BRB No. 13-0021 BLA

DELBERT W. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HYTERS COAL, INCORPORATED	)	DATE ISSUED: 09/27/2013
	)	
and	)	
	)	
OLD REPUBLIC GENERAL INSURANCE CORPORATION	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5383) of Administrative Law Judge Linda S. Chapman, rendered on a subsequent claim filed on

February 12, 2009,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with 24.45 years of surface coal mine employment and found that the newly submitted evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the merits of the claim, the administrative law judge found that, because claimant did not establish that at least fifteen years of his surface coal mine work was in conditions substantially similar to those in an underground mine, claimant was not eligible to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act.[2] However, the administrative law judge determined that claimant suffers from complicated pneumoconiosis and, thus, found that he was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge applied an improper standard and did not rationally explain the basis for her finding that claimant established the existence of complicated pneumoconiosis.[3] Claimant responds, urging affirmance of

[1] Claimant filed his first claim for benefits on February 12, 1996, which was finally denied by the district director on May 3, 1996, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant's second claim, filed on February 1, 2005, was denied by the district director on December 29, 2005, because the evidence was insufficient to establish that claimant was totally disabled and that his disability was due to pneumoconiosis. Director's Exhibit 2. Claimant took no action with regard to the denial until he filed the current subsequent claim on February 12, 2009. Director's Exhibit 4.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, amended Section 411(c)(4) provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if claimant establishes at least fifteen years in underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[3] Employer does not raise any specific error with regard to the administrative law judge's determination that claimant established total disability, based on the medical opinions of Drs. Habre and Castle, nor does employer challenge the administrative law judge's finding that claimant established a change in an applicable condition of

the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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.[4] 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, 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, yields massive lesions in the lung;[5] 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 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 determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means

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entitlement pursuant to 20 C.F.R. §725.309. Accordingly, those findings are affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 32.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5, 8.

[5] The record contains no biopsy evidence pursuant to 20 C.F.R. 718.304(b). *See* Decision and Order at 35.

under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *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). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991) (en banc). 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. 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 Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34; *Truitt v. North American Coal Corp*., 2 BLR 1-199 (1979).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge noted that the record contains eight ILO interpretations of three analog x-rays. Decision and Order at 6-7. The May 14, 2009 x-ray was read as positive for simple and complicated pneumoconiosis, Category A, by Drs. DePonte and Alexander, dually qualified as Board-certified radiologists and B readers. Director's Exhibit 12, Claimant's Exhibit 1. Drs. Wiot and Wheeler, also dually qualified as Board-certified radiologists and B readers, read the same x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibit 24; Employer's Exhibit 6. Dr. Wheeler indicated in the "Other Comments" section of the ILO form that there was an oval nodule measuring one centimeter in the "right base and lateral [left upper lung] compatible with granulomata" and recommended a computerized tomography (CT) scan. Employer's Exhibit 6. The December 2, 2010 x-ray was read by Dr. DePonte as positive for simple and complicated pneumoconiosis, Category A, while Dr. Wheeler read this x-ray as negative for simple and complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 14. Dr. Wheeler reported that there were nodules in the lungs "compatible with granulomatous disease[,] histoplasmosis more likely than [tuberculosis]," but he did not identify the measurements of any of the nodules he saw. Employer's Exhibit 14. The December 16, 2011 x-ray was read by Dr. DePonte, as positive for simple and complicated pneumoconiosis, Category A, but as negative for simple and complicated pneumoconiosis by Dr. Wheeler. Claimant's Exhibit 12; Employer's Exhibit 18. Dr. Wheeler noted a 1.2 centimeter nodule in the right lower lateral lung. Employer's Exhibit 18.

Relevant to 20 C.F.R. §718.304(c), the administrative law judge addressed additional evidence including digital chest x-ray readings, CT scan readings, treatment

records and medical opinions. Decision and Order at 8-30. Dr. Castle, a B reader, interpreted a September 23, 2009 digital x-ray, obtained in conjunction with his examination of claimant, as negative for simple and complicated pneumoconiosis. Employer's Exhibit 1. Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, read this x-ray as positive for simple pneumoconiosis and noting two large opacities consistent with Category A complicated pneumoconiosis. Claimant's Exhibit 8. Dr. Fino, a B reader, interpreted an April 28, 2010 digital x-ray, obtained in conjunction with his examination of claimant, as showing small opacities that could be consistent with coal workers' pneumoconiosis or granulomatous disease. Employer's Exhibit 4. Dr. Alexander, however, read this x-ray as positive for simple pneumoconiosis with Category A large opacities consistent with complicated coal worker's pneumoconiosis. Claimant's Exhibit 7. An August 24, 2010 digital x-ray was obtained at Norton Community Hospital and the interpreting radiologist, Dr. Haines, reported a density in the right upper lobe and suggested a CT scan. Claimant's Exhibit 7. Dr. Scott, dually qualified as a Board-certified radiologist and B reader, read this x-ray and observed small nodules in the lateral apices and a 1.5 centimeter nodule in the right mid-lung, which he opined was not indicative of coal workers' pneumoconiosis, but was due to either tuberculosis or histoplasmosis. Employer's Exhibit 12.

Claimant has undergone six CT scans. A March 22, 2006 CT scan was read by a radiologist, Dr. Mullens, as showing a diffuse nodular interstitial pattern in the lungs consistent with coal workers' pneumoconiosis. Claimant's Exhibit 3. Dr. Scott read the same CT scan and noted changes consistent with healed tuberculosis or histoplasmosis, but no findings consistent with coal workers' pneumoconiosis. Employer's Exhibit 7. An October 3, 2006 CT scan was read by Dr. Mullens as positive for pneumoconiosis. Claimant's Exhibit 3. A March 22, 2007 CT scan was read by Dr. Mullens as positive for pneumoconiosis and by Dr. Scott as negative, with calcified granulomas that were probably due to healed histoplasmosis. Claimant's Exhibit 3; Employer's Exhibit 7. An October 1, 2007 CT scan was read by Dr. Mullens as positive for pneumoconiosis and progressive massive fibrosis and by Dr. Wheeler as negative, with calcified granulomas that were probably due to healed histoplasmosis, and emphysema. Claimant's Exhibit 3; Employer's Exhibit 2. An August 27, 2009 CT scan was read by Dr. McReynolds, a radiologist, as positive for pneumoconiosis, old granulomatous disease and emphysematous changes, and by Dr. Scott as negative, with calcified granulomas that were compatible with histoplasmosis. Claimant's Exhibits 3, 7; Employer's Exhibit 11. An August 24, 2010 CT scan was read by Dr. Gopalan, a radiologist, as showing old granulomatous disease and by Dr. Scott as negative, with calcified granulomas that were probably due to healed histoplasmosis or tuberculosis Claimant's Exhibits 3, 7; Employer's Exhibit 12.

The administrative law judge found, pursuant to 20 C.F.R. §718.304(a), that the x-ray evidence, standing alone, was "in equipoise" because there was an equal number of

positive and negative readings for complicated pneumoconiosis of each analog x-ray by the dually qualified radiologists. Decision and Order at 34-35. The administrative law judge noted that "the hospital radiologists who reviewed [the] CT scans and digital x-rays did not uniformly and unequivocally attribute the masses to pneumoconiosis" and, therefore, she found that the "other evidence," under 20 C.F.R. §718.304(c), did not, standing alone, establish the existence of complicated pneumoconiosis. *Id*. at 37. The administrative law judge further found, however, that the x-rays and "the CT scans in the record document the progression of a disease process in [claimant's] lungs that has resulted in at least one mass/opacity/nodule greater than one centimeter in diameter." *Id*. at 35. In considering the etiology of claimant's disease process, the administrative law judge noted that Drs. Castle and Fino "did not identify a large mass, and thus did not speak to its etiology." *Id*. at 37. She determined that the opinions of Drs. Wheeler and Scott, attributing claimant's radiological findings to alternate diseases and eliminating coal dust exposure as a cause for the masses, were "speculative and without any support in the record." *Id*. at 37. In contrast, the administrative law judge specifically credited the positive x-ray and CT scan readings for complicated coal workers' pneumoconiosis by Drs. DePonte, Alexander, Mullens and McReynolds, along with the medical opinion of Dr. Robinette, diagnosing complicated pneumoconiosis. Based on her consideration of all of the relevant evidence, the administrative law judge concluded that claimant satisfied his burden of proving the existence of complicated pneumoconiosis by a preponderance of the evidence. *Id*. at 41.

Employer contends that the administrative law judge's finding, that claimant established the existence of complicated pneumoconiosis, based on her consideration of the evidence as a whole, cannot be reconciled with her determination that claimant did not establish the existence of the disease under any one of the individual subsections of 20 C.F.R. §718.304(a)-(c). Employer specifically contends that it is irrational to credit medical opinions diagnosing complicated pneumoconiosis, that are based on positive x-ray or CT scan evidence that has been found insufficient, standing alone, to establish that claimant has complicated pneumoconiosis.

Contrary to employer's argument, although an administrative law judge is obligated to make findings pursuant to 20 C.F.R. §718.304(a)-(c), the Fourth Circuit has made clear that the relevant analysis, prior to invocation of the irrebuttable presumption, is whether the evidence, considered as a whole, is sufficient to establish the existence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; Decision and Order at 34. In this case, the administrative law judge properly assessed the credibility of the evidence in light of *Cox* and explained the bases for her credibility

determinations in accordance with the Administrative Procedure Act.[6] In analyzing the etiology of claimant's radiological findings, the administrative law judge noted correctly that Dr. Wheeler attributed claimant's small and large opacities to granulomatous disease, in part, because he believed that claimant "is simply too young to have developed complicated coal workers' pneumoconiosis, because NIOSH and MSHA started controlling dust levels in the mines before he began his coal mine employment." Decision and Order at 38; *see* Employer's Exhibit 2. The administrative law judge permissibly determined that Dr. Wheeler's opinion was not sufficiently reasoned:

> Dr. Wheeler has not offered any evidence to support a conclusion that complicated pneumoconiosis has been successfully eradicated by the efforts of NIOSH and MSHA, or why, typical or not, in [claimant's] specific case, he could not have contracted this condition.

Decision and Order at 38, *citing Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989).

Furthermore, the administrative law judge noted correctly that Dr. Wheeler opined that claimant's x-ray abnormalities were "compatible with" granulomatous disease because the nodules on the x-rays and CT scans appeared in a peripheral and asymmetrical pattern, and granulomatous "commonly is asymmetrical," while pneumoconiosis "typically gives symmetrical small nodular infiltrates in the central mid and upper lungs." Decision and Order at 38 quoting Employer's Exhibit 6. She also noted correctly that Dr. Scott "dismissed the possibility that these abnormalities were due to silicosis or coal workers' pneumoconiosis because he 'expected' to see a symmetrical pattern of small opacities in the central portions of the lungs." Decision and Order at 38 quoting Employer's Exhibit 12.

The administrative law judge permissibly determined that the opinions of Drs. Wheeler and Scott were "based on generalities rather than the specifics of [claimant's] condition and exposure history." Decision and Order at 38. Moreover, the administrative law judge found that "even if some of [claimant's] radiographic abnormalities were more consistent with granulomatous disease, neither Dr. Wheeler nor Dr. Scott considered the possibility that [claimant] might suffer from granulomatous disease *and* coal workers'

[6] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

pneumoconiosis/silicosis."[7] *Id*. at 39. The administrative law judge noted that Drs. Alexander, Gopalan and McReynolds have suggested that claimant has evidence of old granulomatous disease, as well as large opacities for complicated coal workers' pneumoconiosis.[8] *Id*. at 39 n.29. Because the administrative law judge has discretion to determine the credibility of the medical experts, we affirm her decision to assign less weight to the opinions of Drs. Wheeler and Scott. *See also Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d at 441, 21 BLR at 2-274.

With regard to the weight accorded Dr. Robinette's opinion, there is no merit to employer's contention that the administrative law judge erred in finding his diagnosis of complicated pneumoconiosis to be well-reasoned. The administrative law judge permissibly determined that Dr. Robinette's diagnosis of complicated pneumoconiosis was reasoned and documented, based on the parameters of his examination and treatment of claimant, which included an x-ray, objective testing and relevant work, medical and smoking histories. *See 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 14.

Additionally, we reject employer's contention that the administrative law judge erred in her consideration of Dr. Fino's opinion. The administrative law judge permissibly assigned little weight to Dr. Fino's opinion, that claimant does not have complicated pneumoconiosis, because he "failed to specifically explain why, after reviewing [claimant's] known history of extensive exposure to coal mine dust, and lack of any known exposure to granulomatous infection, he nevertheless precluded coal dust

[7] The administrative law judge noted that Drs. Wheeler and Scott did not explain the progression of claimant's radiological changes from 2006 to 2010, in light of their opinion that claimant has either healed or partially healed histoplasmosis. *See* Decision and Order at 40 n.30; Employer's Exhibits 2, 7, 12.

[8] We reject employer's assertion that the administrative law judge has been "inconsistent" in her analysis or that she mischaracterized the opinions of Drs. Wheeler and Scott, as failing to recognize the possibility of coal workers' pneumoconiosis. Employer's Brief in Support of Petition for Review at 17. The administrative law judge noted correctly that several radiologists in this case have identified both granulomatous disease and coal workers pneumoconiosis. The administrative law judge accurately summarized the findings of Drs. Wheeler and Scott, and acted within her discretion in finding that they did not adequately explain why granulomatous disease and complicated pneumoconiosis are mutually exclusive, or why claimant's radiological findings were due entirely to granulomatous disease. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Decision and Order at 39.

exposure as a potential factor contributing to the development of [claimant's] radiographic abnormalities." Decision and Order at 40; *see Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76 (4th Cir. 1997). Furthermore, the administrative law judge found that "Dr. Fino essentially sidestepped the question of whether there were any large masses on x-ray or CT scan, stating that there were no opacities 'consistent with' complicated pneumoconiosis." *Id*. at 40 n.31 quoting Employer's Exhibit 17 at 39. The administrative law judge also noted that Dr. Fino did not "explain why he diagnosed pneumoconiosis in 2005 based on his x-ray findings and review of the medical evidence, but not in his most recent report." *Id*. at 40 n.32.

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Furthermore, because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's award of benefits.

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