

BRB No. 12-0508 BLA

ANTHONY C. BLANKENSHIP)
)
 Claimant-Respondent)
)
 v.)
)
 JAWBONE COAL CORPORATION) DATE ISSUED: 05/28/2013
)
 and)
)
 AMERICAN INTERNATIONAL SOUTH)
 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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Sarah Y. M. Himmel (Two Rivers Law Group PC), Christiansburg, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order – Award of Benefits (2009-BLA-5281) of Administrative Law Judge Richard T. Stansell-Gamm with respect

to a claim filed on December 18, 2007, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). After crediting claimant with at least twenty-three years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of complicated pneumoconiosis, arising out of coal mine employment. The administrative law judge further found, therefore, that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.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 supported by substantial evidence, is rational, and is in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & 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, 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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

¹ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least twenty-three years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

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. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *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, 2-561-62 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for 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 that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *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 eleven interpretations of two x-rays, dated March 5, 2008 and August 11, 2009. Dr. Rasmussen, a B-reader, and Drs. DePonte, Alexander, and Navani, each dually qualified as a Board-certified radiologist and B-reader, interpreted the March 5, 2008 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 13; Claimant's Exhibits 2, 7, 8. Drs. Scatarige, Scott, and Wheeler, also dually qualified radiologists, determined that this x-ray was negative for pneumoconiosis.³ Director's Exhibit 15; Employer's Exhibits 1, 2, 10. Regarding the August 11, 2009 x-ray, Drs. DePonte and Alexander interpreted it as positive for simple and complicated pneumoconiosis, Category A, while Drs. Scott and Wheeler read it as negative for simple and complicated pneumoconiosis. Claimant's Exhibits 1, 6; Employer's Exhibits 8, 9. Dr. Wheeler, however, indicated that there were masses in both lungs measuring up to two centimeters in diameter, "compatible with conglomerate granulomatous disease: histoplasmosis more likely than [tuberculosis]." Employer's Exhibit 8.

In resolving the conflict in the x-ray evidence, the administrative law judge indicated that the readings by the six dually qualified radiologists were entitled to greatest weight. Decision and Order at 10-11. The administrative law judge assigned diminished weight to Dr. Wheeler's negative interpretations of the March 5, 2008 and August 11,

³ Dr. Scatarige identified bilateral nodules measuring between 0.5 and 1.5 centimeters and stated that they "probably" represented "scarring from old tuberculosis." Employer's Exhibit 1. Dr. Scott identified a few nodules as "possible tuberculosis" and Dr. Wheeler identified a 1.5 centimeter mass, compatible with granulomatous disease, histoplasmosis or tuberculosis. Employer's Exhibits 2, 10.

2009 x-rays, based on the comments that Dr. Wheeler made on the ILO form regarding the extent to which claimant was exposed to coal dust.⁴ *Id.*; Employer's Exhibits 8, 10. Because the preponderance of the credible interpretations of each film by the dually qualified radiologists, Drs. DePonte, Alexander, and Navani, was positive, the administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).⁵

Relevant to 20 C.F.R. §718.304(c),⁶ the administrative law judge considered six interpretations of two digital x-rays, dated August 21, 2008 and February 7, 2011, and eight interpretations of three CT scans, dated April 1, 2008, August 6, 2008, and December 15, 2009. Decision and Order at 12-18. The administrative law judge found that the August 21, 2008 digital x-ray was inconclusive for complicated pneumoconiosis,

⁴ On the ILO form for the March 5, 2008 x-ray, Dr. Wheeler noted:

Some small nodules in upper lungs could be [coal workers' pneumoconiosis] but pattern is asymmetrical and probably involving pleura which favors granulomatous disease. Also he is young. NIOSH and MSHA became active in coal mine safety early in 1970s before his career began.

Employer's Exhibit 10. Similarly, Dr. Wheeler noted on the ILO form for the August 11, 2009 x-ray:

Masses are not large opacities of [coal workers' pneumoconiosis] because there are no symmetrical small nodular infiltrates in central mid and upper lungs from which large opacities merge. Also he is very young since NIOSH and MSHA became active controlling dust levels in mines in early 1970s mandated to prevent [coal workers' pneumoconiosis].

Employer's Exhibit 8.

⁵ Employer incorrectly asserts that Dr. Navani provided a quality only reading of the March 5, 2008 x-ray, and did not interpret the x-ray for the purpose of identifying pneumoconiosis. Dr. Navani completed the ILO classification form identifying a Category A opacity and his reading was proffered by claimant in accordance with the evidentiary limitations. *See* 20 C.F.R. §725.414(a)(2)(i); Claimant's Exhibit 8; Administrative Law Judge Exhibit 2; Hearing Transcript at 11-12.

⁶ The administrative law judge determined correctly that there is no biopsy evidence relevant to 20 C.F.R. §718.304(b). Decision and Order at 11.

as it was interpreted as positive by Dr. DePonte and as negative by Dr. Scatarige, both dually qualified radiologists. *Id.* at 13; Claimant's Exhibit 3; Employer's Exhibit 12. The administrative law judge found that the February 7, 2011 digital x-ray was positive for complicated pneumoconiosis, crediting Dr. DePonte's positive reading over the negative reading by Dr. Wheeler.⁷ Decision and Order at 13; Claimant's Exhibits 11-12; Employer's Exhibit 15. The administrative law judge specifically discounted Dr. Wheeler's interpretation, based on his comment that "high unprotected dust exposures are required to cause large opacities which have been illegal for decades," which caused the administrative law judge to question whether Dr. Wheeler had considered claimant's actual coal dust exposure in rendering his opinion. Decision and Order at 13, *quoting* Employer's Exhibit 15. The administrative law judge further determined that "implicit in Dr. DePonte's use of the ILO form to annotate the presence of a Category A opacity is the representation that the mass would also appear as a Category A opacity on a film x-ray under 20 C.F.R. §718.304(a). Decision and Order at 13. Thus, the administrative law judge found that the digital x-ray evidence was positive for complicated pneumoconiosis. *Id.*

In considering the CT scan evidence, the administrative law judge found that the April 1, 2008 scan was read as positive by Drs. Sheikh and DePonte, and as negative by Dr. Scott. Decision and Order at 15; Claimant's Exhibits 4, 13; Employer's Exhibit 14. The administrative law judge determined that Dr. Ramakrishnan's reading of this scan was equivocal, as he identified pneumoconiosis as a differential diagnosis. Decision and Order at 15; Claimant's Exhibits 4-5. The administrative law judge found that the April 1, 2008 CT scan was inconclusive as to the presence or absence of complicated pneumoconiosis. Decision and Order at 15.

Regarding the August 6, 2008 CT scan, the administrative law judge considered readings by Drs. Shook, Wheeler and DePonte. *Id.* at 15-16. The administrative law judge noted that Dr. Shook observed the presence of nodules but did not attribute them to a specific process. Decision and Order at 16; Claimant's Exhibit 4. The administrative law judge indicated that Dr. Wheeler reported masses in claimant's lungs, measuring from 1.2 to 4.2 centimeters, which he attributed to granulomatous disease, with histoplasmosis more likely than mycobacterium avium complex or tuberculosis. Decision and Order at 16; Employer's Exhibit 13. The administrative law judge again assigned little weight to Dr. Wheeler's CT scan interpretation because he included a

⁷ Dr. Robinette, a B-reader, and Dr. Cobb, whose qualifications were not in the record, also read the February 7, 2011 digital x-ray as positive for progressive massive fibrosis. Claimant's Exhibit 11. However, the administrative law judge gave greater weight to the negative readings by Drs. DePonte and Wheeler, based on their qualifications as dually qualified radiologists. Decision and Order at 13.

reference to claimant's "age and controlled dust levels since the 1970s." Decision and Order at 16. Assigning controlling weight to Dr. DePonte's interpretation, the administrative law judge determined that the August 6, 2008 CT scan was positive for complicated pneumoconiosis.⁸ *Id.*

Lastly, the administrative law judge found that the December 15, 2009 CT scan was inconclusive, as there was one positive and one negative reading by Drs. DePonte and Scott, respectively. Decision and Order at 17; Claimant's Exhibit 15; Employer's Exhibit 11. Considering the CT scan evidence overall, the administrative law judge concluded that it demonstrated "the presence of a large pulmonary opacity consistent with pneumoconiosis." Decision and Order at 17.

The administrative law judge next considered the medical opinion evidence. Decision and Order at 21-31. The administrative law judge gave less weight to Dr. Rasmussen's opinion, that claimant has complicated pneumoconiosis, because he found that it was not sufficiently reasoned. *Id.* at 30. The administrative law judge rejected the opinions of Drs. Hippensteel and Fino, that claimant does not have complicated pneumoconiosis, because they cited to the absence of a respiratory impairment to support their opinions when the existence of a disabling respiratory impairment is not required to diagnose complicated pneumoconiosis. *Id.* at 30-31. Conversely, the administrative law judge found that Drs. Sheikh, Gondal, Robinette, and Khasawneh provided reasoned and documented opinions that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.* at 31. Weighing all of the evidence together, the administrative law judge concluded that claimant satisfied his burden to establish that he has complicated pneumoconiosis. *Id.* at 32.

Employer argues that the administrative law judge erred in discrediting Dr. Wheeler's negative interpretations of the analog and digital x-rays and the CT scans, based solely on his comments concerning claimant's age and the dust levels in the mines. Employer maintains that Dr. Wheeler, along with Drs. Scatarige and Scott, provided alternate explanations for their attribution of the opacities observed in claimant's lungs to disease processes other than complicated pneumoconiosis.

Contrary to employer's contention, the administrative law judge acted with his discretion in assigning Dr. Wheeler's x-ray and CT scan readings less weight in this case. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir.

⁸ The administrative law judge found that Dr. DePonte's statement that one of the masses seen on the CT scan would show up on an x-ray as an opacity greater than one centimeter, was sufficient to satisfy the equivalency requirement at 20 C.F.R. §718.304(c). Decision and Order at 16.

1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 10-11. The administrative law judge rationally found that Dr. Wheeler’s comments are “problematic because certainly in determining that a large pulmonary opacity consistent with pneumoconiosis was not present . . . Dr. Wheeler appears to assume in part that [claimant] did not experience significant exposure to coal mine dust based on a generalized observation regarding regulatory mandated dust levels in coal mines since the 1970s.” Decision and Order at 10; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Moreover, it was within the administrative law judge’s discretion to determine that Dr. Wheeler’s additional explanations did not mitigate the fact that he relied upon his belief that, because claimant began working in the mines after rules mandating low dust levels went into effect, claimant did not have sufficient coal dust exposure to develop complicated pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Therefore, because the administrative law judge’s permissibly found that Dr. Wheeler’s negative readings of the x-rays are less probative, we affirm his determination that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. We also affirm the administrative law judge’s finding that a preponderance of the digital x-rays and CT scans were supportive of a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c), as the administrative law judge rationally gave less weight to Dr. Wheeler’s negative readings of that evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336.

Employer also contends that the administrative law judge erred in weighing the medical opinions of Drs. Fino and Hippensteel under 20 C.F.R. §718.304(c). Employer argues that the administrative law judge erred in discounting Dr. Fino’s opinion because he relied on Dr. Wheeler’s negative interpretation of the February 7, 2011 x-ray. In addition, although employer agrees that pulmonary function and blood gas studies do not “directly bear” on whether claimant has complicated pneumoconiosis, employer asserts that the administrative law judge erred in discrediting Dr. Fino’s opinion on the ground that he relied on these studies. Employer’s Brief at 11-12. Employer maintains that the objective studies “are not medically irrelevant to the diagnosis of complicated [pneumoconiosis].” *Id.* Similarly, employer contends that the administrative law judge erred in discrediting Dr. Hippensteel’s opinion because his view, that the x-ray evidence was negative for complicated pneumoconiosis, was contrary to the administrative law judge’s finding, and the physician relied on claimant’s improvement in gas exchange to exclude a diagnosis of complicated pneumoconiosis.

Employer's allegations of error lack merit. The administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Fino and Hippensteel, as they were based on negative x-ray readings for complicated pneumoconiosis, which were contrary to the administrative law judge's findings of fact. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). In addition, the administrative law judge permissibly gave less weight to the opinions of Drs. Fino and Hippensteel, as he found that they did not adequately explain how the absence of a permanent respiratory impairment excluded a finding of complicated pneumoconiosis, given its definition in the Act and the implementing regulations. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. We affirm, therefore, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Consequently, we further affirm the administrative law judge's determination that claimant satisfied his burden to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *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 32. We also affirm, as unchallenged on appeal, the administrative law judge's determination 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 (1983); Decision and Order at 32. Thus, we affirm the administrative law judge's findings that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and that he is entitled to benefits.⁹

⁹ Based on our affirmance of the administrative law judge's finding of complicated pneumoconiosis, it is not necessary that we address employer's arguments with regard to the existence of simple pneumoconiosis.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge