

BRB No. 12-0382 BLA

STEVE L. JOHNSTON )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 DOUBLE-BONUS COAL COMPANY )  
 )  
 and )  
 )  
 BRICKSTREET MUTUAL INSURANCE ) DATE ISSUED: 04/04/2013  
 COMPANY )  
 )  
 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 on Remand of Robert B. Rae,  
Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia,  
for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2008-BLA-06010) of  
Administrative Law Judge Robert B. Rae awarding benefits 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, involving a claim filed on September 11, 2007, is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with twenty-one years of coal mine employment,<sup>1</sup> and found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge also found that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).<sup>2</sup> The administrative law judge, therefore, found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in his consideration of the evidence pursuant to 20 C.F.R. §718.304(a), (c). *Johnston v. Double-Bonus Coal Co.*, BRB No. 10-0444 BLA (Apr. 29, 2011) (McGranery, J. dissenting) (unpub.). The Board, therefore, vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.304(a), (c), and remanded the case for further consideration.<sup>3</sup>

On remand, the administrative law judge again found that the evidence established the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Employer specifically argues that the

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<sup>1</sup> 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, 1-202 (1989) (en banc); Director's Exhibit 3.

<sup>2</sup> Because there is no 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).

<sup>3</sup> The Board further instructed the administrative law judge that if, on remand, he found that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, he must consider this case in light of the 2010 amendments to the Act. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)).

administrative law judge erred in finding that the x-ray and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

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 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, 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 diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that 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 automatically qualify a claimant for 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 that pneumoconiosis is not present, resolve any conflicts and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

### **Section 718.304(a)**

Employer initially argues that the administrative law judge erred in finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

## **The Administrative Law Judge's Decision and Order**

In his initial decision, the administrative law judge considered interpretations of four x-rays dated October 31, 2007, March 5, 2008, August 23, 2008, and November 13, 2008. The administrative law judge found that the October 31, 2007 x-ray was positive for complicated pneumoconiosis, while the interpretations of the March 5, 2008 x-ray were "in equipoise." Decision and Order at 17. The administrative law judge then noted that Drs. DePonte and Scott are the only physicians who interpreted the August 23, 2008 and November 13, 2008 x-rays. *Id.* at 17-18. While Dr. DePonte, a B reader and Board-certified radiologist, interpreted these x-rays as positive for complicated pneumoconiosis, Dr. Scott, an equally qualified physician, listed numerous possible etiologies for claimant's radiological findings (tuberculosis, MAC, fungal disease, histoplasmosis, sarcoidosis, silicosis, and coal workers' pneumoconiosis). Because the administrative law judge found that Dr. Scott's interpretations of the August 23, 2008 and November 13, 2008 x-rays were equivocal, he accorded greater weight to Dr. DePonte's interpretations of these x-rays, and found that they were positive for complicated pneumoconiosis. *Id.* The administrative law judge, therefore, found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

## **The Board's Decision and Order**

Pursuant to employer's appeal, the Board rejected employer's contention that the administrative law judge erred in finding that the October 31, 2007 x-ray is positive for complicated pneumoconiosis.<sup>4</sup> *Johnston*, slip op at 5. However, the Board agreed with employer that the administrative law judge erred in rejecting, as equivocal, Dr. Scott's interpretations of claimant's August 23, 2008 and November 13, 2008 x-rays. *Id.* at 5-6. The Board noted that while Dr. Scott listed numerous possible etiologies for claimant's radiological findings, the doctor specifically marked the ILO classification forms as showing no parenchymal abnormalities consistent with pneumoconiosis, which would be classified as Category A, B or C. *Id.* at 5. The Board further noted that Dr. Scott unequivocally opined that the August 23, 2008 and November 13, 2008 x-rays did not show any large opacities for complicated pneumoconiosis. *Id.* at 6. The Board, therefore, vacated the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remanded the case for further consideration.

## **The Administrative Law Judge's Decision and Order on Remand**

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<sup>4</sup> Employer did not challenge the administrative law judge's finding that the conflicting readings of the March 5, 2008 x-ray were in equipoise.

On remand, the administrative law judge reconsidered the probative value of Dr. Scott's x-ray interpretations in light of the Board's directive. Decision and Order on Remand at 2-6. The administrative law judge clarified his earlier findings, explaining that he accorded less weight to Dr. Scott's negative interpretations of the August 23, 2008 and November 13, 2008 x-rays because there was "absolutely no medical evidence in any of the medical records . . . to support any of the 'mystery diagnoses' speculated upon." *Id.* at 3. The administrative law judge, therefore, credited Dr. DePonte's positive interpretations of the August 23, 2008 and November 13, 2008 x-rays, over Dr. Scott's negative interpretations. *Id.* at 3-6.

## Discussion

Employer argues that the administrative law judge failed to follow the Board's directive to reconsider the x-ray evidence on remand. Employer asserts that the administrative law judge, on remand, instead improperly adopted the views put forth by Judge McGranery in her dissenting opinion. We disagree. Although the administrative law judge, on remand, referenced statements from Judge McGranery's dissenting opinion, he also provided clarification of his earlier findings. Hence, we hold that the administrative law judge complied with the Board's directive to reconsider the x-ray evidence. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985).

Moreover, we find no merit to employer's argument that the administrative law judge erred in according less weight to Dr. Scott's interpretations of claimant's August 23, 2008 and November 13, 2008 x-rays. On remand, the administrative law judge clarified his analysis of Dr. Scott's x-ray interpretations. The administrative law judge explained that he had not accorded less weight to Dr. Scott's x-ray interpretations because it was unclear whether Dr. Scott had diagnosed complicated pneumoconiosis. The administrative was aware that Dr. Scott interpreted the x-rays in question as negative for complicated pneumoconiosis. Rather, the administrative law judge found that Dr. Scott's x-ray interpretations were entitled to less weight because the doctor's diagnosis constituted speculation on possible etiologies for the abnormalities in claimant's lungs without any corroborating support in the record for the doctor's alternative diagnoses.<sup>5</sup>

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<sup>5</sup> We reject employer's assertion that Dr. Scott's alternative diagnoses of granulomatous disease, histoplasmosis, or tuberculosis have support in the record from Dr. Scatarige's March 5, 2008 x-ray reading, and from Dr. Hippensteel's medical opinion. Employer's Reply Brief at 12. Contrary to employer's argument, the administrative law judge properly found that the conflicting readings of the March 5, 2008 x-ray, including Dr. Scatarige's reading, were in equipoise, and thus neither established, nor disproved, the existence of complicated pneumoconiosis. Decision and Order at 17. Employer erroneously suggests that the mere fact that the March 5, 2008 x-

The administrative law judge, therefore, permissibly found that Dr. Scott's interpretations of the August 23, 2008 and November 13, 2008 x-rays were insufficient to support a finding that the opacities on the x-rays were due to something other than pneumoconiosis. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87, 24 BLR 2-269, 2-286-87 (4th Cir. 2010); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

### **Section 718.304(c)**

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

### **The Administrative Law Judge's Decision and Order**

In his initial decision, the administrative law judge considered the medical opinions of Drs. Rasmussen, Castle, and Hippensteel.<sup>6</sup> While Dr. Rasmussen diagnosed complicated pneumoconiosis, Drs. Castle and Hippensteel opined that claimant does not suffer from the disease. The administrative law judge found that Dr. Rasmussen's diagnosis of complicated pneumoconiosis was reasoned and documented. Decision and Order at 19. To the contrary, the administrative law judge found that Dr. Castle's opinion

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ray evidence was insufficient to establish the existence of complicated pneumoconiosis somehow confirms that claimant had, or has, granulomatous disease, histoplasmosis, or tuberculosis. Moreover, as Dr. Hippensteel explicitly relied on Dr. Scott's interpretations of claimant's August 23, 2008 and November 13, 2008 x-rays to support his conclusion that claimant likely suffers from granulomatous disease, employer's argument that Dr. Hippensteel's opinion supports Dr. Scott's x-ray interpretations is circular, at best. Employer's Brief at 12; Employer's Exhibits 13, 15.

<sup>6</sup> The administrative law judge also considered the medical opinions of Drs. Baker and Agarwal. The administrative law judge found that Dr. Baker's diagnosis of complicated pneumoconiosis had "little probative value" because it was based on an x-ray interpretation that was not contained in the record. Decision and Order at 19. The administrative law judge found that Dr. Agarwal's diagnosis of complicated pneumoconiosis "add[ed] little to the existing record" because it was based solely upon an x-ray interpretation. *Id.*

was entitled to little weight because it was “entwined with [inadmissible] evidence.” *Id.* at 19-20. The administrative judge also rejected Dr. Hippensteel’s opinion, that claimant does not suffer from complicated pneumoconiosis, because he found it deficient in several respects. *Id.* at 20. The administrative law judge, therefore, found that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

### **The Board’s Decision and Order**

Pursuant to employer’s appeal, the Board affirmed the administrative law judge’s finding that Dr. Rasmussen’s opinion was reasoned and documented as to the existence of complicated pneumoconiosis. *Johnston*, slip op. at 6-7. The Board further affirmed the administrative law judge’s determination to accord Dr. Castle’s opinion less weight at 20 C.F.R. §718.304(c). *Id.* at 7-8. The Board, however, held that the administrative law judge failed to adequately explain his determination to discount Dr. Hippensteel’s opinion, and, therefore, failed to satisfy the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *Id.* at 8-10. The Board, therefore, vacated the administrative law judge’s credibility determination regarding Dr. Hippensteel’s opinion, and remanded the case for further consideration.

### **The Administrative Law Judge’s Decision and Order on Remand**

On remand, the administrative law judge reconsidered Dr. Hippensteel’s opinion, that claimant does not suffer from complicated pneumoconiosis, and explained his reasons for discrediting it, in accordance with the Board’s instructions. The administrative law judge found that Dr. Hippensteel provided no support for his opinion that claimant might have granulomatous disease instead of complicated pneumoconiosis. Decision and Order on Remand at 14. The administrative law judge also accorded less weight to Dr. Hippensteel’s opinion because it was based upon Dr. Scott’s interpretations of the August 23, 2008 and November 13, 2008 x-rays, evidence that the administrative found unreliable. *Id.* The administrative law judge, therefore, found that the medical opinion evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

### **Discussion**

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Employer specifically argues that the administrative law judge erred in his consideration of Dr. Hippensteel’s opinion. We disagree. In light of our decision to affirm the administrative law judge’s determination to discredit Dr.

Scott's negative interpretations of claimant's August 23, 2008 and November 13, 2008 x-rays, we affirm the administrative law judge's finding that Dr. Hippensteel's opinion was based upon discredited evidence, and was, therefore, entitled to less weight. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

The administrative law judge additionally reconsidered, as instructed, his earlier finding that Dr. Hippensteel's opinion was entitled to less weight because claimant's medical records contain no mention of granulomatous disease or histoplasmosis. Decision and Order on Remand at 13-14. The administrative law judge acknowledged employer's argument that, "the fact that the [c]laimant was never treated for granulomatous disease does not necessarily mean he did [or does] not have granulomatous disease," but found that, while true, this did not constitute evidence in support of Dr. Hippensteel's conclusions. Decision and Order on Remand at 13. Moreover, the administrative law judge explained, Dr. Hippensteel's opinion was contrary to the preponderance of the credible x-ray evidence, which established complicated pneumoconiosis. *Id.* at 14. Thus, the administrative law judge permissibly concluded that Dr. Hippensteel's opinion, that claimant likely has granulomatous disease and not complicated pneumoconiosis, is unsupported by the evidence of record and is unpersuasive. *See Cox*, 602 F.3d at 286-87, 24 BLR at 2-286-87; *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 10.

Because the administrative law judge provided valid reasons for discounting Dr. Hippensteel's opinion, we need not address employer's remaining arguments regarding the weight the administrative law judge accorded his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We, therefore, affirm the administrative law judge's findings, at 20 C.F.R. §718.304(c), that Dr. Hippensteel's opinion does not detract from the probative value of the positive x-ray evidence for complicated pneumoconiosis, and that the credible medical opinion evidence supports the existence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 286-87, 24 BLR at 2-286-87; *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-155.

In concluding, on remand, that claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge complied with the Board's instructions and considered the entire record and weighed together all of the relevant evidence, including the x-rays, the medical opinion evidence,

and claimant's medical treatment records.<sup>7</sup> *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Because it is supported by 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.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits 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

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<sup>7</sup> In so doing, the administrative law judge specifically incorporated his prior findings, to the extent they were not disturbed by the Board. Decision and Order on Remand at 14.