

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 19-0521 BLA

RESSEL L. CLIFTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	DATE ISSUED: 11/20/2020
	)	
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 of J. Alick Henderson, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge J. Alick Henderson's Decision and Order (2014-BLA-05061) rendered on a claim filed pursuant to the Black Lung Benefits

Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on August 21, 2012.<sup>1</sup>

The administrative law judge found Claimant established at least thirty years of underground coal mine employment and the existence of complicated pneumoconiosis. Consequently, he found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding the existence of complicated pneumoconiosis established. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The 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.<sup>2</sup> 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).

### **Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis**

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large 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, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R.

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<sup>1</sup> On November 16, 2017, Administrative Law Judge Tracy Allen Daly issued a Decision and Order Awarding Benefits. Pursuant to Employer's appeal, the Benefits Review Board issued an Order dated October 29, 2018, remanding the case for reassignment to a different administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). *Clifton v. Sea "B" Mining Co.*, BRB No. 18-0130 BLA (Oct. 29, 2018) (Order) (unpub.). District Chief Administrative Law Judge Lee J. Romero, Jr. assigned the case to Administrative Law Judge J. Alick Henderson by Order dated December 18, 2018.

<sup>2</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 2 at 107.

§718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must weigh all evidence relevant to 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, 1-33-34 (1991) (en banc).

The administrative law judge found the analog x-rays under 20 C.F.R. §718.304(a) and digital x-rays under 20 C.F.R. §718.304(c) establish complicated pneumoconiosis, while the medical opinions, Claimant's treatment records, and computed tomography scans do not.<sup>3</sup> 20 C.F.R. §718.304(c); Decision and Order at 6-12. Weighing all the evidence together, he concluded the x-rays outweighed the contrary evidence and found Claimant has complicated pneumoconiosis. Therefore, he found Claimant invoked the irrebuttable presumption. Decision and Order at 11-12. He also found that as Claimant was employed for ten years or more in the coal mines, it is rebuttably presumed his pneumoconiosis arose out of such employment. 20 C.F.R. §718.203(b). After reviewing the relevant evidence, he concluded Employer did not rebut this presumption. Because Claimant established all conditions of entitlement, the administrative law judge awarded benefits.

Employer contends the administrative law judge erred in weighing the x-ray evidence at 20 C.F.R. §718.304(a) and (c) to find Claimant established complicated pneumoconiosis. Employer's Brief at 3-8. Employer's assertions are without merit.

### **X-ray Evidence**

The administrative law judge summarized seven interpretations of three analog x-rays dated October 10, 2012, December 11, 2013, and February 12, 2014, all rendered by physicians dually qualified as B readers and Board-certified radiologists. 20 C.F.R. §718.304(a); Decision and Order at 6-7. Drs. DePonte and Alexander each interpreted the October 10, 2012 x-ray as positive for simple pneumoconiosis and a Category A large opacity, Director's Exhibits 10, 13; in contrast, Dr. Wolfe interpreted the x-ray as positive for only simple pneumoconiosis. Director's Exhibit 16. Dr. Alexander interpreted the December 11, 2013 x-ray as positive for simple pneumoconiosis and a Category A large opacity, while Dr. Halbert interpreted it as positive for only simple pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Alexander identified a Category A large opacity as well as simple pneumoconiosis on the February 12, 2014 x-ray, while Dr. Wolfe read it as positive for only simple pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 4.

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<sup>3</sup> The record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 8.

The administrative law judge also considered four interpretations of two digital x-rays dated April 17, 2013 and December 19, 2013, all rendered by dually-qualified physicians. 20 C.F.R. §718.304(c); Decision and Order at 10. Dr. Alexander interpreted the April 17, 2013 x-ray as positive for simple pneumoconiosis and a Category A large opacity, while Dr. Wolfe interpreted it as positive for only simple pneumoconiosis. Director's Exhibits 17, 19. Dr. DePonte identified a Category A large opacity as well as simple pneumoconiosis on the December 19, 2013 x-ray, while Dr. Wolfe read it as positive for only simple pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 2.

In considering the weight to accord the conflicting x-ray evidence, the administrative law judge considered the physicians' credentials such as their length of radiological experience, academic publications, membership in professional societies, and radiological teaching positions, in addition to their Board certification in radiology and B reader status. Decision and Order at 7-8. The administrative law judge noted Dr. DePonte<sup>4</sup> authored or co-authored three publications, made one presentation, and currently serves on the adjunct clinical faculty of DeBusk College of Osteopathic Medicine. *Id.* at 7. Dr. Alexander<sup>5</sup> was an assistant professor of radiology and nuclear medicine with the

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<sup>4</sup> The administrative law judge further summarized Dr. DePonte's credentials:

Dr. Kathleen DePonte earned her medical degree from Hahnemann Medical College and Hospital in Philadelphia, Pennsylvania in 1980 where she was awarded a Distinction in Medicine. Since that time she completed an internship in internal medicine, and a residency in diagnostic radiology at the North Carolina Baptist Hospital. She is board-certified in diagnostic radiology, and is a certified B reader.

Decision and Order at 7, *referencing* Director's Exhibit 10.

<sup>5</sup> The administrative law judge further summarized Dr. Alexander's credentials:

Dr. Michael Alexander earned his medical degree from New York Medical College in 1978. He completed a residency in diagnostic radiology at the University of California, Irvine, and fellowships in nuclear medicine at the University of North Carolina, nuclear medicine and radiation health services at The Johns Hopkins Hospital, and environmental health sciences at The Johns Hopkins Hospital. Dr. Alexander is board-certified in diagnostic radiology, special competence in nuclear radiology, and in nuclear medicine, diagnostic, and therapeutic. He is also a certified B reader.

University of Maryland Medical System, authored or co-authored four publications, and made five presentations. *Id.* Dr. Wolfe<sup>6</sup> served as chairman of the Radiology Department at UPMC Lee Regional Hospital, currently works at Cambria Somerset Radiology, authored or co-authored four publications, and made two presentations. *Id.* at 7-8. Dr. Halbert<sup>7</sup> was president of several professional societies, sits on the Board of Directors of Pikeville Methodist Hospital, and served as president of its medical staff. *Id.* at 8.

After reviewing their curricula vitae, the administrative law judge observed that all the physicians are dually qualified, have more than three decades of experience, and have excellent credentials. *Id.* at 8. Nevertheless, he accorded “slightly more weight” to the opinions of Drs. DePonte and Alexander based on their additional experience as teachers in the field of radiology and because their interpretations are “consistent with one another.” *Id.* Thus, relying on the interpretations of Drs. DePonte and Alexander, the administrative law judge found all three analog x-rays and both digital x-rays “preponderantly positive

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Decision and Order at 7, *referencing* Director’s Exhibit 13.

<sup>6</sup> The administrative law judge further summarized Dr. Wolfe’s credentials:

Dr. Patrick Wolfe earned his medical degree from the University of Pittsburgh School of Medicine. Dr. Wolfe went on to complete an internship and residency in radiology at the University of Pittsburgh Health Center and received post-doctoral training at Armed Forces Institute of Pathology. Dr. Wolfe is board-certified in radiology and is a certified B reader. From 1998 to 2005, Dr. Wolfe served as the chairman of the Radiology Department.

Decision and Order at 7-8, *referencing* Director’s Exhibit 16.

<sup>7</sup> The administrative law judge further summarized Dr. Halbert’s credentials:

Dr. Dennis Halbert earned his medical degree from the University of Kentucky. There, he was a resident in diagnostic radiology from 1977 to 1981. He became board-certified in diagnostic radiology in 1981 and has been a B reader since 1986. He sat as president of several professional societies, including Pike County Medical Society, Kentucky Medical Society, American College of Radiology, and Radiology Society of North America. Dr. Halbert was also President of Medical Staff at Pikeville Methodist and now sits on the Board of Directors.

Decision and Order at 8, *referencing* Employer’s Exhibit 3.

for complicated pneumoconiosis.” 20 C.F.R. §718.304(a), (c); *Id.* at 8, 10. Weighing all relevant evidence together, the administrative law judge found the x-ray evidence established complicated pneumoconiosis, and the other medical evidence of record did not outweigh that finding. 20 C.F.R. §718.304; Decision and Order at 11-12. Consequently, the administrative law judge awarded benefits.

Employer argues the administrative law judge did not adequately explain his rationale in crediting the interpretations of Drs. DePonte and Alexander over those of Drs. Wolfe and Halbert based on their credentials. Employer’s Brief at 3-8. We disagree. The administrative law judge thoroughly discussed the qualifications of all the physicians and explained that while Drs. Wolfe and Halbert are “impressively credentialed,” he believed Drs. DePonte’s and Alexander’s teaching positions lent more credence to their interpretations. Decision and Order at 8. Because the administrative law judge weighed the x-ray evidence taking into consideration the superior qualifications of each of the physicians, he permissibly accorded determinative weight to the interpretations of Drs. DePonte and Alexander based on their additional credentials. *See generally* 65 Fed Reg. 79920, 79945 (Dec. 20, 2000) (adjudicator should consider any relevant factor in assessing a physician’s credibility), *citing Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993) (the administrative law judge may consider relevant academic qualifications in weighing the x-ray evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 8.

Employer further asserts the administrative law judge improperly shifted the burden of proof to Employer to rule out the presence of complicated pneumoconiosis. Noting the interpretations by Drs. Wolfe and Halbert “clearly state that the x-ray [evidence] showed no parenchymal abnormalities consistent with complicated pneumoconiosis,” Employer argues “it is enough that . . . [Employer] cast doubt as to whether the claimant has complicated pneumoconiosis.” Employer’s Brief at 8-9. We disagree.

The administrative law judge did not shift the burden of proof to Employer. Rather, in finding Claimant met his burden by the preponderance of the evidence, he permissibly found the physicians who diagnosed complicated pneumoconiosis based on the x-ray evidence more credible than the physicians who did not. Employer’s argument thus amounts to a request for the Board to reweigh the x-ray evidence, which we cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge recognized “[C]laimant has the burden of proof in establishing the existence of complicated pneumoconiosis” at 20 C.F.R. §718.304, Decision and Order at 5, and as noted, *supra*, the administrative law judge properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians’ qualifications, and permissibly concluded Claimant satisfied his burden of proof. *See* 20 C.F.R. §§718.202(a)(1), 718.304(a), (c); *see Sea “B” Mining Company v.*

*Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). Thus, we affirm the administrative law judge’s finding that Claimant established complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a), (c).<sup>8</sup>

As Employer raises no further challenge to the administrative law judge’s Decision and Order, we affirm his finding that Claimant invoked the irrebuttable presumption at 20 C.F.R. §718.304. We further affirm, as unchallenged on appeal, the administrative law judge’s finding that Claimant’s complicated pneumoconiosis arose out of his coal mine employment. See 20 C.F.R. §718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

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<sup>8</sup> In any event, the question is not whether Employer’s “physicians cast doubt as to whether the claimant has complicated pneumoconiosis.” Employer’s Brief at 9. It is Claimant’s burden to establish the existence of complicated pneumoconiosis by a preponderance of the evidence, not to remove all doubt. 20 C.F.R. §718.304; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010) (claimant has the burden of proving complicated pneumoconiosis); *Lester v. Director, OWCP*, 993 F.2d 1143, 1146 (4th Cir. 1993) (“The claimant retains the burden of proving the existence of the disease.”).

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

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge