BRB No. 13-0469 BLA

DEBORAH VANCE (On behalf of the Estate of JOE SLADE) Claimant-Petitioner v. SOUTHERN APPALACHIAN COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/15/2014 DECISION and ORDER

Appeal of the Decision and Order on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Deborah Vance, Chapmanville, West Virginia, pro se.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals,[1] without the assistance of counsel, the Decision and Order on Remand denying benefits (2006-BLA-06174) of Administrative Law Judge Lystra A. Harris with respect to a subsequent claim filed on October 25, 2005, pursuant to the

[1] Claimant is the daughter of the miner, Joe Slade, who died on October 7, 2010. Director's Exhibit 1a. She is the administratix of her father's estate and is pursuing this claim on behalf of the estate. *See* 20 C.F.R. §725.360(b).

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time. In the Board's previous decision, it vacated Administrative Law Judge Ralph A. Romano's denial of benefits and remanded the case for consideration of the evidence relevant to the issue of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[2] *Slade v. S. Appalachian Coal Co.*, BRB No. 11-0308 BLA, slip op. at 4 (Nov. 22, 2011)(unpub.).

On remand, the case was assigned to Administrative Law Judge Lystra A. Harris (the administrative law judge) due to Judge Romano's retirement. The administrative law judge determined that the x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and that there was no biopsy or autopsy evidence to consider pursuant to 20 C.F.R. §718.304(b). The administrative law judge further found that claimant did not establish the existence of complicated pneumoconiosis by CT scan or medical opinion at 20 C.F.R. §718.304(c). Considering all of the evidence together, the administrative law judge concluded that the miner did not have complicated pneumoconiosis and, therefore, claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).[3] Consequently, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.[4] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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[2] The Board affirmed, as unchallenged on appeal, Judge Romano's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and, therefore, did not invoke the presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4), 30 U.S.C. §921(c)(4). *Slade v. S. Appalachian Coal Co.*, BRB No. 11-0308 BLA, slip op. at 2. n.2 (Nov. 22, 2011)(unpub.).

[3] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[4] Sharon McDevitt, a lay representative with Stone Mountain Health Services of Oakwood, Virginia, filed a letter requesting, on behalf of claimant, that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). In the letter Ms. McDevitt stated, "[w]e feel that [p]neumoconiosis was present; the claimant was totally disabled from the disease and that this disease did hastened [sic] [the miner's] death." Although the miner has died, this case is a miner's, not a survivor's, claim.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[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).

The sole issue on appeal is whether the administrative law judge properly determined that the evidence failed to establish that the miner had complicated pneumoconiosis at 20 C.F.R. §718.304.[6] 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

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Therefore, whether pneumoconiosis hastened the miner's death is not at issue in this case. *See* 20 C.F.R. §718.1.

[5] The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibits 4, 6. 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).

[6] The miner's most recent prior claim was denied by Administrative Law Judge Victor J. Chao, based on his finding that the miner did not establish a totally disabling respiratory impairment. Director's Exhibit 1a. The Board affirmed the denial of benefits. *Slade v. S. Appalachian Coal Co*., BRB No. 88-1656 BLA (Apr. 30, 1991)(unpub.) In order to obtain review of the merits of the miner's claim, therefore, claimant had to submit new evidence establishing that the miner was totally disabled. *See* 20 C.F.R. §725.309(c)(3), (4); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). As previously indicated, the Board affirmed the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) in its prior Decision and Order in this claim. *See supra* at 2 n.2.

diameter, the administrative law judge must 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. *E. 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. *See 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).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge summarized the interpretations of x-rays dated January 30, 2006, June 28, 2006 and July 23, 2008, as designated by the parties, and the x-ray readings contained in the miner's treatment records. Decision and Order on Remand at 4-6. Dr. Rasmussen, a B reader, and Drs. Miller and Alexander, dually-qualified as B readers and Board-certified radiologists, identified category A large opacities on the x-ray dated January 30, 2006. Director's Exhibit 10; Claimant's Exhibits 2, 5. Dr. Miller stated that the large opacity he observed "may represent complicated pneumoconiosis (A), lung cancer or other etiology." Claimant's Exhibit 5. Dr. Alexander indicated that the opacity he observed could be complicated pneumoconiosis or scarring. Claimant's Exhibit 2. Dr. Gaziano, a B reader, and Dr. Wiot, a dually qualified radiologist, interpreted the January 30, 2006 x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibits 11, 15. Regarding the June 28, 2006 x-ray, Dr. Miller identified a category A large opacity, but commented that it could represent lung cancer. Claimant's Exhibit 3. Dr. Wiot found that this film was negative for both simple and complicated pneumoconiosis. Employer's Exhibit 9. On the x-ray dated July 23, 2008, Dr. Ahmed, a B reader and Board-certified radiologist, reported the presence of a category A large opacity, while Dr. Wiot interpreted it as negative for simple and complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 15. The x-ray interpretations in the miner's treatment records identify various etiologies for the density observed in his lungs, including a "summation shadow associated with perihilar vessels and the costochondral margin" and "parenchymal scarring or possibly a pulmonary nodule." Employer's Exhibit 10.

The administrative law judge initially determined that the readings by Drs. Miller, Alexander, Wiot, and Ahmed were entitled to greatest weight, based on their status as dually-qualified radiologists. Decision and Order on Remand at 6. With respect to the

January 30, 2006 x-ray, the administrative law judge found that, although Drs. Miller and Alexander diagnosed complicated pneumoconiosis, they commented that the opacity could be due to other possible etiologies. *Id*. at 7. As a result, the administrative law judge concluded that this film was in equipoise. *Id*. Similarly, the administrative law judge found that the July 23, 2008 x-ray was in equipoise, "[g]iven the comparable qualifications of the physicians and the alternative diagnoses offered by Dr. Wiot." *Id*.

The administrative law judge then stated, "considering all of the x-ray evidence together, I find that complicated pneumoconiosis is not established at 20 C.F.R. §718.304(a)." Decision and Order on Remand at 8. The administrative law judge explained that all of the x-rays had "conflicting opinions by dually-qualified physicians regarding the presence and absence of complicated pneumoconiosis, but two of the dually-qualified physicians who indicated findings of category A opacities, also noted that there were multiple potential explanations for the observed density." *Id*. Further, the administrative law judge noted that the x-ray interpretations contained in the miner's treatment records "are equivocal and do not offer much clarification regarding the etiology of the [m]iner's large density." *Id*.

We affirm the administrative law judge's findings at 20 C.F.R. §718.304(a), as they are rational and supported by substantial evidence. In determining that the x-rays dated January 30, 2006 and July 23, 2008, were both in equipoise, the administrative law judge permissibly gave more weight to the readings performed by dually-qualified physicians and reasonably found that the readings in which Drs. Miller and Alexander identified alternate etiologies for the large opacity that they observed were entitled to diminished weight because they were equivocal. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Similarly, the administrative law judge rationally found that the x-ray interpretations in the miner's treatment records were insufficient to establish the existence of complicated pneumoconiosis, as they were also equivocal. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). Accordingly, we affirm the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. 718.304(a).[7]

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[7] Although the administrative law judge did not render a specific finding regarding whether the June 28, 2006 x-ray supported a finding of complicated pneumoconiosis, this omission does not require remand, as Dr. Wiot read this x-ray as negative and Dr. Miller indicated that the large opacity that he identified could represent either complicated pneumoconiosis or cancer. Claimant's Exhibit 3; Employer's Exhibit 9. Thus, the readings of this x-ray are subsumed in the administrative law judge's rationale concerning her determination that the x-ray evidence did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order on Remand at 8; *see Larioni v. Director, OWCP*, 12 BLR 1-1276 (1989).

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge initially considered the CT scan evidence, having determined that employer satisfied the requirements of 20 C.F.R. §718.107 by establishing the medical acceptability and relevance of CT scans, based on Dr. Wiot's testimony.[8] Decision and Order on Remand at 8-9. Dr. Dameron, a Board-certified radiologist, read the October 22, 2004 CT scan, and indicated that the density that he observed in the miner's lung was most likely due to scarring, but could be related to progressive massive fibrosis due to coal dust exposure. Director's Exhibit 11c. Dr. Wiot found that this CT scan was negative for simple and complicated pneumoconiosis. Employer's Exhibit 2. Dr. Anton, a Board-certified radiologist, read the CT scan dated December 28, 2004 and stated that the density that he observed could be due to scarring, a primary neoplasm, or inflammatory processes. Director's Exhibit 11b. Dr. Wiot read this scan as negative for simple and complicated pneumoconiosis. Employer's Exhibit 2. Dr. Cordell, a Board-certified radiologist, interpreted a CT scan dated April 28, 2005 and observed that the density in the miner's lung could be due to scarring or conglomerate fibrosis. Director's Exhibit 11a. Dr. Wiot interpreted this scan as negative for simple and complicated pneumoconiosis. Employer's Exhibit 2. Dr. Zekan, a Board-certified radiologist, determined that the March 13, 2006 CT scan showed an opacity that might be due to fibrosis, while Dr. Wiot determined that this scan did not contain any evidence of pneumoconiosis. Employer's Exhibits 2, 6. Dr. Zekan read the April 19, 2007 CT scan, and observed that the opacity he identified was due to scarring. Employer's Exhibit 6.

The administrative law judge noted that all of the physicians interpreting the CT scans are Board-certified radiologists and well-qualified to offer interpretations. Decision and Order on Remand at 11. The administrative law judge found that Dr. Dameron's diagnosis of a large opacity was equivocal, as he indicated that it could be due to scarring or a neoplasm, rather than complicated pneumoconiosis. *Id.* The administrative law judge stated that "none of the other CT scan interpretations attributed the opacity in the [m]iner's upper right lung to pneumoconiosis." *Id.* Accordingly, the administrative law judge concluded that "the CT scan evidence does not support a finding of complicated pneumoconiosis." *Id.*

The administrative law judge permissibly found that Dr. Dameron's reading, indicating speculation as to the source of the large opacity that he observed on the October 22, 2004 scan, was entitled to little weight because it was equivocal. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir.

[8] The administrative law judge did not consider the interpretations of the October 20, 2004 digital x-ray performed by Drs. Wiot and Miller, as neither party established the medical acceptability and relevance of digital x-rays pursuant to 20 C.F.R. §718.107(b). Decision and Order on Remand at 11-12.

2012); Decision and Order on Remand at 11. The administrative law judge also rationally determined that none of the other physicians definitively opined that the opacity in the miner's lung was complicated pneumoconiosis. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Thus, the administrative law judge reasonably concluded that the CT scan evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Concerning the medical opinion evidence relevant to 20 C.F.R. §718.304(c), Drs. Bellotte and Zaldivar indicated that the miner did not have complicated pneumoconiosis, based on the objective medical evidence. Employer's Exhibits 1, 3-4, 5, 7, 13, 14. In contrast, Dr. Rasmussen determined that the density in the miner's lung was complicated pneumoconiosis. Director's Exhibit 10. At Dr. Rasmussen's deposition, however, he testified that the density could also be a granuloma, or could be attributable to scarring or a malignancy. Employer's Exhibit 8 at 8-9.

The administrative law judge determined that Dr. Rasmussen's medical opinion was "too equivocal to establish the presence of complicated pneumoconiosis." Decision and Order on Remand at 18. The administrative law judge also stated, "[a]s neither Dr. Bellotte [n]or Dr. Zaldivar attributed the [m]iner's observed lung abnormalities to pneumoconiosis in any of their reports and, ultimately, definitely concluded that the density in the [m]iner's lungs was attributable to tuberculosis scarring, I find that neither opinion supports a finding of complicated pneumoconiosis." *Id*. The administrative law judge concluded, therefore, that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c), by medical opinion evidence. *Id*.

The administrative law judge acted within her discretion in determining that Dr. Rasmussen's opinion was equivocal, and entitled to little weight, based on Dr. Rasmussen's speculation as to the cause of the density in the miner's lung. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. In addition, the administrative law judge correctly found that the opinions of Drs. Bellotte and Zaldivar did not contain a diagnosis of complicated pneumoconiosis. We affirm, therefore, the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c).[9] *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18.

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[9] As there is no biopsy or autopsy evidence in the record, we also affirm the administrative law judge's determination that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

We further affirm, as supported by substantial evidence, the administrative law judge's determination that the evidence, when considered together, is insufficient to establish the existence of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; Decision and Order on Remand at 19. Consequently, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See* 20 C.F.R. §725.309(c)(3), (4); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004); Decision and Order on Remand at 19.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge