



BRB No. 15-0515 BLA

ROXIE P. McCROSKEY )  
 (On behalf of DANIEL V. McCROSKEY) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 DOSS FORK COAL COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 WEST VIRGINIA CWP FUND )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )

DATE ISSUED: 09/29/2016

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-6224) of Administrative Law Judge Larry A. Temin,<sup>1</sup> rendered on a subsequent claim filed on July 19, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).<sup>2</sup> The administrative law judge found that the miner had twenty-one years and three months of underground coal mine employment. The administrative law judge also determined that the evidence established that the miner had complicated pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.304 and 718.203(b) and, thus, was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 by establishing that the miner had complicated pneumoconiosis. Specifically, employer alleges that the evidence, considered as a whole, establishes that the large opacities identified on claimant's x-rays are due to non-coal mine dust-related conditions. Claimant has not filed a response brief in this appeal. The

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<sup>1</sup> Administrative Law Judge Richard T. Stansell-Gamm conducted the hearing in this claim on August 14, 2014. Decision and Order at 2; Hearing Transcript at 1. However, the parties were subsequently notified that he was retiring from the Office of Administrative Law Judges and the case was ultimately reassigned to Administrative Law Judge Larry A. Temin (the administrative law judge) on August 3, 2015. Decision and Order at 2-3.

<sup>2</sup> The miner filed his initial claim for benefits on March 7, 1997, which was denied by the district director on July 28, 1997 because he did not establish any element of entitlement. Director's Exhibit 1. The miner did not take any further action until filing the current claim. The miner died on December 20, 2012 and his widow, Roxie P. McCroskey (claimant), is pursuing this claim on behalf of his estate. *See* Hearing Transcript at 7. Claimant has filed a separate claim for survivor's benefits, which has not been consolidated with the current claim but, rather, was remanded to the district director on February 18, 2014, by Associate Chief Judge William S. Colwell, pending final resolution of the current claim. *See* Decision and Order at 2 n.3.

Director, Office of Workers' Compensation Programs, urges the Board to affirm the administrative law judge's decision.<sup>3</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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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's total disability is due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities 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 yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held that:

[I]f the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

*Scarbro v. E. Assoc. Coal Corp.*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000), *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283-84, 24 BLR 2-269, 2-281-82 (4th Cir. 2010) (“[C]lear evidence of large opacities would support the presumption unless the record contained ‘affirmative evidence’ showing either that the opacities did

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had twenty-one years and three months of underground coal mine employment and that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 35.

not exist or that they were due to something else, such as a disease other than pneumoconiosis.”).

In this case, the central issue is whether the administrative law judge reasonably determined, consistent with *Scarbro*, that the x-ray evidence of complicated pneumoconiosis did not “lose force” when weighed with the other evidence of record. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100. Pursuant to 20 C.F.R. §718.304(a) and (c), the administrative law judge found that the analog and digital x-ray evidence supports a finding of complicated pneumoconiosis, while the CT scan evidence supports the x-ray findings of large opacities in the miner’s lungs. Decision and Order at 30-35.

Turning to the medical opinion evidence relevant to 20 C.F.R. §718.304(c), the administrative law judge considered the opinions submitted by Drs. Castle, Zaldivar, and Forehand.<sup>5</sup> Decision and Order at 35-41. The administrative law judge gave weight to Dr. Castle’s status as a Board-certified pulmonologist, but found his opinion that the miner’s radiological findings are attributable primarily to rheumatoid arthritis or Parkinson’s disease “inconsistent” and “unpersuasive.” Decision and Order at 37. The administrative law judge also gave weight to Dr. Zaldivar’s qualification as a Board-certified pulmonologist but found his opinion attributing the miner’s radiological abnormalities to conditions other than complicated pneumoconiosis to be “equivocal,” and inadequately explained. *Id.* at 39. In contrast, the administrative law judge gave full weight to Dr. Forehand’s diagnosis of complicated pneumoconiosis, crediting his qualifications in Pediatrics, and Allergy and Immunology, and finding his opinion to be well-documented and well-reasoned. *Id.* at 35.

Upon weighing all of the relevant evidence together, the administrative law judge stated:

As previously noted, the x-ray evidence is positive for complicated pneumoconiosis. Further, while the CT scans of record do not expressly indicate opacities or masses that would appear as greater than one centimeter if seen on x-ray, as required by *Scarbro*, many physicians

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<sup>5</sup> Drs. Castle and Zaldivar examined the miner, reviewed medical records, and concluded that the abnormalities on the miner’s x-rays and CT scans were likely caused by rheumatoid arthritis, granulomatous infection, malignancy, or chronic aspiration related to the miner’s Parkinson’s disease. Director’s Exhibit 13; Employer’s Exhibits 2, 9, 10, 19. Dr. Forehand examined the miner at the request of the Department of Labor and determined that he had complicated pneumoconiosis, but did not suffer from tuberculosis, lung cancer, connective tissue diseases, sarcoidosis, histoplasmosis, aspergillosis, or granulomatosis. Director’s Exhibits 9, 11; Claimant’s Exhibit 11.

interpreted the CT scans as having large masses in addition to changes consistent with coal workers' pneumoconiosis, which lends credibility to the conclusion that the [miner] has a process in his lungs that shows up on an x-ray as an opacity of more than one centimeter in diameter, as reported by Drs. Forehand, DePonte, and Alexander. Finally, the medical opinion evidence from Dr. Forehand offered a well-reasoned and well-documented diagnosis of complicated pneumoconiosis while Drs. Castle and Zaldivar did not diagnose complicated pneumoconiosis and instead offered speculative and equivocal impressions that were not persuasively supported by the medical documentation they claim they reviewed.

Decision and Order at 41. Based on these findings, the administrative law judge concluded that claimant satisfied her burden to establish the existence of complicated pneumoconiosis – “that is a disease process in [the miner’s] lungs that appear[ed] on x-rays as large opacities greater than one centimeter in diameter.” *Id.*

Employer argues that it was improper for the administrative law judge to discredit the opinions of Drs. Castle and Zaldivar for alternating between identifying rheumatoid arthritis and Parkinson’s disease as the cause of the miner’s abnormalities because employer is not required to prove a specific alternative diagnosis. Employer also contends that the administrative law judge did not sufficiently explain why he gave more weight to Dr. Forehand’s opinion, given that Dr. Forehand did not consider a contribution from rheumatoid arthritis or the miner’s previous coronary artery bypass surgery, and did not explain how he excluded Parkinson’s disease as a cause of the miner’s abnormalities. Employer further alleges that Dr. Forehand’s reliance on the absence of significant change between the 2010 and 2012 x-rays is erroneous because there were differences in the size, shape and profusion of the small opacities and in the size of the large opacity.<sup>6</sup>

Contrary to employer’s contentions, the administrative law judge acted within his discretion in giving less weight to Dr. Castle’s opinion because it is inconsistent concerning the cause of the miner’s radiological abnormalities. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4 (1999)(*en banc*). Dr. Castle initially stated that the miner’s radiological findings “are far more likely to be indicative

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<sup>6</sup> Employer has not identified any specific error concerning the administrative law judge’s determinations that the analog x-ray evidence and the digital x-ray evidence support the diagnosis of complicated pneumoconiosis, while the CT scan evidence is consistent with the diagnosis of large opacities in claimant’s lungs. These findings are, therefore, affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

of chronic aspiration due to Parkinson's disease. It is possible that there are other causes, including an infectious process such as tuberculosis or fungal disease as well as malignancy." Employer's Exhibit 2. Then, during his subsequent deposition, Dr. Castle testified:

The disease that [the miner] has was present going back to at least 2003 and probably 2001, to some extent. There was some increase in nodularity between 2001 and 2003 according to the report, and as I said before, that time frame is extremely short for those changes to be due to the development of complicated pneumoconiosis or even progression of complicated disease, there are numerous other conditions that can do that, but it clearly was present *before* he developed Parkinson's disease.

Employer's Exhibit 10 at 32 (emphasis added). In addition, Dr. Castle discussed the alternative diagnosis of Caplan's syndrome which, he explained, is also called "rheumatoid pneumoconiosis" and occurs in people that have simple coal workers' pneumoconiosis. Decision and Order at 37; Employer's Exhibit 10 at 37. Dr. Castle stated, "in looking at all the radiographic findings in this case, those could all be due to rheumatoid arthritis with rheumatoid pneumoconiosis or rheumatoid nodules present." Employer's Exhibit 10 at 37. Dr. Castle subsequently concluded that "[t]he radiographic changes that have been seen have all occurred *after* the development of Parkinson's disease." Employer's Exhibit 19 (emphasis added).

Further, the administrative law judge noted that Dr. Castle relied on Dr. Wides's October 9, 2007 chest x-ray interpretation,<sup>7</sup> stating that the miner did not have any radiological abnormalities to support his conclusion that the miner's Parkinson's disease diagnosis predated the miner's radiological abnormalities. Decision and Order at 37; Employer's Exhibits 12, 19. However, the administrative law judge permissibly accorded Dr. Wides's interpretation little weight because her qualifications are not of record, and Dr. Wides noted that she interpreted the scan "in lieu of the radiologist[.]" Decision and Order at 37, *quoting* Employer's Exhibit 12; *see Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). In addition, the administrative law judge rationally gave diminished weight to Dr. Castle's reliance on Dr. Forehand's interpretation of a May 29, 2012 x-ray because it is not in the record. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring & dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring & dissenting); Decision and Order at 37-38. Consequently, the administrative

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<sup>7</sup> The Decision and Order misstates the date of Dr. Wides's chest x-ray interpretation as October 7, 2009. Decision and Order at 37; Employer's Exhibit 12.

law judge acted within his discretion in giving less weight to Dr. Castle's opinion because it was inconsistent concerning the cause of the large opacities evident on the miner's x-rays. See *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

We further affirm the administrative law judge's finding that Dr. Zaldivar's opinion is equivocal and is not adequately explained concerning the etiology of the abnormalities seen on x-ray. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Dr. Zaldivar initially indicated that the abnormalities on the miner's x-ray were due to inflammation and chronic aspirations due to Parkinson's disease. Director's Exhibit 13. As the administrative law judge noted, however, the miner's radiological abnormalities predated his Parkinson's disease.<sup>8</sup> See *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 39. In addition, the administrative law judge rationally found that although Dr. Zaldivar relied on Dr. Krishnan's July 7, 2003 treatment note to support his assertion that the miner's opacities were due to rheumatoid arthritis, Dr. Zaldivar did not explain why he failed to consider Dr. Krishnan's additional statement that the miner suffers from "progressive massive fibrosis with nodular lesions complicated by severe rheumatoid arthritis affecting the small joints of both hands and feet." Decision and Order at 39, quoting Claimant's Exhibit 9; see *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Employer's Exhibit 9 at 25-26, 28-29. Further, the administrative law judge permissibly discounted Dr. Zaldivar's rationale because he relied on invalid assumptions concerning the latent and progressive nature of pneumoconiosis and on the location of the opacities consistent with pneumoconiosis.<sup>9</sup> 20 C.F.R. §§718.201(c), 718.202(a)(1); see

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<sup>8</sup> On a CT scan, dated May 29, 2003, Dr. Rao, a Board-certified internist, "identified bilateral upper lobe conglomerate masses that were reportedly increased in size and number from the comparison study obtained November 27, 2001." Claimant's Exhibit 6. Also, on a June 4, 2003 PET scan, Dr. Cappiello, a Board-certified diagnostic radiologist, stated that the miner had a "history of complicated pneumoconiosis that is getting worse, but no actual history of malignancy for evaluation." Claimant's Exhibit 10.

<sup>9</sup> Dr. Zaldivar stated, "[w]ithout a diagnosis of rheumatoid arthritis, one could say that perhaps this is a progression of the films from negative, positive, negative, to somehow simple pneumoconiosis to very complicated pneumoconiosis, which is extremely rare, but it can happen." Employer's Exhibit 9 at 66. In addition, he indicated that "the progression from nothing at all to complicated pneumoconiosis after quitting the coal mines – it is very unusual." *Id.* at 67. Dr. Zaldivar maintained that the miner's lung nodules are inconsistent with pneumoconiosis because "coal dust exposure causes abnormality in the upper zones preferentially, not in the lower zones." *Id.* at 47.

*Eastern Associated Coal Corp. v. Director, OWCP [Toler]*, 805 F.3d 502, 512-13 (4th Cir. 2015).

Based on the foregoing, we affirm the administrative law judge's determination that the opinions of Drs. Castle and Zaldivar are insufficient to establish that the opacities detected on the miner's x-rays were not opacities of complicated pneumoconiosis. See *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). Moreover, we decline to address employer's allegations of error regarding the administrative law judge's decision to credit Dr. Forehand's opinion, as Dr. Forehand's diagnosis of complicated pneumoconiosis does not conflict with the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis by the preponderance of the x-ray evidence under 20 C.F.R. §718.304(a). See *Cox*, 602 F.3d at 283-84, 24 BLR at 2-281-82. We affirm, therefore, the administrative law judge's findings, based on a weighing of the evidence as a whole, that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment and invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.203(b) and 718.304.<sup>10</sup>

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<sup>10</sup> Therefore, claimant has established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 as a matter of law. See *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).



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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge