

BRB No. 10-0709 BLA

ARNOLD L. KNUCKLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/22/2011
	)	
MANALAPAN 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 - Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole, Anderson & Newman, PSC), Barbourville, Kentucky, for claimant.

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

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (06-BLA-5909) of Administrative Law Judge Robert B. Rae rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The case involves a claim filed on September 9, 2005. Director's Exhibit 2. The administrative law judge credited claimant with at least thirty-eight years of underground coal mine employment, as stipulated by the parties,<sup>1</sup> and found that the evidence established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer asserts that the administrative law judge's evaluation of the chest x-rays and "other evidence," including the computerized tomography (CT) scans, does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.<sup>2</sup>

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

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<sup>1</sup> The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction 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*).

<sup>2</sup> The administrative law judge's finding that claimant established at least thirty-eight years of underground coal mine employment is unchallenged on appeal. Thus, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

### **Impact of the Recent Amendments**

Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims.<sup>3</sup> As the Director asserts, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, there is no need to consider whether he could establish entitlement with the aid of the rebuttable presumption reinstated by Section 1556.

### **Complicated Pneumoconiosis**

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that 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

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<sup>3</sup> Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Considering the relevant evidence of record, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thus giving claimant the benefit of the irrebuttable presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.304.

In evaluating the x-ray evidence relevant to the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), the administrative law judge considered eight interpretations of four x-rays taken on April 30, 2005, November 10, 2005, November 30, 2005, and April 15, 2009. Decision and Order at 4-6, 14-16. The administrative law judge considered the readers' radiological qualifications, and correctly stated that all of the physicians identified large masses in claimant's right and left lungs, ranging from 2 cm-4.5 cm. Decision and Order at 4-6, 14-16, 19. However, while Drs. Hudson, Alexander, and Baker opined that these masses represented Category B large opacities, by contrast, Drs. Wheeler, Dahhan, and Fino opined that the masses represented another disease process, such as conglomerate granulomatous disease or cancer.<sup>4</sup>

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<sup>4</sup> Dr. Baker, a B reader, interpreted a April 30, 2005 x-ray as "1/2" for small opacities of simple pneumoconiosis, and as positive for Category B large opacities in both lower lobes, noting that large opacities usually occur in the upper lobes. Claimant's Exhibit 1. Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for small opacities of simple pneumoconiosis, and as negative for large opacities. Dr. Wheeler observed masses greater than one centimeter in both lungs, but opined that they were compatible with granulomatous disease, with histoplasmosis or mycobacterium avium complex being more likely than tuberculosis or cancer. Employer's Exhibit 4. Dr. Wheeler stated that he did not diagnose pneumoconiosis by x-ray because he did not observe symmetrical small nodular infiltrates in the upper lungs, but instead observed opacities in the lower lungs. *Id.*

Dr. Hudson, an A reader, interpreted a November 10, 2005 x-ray as "1/1" for small opacities, and as positive for Category B large opacities, observing nodules greater than one centimeter in both lungs. Claimant's Exhibit 2. Dr. Alexander, a Board-certified radiologist and B reader, classified the same x-ray as "2/2" for small opacities, and as positive for Category B large opacities, noting that the presence of large opacities in the lower lung zones is not typical for complicated pneumoconiosis unless the miner

The administrative law judge further found that the record contains the results of two lung biopsies, relevant to 20 C.F.R. §718.304(b). On September 3, 2003, claimant underwent bronchial lung biopsies of his right and left lungs after CT and PET scans revealed the presence of suspicious masses in both lungs. Decision and Order at 8, 12-13, 16, 19-20; Claimant's Exhibits 9, 10, 13 at 50-66, 14 at 67-70. The administrative law judge noted that Dr. Haq, a pathologist, reported that both biopsies were negative for malignant or premalignant cells and granulomas. Decision and Order at 8, 12-13, 16. In addition, cultures of the biopsied tissue revealed no fungal or tubercular growth after two weeks. Claimant's Exhibit 13 at 64. The administrative law judge further found that on September 24, 2003, claimant underwent additional needle biopsies of the right lung masses. Decision and Order at 12-13, 16; Claimant's Exhibit 13 at 51, 66. Dr. Haq reported that after a fine needle biopsy revealed a single cluster of atypical cells, likely of histiocytic origin, and black pigment consistent with carbon particles, a core needle biopsy of the right lung mass was performed. The administrative law judge observed that, as a result of the core needle biopsy, Dr. Haq concluded that "the mass in the lung is consistent with a nodule of coal workers' pneumoconiotic nodule [sic]." Decision and Order at 12-13; Claimant's Exhibit 13 at 66. Dr. Haq further stated that no malignancy or

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also has rheumatoid arthritis, and that cancer needed to be excluded by CT or PET scan. Claimant's Exhibit 3. Dr. Wheeler interpreted the same x-ray as negative for small opacities of simple pneumoconiosis, and as negative for large opacities, observing, instead, masses greater than one centimeter in both lower lungs compatible with granuloma, cancer, or inflammatory disease. Dr. Wheeler recommended a CT scan for better evaluation of the masses. Director's Exhibit 17.

Dr. Alexander interpreted the November 30, 2005 x-ray as "2/2" for small opacities, and as positive for Category B large opacities, again noting that the presence of large opacities in the lower lung zones is not typical for complicated pneumoconiosis unless the miner also has rheumatoid arthritis, and that cancer needed to be excluded by CT or PET scan. Claimant's Exhibit 4. Dr. Fino, a B reader, classified the same x-ray as "1/2" for small opacities, and as negative for large opacities, noting that the location and appearance of the masses greater than one centimeter in both lungs is not consistent with coal mine dust exposure but may be due to malignancy. Director's Exhibit 16 at 8.

Lastly, Dr. Dahhan, a B reader, classified the April 15, 2009 x-ray as "2/2" for small opacities, noting that they were not consistent with coal mine dust exposure because they were irregularly-shaped opacities in the lower and mid zones while coal mine dust exposure causes rounded opacities in the upper and mid zones. Employer's Exhibit 3. Dr. Dahhan also read the x-ray as negative for large opacities, observing that a mass in the right lower zone was not consistent with complicated pneumoconiosis, but was possibly due to malignancy. *Id.*

fungal organisms were seen, and listed his final pathologic diagnosis as “‘coal nodule’ with areas of degeneration and necrosis.” *Id.* The administrative law judge concluded that, considered together, the biopsies established the existence of simple pneumoconiosis, pursuant to 20 C.F.R. 718.202(a), and they ruled out granulomatous disease and cancer as the cause of the bilateral large lesions, but did not, alone, establish the presence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b). Decision and Order at 10 n.7.

Having found that the biopsy evidence established the existence of pneumoconiosis, and ruled out the presence of granulomatous disease and cancer, the administrative law judge accorded greater weight to the x-ray readings of Drs. Hudson, Alexander, and Baker, finding that claimant’s bilateral lung masses represented Category B large opacities of pneumoconiosis, than to the opinions of Drs. Wheeler, Dahhan, and Fino, finding that the masses were not consistent with opacities of coal workers’ pneumoconiosis. Decision and Order at 14-16.

Employer does not challenge the administrative law judge’s findings regarding the biopsy evidence.<sup>5</sup> Rather, employer asserts that the administrative law judge erred in relying on the biopsy evidence to support his decision to accord no weight to the x-ray readings by Drs. Wheeler, Dahhan, and Fino. Employer’s Brief at 9-12. Contrary to employer’s argument, the administrative law judge permissibly determined that the uncontradicted biopsy evidence, which established the presence of at least simple pneumoconiosis, and, more importantly, specifically ruled out the presence of both granulomatous disease and cancer, called into question the opinions of Drs. Wheeler, Dahhan, and Fino, that the large masses in claimant’s lungs were not consistent with the appearance or location of pneumoconiosis opacities, and were most likely caused by either granulomatous disease or cancer. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Melnick*, 16 BLR at 1-37; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 14-16, 19-20. Thus, the administrative law judge rationally assigned less weight to the negative x-ray readings by Drs. Wheeler, Dahhan, and Fino, as their opinions regarding the potential causes of what they observed on claimant’s x-rays were not adequately supported by the record. *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Therefore, we affirm, as rational, the administrative law judge’s decision to accord greatest weight to the x-ray readings of Drs. Hudson, Alexander, and Baker, that claimant’s bilateral lung masses represented Category B large opacities of pneumoconiosis, as consistent with the biopsy evidence. Consequently, we affirm, as supported by substantial evidence, the administrative law judge’s conclusion that the weight of the x-ray evidence supports a

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<sup>5</sup> As employer raises no challenge to the administrative law judge’s findings with regard to the biopsy evidence, they are affirmed. *See Skrack*, 6 BLR at 1-711.

finding of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 16, 20.

We further reject employer's assertion that the administrative law judge erred in his evaluation of the CT scan evidence, pursuant to 20 C.F.R. §718.304(c). Employer's Brief at 9-12. The administrative law judge correctly found that Dr. Powers, a treating physician, interpreted a January 22, 2004 CT scan as showing multiple lung nodules in both lower lobes. Claimant's Exhibit 11. Dr. Wheeler reviewed the January 22, 2004 CT scan, and observed several masses, which he opined were compatible with granulomata or, less likely, with tumors, but were not reflective of coal workers' pneumoconiosis. Employer's Exhibit 11.

An August 17, 2004 CT scan was read by Dr. Rodgers, a treating physician, as indicative of a benign process such as pneumoconiosis, and not metastases. Claimant's Exhibit 12. Dr. Wheeler reviewed the August 17, 2004 CT scan and opined that it did not indicate pneumoconiosis or asbestosis, but rather represented conglomerate granulomatous disease and interstitial fibrosis. Employer's Exhibit 1.

Contrary to employer's argument, the administrative law judge permissibly discredited Dr. Wheeler's CT scan readings, in part, as speculative because, while Dr. Wheeler testified that he was one "hundred percent" certain that the lesions seen on the CT scans represented granulomatous disease, he qualified his opinion by stating that a needle biopsy was needed to confirm this diagnosis. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); Decision and Order at 17; Director's Exhibit 47 at 12-13. Moreover, the administrative law judge noted that a needle biopsy had been performed and had ruled out the presence of either granulomatous disease or cancer, further undermining Dr. Wheeler's conclusions. *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 17. Thus, the administrative law judge permissibly concluded that the CT scan evidence confirmed the presence of the large opacities identified on the x-rays, and did not call into question his conclusion that those opacities represented complicated pneumoconiosis, and not some other disease process. Decision and Order at 20.

Finally, the administrative law judge considered the medical opinions of Drs. Baker, Hudson, Fino, and Dahhan, pursuant to 20 C.F.R. §718.304(c). Decision and Order at 18-19. Dr. Baker, in his report dated April 30, 2005, diagnosed coal workers' pneumoconiosis, Category 1/2, with progressive massive fibrosis and Category B opacities present in both lower lobes. Dr. Baker acknowledged that large opacities of pneumoconiosis usually occur in the upper lung lobes, but stated that they may occur in the lower lobes as well. In support of his diagnosis, Dr. Baker noted that claimant's x-

rays, PET scans, CT scans, and core lung biopsy were all consistent with a diagnosis of pneumoconiosis, and that the lung biopsy was also negative for tumors, tuberculosis, and other diseases. Claimant's Exhibit 7. Dr. Hudson, who examined claimant on behalf of the Department of Labor, also diagnosed complicated pneumoconiosis. In his report dated November 10, 2005, Dr. Hudson indicated that his diagnosis was based, in part, on the chest x-ray and biopsy evidence, and the facts that the "work up" of claimant's large lung nodules was negative for cancer, and follow-up of his three lung nodules showed no change after one and a half years. Director's Exhibit 13.

By contrast, in his report dated December 14, 2005, Dr. Fino diagnosed only simple coal workers' pneumoconiosis. Director's Exhibit 16. Dr. Fino acknowledged that, in addition to the small opacities of pneumoconiosis, claimant had evidence of large masses in his right and left lower lobes, but opined that the location and appearance of these abnormalities were inconsistent with coal mine dust inhalation. Dr. Fino stated that he was concerned about the possibility of malignancy, and advised that claimant seek further evaluation of these findings. Director's Exhibit 16. Finally, in a report dated April 15, 2009, Dr. Dahhan opined that there are no findings to justify a diagnosis of simple or complicated pneumoconiosis. Dr. Dahhan explained that both the small and large irregularities seen on claimant's x-rays are not consistent with the appearance or location of changes caused by coal dust exposure, and that the possibility of malignancy had to be considered. Employer's Exhibit 3.

The administrative law judge permissibly accorded the greatest weight to Dr. Baker's diagnosis of complicated pneumoconiosis, finding it well-documented and well-reasoned, and supported by "sound and objective medical evidence, including the needle biopsy results." See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-551 (6th Cir. 2002); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 19. The administrative law judge also credited Dr. Hudson's opinion of complicated pneumoconiosis because it was based on objective test findings and claimant's work and smoking histories, but found it "diminished somewhat" by Dr. Hudson's reliance on an inaccurate smoking history. See *Napier*, 301 F.3d at 713-14, 22 BLR at 2-551. By contrast, the administrative law judge permissibly discounted the opinions of Drs. Fino and Dahhan, finding that neither physician adequately explained their opinion in light of the biopsy evidence, which was positive for the existence of pneumoconiosis and negative for the existence of other diseases, or identified any other evidence to support their conclusions that claimant suffered from an alternative disease process. See *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 19. Moreover, employer does not challenge this finding on appeal. *Skrack*, 6 BLR at 1-711.

In evaluating all of the relevant medical evidence together, the administrative law judge found that the chest x-rays, when considered in conjunction with the biopsy reports, CT scan findings and other medical evidence, are sufficient to support a finding



of complicated pneumoconiosis, and that the contrary evidence offered by Drs. Wheeler, Dahhan, and Fino is not sufficient to cause this evidence to lose force. Decision and Order at 20, citing *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010)(an opinion that excludes the existence of complicated pneumoconiosis does not constitute affirmative evidence sufficient to undermine claimant's x-ray evidence of complicated pneumoconiosis if the opinion offers speculative diagnoses, unsupported by the record). Therefore, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 20.

In sum, the administrative law judge's finding of complicated pneumoconiosis was based upon a thorough, integrated consideration of all of the available medical evidence, an approach that was legally proper under *Gray*. See *Gray*, 176 F.3d at 389, 21 BLR at 2-628-29 (explaining that all relevant evidence from each category should be weighed against one another); see also *Cox*, 602 F.3d at 285, 24 BLR at 2-284. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that all of the relevant evidence, when considered together, established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. See *Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Finally, because it is unchallenged on appeal, we also affirm the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). See *Skrack*, 6 BLR at 1-711; Decision and Order at 20-21.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge