BRB No. 12-0654 BLA

ROBERT MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEN R. MULLINS EXCAVATING	)	DATE ISSUED: 08/26/2013
	)	
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 of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order (2010-BLA-05254) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed on July 15, 2008, 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 at least eighteen years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that claimant has complicated pneumoconiosis and, thus, found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[1]

[1] The administrative law judge did not address whether claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis by a preponderance of the analog x-ray readings and that she incorrectly based her finding of complicated pneumoconiosis entirely on that evidence, while disregarding the physicians' opinions, digital x-ray readings, and the CT scan readings, indicating that claimant does not have the disease. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

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

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least eighteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7.

[3] The administrative law judge stated that claimant "last engaged in coal mine employment in the State of Kentucky[.]" Decision and Order at 8. Based on our review of the record, although the Social Security Administration records indicate that employer is located in Kentucky, the location of the mine where claimant last worked for employer was in Virginia. Director's Exhibit 3. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

diagnosed by biopsy, 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.

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 Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

I. The Analog X-ray Evidence – 20 C.F.R. §718.304(a)

Relevant to 20 C.F.R. §718.304(a), the administrative law judge noted that the record contained nine ILO classified readings of two analog x-rays dated June 25, 2008 and August 14, 2008. Decision and Order at 9, 16. The June 25, 2008 x-ray was read by both Drs. Miller and Alexander, dually qualified as Board-certified radiologists and B readers, as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 10; Claimant's Exhibit 1. The same x-ray was read by Drs. Scott and Wheeler, also dually qualified radiologists, as negative for both simple and complicated pneumoconiosis. Director's Exhibit 14; Employer's Exhibit 1. Because the June 25, 2008 x-ray had an equal number of positive and negative readings by dually qualified radiologists, the administrative law judge determined that the evidence was in equipoise. Decision and Order at 16.

The August 14, 2008 x-ray was read by Dr. Patel, a Board-certified radiologist, as positive for simple and complicated pneumoconiosis, Category A, and by Drs. Miller and Alexander, dually qualified radiologists, as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibits 10, 18; Claimant's Exhibit 2. The same x-ray was read by Drs. Scott and Wheeler, also dually qualified, as negative for simple and complicated pneumoconiosis. Director's Exhibit 10; Employer's Exhibit 2. The administrative law judge determined that the August 14, 2008 x-ray was positive for complicated pneumoconiosis, finding that "on balance, the interpretations of Drs. Alexander and Miller, supported by Dr. Patel, outweigh the interpretations of Drs. Scott and Wheeler." Decision and Order at 16. The administrative law judge further stated:

> In its brief, Employer argues that I should give more weight to the interpretations of Drs. Scott and Wheeler, because they have additional qualifications as teaching professors of radiology. However, I note that Dr.

> Alexander also has additional qualifications as an assistant professor of radiology and nuclear medicine, and he is board-certified in special competence in nuclear radiology, among other qualifications. Additionally, I note that Dr. Miller has additional qualifications as an assistant professor of radiology, among other qualifications. Accordingly, based upon the record, I find no reason to give more weight to the interpretations of Drs. Scott and Wheeler, both dually-qualified, over the interpretations of Drs. Alexander and Miller, also both dually-qualified. Accordingly, after examining the chest x-rays both individually and as a whole, I find the chest x-ray evidence overall establishes the existence of simple and complicated pneumoconiosis.

Id. Thus, the administrative law judge found that claimant satisfied his burden of proof under 20 C.F.R. §718.304(a).

Employer contends that the administrative law judge "failed to acknowledge the prestige of Drs. Scott's and Wheeler's positions at Johns Hopkins in determining that their readings did not outweigh the readings of Drs. Alexander and Miller." Employer's Brief in Support of Petition for Review at 7. Employer asserts that "Drs. Scott's and Wheeler's qualification are not superior merely because they are professors, but because they are professors at such a prestigious medical facility." *Id*. Employer also argues that no weight should be given to Dr. Patel's positive reading, as he is not a B reader.

Contrary to employer's contention, although an administrative law judge *may* give greater weight to the interpretations of a physician based upon his or her academic qualifications, the administrative law judge is not required to accord controlling weight to any particular medical expert. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *citing Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255, 1-261 (2003). In this case, the administrative law judge properly considered the relevant radiological qualifications of the physicians and permissibly assigned equal weight to the readings by Drs. Scott, Wheeler, Alexander and Miller on the ground that she considered them to be equally qualified. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

With respect to the August 14, 2008 x-ray, although Dr. Patel is not a B reader, the administrative law judge permissibly assigned some weight to his positive reading for complicated pneumoconiosis, based on his status as a Board-certified radiologist. *See*

Adkins, 958 F.2d at 52, 16 BLR at 2-66. We also see no error in the administrative law judge's finding that Dr. Patel's positive reading lends support to Dr. Alexander's positive reading. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir, 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Thus, because the administrative law judge properly performed both a qualitative and quantitative analysis of the x-ray evidence, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, based on the two positive readings of the August 14, 2008 x-ray, pursuant to 20 C.F.R. §718.304(a). *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

II. Other Evidence – 20 C.F.R. §718.304(c)

Relevant to 20 C.F.R. §718.304(c),[4] the administrative law judge considered digital x-ray readings, CT scan readings, and the medical opinion evidence. The administrative law judge noted that "[s]ix interpretations of five digital chest x-rays were submitted in this claim." Decision and Order at 20. The digital x-rays dated February 14, 2008, April 16, 2008 and June 1, 2009 were read by Dr. Fino, a B reader, as negative for simple and complicated pneumoconiosis. Employer's Exhibits 11-13. The digital x-ray dated July 22, 2009 was read as positive for complicated pneumoconiosis by Dr. Miller, a dually qualified radiologist, but read as negative for pneumoconiosis by Dr. Scott, also dually qualified. Director's Exhibits 13, 16. Dr. Scott noted a "5 cm x 3 cm density adjacent to right hilum, probably partially due to atelectasis because of the shape . . . [p]ossibly granulomatous disease." Director's Exhibit 13. Lastly, the digital x-ray dated June 23, 2010 was read as negative for simple and complicated pneumoconiosis by Dr. Scott, but he identified a "5 cm x 2.5 cm mass lateral to right hilum and 5 cm x 2 cm mass lateral to left hilum" and opined that the masses are "probably granulomatous disease although lymphoma cannot be excluded." Employer's Exhibit 3. The administrative law judge found that evidence regarding the July 22, 2009 digital x-ray was in equipoise, but that the "remaining x-rays do not support a finding of simple or complicated pneumoconiosis." Decision and Order at 20.

The administrative law judge considered five readings of four CT scans. The May 27, 2008 CT scan was read by Dr. Ward as positive for coal workers' pneumoconiosis with progressive massive fibrosis, but read by Dr. Fino as negative for complicated pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibit 10. Dr. Fino indicated that the CT scan showed evidence of granulomatous disease and possible sarcoidosis. Employer's Exhibit 10. Dr. Cobb read a June 27, 2008 CT scan as revealing bilateral hilar masses, fibrotic changes, and small nodular densities suggestive of sarcoidosis. Employer's Exhibit 5. Dr. Delozier read the June 9, 2010 CT scan as revealing a mass in

[4] The record contains no biopsy evidence pursuant to 20 C.F.R. §718.304(b).

the right lung and non-calcified nodules due to neoplasm. Employer's Exhibit 6. Drs. Fino and Scott read the February 8, 2011 CT scan as negative for complicated pneumoconiosis. Employer's Exhibits 10, 15. Dr. Fino identified a one centimeter mass and two centimeter mass "consistent with granulomatous disease" or "possibly sarcoidosis." Employer's Exhibit 10. Dr. Scott identified "irregular 4-5 cm masses" and a few smaller "1-2 cm nodules" due to partially healed granulomatous disease. Employer's Exhibit 15. The administrative law judge found that the CT scan evidence "as a whole and when viewed in isolation" does not establish the presence of simple or complicated pneumoconiosis. Decision and Order at 21.

The administrative law judge further noted that the record contained three medical opinions, by Drs. Alam, Castle and Fino. Decision and Order at 10-12. Dr. Alam performed the examination at the request of the Department of Labor on August 14, 2008. Director's Exhibit 18. The administrative law judge noted that Dr. Alam found radiographic evidence of simple pneumoconiosis, but did not "note any observations of a greater than one centimeter mass or any large opacity in [c]laimant's chest x-ray." Decision and Order at 17; *see* Director's Exhibit 18. Dr. Castle examined claimant on July 22, 2009 and opined that claimant has simple pneumoconiosis. Director's Exhibit 13. Referencing his review of the July 22, 2009 digital x-ray he obtained, Dr. Castle noted that claimant had a large mass next to the right hilum with a questionable cavity inside the mass, but opined that it "did not look like changes of complicated pneumoconiosis," based on the location of the mass and the presence of the cavity. *Id.* Dr. Castle recommended that the mass be further evaluated for carcinoma or infection. *Id.* Dr. Fino examined claimant on June 23, 2010 and opined that claimant has possible granulomatous disease or sarcoidosis, but not complicated pneumoconiosis. Employer's Exhibit 3. The administrative law judge found that the medical opinion evidence did not support a finding of complicated pneumoconiosis.

Based on her consideration of the "other evidence" the administrative law judge concluded that claimant was unable to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order at 20-21. However, weighing all of the evidence together under 20 C.F.R. §718.304(a)-(c), the administrative law judge gave controlling weight to the positive analog x-ray of August 14, 2008, over the contrary evidence, and found that claimant satisfied his burden to prove that he has complicated pneumoconiosis. *Id*. at 21-23.

We reject employer's general assertion that the administrative law judge "disregarded" the negative evidence for complicated pneumoconiosis in considering whether claimant satisfied his burden of proof. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge specifically explained that she discounted Dr. Fino's opinion, based on his negative readings of the February 14, 2008, April 16, 2008 and June 1, 2009 digital x-rays. She also stated that she discounted the

opinions of Drs. Fino and Castle because both physicians suggested that claimant has "possible cancer," but a "cytopathology report, dated August 10, 2010, [was] negative for malignancy." Decision and Order at 22. The administrative law judge found that, while Dr. Scott suggested that the large densities he identified on claimant's digital x-rays were due to "possible" granulomatous disease, lymphoma, tuberculosis, fungal disease and sarcoid, "the record does not include evidence demonstrating [c]laimant was tested or treated for any of these disease . . . [or] any conclusive evidence that he suffered from these diseases." *Id*. at 22-23. Similarly, the administrative law judge explained that she rejected the positive CT scan reading for granulomatous disease by Dr. Fino, as the record does not contain any evidence to support that diagnosis.[5] *Id*. at 21, 23. The administrative law judge further noted that none of the physicians who interpreted claimant's CT scans and identified alternate diseases, "discuss whether any of the alternative diseases could occur in conjunction with pneumoconiosis." *Id*. at 23. Additionally, with regard to Dr. Castle's opinion, the administrative law judge noted that, while Dr. Castle stated that claimant's mass with the presence of cavity did not look like complicated pneumoconiosis, "he has failed to explain why he considers [c]laimant to represent a 'typical' case and why [c]laimant could not be the atypical miner with complicated coal workers' pneumoconiosis." *Id*. at 18.

We affirm the administrative law judge's rational findings that the opinions of Drs. Castle, Fino and Scott are "equivocal, vague and speculative" and entitled to diminished weight as to the existence of complicated pneumoconiosis. Decision and Order at 17, 19; *see Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84. We consider employer's arguments with respect to the weight accorded to the readings of claimant's analog and digital x-rays and CT scans, along with the medical opinions, to be a request that the Board reweigh the evidence, which we are not empowered to do. *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); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, 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, as 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

[5] The administrative law judge reiterated that "the record does not include evidence demonstrating [c]laimant was tested or treated for granulomatous disease nor does the record include any evidence that he suffered from this disease." Decision and Order at 23.

Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 23. We therefore affirm the award of benefits in this claim.

Accordingly, the administrative law judge's Decision and Order 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