BRB No. 12-0013 BLA

BLAINE G. STIDHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MILL BRANCH COAL CORPORATION	)	
	)	DATE ISSUED: 10/31/2012
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (10-BLA-5078) of Administrative Law Judge Linda S. Chapman rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on October 16, 2008.[1] Director's Exhibit 4.

[1] Claimant filed two previous claims. Claimant's first claim, filed on October 17, 2002, was withdrawn. Director's Exhibit 1. Claimant's second claim, filed on July 21,

The administrative law judge credited claimant with twenty-nine years of coal mine employment[2] and found the new x-ray and medical opinion evidence established the existence of simple clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1),(4). The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the merits of the claim. The administrative law judge found that all of the evidence established the existence of simple clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the evidence as a whole established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[4] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis.[5] Claimant

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2004, was denied by the district director on May 5, 2005, because claimant did not establish the existence of pneumoconiosis, or that he was totally disabled by a respiratory of pulmonary impairment. Claimant requested modification, which the district director denied on November 13, 2006. Director's Exhibit 2.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 2, 7, 8.

[3] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] The administrative law judge additionally found that the evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore determined that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Decision and Order at 21, 23.

[5] Employer does not challenge the administrative law judge's findings of twenty-nine years of coal mine employment, that the new evidence established the existence of

responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 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 that is diagnosed by biopsy or autopsy under prong (B) or by other means 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, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining*

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simple clinical coal workers' pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and that the evidence as a whole established the existence of clinical pneumoconiosis arising out of coal mine employment. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Corp., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

Pursuant to 20 C.F.R. §718.304(a),(c), the administrative law judge considered interpretations of analog x-rays, digital x-rays, and CT scans, and considered medical opinion evidence.[6] In analyzing whether claimant established the existence of complicated pneumoconiosis, the administrative law judge initially found that the conflicting evidence, "when considered in isolation under independent subsections at 20 C.F.R. §718.304(a), and (c) is not sufficient to establish the presence, *or absence*, of complicated pneumoconiosis." Decision and Order at 22 (footnote omitted). The administrative law judge, however, found that when the evidence was considered as a whole, the preponderance of the x-ray, CT scan, and medical opinion evidence established that claimant "has complicated pneumoconiosis, based on the findings of a large mass that has been designated as a category A or B opacity on seven ILO readings, and has been attributed to pneumoconiosis in numerous x-ray and CT scan readings."[7] Decision and Order at 23.

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[6] Because there is no autopsy or biopsy evidence in the record, the administrative law judge noted that there was no evidence to consider pursuant to 20 C.F.R. §718.304(b).

[7] The administrative law judge concluded that the totality of the evidence established that the etiology of the large mass is pneumoconiosis:

> Weighing the . . . medical evidence as a whole, I find that the x-ray and CT scan evidence submitted in connection with the instant claim establishes that [claimant] has a mass in his lungs that appears larger than one centimeter in diameter on an x-ray. The evidence offered by . . . [e]mployer does not show that the mass does not exist; indeed the preponderance of the x-ray and CT scan evidence confirms the presence of a large mass in [claimant's] right lung. Nor does the medical evidence show that this mass is due to a process other than pneumoconiosis; the opinions submitted by the [e]mployer's experts are equivocal and speculative, and do not establish that the opacities are due to a process other than pneumoconiosis. Accordingly, I find that [claimant] has met his burden to successfully establish his entitlement to the irrebuttable presumption of total disability due to pneumoconiosis under [S]ection 718.304.

Decision and Order at 33.

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 pursuant to 20 C.F.R. §718.304. 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 is supported by substantial evidence, consistent with applicable law, and contains no reversible error.

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered fourteen ILO interpretations of six analog x-rays taken October 21, 2004; February 23, 2005; June 23, 2006; December 22, 2008; July 13, 2009; and December 29, 2009, considered the readers' radiological qualifications, and found that the x-ray evidence established the existence of large opacities.[8] Director's Exhibits 2, 14, 17-19; Claimant's Exhibit 3; Employer's Exhibit 3, 4, 10. In so finding, the administrative law judge discounted the negative x-ray readings, which were rendered by Drs. Scott and Wheeler. Decision and Order at 30-32. Employer contends that the administrative law judge erred in discounting Dr. Wheeler's negative x-ray readings. Employer's Brief at 8-9. We disagree. The administrative law judge permissibly discounted Dr. Wheeler's readings as speculative and equivocal, in that he identified granulomatous disease as a possible cause of the large masses on claimant's x-rays, when the record contains no evidence that claimant was ever diagnosed with or treated for granulomatous disease, and when Dr. Rosenberg indicated that claimant's histoplasmosis test was negative. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010); Decision and Order at 31 & n.15. Further, employer does not challenge the administrative law judge's additional determination, that the negative readings of both Drs. Wheeler and Scott

[8] Drs. Patel and Alexander interpreted the October 21, 2004 x-ray as positive for a Category A large opacity, while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Director's Exhibit 2. Dr. Wheeler also read the February 23, 2005 x-ray as negative for pneumoconiosis. *Id*. Dr. DePonte interpreted the June 23, 2006 x-ray as positive for a Category A large opacity, while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. *Id*. Drs. Alexander and Rasmussen interpreted the December 22, 2008 x-ray as positive for a Category A large opacity, while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Director's Exhibits 14, 17-19. Dr. DePonte interpreted the July 13, 2009 x-ray as positive for a Category B large opacity, while Drs. Scott and Wheeler read the x-ray as negative for pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibits 3, 10. Finally, Dr. DePonte interpreted the December 29, 2009 x-ray as positive for a Category B large opacity, while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 4. Except for Dr. Rasmussen, who is a B reader only, the foregoing physicians are all Board-certified radiologists and B readers.

merited less weight on the issue of complicated pneumoconiosis, because the physicians did not diagnose claimant with simple pneumoconiosis, contrary to the weight of the evidence. That determination is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Relevant to 20 C.F.R. §718.304(c), the administrative law judge considered interpretations of three CT scans taken on March 8, 2007, July 18, 2007, and November 5, 2007.[9] According greater weight to the positive readings of Dr. DePonte, the administrative law judge found that the CT scan evidence also supported the existence of large opacities of complicated pneumoconiosis. Decision and Order at 29-30, 32. Employer's contention that the administrative law judge erred in according less weight to Dr. Fino's negative readings lacks merit. Employer's Brief at 6. The administrative law judge found that Dr. DePonte, a Board-certified radiologist and B reader, is better qualified than Dr. Fino to interpret CT scans, and employer has not challenged that finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25. Moreover, the administrative law judge permissibly credited the positive CT scan interpretations of Dr. DePonte, because she found those readings to be more thorough, detailed, and better explained than Dr. Fino's negative interpretations of the CT scans. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 25-26, 29-30, 32.

[9] As summarized by the administrative law judge, Dr. DePonte, a B reader and Board-certified radiologist, provided measurements and descriptions of the large masses she observed. On the March 8, 2007 CT scan, Dr. DePonte identified, among other abnormalities, a 2.8 centimeter (cm) by 1 cm opacity that she opined was "a typical conglomerate mass of coal workers' pneumoconiosis." Claimant's Exhibit 8. Dr. DePonte diagnosed "[t]ypical pulmonary interstitial abnormalities of complicated coal workers[']s pneumoconiosis." *Id*. On the July 18, 2007 CT scan, Dr. DePonte described an opacity measuring "approximately 32 millimeters" by approximately 1 cm, along with another large opacity measuring "over a centimeter in size." Claimant's Exhibit 9. Dr. DePonte diagnosed "[c]lassic findings of complicated coal [workers'] pneumoconiosis (progressive massive fibrosis)." *Id*. On the November 5, 2007 CT scan, Dr. DePonte described "one of the largest opacities" as measuring approximately 3 cm by 1 cm in diameter, with another opacity measuring approximately 2 cm by 1.5 cm. Claimant's Exhibit 10. Dr. DePonte diagnosed "[c]lassic pulmonary parenchymal findings consistent with coal workers[']s pneumoconiosis and progressive massive fibrosis." *Id*. Additionally, for each CT scan reading, Dr. DePonte explained that the "opacities and structures would appear nearly equivalent in size on a plain chest film." Claimant's Exhibits 8-10. Dr. Fino, a B reader, read the same CT scans and stated that complicated pneumoconiosis was not present. Employer's Exhibit 1A.

Employer argues further that Dr. DePonte's statement, that the opacities and structures she identified on the CT scans would appear as "nearly equivalent" in size on a conventional x-ray, is "not sufficiently precise" to satisfy claimant's burden to establish that the opacities would show as greater than one centimeter if they were seen on an x-ray. Employer's Brief at 6. We disagree. As noted by the administrative law judge, Dr. DePonte measured, and described in detail, opacities larger than one centimeter in diameter, and indicated that one opacity reached 2.8 centimeters in diameter. Claimant's Exhibits 8-10. Having found that the x-ray interpretations themselves already established the existence of opacities greater than one centimeter in diameter, the administrative law judge permissibly found that Dr. DePonte's CT scan readings corroborated the existence of the large opacities. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (holding that x-ray evidence displaying opacities greater than one centimeter "can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be").

We also reject employer's assertion that the administrative law judge erred in her consideration of Dr. Fino's opinion.[10] The administrative law judge permissibly accorded less weight to Dr. Fino's opinion, that claimant does not have complicated pneumoconiosis, because she discounted his opinion that claimant's CT scans were negative for complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62; *Lester*, 993 F.2d at 1145-46, 17 BLR at 1145-46. Because we affirm the administrative law judge's finding for the reason stated above, we need not address employer's other arguments regarding the administrative law judge's analysis of Dr.

[10] Multiple findings and credibility determinations by the administrative law judge regarding other evidence submitted under 20 C.F.R. §718.304(c) are not challenged by employer and they are, therefore, affirmed. *See Skrack*, 6 BLR at 1-711. Specifically, employer does not challenge the administrative law judge acceptance of the medical opinion of Dr. Rasmussen, and the treatment records of Drs. Agarwal and Al-Khasawneh, diagnosing claimant with complicated pneumoconiosis, or the administrative law judge's discounting of Dr. Castle's opinion that claimant does not have complicated pneumoconiosis, because the physician did not review claimant's most recent x-rays and CT scans. Similarly, employer does not challenge the administrative law judge's discounting of the opinion of Dr. Rosenberg, that claimant does not have complicated pneumoconiosis, because it was based on an "extremely selective assortment of medical evidence." Decision and Order at 29. Further, employer does not challenge the administrative law judge's decision to discount Dr. Rosenberg's opinion that claimant may have sarcoidosis, because the physician did not explain how an enzyme level he identified supported a diagnosis of sarcoidosis, and because the administrative law judge found no evidence that claimant was treated for sarcoidosis.

Fino's opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13, 22 BLR 2-162, 2-178 n.13 (4th Cir. 2000); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer also maintains that the administrative law judge's statement, that the evidence considered in isolation at each subsection of 20 C.F.R. §718.304 does not establish the existence of complicated pneumoconiosis, precludes a finding of complicated pneumoconiosis. Employer's Brief at 4-5. Contrary to employer's assertion, the administrative law judge merely noted at the outset of her analysis of the evidence that the x-ray evidence, CT scan evidence, and medical opinion evidence, standing alone, did not establish complicated pneumoconiosis. The administrative law judge, however, properly assessed the credibility of the evidence in light of *Cox*, and explained why the evidence as a whole established the existence of the disease. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (explaining that "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray"). Consequently, we affirm the administrative law judge's finding that claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 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.

Accordingly, the administrative law judge's Decision and Order 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