

BRB No. 08-0117 BLA

B.W.)
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 Claimant-Respondent)
)
 v.) DATE ISSUED: 10/23/2008
)
 17 WEST MINING INCORPORATED)
 C/O HORIZON NATURAL RESOURCES)
)
 and)
)
 ZURICH AMERICAN INSURANCE)
 GROUP)
)
 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 Stephen L. Purcell,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-5025) of
Administrative Law Judge Stephen L. Purcell rendered on a claim 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). Claimant filed his claim on November 16, 2005. Director's Exhibit 2. The administrative law judge credited claimant with twenty-six years of coal mine employment, as stipulated by employer.¹ The administrative law judge found that claimant established the existence of simple pneumoconiosis by the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found that claimant established the existence of complicated pneumoconiosis based on both the x-ray and medical opinion evidence, and was therefore entitled to the irrebuttable presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. The administrative law judge additionally found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment, provided at 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis, based upon the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.304(a), (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter and would be classified in category A, B, or C; (b) a biopsy or autopsy shows massive lesions in the lung;² or (c) when diagnosed by other

¹ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

² In this case, there was no biopsy or autopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b). Decision and Order at 13.

means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Pursuant to Section 718.304(a), the administrative law judge weighed seven readings of two x-rays dated February 8, 2006 and May 6, 2006. Dr. Repsher, a B reader, and Dr. Poulos, a Board-certified radiologist and B reader, interpreted the February 8, 2006 x-ray as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis, also noting possible lesions of tuberculosis in the upper lung zones. Employer's Exhibits 1, 2. By contrast, Dr. Rasmussen, a B reader, interpreted the February 8, 2006 x-ray as positive for both simple pneumoconiosis and for Category B large opacities of complicated pneumoconiosis, noting bilateral, upper zone, thick-walled cavitory lesions. Director's Exhibit 11. Dr. Alexander, a Board-certified radiologist and B reader, interpreted the February 8, 2006 x-ray as positive for both simple pneumoconiosis and Category A large opacities, noting that opacities greater than ten millimeters in diameter were present in both upper zones consistent with complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Miller, a Board-certified radiologist and B reader, interpreted the February 8, 2006 x-ray as positive for both simple pneumoconiosis and Category A complicated pneumoconiosis, noting that there were bilateral apical opacities consistent with scarring, probably secondary to complicated pneumoconiosis, but also noting that tuberculosis was a consideration. Claimant's Exhibit 6.

Dr. Dahhan, a B reader, interpreted the May 6, 2006 x-ray as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibit 16. However, Dr. Alexander interpreted the same x-ray as positive for both simple pneumoconiosis and Category A large opacities of complicated pneumoconiosis. Claimant's Exhibit 2.

Considering all of these readings in light of the physicians' differing radiological qualifications, the administrative law judge found that the preponderance of the x-ray evidence supported the existence of complicated pneumoconiosis. Decision and Order at 5, 11-12.

Employer first contends that the administrative law judge erred by not rejecting the x-ray interpretations diagnosing “Category A” large opacities by Drs. Alexander and Miller because they were silent as to the existence of claimant’s mycobacterium xenopi infection.³ Contrary to employer’s contention, the administrative law judge was not required to reject the interpretations by Drs. Alexander and Miller because they were silent as to mycobacterium xenopi, since none of the x-ray readings specifically reflected a finding of mycobacterium xenopi by any physician. Moreover, Dr. Miller considered tuberculosis as a possibility for claimant’s large opacities. Thus, employer’s contention lacks merit. The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Therefore, and as employer raises no other arguments pursuant to Section 718.304(a), we affirm the administrative law judge’s finding that the preponderance of the x-ray evidence supported the existence of complicated pneumoconiosis.

Pursuant to Section 718.304(c), the administrative law judge discussed and weighed the medical opinion evidence. Dr. Rasmussen opined that claimant suffered from complicated pneumoconiosis, and Drs. Castle and Dahhan opined that claimant did not have complicated pneumoconiosis. Director’s Exhibits 11, 16; Employer’s Exhibits 3-8. Dr. Sikder, whose treatment notes were of record, did not diagnose claimant with complicated pneumoconiosis. Director’s Exhibit 15.

The administrative law judge found that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304(c). Decision and Order at 12-13. The administrative law judge accorded the opinion of Dr. Rasmussen great weight, finding it to be well-documented and supported, and to be the most thorough and complete evaluation of the possible etiologies of claimant’s lung disease. By contrast, the administrative law judge accorded the opinions of Drs. Castle and Dahhan less weight, in part because the physicians were equivocal as to whether claimant had complicated pneumoconiosis. The administrative law judge found that Dr. Sikder’s treatment notes were not probative on the issue because she did not address the existence of complicated pneumoconiosis.

Employer contends that the administrative law judge erred by considering that Drs. Castle and Dahhan are not Board-certified radiologists, because their opinions were

³ The record reflects that claimant was diagnosed with mycobacterium xenopi in 2003. Director’s Exhibit 11. Dr. Dahhan described mycobacterium xenopi as a form of “atypical” tuberculosis, Employer’s Exhibit 7 at 12, and Dr. Rasmussen described it as “distantly related to tuberculosis.” Employer’s Exhibit 8 at 6.

based on more than interpretations of x-rays. Employer also contends that the administrative law judge erred in according less weight to Dr. Dahhan's opinion because Dr. Dahhan failed to explain how he attributed claimant's pulmonary condition solely to smoking. We need not resolve these issues, however, because employer does not challenge other reasons provided by the administrative law judge for discrediting the opinions of Drs. Castle and Dahhan. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Dr. Castle, who is Board-certified in Internal Medicine, Pulmonary Disease, and is a B reader, reviewed claimant's medical records, and stated in his August 21, 2006 report that claimant "*most likely* did not have evidence of complicated coal workers' pneumoconiosis." Employer's Exhibit 3 (emphasis added). The administrative law judge considered that Dr. Castle is a pulmonologist but not a Board-certified radiologist, and that Dr. Castle reviewed claimant's medical records but did not examine claimant. Decision and Order at 12. However, the administrative law judge's decision to accord less weight to Dr. Castle's opinion was based solely on the administrative law judge's finding that the opinion was equivocal. *Id.* The administrative law judge rationally found that Dr. Castle's opinion was equivocal, and gave it less weight. See *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 12; Employer's Exhibit 3. Moreover, as noted, employer does not challenge this finding. Consequently, we affirm the administrative law judge's decision to accord less weight to Dr. Castle's opinion.

Dr. Dahhan, who is Board-certified in Internal Medicine, Pulmonary Disease, and is a B reader, examined claimant and stated in his May 9, 2006 report that claimant's x-rays showed no large opacities of complicated pneumoconiosis. He attributed claimant's mild obstruction to smoking. Director's Exhibit 16. Dr. Dahhan testified by deposition on July 6, 2006, that claimant did not have complicated pneumoconiosis based on physical examination, chest x-ray, pulmonary function study, and blood gas study. Employer's Exhibit 7 at 8-9, 12-14, 17. Dr. Dahhan had not been given the history of claimant having been diagnosed with mycobacterium xenopi at the time of his examination of claimant. Employer's Exhibit 7 at 13. Subsequently, upon learning of that history in a review of additional medical records, Dr. Dahhan concluded that claimant "has cavitary [sic] atypical pulmonary tuberculosis, which could produce opacities that will mimic those of coal workers' pneumoconiosis leading me to raise doubt regarding the etiology of the opacities" Employer's Exhibit 5.

The administrative law judge found that Dr. Dahhan's "[r]aising doubts about the etiology of opacities is not the same as making a definitive diagnosis of no complicated pneumoconiosis." Decision and Order at 12. The administrative law judge acted within his discretion to gauge the strength and persuasiveness of Dr. Dahhan's opinion, and

permissibly accorded the opinion less weight. *See Holdman*, 202 F.3d at 882, 22 BLR at 2-42; *Justice*, 11 BLR at 1-94; Decision and Order at 12; Director's Exhibit 16; Employer's Exhibits 5-7. Moreover, as noted, employer does not challenge this finding. Consequently, we affirm the administrative law judge's decision to accord less weight to Dr. Dahhan's opinion.

Employer next contends that the administrative law judge erred in giving great weight to Dr. Rasmussen's opinion diagnosing complicated pneumoconiosis because, employer asserts, Dr. Rasmussen's opinion was based solely on an x-ray reading. Employer further contends that the administrative law judge erred by not considering that Dr. Rasmussen is not Board-certified in Pulmonary Disease. We disagree.

In his report dated February 8, 2006, Dr. Rasmussen, who is Board-certified in Internal Medicine and is a B reader, identified the causes of claimant's lung disease as coal mine employment and smoking, citing medical studies to support his conclusion. Director's Exhibit 11 at 4. Dr. Rasmussen stated that claimant's mycobacterium xenopi infection had no significant impact on claimant's impaired function, citing two additional studies to support his opinion. *Id.* at 5. At his deposition on September 7, 2006, Dr. Rasmussen based his diagnosis of complicated pneumoconiosis on his Category B chest x-ray reading, showing thick-walled cavitary lesions and many rounded, evenly distributed nodular densities, that Dr. Rasmussen stated would be unusual for tuberculosis. Employer's Exhibit 8 at 10-11. Dr. Rasmussen admitted that mycobacterium xenopi can produce cavitary lesions, similar to those seen with tuberculosis, but stated that this also would be "quite unusual." *Id.* at 12. Dr. Rasmussen stated that his diagnosis of complicated pneumoconiosis was corroborated by the blood gas study that he performed, which showed a significant impairment in oxygen transfer, and claimant's airway obstruction, as shown by pulmonary function study, characteristic of lung disease caused by coal mine employment. *Id.* at 20. Dr. Rasmussen testified that smoking can cause some impairment in oxygen transfer, but that it was less likely to cause a degree of oxygen transfer impairment in individuals with only mild airway obstruction, as seen in claimant. *Id.* at 21. Dr. Rasmussen had no doubt that smoking was a significant factor in claimant's pulmonary impairment. *Id.* But Dr. Rasmussen doubted that mycobacterium xenopi could cause claimant's pulmonary abnormalities. *Id.* Dr. Rasmussen reasoned that the pattern seen in claimant, primarily the radiographic changes, was inconsistent with a pulmonary abnormality due to mycobacterium xenopi. *Id.*

The administrative law judge accorded Dr. Rasmussen's opinion great weight because he found that it was the most thorough and complete opinion and because it addressed all possible causes for the large opacities seen on claimant's x-rays and the abnormal blood gas study findings, including coal dust exposure, smoking, and tuberculosis. Decision and Order at 12-13. The administrative law judge noted that Dr.

Rasmussen diagnosed complicated pneumoconiosis based both on chest x-ray findings and a treadmill exercise study showing marked impairment in oxygen transfer with moderate exercise. Decision and Order at 12.

Contrary to employer's contention, the administrative law judge accurately stated that Dr. Rasmussen diagnosed complicated pneumoconiosis based on a chest x-ray and an exercise blood gas study showing a marked impairment in oxygen transfer. Decision and Order at 12; Director's Exhibit 11. Dr. Rasmussen explained that he diagnosed complicated pneumoconiosis based primarily on the x-ray changes, in conjunction with the pattern shown on blood gas study, which he stated was consistent with a coal mine-related lung disease, in conjunction with the pulmonary function study showing airway obstruction. Employer's Exhibit 8 at 20. Although employer alleges that the administrative law judge failed to consider that Dr. Rasmussen is not a Board-certified pulmonologist, any error in the administrative law judge's failure to consider this issue was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed, the administrative law judge permissibly accorded less weight to the contrary opinions of Drs. Castle and Dahhan, leaving only Dr. Rasmussen's opinion, which the administrative law judge permissibly found to be thorough and well-supported, and which, the record reflects, is consistent with the administrative law judge's finding as to the weight of the x-ray evidence. Consequently, we affirm the administrative law judge's decision to accord great weight to Dr. Rasmussen's opinion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005).

Employer argues that the administrative law judge erred by not considering Dr. Sikder's treatment records, because Dr. Sikder did not mention complicated pneumoconiosis. Dr. Sikder, who is Board-certified in Internal Medicine, treated claimant from September 28, 2005, through December 6, 2006, and diagnosed claimant with cavitary lung disease, mycobacterium xenopi, chronic obstructive pulmonary disease, with a history of tobacco abuse, hemoptysis, and silicosis. Director's Exhibit 15; Claimant's Exhibit 3. The administrative law judge found that Dr. Sikder's treatment notes were not probative because Dr. Sikder did not address the existence of complicated pneumoconiosis. Decision and Order at 12.

Contrary to employer's contention, the administrative law judge accurately noted that Dr. Sikder did not specifically address whether claimant had complicated pneumoconiosis. Moreover, although Dr. Sikder diagnosed other diseases, as discussed *supra*, the administrative law judge permissibly accorded great weight to Dr. Rasmussen's "thorough" and "well supported" opinion that the cause of claimant's large opacities on x-ray was not mycobacterium xenopi. Decision and Order at 13. We therefore reject employer's allegation of error in the administrative law judge's analysis of Dr. Sikder's treatment notes.

Finally, the administrative law judge weighed the evidence together, and found that the positive x-ray evidence, coupled with Dr. Rasmussen's "well reasoned" opinion diagnosing complicated pneumoconiosis, established the existence of complicated pneumoconiosis pursuant to Section 718.304. Decision and Order at 13. Substantial evidence supports this finding. Consequently, we affirm the administrative law judge's finding that claimant is entitled to the irrebuttable presumption pursuant to Section 718.304.⁴ *See Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33.

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

⁴ We affirm the administrative law judge's findings that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that both his simple and complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), as the findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).