BRB No. 13-0005 BLA

COLLEEN MOORE (Widow of DALE A. MOORE)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 10/30/2013
MATT MINING COMPANY, INCORPORATED	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand–Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Third Remand–Awarding Benefits (2005-BLA-5485) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim[1] filed on September 2, 2003, pursuant to the provisions of the Black

[1] Claimant is the widow of the miner, who died on June 17, 2003. Director's Exhibit 4. The miner was awarded benefits on March 29, 2002, on his claim filed on November 21, 1997. Director's Exhibit 29.

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[2] This case is before the Board for the fourth time.[3]

In its most recent decision, the Board vacated the administrative law judge's determination that claimant invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Moore v. Matt Mining Co.*, BRB No. 10-0691 BLA (Aug. 25, 2011)(unpub.). The administrative law judge based that determination primarily upon the medical opinion of Dr. Robinette, which he found to be reasoned and documented, and supported by x-ray and CT scan evidence that was admissible under 20 C.F.R. §725.414 (2013).[4] Upon review of employer's appeal, the Board held that the administrative law judge erred in relying on a November 3, 1998 letter from Dr. Robinette to the miner's attorney to determine that Dr. Robinette set forth his own reading of an April 29, 1998 x-ray, and not the reading of another physician, given that the administrative law judge had earlier excluded Dr. Robinette's November 3, 1998 letter from evidence. *Moore*, BRB No. 10-0691 BLA, slip op. at 8-9. Thus, the Board vacated the administrative law judge's determination to credit Dr. Robinette's opinion that the miner suffered from complicated pneumoconiosis, and remanded the case for the administrative law judge to determine whether Dr. Robinette himself read the April 29, 1998 x-ray, without considering Dr. Robinette's November 3, 1998 letter. The Board further instructed the administrative law judge, on remand, to determine whether

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 1. The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id*. Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[3] The full procedural history of this case is set forth in the Board's prior decisions. *Moore v. Matt Mining Co.*, BRB No. 10-0691 BLA (Aug. 25, 2011)(unpub.); *Moore v. Matt Mining Co.*, BRB No. 09-0188 BLA (Nov. 25, 2009)(unpub.); *Moore v. Matt Mining Co.*, BRB No. 06-0848 BLA (Aug. 30, 2007)(unpub.).

[4] In making the above finding, the administrative law judge was addressing the Board's previous instruction to determine whether Dr. Robinette's medical opinion was based on inadmissible evidence and, if so, to determine the weight that should be accorded to the opinion. *Moore*, BRB No. 09-0188 BLA, slip op. at 8.

the April 29, 1998 x-ray reading was admissible as a treatment record under 20 C.F.R. §725.414(a)(4) (2013) and, if so, whether employer established good cause, under 20 C.F.R. §725.456 (2013), for the admission of a rebuttal reading in response.[5] The Board further instructed the administrative law judge to reconsider whether claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 (2013).

On remand, the administrative law judge found that Dr. Robinette interpreted the April 29, 1998 x-ray, that the interpretation was admissible as a treatment record, and that employer did not establish good cause for the admission of a rebuttal reading. Reconsidering the evidence, the administrative law judge determined that claimant established the existence of complicated pneumoconiosis that arose out of the miner's coal mine employment, thereby invoking the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 (2013). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's rulings regarding Dr. Robinette's interpretation of the April 29, 1998 x-ray. Employer also contends that the administrative law judge erred in his analysis of the medical evidence in finding that claimant invoked the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2013). Claimant did not file a response brief. 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 supported by substantial evidence, is rational, and is in accordance with applicable law.[6] 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).

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[5] As the Board explained in its initial decision in this case, treatment records related to a miner's respiratory or pulmonary condition are admissible notwithstanding the evidentiary limitations, and the regulations contain no provision for the rebuttal of treatment records. *Moore*, BRB No. 06-0848 BLA, slip op. at 3-5. The regulations, however, allow a party to submit rebuttal evidence to treatment records on a showing of "good cause" under 20 C.F.R. §725.456 (2013). *Id*.

[6] The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, and before January 1, 2005, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304 (2013) is applicable, or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1)-(3).

Pursuant to Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 (2013), there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered 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,[7] yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c) (2013). The United States Court of Appeals for the Fourth Circuit has held that the administrative law judge must perform an equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999); *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 364, 23 BLR 2-374, 2-384 (4th Cir. 2006).

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 (2013). 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, 283, 24 BLR 2-269, 2-280-81 (4th Cir. 2010); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *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).

Initially, we address employer's contention that the administrative law judge erred in determining that Dr. Robinette personally interpreted the April 29, 1998 x-ray, and that

[7] The record contains no biopsy or autopsy evidence for consideration under 20 C.F.R. §718.304(b) (2013).

his interpretation was admissible as a treatment record. Employer's Brief at 5-6. Contrary to employer's contention, the administrative law judge explained that he found no evidence in the record that Dr. Robinette, a B reader and the miner's treating pulmonary physician, did not set forth his own interpretation of the April 29, 1998 x-ray in his June 18, 1998 letter addressed to Dr. Nida, the miner's family physician. Further, the administrative law judge determined that Dr. Robinette interpreted the April 29, 1998 x-ray for the purpose of treatment, because Dr. Robinette stated that he evaluated the miner "for an assessment of a spot on his right lung." Director's Exhibit 5 (June 18, 1998 Letter at 1). In view of the administrative law judge's broad discretion to resolve procedural matters, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc), we reject employer's allegation of error, and affirm the administrative law judge's rulings.

We likewise find no merit in employer's contention that the administrative law judge erred in finding that employer did not establish good cause to submit a rebuttal reading of the April 29, 1998 treatment record x-ray. The administrative law judge reiterated the analysis he set forth previously, when he found that employer did not establish good cause to rebut two other treatment record x-rays, an analysis we affirmed in our 2009 decision.[8] Specifically, the administrative law judge compared the quantity and quality of the parties' x-ray evidence, and found that employer was not put at a disadvantage by an inability to submit a rebuttal reading. The administrative law judge further explained that, since all the physicians observed the same mass on the miner's x-rays and the disputed issue was its cause, and since employer had already submitted "reports from two expert radiologists interpreting the mass," employer did not establish good cause to submit an additional interpretation. Decision and Order on Third Remand at 5. Detecting no abuse of discretion by the administrative law judge, we affirm his determination that employer did not establish good cause to submit a rebuttal reading of the April, 29, 1998 x-ray. *Clark*, 12 BLR at 1-153. We now turn to the administrative law judge's findings regarding claimant's entitlement to benefits.

Pursuant to 20 C.F.R. §718.304(a) (2013), the administrative law judge considered eight readings of six x-rays, and considered the readers' radiological qualifications. Dr. Robinette, a B reader, interpreted a December 12, 1997 x-ray as positive for Category A large opacities. Director's Exhibits 5, 17. Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis, and identified a 2 x 4 centimeter mass compatible with inflammatory disease or cancer, noting a granulomata that he opined was best explained by tuberculosis. Employer's Exhibit 8.

[8] *Moore*, BRB No. 09-0188 BLA, slip op. at 5-6 (rejecting employer's allegations of error and affirming administrative law judge's determination that good cause was not established to rebut two treatment record x-rays).

Dr. Robinette next interpreted an April 29, 1998 x-ray as positive for a Category A large opacity. Director's Exhibit 5. Dr. Scott, a Board-certified radiologist and B reader, interpreted a May 28, 1998 x-ray as negative for pneumoconiosis, noting a 2.5 centimeter mass in the right upper lobe, which he thought was granulomatous disease, but indicated that he could not rule out cancer. Employer's Exhibits 17, 18.

Dr. Humphreys, a Board-certified radiologist, interpreted a September 14, 1998 x-ray as revealing "conglomerate masses," the largest of which "appear[ed] to measure 3.5 cm in maximum diameter." Director's Exhibit 5. Dr. Humphreys opined that the x-ray was "most suggestive of silicosis with progressive massive fibrosis." Director's Exhibit 5. Dr. Scott interpreted a November 8, 1999 x-ray as negative for pneumoconiosis, and identified a granulomatous mass compatible with tuberculosis. Employer's Exhibit 26.

Finally, Dr. Robinette classified the May 8, 2001 x-ray as positive for Category A large opacities, and Dr. McReynolds, a Board-certified radiologist, interpreted the same x-ray as "consistent with silicosis/[coal workers' pneumoconiosis] CWP and [progressive massive fibrosis] PMF." Director's Exhibits 5, 17.

In weighing the x-ray readings, the administrative law judge considered the physicians' conflicting opinions in the context of the treatment records of Dr. Robinette, who, he noted, is Board-certified in Internal Medicine and Pulmonary Disease, and who treated the miner for his pulmonary condition from June 8, 1998 through May 5, 2003. Decision and Order on Third Remand at 6. Noting that "the determinative issue [was] the cause of the abnormalities," not whether they were present, the administrative law judge found that Dr. Robinette's opportunity to treat the miner and consider his objective testing and clinical history over a five-year period, placed Dr. Robinette in a better position to determine the cause of the masses present on the miner's x-rays:

> Dr. Robinette was responsible for determining the cause of the miner's pulmonary problems by considering the objective testing including the chest x-rays and CT scans; the "negative" acid fast smears for diagnosing [tuberculosis] TB; pulmonary function tests showing airflow obstruction and associated restrictive lung disease with no evidence of significant progression; and the clinical and occupational history showing "no exposure to TB," no history of TB, the miner being "essentially a nonsmoker," and [having] significant coal dust exposure during 23 years of coal mine work.

Decision and Order on Third Remand at 6. The administrative law judge concluded that, "as the consultant pulmonologist," Dr. Robinette was "able to correlate the x-ray results and CT scan results with his clinical considerations, presenting him with better knowledge of the miner's pulmonary condition and the cause of the abnormalities on his

lungs." *Id*. The administrative law judge therefore chose to accord greater weight to Dr. Robinette's positive interpretations for Category A large opacities of complicated pneumoconiosis, "as buttressed by" the unclassified readings of the physicians who identified "progressive massive fibrosis" on the miner's x-rays. *Id*. Accordingly, the administrative law judge found that the preponderance of the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) (2013).

Employer challenges the administrative law judge's credibility determination, arguing that the negative readings of Drs. Wheeler and Scott should have been credited because those physicians are highly qualified in the field of radiology. The Board, however, is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In our last decision, we specifically held that "the administrative law judge acted within his discretion in crediting Dr. Robinette's finding that tuberculosis did not account for the conditions observed on the miner's x-rays and CT scans." *Moore*, BRB No. 10-0691 BLA, slip op. at 10. The administrative law judge's decision, on remand, to again discount the negative x-ray readings of those physicians who attributed the miner's lung masses to alternative diseases or conditions that were not documented in the miner's treatment records, was consistent with law. *See Cox*, 602 F.3d at 286-87, 24 BLR at 2-285-87. As substantial evidence supports the administrative law judge's finding that the preponderance of the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) (2013), the finding is affirmed.

Pursuant to 20 C.F.R. §718.304(c) (2013), the administrative law judge considered conflicting readings of two CT scans by Drs. Wheeler, Scott, and Mullens.[9] The administrative law judge found that the CT scan evidence "by itself would not . . . establish complicated pneumoconiosis," because Drs. Scott and Wheeler were more highly qualified than was Dr. Mullens. Decision and Order on Third Remand at 7. The

[9] Dr. Wheeler interpreted the May 28, 1998 CT scan as reflecting a 2.5 centimeter mass compatible with granuloma and tuberculosis, and noted that a few small nodules could be pneumoconiosis. Employer's Exhibit 20. Dr. Wheeler interpreted the June 8, 1998 CT scan as revealing a two-centimeter mass compatible with tuberculosis, and noted that a few small nodules could be pneumoconiosis. Employer's Exhibit 21. Dr. Scott interpreted the June 8, 1998 CT scan as consistent with tuberculosis, and noted that some small nodules were compatible with silicosis or coal workers' pneumoconiosis. Employer's Exhibit 22. Dr. Mullens, a physician in the Radiology Department of Johnston Memorial Hospital, interpreted the June 8, 1998 CT scan at Dr. Robinette's request, and described "irregular parenchymal masses," the largest measuring 2.5 centimeters in diameter, which he opined were "most consistent with silicosis and progressive massive fibrosis." Director's Exhibit 5.

administrative law judge, however, concluded that, for the same reasons he determined that the x-ray evidence established the existence of complicated pneumoconiosis when it was viewed in context with Dr. Robinette's medical treatment records, the CT scan evidence "support[ed] a finding of complicated pneumoconiosis. . . ." *Id.*

Employer argues that the administrative law judge erred in finding that the CT scan evidence established invocation of the irrebuttable presumption at 20 C.F.R. §718.304(c) (2013). Employer's Brief at 18-20. Employer misconstrues the administrative law judge's finding. The administrative law judge determined that the CT scan evidence itself did not establish complicated pneumoconiosis, but was merely "corroborative of" the x-ray evidence that he found established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a) (2013). Decision and Order on Third Remand at 7. Because the administrative law judge did not find that the CT scan evidence established complicated pneumoconiosis, we also reject employer's argument that he failed to conduct a proper equivalency determination between the CT scan readings and the x-ray readings.

Employer contends that the administrative law judge failed to weigh the evidence together before finding complicated pneumoconiosis established. Employer's Brief at 20-22. Contrary to employer's contention, as discussed above, the administrative law judge weighed the evidence together throughout his decision, by explicitly integrating his consideration of the x-ray and CT scan readings with Dr. Robinette's treatment records and associated objective testing and clinical information.[10] *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Because the administrative law judge acted within his discretion in assessing the weight and credibility of the evidence, we affirm his determination that the existence of complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304 (2013), as it is rational and supported by substantial evidence. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Therefore, we affirm the administrative law judge's finding that

[10] In the administrative law judge's last decision, he also considered the medical opinion of Dr. Fino, and found that Dr. Fino did not address whether the miner had complicated pneumoconiosis. Decision and Order on Second Remand at 8-9. He further considered Dr. Dahhan's opinion that a negative tuberculosis skin test does not preclude a diagnosis of tuberculosis, but found that it did not undermine Dr. Robinette's conclusion that the miner did not have tuberculosis, in view of Dr. Robinette's qualifications and his ability to "assertively" test the miner to determine whether he had tuberculosis. *Id.* The administrative law judge, on remand, did not readdress those two medical opinions and, on appeal, employer does not challenge that aspect of the administrative law judge's current decision.

claimant invoked the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2013), by establishing the existence of complicated pneumoconiosis arising out of coal mine employment. Consequently, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Third Remand–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