

BRB No. 05-0154 BLA

BENNIE D. HARRIS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
JEWELL SMOKELESS COAL)	DATE ISSUED: 10/27/2005
CORPORATION)	
)	
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 Stephen L. Purcell, Administrative Law Judge United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (04-BLA-5325) of Administrative Law Judge Stephen L. Purcell 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 found, based on employer's concession and the evidence of record, that claimant established a coal mine employment history of twenty-three years. The administrative law judge also found that the x-ray, biopsy, and medical opinion evidence established the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1), (2) and (4). The administrative law judge further determined that claimant was entitled to the presumption that his pneumoconiosis

arose out of coal mine employment pursuant to the presumption found at 20 C.F.R. §718.203(b). Additionally, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis arising out of coal mine employment, and was, therefore, sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Decision and Order at 11-13. The administrative law judge, therefore, found that even though the evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), claimant nevertheless established entitlement to benefits because he had established that he was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Decision and Order at 14-17. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption. Claimant responds, urging affirmance of the decision below. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.¹

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹ We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, the finding that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2) and (4), the determination that such pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and the finding that the evidence of record was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, creates an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis if (A) an x-ray of the miner's lungs show at least one opacity greater than one centimeter in diameter; (B) a biopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). In *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, went on to state that although the clauses in (A), (B), and (C), provide three different ways to establish the existence of complicated pneumoconiosis for purposes of invoking the irrebuttable presumption, the clauses were intended to describe a single, objective condition. Thus, the court stated that, in applying the standards set forth in each prong, equivalency determinations must be performed to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. The court further stated that because prong (A) sets out an entirely objective scientific standard, *i.e.*, an opacity on an x-ray greater than one centimeter, x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Scarbro*, 220 F.3d 250, 22 BLR 2-93. In addition, in determining whether complicated pneumoconiosis has been established, the administrative law judge must in every case review the evidence under each prong and must also look at all of the relevant evidence presented. *Scarbro*, 220 F.3d 250, 22 BLR at 2-93; *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).

In finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304 in this case, the administrative law judge found that there was no x-ray evidence of complicated pneumoconiosis. Turning to the CT scan and biopsy evidence, which the administrative law judge found to be the "most probative evidence," the administrative law judge concluded that the biopsy evidence established the existence of complicated pneumoconiosis based on Dr. Ferguson's diagnosis of a coalesced area of induration measuring 1.7 centimeters by 5 centimeters by 3 centimeters, Director's Exhibit 12, even though Dr. Ferguson failed to answer the question of whether the "largest individual area of in duration" measuring 1.7 centimeters would appear as a one-centimeter opacity on x-ray. The administrative law judge stated that there was no credible evidence to conclude that the 1.7 centimeter nodule seen on biopsy would not equate to a 1.0 centimeter opacity on chest x-ray. Decision and Order at 12, 13. The administrative law judge further found that Dr. Scott's CT scan interpretation which found a large irregular density or mass measuring 5 centimeters by 2 centimeters closely correlated with Dr. Ferguson's measurement of a 1.7 centimeter by 5 centimeters by 3 centimeters lung tissue mass.

Regarding Dr. Tomashefski's review of the biopsy evidence and diagnosis of nodules measuring 0.5 centimeter to 1.1 centimeter, Director's Exhibit 32, the administrative law judge noted Dr. Tomashefski specifically ruled out the presence of complicated pneumoconiosis because "none of the macroadules [sic] exceeded two centimeters in greatest dimension." Decision and Order at 12. Citing *Blankenship*, 177 F.3d 240, 22 BLR 2-554, the administrative law judge discounted Dr. Tomashefski's opinion that the miner did not have complicated pneumoconiosis for the reason that none of the nodules seen on biopsy were two centimeters in diameter because the court in *Blankenship* held that even though the medical community has determined that a lesion found on biopsy must measure two centimeters in diameter in order to support a finding of complicated pneumoconiosis, it would not mandate the use of a 2 centimeters measurement in order to determine the existence of complicated pneumoconiosis. Considering the CT scan evidence, the administrative law judge found that Dr. McSharry's opinion that the solid-appearing lesion in the right upper lobe, was not pneumoconiosis, but might be cancer or a scar from infection, Director's Exhibit 31, was entitled to little weight because the biopsy evidence had ruled out cancer and had established the existence of pneumoconiosis. Decision and Order at 11. Similarly, the administrative law judge discounted Dr. Scott's CT scan opinion finding a five centimeters by two centimeters mass in the upper lung, which was a mass of granulomatous, fibrous disease, or cancer, not a large opacity and not pneumoconiosis, because it had been "proven incorrect by the biopsy evidence." Decision and Order at 11. In addition, the administrative law judge gave little weight to Dr. Rasmussen's opinion that claimant suffered from complicated pneumoconiosis, Claimant's Exhibit 1, because it was based on the biopsy finding of the 1.7 centimeter mass, but the physician did not state whether such a finding would equate to a least 1.0 centimeter on x-ray. Decision and Order at 13. The administrative law judge accorded little weight to Dr. Fino's opinion that claimant did not suffer from complicated pneumoconiosis, Employer's Exhibits 1, 5, because he found Dr. Fino's testimony to be vague and lacking in detail. Decision and Order at 12. Lastly, the administrative law judge found Dr. Hippensteel's opinion, that claimant did not have complicated pneumoconiosis, entitled to little weight as the physician opined that a lesion had to be at least 2 centimeters in diameter to qualify as complicated pneumoconiosis. Decision and Order at 12-13; *Blankenship*.

Considering the above evidence as a whole, the administrative law judge concluded that Dr. Ferguson's biopsy finding of 1.7 centimeter by 5 centimeters by 3 centimeters lung tissue mass supported by Dr. Scott's CT scan interpretation of a large density or mass of 5 centimeters by 2 centimeters established the existence of complicated pneumoconiosis and that claimant was therefore entitled to the irrebuttable presumption of totally disabling pneumoconiosis because there was no credible evidence to conclude that the 1.7 centimeter nodule seen on biopsy would not equate to a greater than 1 centimeter opacity on x-ray. Decision and Order at 13.

Employer contends that the administrative law judge erroneously shifted the burden of proving the existence of complicated pneumoconiosis from claimant to employer when he found that there was no credible evidence that the 1.7 centimeter nodule seen on biopsy would not equate to a 1.0 centimeter opacity on x-ray. *See* Decision and Order at 12, 13. We agree. Contrary to the administrative law judge's finding, the burden rests with claimant to present medical evidence showing that the 1.7 centimeter nodule seen on biopsy would equate to a greater than one centimeter opacity on x-ray. In this case, while the administrative law judge rejected medical evidence that claimant did not have complicated pneumoconiosis as incredible, the administrative law judge never discussed the medical evidence, if any, which found that the 1.7 centimeter nodule seen on biopsy would equate to a greater than one centimeter opacity on x-ray. In fact, although the administrative law judge relied on Dr. Ferguson's biopsy finding to find the existence of complicated pneumoconiosis established, the administrative law judge admitted that Dr. Ferguson's report did not answer the question of whether Dr. Ferguson's finding of a "[large] individual area of induration" measuring 1.7 centimeter would have appeared as a one-centimeter opacity on x-ray. *Blankenship*, 177 F.3d 240, 22 BLR 2-554; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Likewise, employer contends that the administrative law judge erred in using flawed reasoning to combine CT scan evidence and biopsy evidence to make an equivalency determination under Section 718.304(c) in the absence of medical evidence supporting such an equivalency determination. Employer's Brief at 14. As employer asserts, equivalency determinations must be based on medical evidence. *See Blankenship*, 177 F.3d 240, 22 BLR 2-554; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236 (2003) (Gabauer, J., concurring). Accordingly, we vacate the administrative law judge's finding that the biopsy and CT scan evidence were sufficient to support a finding of complicated pneumoconiosis and remand the case to the administrative law judge for further consideration of the evidence and to determine whether there is medical evidence which supports the administrative law judge's equivalency determination. *Blankenship*, 177 F.3d 240, 22 BLR 2-554; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100.

Employer also contends that the administrative law judge erred in failing to offer valid reasons for discounting the opinions of Drs. Scott, Tomashefski, Fino and Hippensteel, which ruled out the existence of complicated pneumoconiosis. Specifically, employer argues that the administrative law judge erred in rejecting Dr. Tomashefski's biopsy opinion and Dr. Hippensteel's medical opinion because these physicians stated that a mass of two centimeters on biopsy was required to establish complicated pneumoconiosis. While the court in *Blankenship*, recognized that the medical community relied upon a two centimeters standard to constitute complicated

pneumoconiosis, because nodules seen on biopsy or autopsy are generally larger than they appear on chest x-ray, the question before the administrative law judge is whether the opinions establish that the lesion seen on biopsy would show on x-ray as opacities of at least one centimeter. *Blankenship*, 177 F.3d at 243. On remand, therefore, the administrative law judge must reconsider the evidence in light of that standard.

Employer also asserts that the administrative law judge erred in rejecting the opinions of Drs. Scott and Drs. McSharry on CT scan because they found that the existence of pneumoconiosis was not shown when pneumoconiosis had been established by biopsy evidence. Employer argues that such a conclusion constitutes an impermissible substitution of the administrative law judge's medical expertise for those of the physicians. The administrative law judge rejected these opinions because he found that they were contradicted by his finding that the biopsy evidence established the existence of pneumoconiosis. While these opinions contradict the finding of simple pneumoconiosis, their findings regarding the nonexistence of complicated pneumoconiosis are, nonetheless, relevant, especially since the administrative law judge's finding of complicated pneumoconiosis based on biopsy is being vacated and remanded. Accordingly, on remand, the administrative law judge must consider these opinions finding that claimant does not have complicated pneumoconiosis, along with the other relevant evidence. *Lester*, 993 F.2d 1143, 17 BLR 2-114.

Lastly, employer asserts that the administrative law judge erred in according little weight to the conclusion of Dr. Fino, that claimant did not suffer from complicated pneumoconiosis, as the physician's conclusions were unexplained and vague. We agree. While an administrative law judge may, within his discretion, accord less weight to a medical opinion he determines to be unexplained, *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); *see also York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985), review of Dr. Fino's opinions demonstrates that the physician specifically stated why claimant did not suffer from complicated pneumoconiosis and fully explained the bases of his conclusions. Director's Exhibits 1, 5. We thus hold that the administrative law judge's analysis of Dr. Fino's opinions is flawed and conclude that the physician's conclusions must again be considered on remand. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge must sufficiently discuss the evidence and his reasons for crediting it or discrediting it pursuant to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as

incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge