BRB No. 12-0364 BLA

DEXTER C. TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAM MINING, LLC	)	DATE ISSUED: 03/26/2013
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05686) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed on May 12, 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 credited claimant with at least thirty years of coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge

found that the evidence was sufficient to establish the existence of complicated pneumoconiosis and that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting the biopsy report of Dr. Dennis, over that of Dr. Caffrey, in finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Employer also contends that the administrative law judge erred in finding that claimant satisfied his burden to establish the existence of complicated pneumoconiosis, based on a weighing of all the relevant evidence. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 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).

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

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked at least thirty years in coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered four readings of three x-rays, dated June 10, 2009, March 1, 2010, and March 4, 2010. Dr. Patel, a Board-certified radiologist, read the June 10, 2009 x-ray as negative for simple and complicated pneumoconiosis. However, in the "Comments" section of the ILO form, Dr. Patel noted that there was a lung "density" and recommended correlation with other films. Director's Exhibit 12. Dr. Wiot, dually-qualified as a Board-certified radiologist and B reader, reported that the June 10, 2009 x-ray was "over-exposed" and "unreadable by ILO standards." Director's Exhibit 17. The administrative law judge gave "greater weight to the interpretation by Dr. Wiot because his dual qualifications exceed those of Dr. Patel" and, thus, found that the June 10, 2009 x-ray was entitled to "little evidentiary weight." Decision and Order at 9.

The March 1, 2010 x-ray had one reading by Dr. West, a dually-qualified radiologist, as negative (0/1) for simple and complicated pneumoconiosis. Director's Exhibit 16. Dr. West noted that ill-defined opacities and "a calcified mass on [right]" were "probably" due to post-operative changes. Director's Exhibit 16. Dr. Jarboe, a B reader, read the March 4, 2010 x-ray as negative (0/1) for simple and complicated pneumoconiosis. Director's Exhibit 15. He identified a "1.5 [centimeter] rounded density" at the tip of the right fourth rib and a "vague density" at the tip of the right sixth rib. He stated that "[t]hese are probably post-surgical changes." *Id*. The administrative law judge found that the March 1, 2010 and March 4, 2010 x-rays were negative for simple and complicated pneumoconiosis and, thus, concluded that claimant was unable to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order at 9.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge noted that claimant underwent a lung wedge biopsy of the right upper lobe on April 21, 2009, performed by Dr. Dennis, who is Board-certified in anatomical and clinical pathology. Decision and Order at 9; *see* Director's Exhibit 10; Claimant's Exhibit 2. In the gross description, Dr. Dennis noted that "[t]here is a palpable nodule in one edge of the

wedge," measuring "1.2 [centimeters in] diameter" and "an additional nodule which measures 1 [centimeter in] diameter;" both nodules composed of "black firm nodular tissue." Director's Exhibit 10. Under microscopic description, Dr. Dennis noted that sections of the nodules showed "anthracosilicosis, moderate, with moderate fibrosis, no tumor, dense fibrous connective tissue with black pigment deposition and multiple clusters of silica particles scattered throughout." *Id*. The final diagnosis was "[a]nthracosilicosis with macular development greater than 1 [centimeter in] diameter with silica particle impregnation and dense fibrosis multinodular. Emphysema and congestion with progressive massive fibrosis associated with macular development in the right upper [sic] of this lung." *Id*. In a letter dated September 15, 2010, Dr. Dennis opined that claimant has "coal workers' pneumoconiosis with progressive massive fibrosis exhibited by a nodule measuring 1.1 [centimeters]." Claimant's Exhibit 2. Dr. Dennis further stated that the nodule "should have been seen by the x-ray examination prior to the biopsy." *Id*.

Dr. Caffrey, who is also Board-certified in anatomic and clinical pathology, prepared a consultative report on July 8, 2010, based on his review of Dr. Dennis's report and the six biopsy slides. Employer's Exhibit 1. Dr. Caffrey's microscopic examination revealed lesions of simple coal workers' pneumoconiosis, with micronodules, measuring 2 millimeters, and macrodules, measuring from eight to nine millimeters, as well as a "1.1 [centimeter] nodule showing dense collagen with anthracotic pigment and focal necrosis." *Id*. Dr. Caffrey's final diagnosis was "[s]imple coal workers' pneumoconiosis with micro and macrondules, severe." *Id*. Dr. Cafffrey stated:

> The largest lesion I measured on the slide was 1.1 [centimeters] on slide labeled *C*. In the textbook entitled Dale & Hammar's Pulmonary Pathology, 3rd edition, 2008 on page 916 the authors state the following: "The nodules of [pneumoconiosis] are arbitrarily classified to micronodules which measure up to .7 [of a centimeter], macronodules which range in size from .7 to 2.0 [centimeters], and PMF [progressive massive fibrosis] which is more asymmetrical in distribution and irregular in shape with lesions by definition at least 2.0 [centimeters] in one or more dimensions."
>
> The surgical pathology slides do not show any lesion approaching 2.0 [centimeters] in size, and the surgical pathologist did not describe any lesion greater than 1.0 and 1.2 [centimeters] in his gross and microscopic description.

Employer's Exhibit 1.

In weighing the conflicting biopsy reports, the administrative law judge determined that Dr. Caffrey's opinion was not well-reasoned and explained:

> With his medical textbook reference, Dr. Caffrey implies in his consultation report that a diagnosis of progressive massive fibrosis on biopsy requires the presence of nodules reaching 2 [centimeters] in diameter. However, neither the Act nor the regulations requires that 2 [centimeter] nodules be present on biopsy in order to diagnose progressive massive fibrosis. Rather, the pathological evidence need only show that there are massive lesions in the lung. [20 C.F.R. §]718.304(b).

Decision and Order at 10-11. The administrative law judge determined that Dr. Caffrey's opinion was entitled to less weight because "[t]he apparent standard which Dr. Caffrey employed to determine that the lesions present on the biopsy slides here reviewed were massive is inconsistent with the applicable regulations." *Id*. at 11. In contrast, the administrative law judge found that Dr. Dennis's opinion was reasoned because he "described how the biopsy reports revealed progressive massive fibrosis." *Id*. The administrative law judge therefore found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the opinions of Drs. Alam, Rosenberg, and Jarboe, as well as claimant's hospitalization and treatment records. Dr. Alam examined claimant on June 10, 2009, at the request of the Department of Labor, and diagnosed simple pneumoconiosis but did not comment on whether claimant also suffered from complicated pneumoconiosis. Director's Exhibit 12. Dr. Rosenberg evaluated claimant on March 1, 2010, and opined that claimant did not have pneumoconiosis. Director's Exhibit 16. Dr. Jarboe examined claimant on March 4, 2010, and identified densities or lesions by x-ray, as discussed *supra*. Director's Exhibit 5. He indicated that lesions or densities "did not have the appearance of complicated pneumoconiosis," but recommended additional testing, such as a CT scan. *Id*.

The administrative law judge also considered claimant's hospitalization and treatment records. The administrative law judge observed that claimant's treating physician, Dr. Manning, an osteopath, referred claimant to the Pikeville Medical Center "because of an abnormal chest x-ray that showed diffuse nodular infiltrates bilaterally and 1.7 [centimeter] lesion in the right upper lobe." Decision and Order at 12, quoting Claimant's Exhibit 1. As part of his treatment, claimant underwent a CT scan on March 19, 2009 and a PET scan on March 25, 2009.[3] Claimant's Exhibit 1. Claimant's attending physician, Dr. McKeown, reviewed the results of the scans and opined that

[3] Dr. Poulus read the March 19, 2009 CT scan as showing a 1.75 centimeter mass in the posterior aspect of the right apex. Claimant's Exhibit 1. Dr. Kendall read the March 25, 2009 PET scan as showing "two right apical nodular densities." *Id*.

claimant's diagnosis "could be pneumoconiosis with a secondary fungal infection or possibly a malignancy," but recommended a bronchoscopy and lung biopsy. *Id*. The administrative law judge determined that, while the evidence relevant to 20 C.F.R. §718.304(c), standing alone, was insufficient to establish the existence of complicated pneumoconiosis, it "did not completely rule out that [claimant] suffers from complicated pneumoconiosis." Decision and Order at 13.

Finally, the administrative law judge weighed all of the evidence under 20 C.F.R. §718.304 together to determine whether claimant carried his burden to establish complicated pneumoconiosis. Decision and Order at 13. The administrative law judge found:

> The biopsy evidence under [20 C.F.R.] §718.304(b), combined with the other evidence including treatment records under [20 C.F.R.] §718.304(c), does establish the presence of complicated pneumoconiosis: the biopsy and other evidence outweigh the x-ray evidence under [20 C.F.R.] §718.304(a). Accordingly, I find that the Claimant has established that he was suffering from complicated pneumoconiosis under [20 C.F.R.] §718.304.

Id.

On appeal, employer contends it was error for the administrative law judge to discount the opinion of Dr. Caffrey as it was based upon medical literature and is not contrary to the Act or regulations.[4] Employer's Brief at 6-7. Employer also argues that the administrative law judge erred in crediting Dr. Dennis's opinion because Dr. Dennis commented that the 1.1 centimeter nodule he observed on one of the biopsy slides "should have been seen by the x-ray examination prior to the biopsy," and the administrative law judge found that the preponderance of the x-ray evidence was negative for both simple and complicated pneumoconiosis, contrary to Dr. Dennis's assertion. Employer's Brief at 6, quoting Claimant's Exhibit 2. Finally, employer asserts that the

[4] Employer argues that the administrative law judge erred in finding that Dr. Caffrey's opinion was not well-reasoned, since employer submitted Dr. Caffrey's opinion as a biopsy report and "did not submit Dr. Caffrey's opinion as an affirmative reasoned medical report." Employer's Brief at 6. Contrary to employer's argument, however, an administrative law judge may properly consider whether a physician's opinion, based on his review of the biopsy slides, is reasoned and documented, in determining the weight to accord that opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

"overwhelming weight" of the evidence demonstrates that claimant has, at most, simple coal workers' pneumoconiosis, and that the administrative law judge erred in crediting the biopsy evidence to support her finding that the evidence as a whole establishes the existence of complicated pneumoconiosis. We reject employer's arguments as they lack merit.

The United States Court of Appeals for the Sixth Circuit has held that a miner may establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) if the autopsy evidence shows massive lesions *or, in the alternative,* if the nodules found on autopsy would appear as greater than one centimeter on x-ray. *Gray*, 176 F.3d at 387, 21 BLR at 2-624. An autopsy report need not contain the specific words "massive" or "lesions" in order to satisfy the requirements at 20 C.F.R. §718.304(b). *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986, 24 BLR 2-72, 89 (11th Cir. 2007); *Perry v. Mynu Coals, Inc*., 469 F.3d 360, 365 n.4, 23 BLR 2-374, 2-385 n.4 (4th Cir. 2006) (autopsy report diagnosing "[c]oal worker type pneumoconiosis, complicated type, with progressive massive fibrosis" sufficient to invoke the presumption pursuant to 20 C.F.R. §718.304(b)). As the administrative law judge correctly noted, the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis" and when there is a diagnosis of progressive massive fibrosis, it equates to a diagnosis of massive lesions resulting from pneumoconiosis. Decision and Order at 11; *see generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1359, 20 BLR 2-227, 2-228 (4th Cir. 1996) (noting that complicated pneumoconiosis is known "by its more dauntingly descriptive name, 'progressive massive fibrosis.'"). In this case, the administrative law judge correctly determined that the finding of progressive massive fibrosis by Dr. Dennis is supportive of a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b). *See Cornelius*, 508 F.3d at 986, 24 BLR at 2-89; *Perry*, 469 F.3d at 365 n.4, 23 BLR at 2-385 n.4; *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3, 1-5 (1991); Decision and Order at 11.

We specifically reject employer's assertion that the administrative law judge erred in crediting Dr. Dennis's opinion, based on his comment that a 1.1 centimeter nodule "should have been seen by the x-ray examination prior to the biopsy." Claimant's Exhibit 2. We disagree with employer that Dr. Dennis's comment is inconsistent with the administrative law judge's findings that the x-ray evidence failed to establish the existence of simple and complicated pneumoconiosis. Contrary to employer's assertion, the treatment record establishes that claimant had a large nodule identified on an x-ray, which prompted the biopsy. Claimant's Exhibit 1. The CT and PET scan evidence confirmed the presence of the nodule and it was suspected that claimant had either pneumoconiosis or cancer. *Id*. Moreover, the negative x-ray readings in this case were of films taken after claimant's April 21, 2009 biopsy and would not show the 1.1 centimeter nodule excised by Dr. Dennis and discussed in the pathology report. Directors' Exhibits 12, 15-17, 16. Therefore, we reject employer's assertion that Dr.

Dennis's opinion is at odds with the administrative law judge's findings at 20 C.F.R. §718.304(a).

Furthermore, contrary to employer's argument, the administrative law judge permissibly assigned less weight to Dr. Caffrey's opinion because he applied a standard for diagnosing progressive massive fibrosis that is not set forth in the regulations. *See Cornelius*, 508 F.3d at 986, 24 BLR at 2-92; *see also* 65 Fed. Reg. 79,936 (Dec. 20, 2000) (Declining to adopt diagnostic criteria which necessitate a lesion of 2.0 [centimeters] for a diagnosis of complicated pneumoconiosis, in 20 C.F.R. §718.106 because "the record does not substantiate the existence of a consensus among physicians for making diagnoses using these criteria . . . ."). Because the administrative law judge acted within her discretion in weighing the biopsy evidence, we affirm her finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). *See Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Finally, we reject employer's argument that the administrative law judge erred in concluding that claimant satisfied his burden to establish the existence of complicated pneumoconiosis, based on a weighing of all of the relevant evidence. The administrative law judge permissibly determined that the negative x-ray evidence for complicated pneumoconiosis was outweighed by Dr. Dennis's biopsy report, diagnosing progressive massive fibrosis, considered in conjunction with claimant's treatment record, the CT scan and PET scan evidence. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Melnick*, 16 BLR at 1-33-34; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Because the administrative law judge weighed all contrary evidence, explained how she resolved the conflict in the evidence, and acted within her discretion in rendering her credibility determinations, we affirm, as supported by substantial evidence, her finding that claimant proved the existence of complicated pneumoconiosis and was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Cornelius*, 508 F.3d at 987, 24 BLR at 2-94; *Melnick*, 16 BLR at 1-33-34. Further, 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 Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

Accordingly, the administrative law judge's Decision and Order Awarding 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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BETTY JEAN HALL
Administrative Appeals Judge