

BRB No. 05-0689 BLA

BENNY S. SPADARO )  
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 Claimant-Respondent )  
 )  
 v. )  
 ) DATE ISSUED: 06/26/2006  
 CONSOLIDATION COAL COMPANY )  
 )  
 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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-6384) of Administrative Law Judge Gerald M. Tierney rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with twenty-one years of coal mine employment<sup>1</sup> and found that the medical evidence established the existence of complicated pneumoconiosis, entitling claimant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. The administrative law judge further found that employer did not rebut the presumption of 20 C.F.R. §718.203(b) that claimant's complicated pneumoconiosis arose out of coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that the existence of complicated pneumoconiosis was established. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he takes no position with regard to claimant's entitlement to benefits. The Director notes, however, his disagreement with the administrative law judge's finding that good cause was shown pursuant to 20 C.F.R. §725.456(b)(1) for the admission of medical evidence which employer submitted in excess of the evidentiary limitations of 20 C.F.R. §725.414.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304, 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

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<sup>1</sup> The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction 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*).

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 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)(A); 20 C.F.R. §718.304. The Act does not “incorporate a purely medical definition” of complicated pneumoconiosis, but instead provides an irrebuttable presumption based on the presence of the “congressionally defined condition” described in the Act. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 257, 22 BLR 2-93, 2-103 (4th Cir. 2000); *see also Double B Mining v. Blankenship*, 177 F.3d 240, 244, 22 BLR 2-554, 2-562 (4th Cir. 1999)(noting that “[t]he statute does not mandate use of the medical definition of complicated pneumoconiosis”). Consequently, “to the extent there is a divergence between the medical and legal standards for complicated pneumoconiosis, [the administrative law judge] must apply the standard established by Congress.” *Scarbro*, 220 F.3d at 257, 22 BLR at 2-103. The administrative law judge must review all relevant evidence to determine whether complicated pneumoconiosis is present. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993).

The administrative law judge noted that x-rays and medical opinions were submitted relevant to complicated pneumoconiosis.<sup>2</sup>

Specifically, the administrative law judge considered that Drs. Patel, Miller, and Ahmed, all of whom are Board-certified radiologists and B-readers, interpreted claimant’s December 10, 2001 and November 14, 2002 x-rays as positive for both simple pneumoconiosis and for category “A” large opacities. Director’s Exhibits 13, 15. The administrative law judge also considered that equally qualified readers, Drs. Scott, Wheeler, and Scatarige, did not interpret claimant’s December 10, 2001, November 14, 2002, and December 9, 2002 x-rays as positive for large opacities. Director’s Exhibits 16, 17; Employer’s Exhibits 1, 4. The administrative law judge, however, found that Drs. Scott, Wheeler, and Scatarige were equivocal and inconsistent regarding the large masses they detected on claimant’s x-rays. The administrative law judge therefore chose to rely

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<sup>2</sup> As the administrative law judge found, the only type of evidence diagnosing complicated pneumoconiosis was x-ray evidence. Because no biopsy or autopsy evidence was presented under prong (B) of the Act, and no evidence was presented diagnosing complicated pneumoconiosis by other means under prong (C), the requirement that the administrative law judge perform an equivalency determination between a diagnosis under prongs (B) or (C) and a diagnosis by x-ray under prong (A) was inapplicable in this case. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999).

on the more definite and consistent interpretations of Drs. Patel, Miller, and Ahmed diagnosing the presence of a large opacity greater than one centimeter in diameter.

The administrative law judge also considered the medical opinions of Drs. Crisalli, Castle, and Spagnolo stating that claimant does not have complicated pneumoconiosis. Director's Exhibit 17; Employer's Exhibits 2, 3, 5, 6. The administrative law judge discounted these opinions because "at the root of their conclusions," Drs. Crisalli, Castle, and Spagnolo had relied on the x-ray readings of Drs. Scott, Wheeler, and Scatarige. Decision and Order at 5. Additionally, to the extent that Drs. Castle and Crisalli pointed to claimant's normal pulmonary function studies as a feature inconsistent with complicated pneumoconiosis, the administrative law judge found that normal pulmonary function did not preclude a finding of statutory complicated pneumoconiosis. Decision and Order at 5 n.3. Based on the evidence, the administrative law judge found that a preponderance of the x-ray evidence established the presence of complicated pneumoconiosis as defined in the Act.

Employer contends that the administrative law judge erred in discrediting the x-ray readings of Drs. Scott, Wheeler, and Scatarige. We disagree. The administrative law judge makes credibility determinations and weighs the evidence. *Underwood v. Elkay Mining*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). The administrative law judge explained that he found the x-ray readings of Drs. Scott and Scatarige equivocal because Dr. Scott described a three-centimeter mass as "Probable" tuberculosis or "strongly favor[ing]" tuberculosis, and because Dr. Scatarige described 2.5 and 1.5-centimeter masses as "TB vs pneumoconiosis or both," and as "favor[ing]" tuberculosis of unknown activity or sarcoid. Director's Exhibit 16; Employer's Exhibit 4.<sup>3</sup> The administrative law judge explained further that Drs. Scott, Wheeler, and Scatarige did not consistently observe the presence of a mass larger than one centimeter in each of their respective readings. Additionally, the administrative law judge noted that Drs. Scatarige and Wheeler recommended that a CT-scan be conducted for further evaluation. Finally, the administrative law judge found that Dr. Wheeler's opinion that the background opacities of simple pneumoconiosis were of low profusion, a factor inconsistent with complicated pneumoconiosis, was an opinion countered by the view of employer's expert, Dr. Smith, a Board-certified radiologist and B-reader who classified claimant's December 9, 2002 x-ray in the "2/2" profusion category, consistent with the readings of

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<sup>3</sup> Similarly, in *Yogi Mining Co. v. Fife*, 159 Fed. Appx. 441 (4th Cir. 2005), the administrative law judge accorded less weight to the equivocal x-ray interpretations of Drs. Scott and Wheeler than to the unequivocal interpretations of two doctors finding complicated pneumoconiosis and the Fourth Circuit affirmed his weighing as a proper exercise of discretion.

Drs. Patel, Miller, and Ahmed. Director's Exhibit 17. The administrative law judge was within his discretion to assess the credibility of the x-ray readings in this manner, and substantial evidence supports his findings. See *Underwood*, 105 F.3d at 949, 21 BLR at 2-28. We therefore reject employer's allegation of error.<sup>4</sup>

Employer argues that the administrative law judge selectively analyzed the x-ray evidence when he found employer's readings equivocal and inconsistent, while overlooking an alleged inconsistency in the reading of claimant's expert, Dr. Miller. Employer states that Dr. Miller found no large opacities, yet inconsistently diagnosed complicated pneumoconiosis. Contrary to employer's characterization, the record reflects that Dr. Miller described a "3 cm. large opacity right apex" on claimant's November 14, 2002 x-ray, and checked the box on the x-ray classification form to indicate a category "A" large opacity. Director's Exhibit 15. Thus, the record does not support employer's argument.

Employer contends that the administrative law judge erred because he attached no significance to the numerical superiority of the x-ray readings that were negative for complicated pneumoconiosis. Employer's contention lacks merit. An administrative law judge should not rely on a numerical count of experts to resolve conflicting evidence. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992). The administrative law judge should consider the quality of the opinions. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 444-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood*, 105 F.3d at 950-951, 21 BLR at 2-31-32. Here, the administrative law judge conducted a proper, qualitative analysis by weighing the x-ray readings in light of the readers' radiological qualifications, as well as the strength and consistency of the readers' opinions. See *Underwood*, 105 F.3d at 950-951, 21 BLR at 2-31-32; *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004).

Employer asserts that the administrative law judge erred in discounting the opinions of employer's doctors that claimant does not have complicated pneumoconiosis. Employer argues that the administrative law judge ignored the doctors' reasoning, and thus failed to consider all relevant evidence. Again, we disagree with employer. The

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<sup>4</sup> Employer's reliance on *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986), and *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985), for the proposition that an employer need not identify an etiology for a claimant's x-ray abnormalities, is misplaced. Those cases addressed the nature and scope of an employer's burden to rebut the interim presumption pursuant to 20 C.F.R. §727.203(b)(3),(b)(4). They did not address the administrative law judge's authority to weigh the evidence regarding the existence of statutory complicated pneumoconiosis.

administrative law judge correctly observed that “[t]he most objective measure of the presence of complicated pneumoconiosis is by chest x-ray.” Decision and Order at 4; *see Scarbro*, 220 F.3d at 258, 22 BLR at 2-104 (stating that “the most objective measure of the condition specified by §921(c)(3) is obtained through x-rays”)(citation omitted). Viewing the medical opinions from this perspective, the administrative law judge accurately noted that on the issue of whether complicated pneumoconiosis was present, Drs. Crisalli, Castle, and Spagnolo had relied on the x-ray readings of Drs. Scott, Wheeler, and Scatarige: “[T]he fact remains that it is what the selected radiological experts, Drs. Scott, Wheeler, and Scatarige, reported seeing on chest x-ray that Drs. Crisalli, Castle, and Spagnolo relied on and that is at the root of their conclusions.” Decision and Order at 5; *see* Director’s Exhibit 17 at 4; Employer’s Exhibit 2 at 4; Employer’s Exhibit 3 at 7; Employer’s Exhibit 5 at 10; Employer’s Exhibit 6 at 21-22.

Thus, the administrative law judge properly considered the medical opinions in the context of the x-ray readings upon which they were based. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-104. As discussed, the administrative law judge found that the x-ray readings of Drs. Scott, Wheeler, and Scatarige merited less weight because they were equivocal and inconsistent on the large masses seen on claimant’s x-rays. Consequently, he did not err in his analysis of medical opinions relying on x-ray findings that he discounted. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Additionally, contrary to employer’s contention, the administrative law judge considered all relevant evidence on the issue of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117. The administrative law judge reviewed the medical opinions, but found that they did not undermine the force of the x-ray evidence by demonstrating an intervening pathology for the large opacities. Decision and Order at 4, 5; *see Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Specifically, he did not credit the x-ray readings upon which the medical opinions relied. Additionally, the administrative law judge correctly found that although Drs. Crisalli and Castle cited the absence of a respiratory impairment as a factor inconsistent with a diagnosis of complicated pneumoconiosis, that factor was not dispositive under the criteria that he was bound to apply in determining complicated pneumoconiosis as defined in the Act. *See Scarbro*, 220 F.3d at 257, 22 BLR at 2-103. Because the issue before the administrative law judge was whether the legal definition of complicated pneumoconiosis was satisfied, not the medical definition, he properly discounted the medical opinions requiring a respiratory impairment to diagnose complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 257, 22 BLR at 2-103. We therefore reject employer’s arguments, and we affirm the administrative law judge’s finding that invocation of the irrebuttable presumption was established pursuant to 20 C.F.R. §718.304(a).

Employer does not challenge the administrative law judge's finding that employer did not rebut the presumption at 20 C.F.R. §718.203(b) that claimant's complicated pneumoconiosis arose out of coal mine employment. Substantial evidence supports that finding. The finding is therefore affirmed.

Finally, the Director disputes the administrative law judge's determination that good cause existed to allow the admission of x-ray readings and a medical report submitted by employer that exceeded the evidentiary limits imposed by 20 C.F.R. §725.414.<sup>5</sup> The administrative law judge found good cause established because employer argued that excess evidence was "relevant and helpful" in a case involving complicated pneumoconiosis. Decision and Order at 2. The Director argues that the mere assertion that evidence is relevant does not constitute good cause for exceeding the evidentiary limitations. We agree. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-61-62 (2004)(*en banc*)(affirming an administrative law judge's ruling that an argument that excess evidence was relevant did not establish good cause). In the case at bar, however, any error by the administrative law judge with respect to the admission of the excess evidence is harmless in light of our affirmance of the award of benefits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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<sup>5</sup> The applicable regulations limited employer to "no more than two chest X-ray interpretations" and "no more than two medical reports," submitted "in support of its affirmative case," and to "no more than one physician's interpretation of each chest X-ray" in rebuttal of claimant's affirmative case x-ray readings. 20 C.F.R. §§725.414(a)(3)(i),(ii). Employer had to demonstrate "good cause" to exceed those limits. 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL  
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant was entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis based on a finding of complicated pneumoconiosis in this case, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Instead, I would vacate the administrative law judge's invocation of the irrebuttable presumption based on a finding of complicated pneumoconiosis under Section 718.304, and remand the case for the administrative law judge to reconsider the x-ray evidence of record together with the other relevant evidence under Section 718.304(c). See *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). In the present case, the majority has applied the Fourth Circuit court's holding in *Scarbro* out of context. Although the administrative law judge summarized the x-ray reports of Drs. Patel, Miller, Ahmed, Scott, Wheeler, and Scatarige, and the reports of Drs. Crisalli, Castle, and Spagnolo, I agree with employer that he did not adequately consider their comments or deposition testimony that further explained their conclusions that claimant did not suffer from complicated pneumoconiosis. Instead, the administrative law judge relied solely on the x-ray evidence and summarily rejected the interpretations of Drs. Wheeler, Scott, and Scatarige because their opinions were inconsistent as to another pathology for the large opacity, while ignoring their consistent determination that complicated pneumoconiosis was not present. See *Bill Branch Coal Corp. v. Sparks*, 213

F.3d 186, 191, 22 BLR 2-251, 2-260 (4th Cir. 2000). I would therefore instruct the administrative law judge to reconsider the relevant medical evidence regarding the existence of complicated pneumoconiosis, *i.e.*, x-rays and medical opinions, together at Section 718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In addition, I would also instruct the administrative law judge to consider whether claimant established that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. The majority does not address this issue in detail, but instead avers that substantial evidence supports such a finding. On the contrary, that conclusion is simply not necessarily true, and I would instruct the administrative law judge to consider the evidence relevant to the issue on remand and to render a finding as to whether claimant's complicated pneumoconiosis, if established, arose out of coal mine employment.

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ROY P. SMITH  
Administrative Appeals Judge