

BRB No. 09-0338 BLA

EUGENE HURLEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
VIRGINIA CREWS COAL COMPANY)	DATE ISSUED: 01/25/2010
)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson Lefler & Associates), Princeton, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West 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 (06-BLA-6172) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) 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 at least seventeen years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and that the complicated pneumoconiosis arose out of claimant’s coal mine employment pursuant to 20 C.F.R.

§718.203(b). The administrative law judge, therefore, found that claimant was entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, and awarded benefits on the claim.

On appeal, employer argues that the administrative law judge's finding of complicated pneumoconiosis violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) and 33 U.S.C. §919(d), because the administrative law judge failed to provide the reasons and bases for his finding of complicated pneumoconiosis. Employer also argues that the medical evidence does not support the administrative law judge's finding of complicated pneumoconiosis. Additionally, employer asserts that the administrative law judge improperly substituted his own opinion for that of the medical experts in weighing the evidence on the issue of complicated pneumoconiosis.¹ In response, claimant asserts that the administrative law judge's decision awarding benefits should be affirmed. The Director, Office of Workers' Compensation Programs, has declined to file 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.² 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

¹ The administrative law judge's finding that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), based on his length of coal mine employment, is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

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 which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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 which 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 (4th Cir. 1999). 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. Rather, in determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 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); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

In finding that complicated pneumoconiosis was established, the administrative law judge considered the x-ray, biopsy, CT scan, and medical opinion evidence. The administrative law judge first determined that the x-ray evidence failed to establish complicated pneumoconiosis pursuant to Section 718.304(a), based on the preponderance of negative readings by the best qualified physicians of record. Specifically, the administrative law judge credited the negative readings of Drs. Wheeler, Wiot and Meyers, over the positive readings of Drs. Rasmussen and Ahmed, because Drs. Wheeler, Wiot and Myers were all B readers and Board-certified radiologists, while only Dr. Ahmed was a B reader and Board-certified radiologist and Dr. Rasmussen was a B reader. The administrative law judge also noted that he credited the readings of Drs. Wheeler, Wiot and Meyers over the readings of Drs. Rasmussen and Ahmed because Drs. Wheeler, Wiot and Meyers were all “long-standing medical school professors and have published extensively on pulmonary radiology.” Decision and Order at 4. Further, the administrative law judge noted that, “[m]ost important, Dr. Wiot has served on the American College of Radiology Task Force on Pneumoconiosis since 1969, and was the consulting radiologist to the committee which wrote the pathology standards for diagnosing coal workers’ pneumoconiosis.” *Id.*

Turning to the biopsy evidence at Section 718.304(b), the administrative law judge found that it consisted of one report from Dr. Patel, claimant's treating physician and pulmonologist, regarding the October 18, 2005 biopsy of claimant's lung. The administrative law judge, however, found that the biopsy evidence was of little value because Dr. Patel did not have either the cytology or biopsy report when he wrote his opinion regarding the findings of claimant's biopsy procedures. Accordingly, the administrative law judge found that the biopsy evidence had no probative value and that complicated pneumoconiosis was not established at Section 718.304(b).

Finally, the administrative law judge considered the "other evidence" at Section 718.304(c), which he concluded consisted of the CT scan evidence and the medical opinion evidence. The administrative law judge accorded little weight to the reports³ of Dr. Repsher, dated August 27, 2007, and Dr. Spagnolo, dated September 2, 2007, who both found that claimant did not have complicated pneumoconiosis because they relied primarily on the negative x-ray evidence, without considering the positive CT scan evidence or the opinion of Dr. Patel, claimant's treating physician and pulmonologist, who found complicated pneumoconiosis.

Instead, the administrative law judge accorded determinative weight to the CT scan readings of Dr. Groten, a Board-certified radiologist, who read the January 31, 2007 and the December 19, 2005 CT scans as positive for complicated pneumoconiosis and the CT scan reading of Dr. Patel, the treating physician and pulmonologist, who was also a Board-certified radiologist, and who read the September 14, 2005 CT scan as showing complicated pneumoconiosis. The administrative law judge found that Dr. Groten's January 31, 2007 CT scan reading established complicated pneumoconiosis at Section 718.304(c) because Dr. Groten opined that the masses seen on the CT scan "would be easily seen as greater than 1 cm in diameter on a standard chest x-ray." Claimant's Exhibit 4; Decision and Order at 5. The administrative law judge further noted that the finding of complicated pneumoconiosis on this CT scan was buttressed by the fact that all of the CT scan readings showed complicated pneumoconiosis and at least two of the five x-rays of record were read as positive for complicated pneumoconiosis.⁴ Given the

³ The administrative law judge also accorded little weight to Dr. Rasmussen's opinion diagnosing complicated pneumoconiosis based on his February 27, 2006 examination, because it was, in fact, based on his positive x-ray reading, which was outweighed by the negative x-ray readings of better-qualified physicians. Decision and Order at 5.

⁴ The administrative law judge acknowledged that the presence of complicated pneumoconiosis was not established at 20 C.F.R. §718.304(a) based on the preponderance of the x-ray evidence that was read as negative for complicated pneumoconiosis. The administrative law judge noted, however, that at least two x-rays

consistency of the CT scan evidence on the existence of complicated pneumoconiosis, and the absence of contrary CT scan evidence, the administrative law judge concluded that the positive CT scan evidence in this case was more probative of the presence of complicated pneumoconiosis than the preponderance of the negative x-ray evidence. Accordingly, the administrative law judge found complicated pneumoconiosis established at Section 718.304(c), based on the CT scan evidence.

Employer contends, however, that the administrative law judge erred in crediting the CT scan evidence over the x-ray evidence, as the administrative law judge failed to explain why he believed that CT scan evidence was more probative than x-ray evidence regarding the existence of complicated pneumoconiosis. Employer further contends that there is no medical evidence in the record showing that CT scan evidence is more probative than x-ray evidence regarding the existence of complicated pneumoconiosis. These arguments are rejected.

The administrative law judge fully weighed the x-ray evidence as well as the CT scan evidence before concluding that, in this case, the latter was more probative of the existence of complicated pneumoconiosis. The administrative law judge accurately referenced employer's hearing stipulation to the validity or acceptability of the CT scan as a method of diagnosing pneumoconiosis. Decision and Order at 5 n.8. Employer did not contend that the administrative law judge erred in summarizing employer's stipulation. Nor, contrary to employer's contention, did the administrative law judge find that CT scan evidence is more probative *per se* than x-ray evidence regarding the existence of complicated pneumoconiosis. Rather, the administrative law judge permissibly assigned the CT scan evidence more determinative weight than the x-ray evidence in this case because the three CT scans of record were consistent as to the existence of complicated pneumoconiosis. The administrative law judge further noted that the CT scan evidence was buttressed by two x-rays that were read as positive for complicated pneumoconiosis and, the opinion of Dr. Patel, claimant's treating physician and pulmonologist, who found the presence of complicated pneumoconiosis. Contrary to employer's argument, therefore, the administrative law judge did not rely solely on the CT scan evidence to the exclusion of the other evidence in finding complicated pneumoconiosis established at Section 718.304(c). Rather, he properly reviewed all the relevant evidence and gave adequate reasons for finding the CT scan evidence to be the most probative in this case. *See Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002).

that were read as positive for complicated pneumoconiosis, supported the CT scan evidence, showing the presence of complicated pneumoconiosis. Decision and Order at 5.

Employer next contends that the administrative law judge erred in rejecting the medical reports of Drs. Repsher and Spagnolo, who found that claimant did not have any evidence of simple or complicated pneumoconiosis. Employer asserts that the administrative law judge erred in rejecting these opinions on the grounds that they were based on only negative x-ray evidence and the physicians did not consider the positive CT scan evidence or Dr. Patel's opinion. Employer asserts that the administrative law judge erred because Drs. Repsher and Spagnolo, in fact, relied on the totality of the evidence. Employer's Brief at 7-8. This argument is rejected.

Employer contends that the opinions of Drs. Repsher and Spagnolo were not based solely on the x-ray evidence, as they were based on a review of the opinion of Dr. Rasmussen, as well as the x-ray evidence. Employer's Brief at 8. Employer does not, however, contend that these physicians' opinions were also based on a review of the CT scan evidence or Dr. Patel's opinion. An administrative law judge may reject an opinion that lacks a complete picture of the miner's health history, or is based on insufficient support. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *see also Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-587, 2-606 (4th Cir. 1999); *Ellison v. Ranger Fuel Corp.*, 73 F.3d 357, 20 BLR 2-125 (4th Cir. 1995); *Allen v. Mead Corp.*, 22 BLR 1-63, 1-67 n.7 (2000); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8, 1-12 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987). Accordingly, since the opinions from Drs. Repsher and Spagnolo, ruling out complicated pneumoconiosis, failed to take into account the positive CT scan evidence and the opinion of Dr. Patel, claimant's treating physician and pulmonologist, which found the presence of complicated pneumoconiosis, the administrative law judge's reason for discounting the medical opinions of Drs. Repsher and Spagnolo was rational. *See Consolidation Coal Co. v. Director, OWCP [Held]*, 314 F.2d 184, 22 BLR 2-564 (4th Cir. 2002); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

Finally, employer asserts that the credited medical opinion of Dr. Patel is insufficiently reasoned or documented to support a diagnosis of complicated pneumoconiosis and, further, that the administrative law judge's inference that Dr. Patel's diagnosis of complicated pneumoconiosis was based on the CT scan evidence is an unsupported "guess." Employer's Brief at 9-10. In support of its argument, employer contends that claimant's October 2006 hospital record failed to "affirmatively diagnose" complicated pneumoconiosis. Employer's Brief at 9; Claimant's Exhibit 8. Therefore, employer argues that Dr. Patel's subsequent notation of July 18, 2006, that claimant "carries the diagnoses of diabetes and complicated pneumoconiosis," Claimant's Exhibit 6, has no basis in his office notes. Additionally, employer argues that there is no "direct evidence" of record that Dr. Patel read the September 14, 2005 CT scan. Employer asserts that the administrative law judge erred in crediting the hospitalization record,

which contained the September 14, 2005 CT scan, to support a finding of complicated pneumoconiosis.

Dr. Patel reviewed claimant's medical records and obtained current medical data for claimant's bronchoscopy, performed on October 18, 2005. Claimant's Exhibit 9. The Princeton Community Hospital [PCH] pre-admission bronchoscopy hospital record dated October 11, 2005, showed a chief complaint of "lung mass, getting bigger" and reflected: "patient is carrying a diagnosis of severe chronic obstructive pulmonary disease." Claimant's Exhibit 8. Dr. Patel's report includes a physical examination and radiological and laboratory data, including a CT scan showing an increasing lung mass:

CT scan of chest on [September 14, 2005] at PCH: Severe complicated pneumoconiosis. There is increase in the size of the left lower lobe lung mass compared to the previous CT scan of the chest, which was done in February and also May 2004. Malignancy cannot be ruled out. Admission Impression: 1. Increase in size of left lower lung mass – rule out carcinoma of the lung. It very well could be from pneumoconiosis also will schedule bronchoscopy.

Id.

On July 18, 2006, Dr. Patel treated claimant for "follow-up of discharge for acute myocardial infarction, COPD (chronic obstructive pulmonary disease) and pneumoconiosis" noting as history that "[C]laimant carries the diagnoses of diabetes and complicated pneumoconiosis," and concluding that "[c]omplicated pneumoconiosis/COPD appears stable at this time." Claimant's Exhibit 6. Dr. Patel's records also include pulmonary function testing performed on May 16, 2006, showing moderate COPD, arterial blood gas testing of February 26, 2007, Claimant's Exhibit 7, and a CT scan performed by Dr. Groten on January 31, 2007, on Dr. Patel's referral. Dr. Groten compared his CT scan of January 31, 2007, with a previous CT scan of December 19, 2005, and concluded: "Findings consistent with complicated pneumoconiosis are again noted. Large conglomerate masses [measuring 8.1 x 6.3cm. and 6.4 x 3.9cm.] are again identified bilaterally which appear essentially unchanged in size...both masses would be easily seen as greater than 1 cm. in diameter on a standard chest x-ray." Claimant's Exhibits 3, 4. The administrative law judge concluded: "It is Dr. Patel's opinion that the Claimant suffers from complicated pneumoconiosis, apparently based on the CT scan evidence." Decision and Order at 6.

We conclude that employer's arguments regarding Dr. Patel's opinion are without merit. Substantial evidence supports the administrative law judge's inference that Dr. Patel's diagnosis of complicated pneumoconiosis was based on the CT scan evidence. As claimant's treating physician and pulmonologist, Dr. Patel reviewed claimant's history,

conducted objective pulmonary function and arterial blood gas testing, and ordered Dr. Groten's CT scan. Further, employer's assertion that the record contains no evidence that Dr. Patel actually read the September 14, 2005 CT scan is unavailing, since a rational construction of Dr. Patel's office notes indicates that he reviewed the record. *See* Claimant's Exhibits 3, 4, 6, 8; Decision and Order at 6. Moreover, the documentation comprising Dr. Patel's medical report included the January 31, 2007 CT scan he ordered from Dr. Groten, who diagnosed complicated pneumoconiosis. Contrary to employer's assertion, therefore, the administrative law judge's decision demonstrates that he fully reviewed the medical evidence and drew reasonable inferences. Accordingly, the administrative law judge's reliance on the opinion of Dr. Patel, claimant's treating physician and pulmonologist, who reviewed his medical records and objective testing for a period of years, represents a rational exercise of the administrative law judge's discretion to resolve evidentiary conflicts, and accords with law. Decision and Order at 6; 20 C.F.R. §718.104(d); *Held*, 314 F.2d at 184, 22 BLR at 2-564; *see Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *accord Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Church*, 20 BLR at 1-112. Moreover, Dr. Patel's consistent and uniform assessment of claimant's condition over time provides a proper and rational basis for crediting his evidence over that of Drs. Spagnolo and Repsher, *see Ellison*, 73 F.3d at 357, 20 BLR at 2-128. The Board will not substitute its inferences for those of the administrative law judge. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). We therefore reject employer's argument that Dr. Patel's diagnosis of complicated pneumoconiosis was either improperly characterized, or inadequately supported.

We also reject employer's assertion that the administrative law judge found "that the CT scan evidence, standing alone, is sufficient to establish that [c]laimant has complicated pneumoconiosis." Employer's Brief at 5. Instead, the administrative law judge reasonably credited Dr. Patel's diagnosis of complicated pneumoconiosis, noted that at least two of the x-rays supported the CT scan evidence and concluded: "Having considered *all* of the evidence relevant to determining whether Claimant has complicated pneumoconiosis, I give the greatest weight to Dr. Groten's CT scan interpretations. Therefore, I find that the Claimant has complicated pneumoconiosis." (emphasis added). Decision and Order at 6.

The administrative law judge is obligated to weigh all of the evidence relevant to this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and render rational findings of fact. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Melnick*, 16 BLR at 1-33-34; *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). Our review indicates that he has done so, because his decision adequately comports with the requirements of the APA, and

substantial evidence supports his determination that the existence of complicated pneumoconiosis is established under Section 718.304. It is therefore affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge