the efforts of NIOSH and MSHA, or why, in [claimant's] specific case, he could not have contracted this condition, even if, as Dr. Wheeler seems to believe, it

> is now rare. Moreover, the regulations do not provide that a miner's age is a controlling factor in determining whether he has complicated pneumoconiosis.

Decision and Order at 30, *citing Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. The administrative law judge also rationally assigned Dr. Wheeler's opinion less weight because she found that Dr. Wheeler "did not explain why findings of granulomatous disease necessarily precluded co-existent findings of complicated pneumoconiosis."[6] Decision and Order at 31; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Clark*, 12 BLR at 1-155.

With regard to Dr. Hippensteel, the administrative law judge noted that he disputed Dr. DePonte's identification of Category B opacities on the January 10, 2009 x-ray. *See* Decision and Order at 10; Director's Exhibit 13. Dr. Hippensteel based his opinion on his own negative reading of the July 7, 2009 *subsequent* digital x-ray. *Id*. Dr. Hippensteel opined that Dr. DePonte actually observed "residual abnormalities from [claimant's] pneumonia in the fall of 2008 that have cleared further since [January 10, 2009] and which lead to a mistaken classification of large opacities secondary to coal workers' pneumoconiosis." *Id*. Dr. Hippensteel further stated that "[i]f such abnormalities were related to coal workers' pneumoconiosis[,] they would be fixed or progressive and would not improve over time as has occurred in this case." *Id*.

Contrary to employer's assertion, the administrative law judge rationally rejected Dr. Hippensteel's opinion, noting that it was speculative and contradicted by the fact that Dr. DePonte identified complicated pneumoconiosis on two x-rays, taken on January 14, 2010 and February 21, 2011, post-dating the digital x-ray that Dr. Hippensteel reviewed. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 31. In addition, the administrative law judge permissibly rejected Dr. Hippensteel's explanation that post-surgical changes on the x-rays were being confused with complicated pneumoconiosis:

> Dr. DePonte, who reviewed three of the x-rays, reported the existence of category B opacities *in addition to* changes attributable to [claimant's] right

[6] We reject employer's assertion that the administrative law judge did not consider the medical treatment records in weighing Dr. Wheeler's opinion. The administrative law judge's summary of the evidence indicates that she was aware of claimant's history of treatment for lung cancer and granulomatous disease. She merely concluded that the preponderance of the credible x-ray readings in this case establish that claimant also suffers from complicated pneumoconiosis.

> lung wedge resections. Dr. Alexander reported a large opacity in the right lung zone; Dr. Wheeler also reported a "probable" 2 cm. mass in the right upper lung, which he attributed to granuloma or tumor. Finally, in his description of the large mass that he thought could be due to complicated pneumoconiosis on [claimant's] July 7, 2009 digital x-ray, Dr. Alexander specifically noted that it was adjacent to surgical staples. I note that Dr. Hippensteel is not a radiologist, and I do not credit his speculation that the radiologists who did review the films mistakenly attributed the large mass or masses they reported to "postsurgical changes," or possible unresolved pneumonia in 2008.

Decision and Order at 31; *see Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

The administrative law judge weighed all of the relevant evidence in this case and properly explained, in light of *Cox* and *Scarbro*, why claimant met his burden of establishing the existence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Furthermore, because it is unchallenged on appeal, we affirm 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 Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 22. We, therefore, affirm the award of benefits in this claim.[7]

[7] Because we affirm the administrative law judge's finding that claimant is entitled to benefits pursuant to 20 C.F.R. §718.304, it is not necessary that we address employer's arguments with regard to the administrative law judge's findings under amended Section 411(c)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge