



BRB No. 19-0326 BLA

VERA THOMAS)	
(Widow of HERBERT THOMAS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	
)	DATE ISSUED: 07/30/2020
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Sean P.S. Rukavina and Joseph D. Halbert (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Lystra A. Harris's Decision and Order Awarding Benefits (2017-BLA-05707) rendered on a survivor's claim filed on October 7,

2015,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act).²

The administrative law judge credited the Miner with thirty-eight years of coal mine employment. She found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

On appeal, Employer argues the administrative law judge erred in finding the Miner had complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.³

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 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).

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner's death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh all evidence relevant to

¹ Claimant is the widow of the Miner, who died on April 29, 2015. Director's Exhibit 9.

² The Miner filed five claims for benefits during his lifetime that were all denied. The administrative law judge noted Claimant designated evidence from the Miner's initial claim in this survivor's claim. Decision and Order at 4 n.1.

³ We affirm, as unchallenged on appeal, the administrative law judge's finding the Miner had thirty-eight years of coal mine employment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner's last coal mine employment occurred in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Employer's Exhibit 4 at 12.

the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-ray evidence establishes the Miner had Category A complicated pneumoconiosis, 20 C.F.R. §718.304(a), while the biopsy reports, computed tomography (CT) scans, the Miner's treatment records, and medical opinions do not. 20 C.F.R. §718.304(b), (c); Decision and Order at 15-20. Weighing all of the evidence, the administrative law judge found the contrary evidence of record does not undermine the x-ray evidence of complicated pneumoconiosis, thus entitling Claimant to the irrebuttable presumption of death due to pneumoconiosis. *Id.*

Employer does not challenge the administrative law judge's finding the preponderance of the x-ray evidence establishes Category A complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 16-17. We therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Instead, Employer argues the administrative law judge thereafter improperly shifted the burden of proof to Employer to rule out the presence of complicated pneumoconiosis. Employer's Brief at 5-6. We disagree.

The administrative law judge noted the United States Court of Appeals for the Fourth Circuit's holding that "if the x-ray evidence vividly displays" opacities of complicated pneumoconiosis, its probative force is reduced "only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be" *Cox*, 602 F.3d at 282-284; *Scarbro*, 220 F.3d at 256; Decision and Order at 15-16. Thus, after finding Claimant established complicated pneumoconiosis by a preponderance of the x-ray evidence, the administrative law judge stated she would invoke the presumption "unless there is contrary evidence (typically offered by the employer)" that causes the x-ray evidence to lose force. Decision and Order at 15-16; *see Cox*, 602 F.3d at 282-84 (rejecting the argument that such an analysis shifts the burden of proof to employer). Further, the administrative law judge recognized when weighing the conflicting evidence at prongs (a), (b), and (c), "the burden of proof remains at all times with the claimant." Decision and Order at 15-16. Therefore, the administrative law judge did not shift the burden of proof to Employer.

Employer next argues the administrative law judge substituted her opinion for that of a medical expert when she discredited Dr. Vuskovich's opinion that the Miner did not have complicated pneumoconiosis. Employer's Brief at 6-7. This argument has no merit.

As the administrative law judge noted, Dr. Vuskovich reviewed the Miner's medical records and acknowledged x-rays, CT scans, and the Miner's treatment records revealed a

large mass in his right upper lung dating back to 2001. Decision and Order at 8-9, 18-19; Employer's Exhibits 8, 9. Dr. Vuskovich concluded that this mass was due to slow-growing lung cancer that ultimately caused the Miner's death but was not definitively diagnosed until April 15, 2015, "a few days before [the Miner] died." *Id.* He opined the Miner's treating physicians had mistaken the Miner's lung cancer for complicated pneumoconiosis. Employer's Exhibits 8, 9. Contrary to Employer's argument, the administrative law judge permissibly found the Miner's treatment records do not support the conclusion that the large opacity established by x-ray evidence was due to lung cancer and not complicated pneumoconiosis. See *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 18-20; Employer's Brief at 6-7.

In evaluating the Miner's treatment records, the administrative law judge acknowledged the Miner's treating physicians were concerned about the possibility of lung cancer fourteen years before his death, but his treatment records also include numerous diagnoses of complicated pneumoconiosis. Decision and Order at 18-19. She recognized that the earliest documentation of a large lung mass in the record was an August 14, 2001 x-ray Dr. Manu Patel read as revealing "an ill-defined coin density" two centimeters in diameter in the Miner's right upper lung that is "likely a large opacity of complicated pneumoconiosis." Director's Exhibit 21. She further noted Dr. Al-Asadi thereafter evaluated the Miner at Charleston Area Medical Center. Director's Exhibit 19 at 48-57. Because a January 21, 2002 CT scan revealed a "patchy right upper lobe" and one-centimeter lesion "suggestive of lung cancer," Dr. Al-Asadi ordered a bronchoscopy of the Miner's right upper lung area. *Id.* A March 19, 2002 bronchoscopy and needle aspiration, however, revealed "no malignant cells." *Id.* Thus the administrative law judge found, "[a]lthough [the Miner's] doctors were concerned about the possibility of [lung] cancer, his 2002 bronchoscopy did not show malignancy" at that time. Decision and Order at 18-19.

The administrative law judge further found the Miner's treatment records "continued to [document] changes due to pneumoconiosis." Decision and Order at 19. Specifically, these records include a February 8, 2010 x-ray Dr. Bharat Patel read as showing progressive massive fibrosis in the Miner's right upper lobe consistent with complicated pneumoconiosis. Miner's Claim Director's Exhibit 20 at 25. Dr. Rasmussen read the same x-ray and diagnosed Category A complicated pneumoconiosis, noting the opacity was "slightly greater than in 2001." Miner's Claim Director's Exhibit 14. The Miner underwent treatment at Appalachian Regional Healthcare beginning August 30,

2014,⁵ and was discharged with a diagnosis of minimal pulmonary infiltrate, pleurisy, soft tissue mass in his right upper lobe with calcification, other abnormalities secondary to pneumoconiosis, benign prostatic hypertrophy, hyperlipidemia, and gastroesophageal reflux disease. Director's Exhibit 20.

Finally, the administrative law judge acknowledged the Miner's treatment records in the year before his death revealed the presence of lung cancer.⁶ Decision and Order at 18-19. She was not persuaded, however, that this evidence excluded a diagnosis of complicated pneumoconiosis. *Id.* She noted the Miner "declined further evaluation of these lung lesions, and refused bronchoscopy." *Id.* Although pleural fluid was collected and "confirmed a diagnosis of cancer,"⁷ she found this evidence was insufficient to establish "the etiology of the lung mass itself, as there was never a biopsy performed" and "no autopsy was done." *Id.*

Based on her evaluation of all the relevant evidence, the administrative law judge rationally found the diagnosis of lung cancer contained in the Miner's treatment records and Dr. Vuskovich's opinion do not "necessarily rule out a diagnosis of [complicated] pneumoconiosis, or in other words," do not explain "why these conditions could not co-exist." Decision and Order at 18-19; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Thus substantial evidence supports the administrative law judge's finding that the contrary evidence of record is insufficient to show the Category A opacity established by x-rays is

⁵ Treatment records from this admission include Dr. Bharat Patel's reading of an August 30, 2014 x-ray showing infiltrate in the Miner's left-middle and left-lower lung. Director's Exhibit 20. They also include his reading of an August 30, 2014 CT scan showing a soft tissue mass in the Miner's right upper lung with calcification and a pulmonary nodule in the right upper lobe suspicious for bronchogenic carcinoma. *Id.*

⁶ Specifically, the administrative law judge noted the Miner was admitted to Raleigh General Hospital in February 25, 2015, and diagnosed with "right sided pleural effusion with a right hilar mass/upper lobe mass with obstruction; malignancy was the working diagnosis." Decision and Order at 19; Director's Exhibit 17. Dr. Lintala identified a right hilar and perihilar soft tissue mass consistent with lung cancer on an April 21, 2015 CT scan. Director's Exhibit 17.

⁷ The administrative law judge noted Dr. Amirghassemi "reported that the pleural fluid sample from the sputum culture done on April 13, 2015 showed overall findings indicative of pleural fluid involvement by pulmonary adenocarcinoma," and Dr. Caffrey made similar findings on reviewing this sample and a sample of pleural fluid collected on March 22, 2015. Director's Exhibit 17 at 70; Employer's Exhibit 6.

not there or is due to another lung condition. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Cox*, 602 F.3d at 282-84; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 18-19.

Because the administrative law judge considered all relevant evidence in finding the Miner had complicated pneumoconiosis, we affirm her determination. *See Cox*, 602 F.3d at 283; *Melnick*, 16 BLR at 1-33-34. As Employer raises no further challenge to the administrative law judge's Decision and Order, we affirm her finding that Claimant invoked the irrebuttable presumption and therefore affirm the award of benefits. 20 C.F.R. §718.304.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge