

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0139 BLA

DAVID A. BLAIR)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BLACK GEM MINING)	
)	
and)	
)	
EMPLOYERS INSURANCE OF WAUSAU)	DATE ISSUED: 02/14/2019
C/O LIBERTY MUTUAL)	
)	
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 Peter B. Silvain, Jr.,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton,
Virginia, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05276) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a subsequent claim filed on February 3, 2014,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant has complicated pneumoconiosis, thereby invoking the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act and establishing a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309. He further found that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established complicated pneumoconiosis.² Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

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.³ 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).

¹ Claimant's prior claim, filed on April 22, 2011, was denied by the district director on December 2, 2011, because he did not establish total disability. Director's Exhibit 1. Claimant did not take any further action before filing the current claim. Director's Exhibit 3.

² We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eighteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7-8.

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large 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, 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. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); see *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-ray evidence in equipoise under 20 C.F.R. §718.304(a).⁴ Decision and Order at 12. Pursuant to 20 C.F.R. §718.304(c),⁵ the administrative law judge credited Dr. Copley's opinion that claimant has complicated pneumoconiosis over the contrary opinion of Dr. Rosenberg. *Id.* at 14. Upon weighing all relevant evidence together, the administrative law judge determined that claimant proved

⁴ As summarized by the administrative law judge, the physicians agree that the three x-rays submitted in conjunction with this claim are positive for simple pneumoconiosis, but disagree as to whether they are positive for large opacities. Drs. Alexander and Crum, each dually qualified as a B reader and Board-certified radiologist, read the February 28, 2014 x-ray as positive for Category A large opacities of complicated pneumoconiosis; Dr. Meyer, also dually qualified, read it as negative for complicated pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 2; Employer's Exhibit 3. The administrative law judge considered this x-ray to be positive for complicated pneumoconiosis. Decision and Order at 12. Dr. Crum read the May 19, 2014 x-ray as positive for Category A large opacities; Drs. DePonte and Meyer read it as negative for complicated pneumoconiosis. Director's Exhibits 12, 14; Claimant's Exhibit 1. The administrative law judge found this x-ray negative for complicated pneumoconiosis. Decision and Order at 12. Finally, Dr. Kendall, dually qualified, read the September 9, 2014 x-ray as negative for complicated pneumoconiosis; Dr. Crum read it as positive for Category A large opacities. Director's Exhibit 15; Employer's Exhibit 2. The administrative law judge found this x-ray in equipoise. Weighing the three x-rays together, the administrative law judge concluded that the x-ray evidence, as a whole, is in equipoise regarding complicated pneumoconiosis. Decision and Order at 12.

⁵ There is no biopsy evidence in the record to be considered pursuant to 20 C.F.R. §718.304(b).

that he has complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. *Id.*

Employer asserts that Dr. Copley's diagnosis of complicated pneumoconiosis is "simply a reiteration of Dr. Crum's [positive] reading of the [February 28, 2014] x-ray." Employer's Brief at 3. Employer therefore argues that the administrative law judge erred in crediting Dr. Copley's opinion at 20 C.F.R. §718.304(c), given the determination that the x-ray evidence is in equipoise. Employer's Brief at 3. Employer's arguments are without merit.⁶

As previously indicated, subsection (c) provides for the consideration of diagnoses of large opacities by means other than an x-ray, biopsy, or autopsy. 20 C.F.R. §718.304(c). Contrary to employer's characterization, the administrative law judge found that, in addition to relying on Dr. Crum's reading of the February 28, 2014 x-ray, which was found to be positive for complicated pneumoconiosis, Dr. Copley based her opinion on relevant work and social histories, claimant's symptoms, physical findings, and the results of objective tests.⁷ Director's Exhibit 11. As Dr. Copley based her diagnosis of complicated pneumoconiosis on the totality of information from her examination, the administrative

⁶ We affirm, as unchallenged on appeal, the administrative law judge's determination that Dr. Rosenberg's opinion is not well reasoned and is entitled to no probative weight regarding whether claimant has complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14.

⁷ Dr. Copley examined claimant on behalf of the Department of Labor on February 28, 2014. Director's Exhibit 11. As noted by the administrative law judge, Dr. Copley reported that claimant is a non-smoker and had "a twenty-three year history of underground coal mine employment with heavy coal dust exposure, working as a section boss, roof bolter, and operating a continuous miner, shuttle car, cutting machine and scoop." Decision and Order at 7; *see* Director's Exhibit 11. She obtained a chest x-ray, history of symptoms and complaints, a pulmonary function study, blood gas study, and an EKG. Director's Exhibit 11. Dr. Copley diagnosed chronic bronchitis and "Coal Workers' Pneumoconiosis, complicated – based on symptoms of dyspnea, cough, sputum production and [an] occupational history of heavy coal dust exposure for 23 years; chest x-ray findings [by Dr. Crum of the February 28, 2014 x-ray] of small rounded opacities as well as a large type A opacity; and poor exercise tolerance" demonstrated on the exercise blood gas study. *Id.* In a supplemental report, Dr. Copley indicated that her review of the negative readings of the May 19, 2014 x-ray by Drs. DePonte and Meyer did not alter her diagnosis of complicated pneumoconiosis. Director's Exhibit 49. She specifically noted that claimant has a history of heavy dust exposure and no "other occupational or social exposures to explain the diagnosis of chronic bronchitis or the x-ray findings." *Id.*

law judge permissibly relied on her opinion to establish complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 576 (6th Cir. 2000); *Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-248-49 (2003) (Gabauer, J., concurring); *Melnick*, 16 BLR at 1-34-35.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). We see no error in the administrative law judge's determination that Dr. Copley's opinion is reasoned and documented and "consistent with the evidence she considered." Decision and Order at 13; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Thus, we affirm the administrative law judge's finding that claimant established complicated pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.304(c). Decision and Order at 14.

We further conclude that substantial evidence supports the administrative law judge's finding, based on his consideration of all the relevant evidence together, that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 14. Those findings are therefore affirmed. We also affirm, as unchallenged on appeal, 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 under 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15. As claimant established that he has complicated pneumoconiosis arising out of coal mine employment, he is entitled to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge