



BRB No. 14-0440 BLA

RANDALL WRISTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2015
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the September 9, 2014 Decision and Order Awarding Benefits (2011-BLA-05345) of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012). This case involves an initial claim filed on February 2, 2010. Director's Exhibit 2. The administrative law judge credited the claimant with nineteen and one quarter years of coal mine employment, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined the claimant suffers from complicated pneumoconiosis and that he is entitled 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 argues the administrative law judge failed to properly consider the evidence as a whole in finding the claimant entitled to the irrebuttable presumption at 20 C.F.R. §718.304. Specifically, employer argues the administrative law judge erred by selectively analyzing the evidence, failing to consider the evidence concerning the lack of a pulmonary impairment, and improperly shifted the burden of proof to employer.<sup>1</sup> Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, elected not to file a substantive response addressing employer's arguments concerning the administrative law judge's finding of complicated pneumoconiosis, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act 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, 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, 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 invocation of the irrebuttable presumption. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c), before determining whether invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 has been established. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010). *See also Gray v. SLC Coal Co.*, 176 F.3d

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<sup>1</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant spent nineteen and one quarter years employed as a coal miner, and suffers from simple coal workers' pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>2</sup> The record reflects claimant's coal mine employment was in West Virginia. Director's Exhibit 3, Hearing Transcript 12-14. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

382, 387, 21 BLR 2-616, 624 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (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).

Under 20 C.F.R. §718.304(a), the administrative law judge considered five interpretations of the claimant's February 15, 2010 analog chest x-ray, where each physician identified the presence of simple pneumoconiosis, and a right hilar mass.<sup>3</sup> The administrative law judge found the x-ray evidence insufficient to establish the presence of complicated pneumoconiosis, but found it shows the claimant suffers from simple pneumoconiosis. 20 C.F.R. §718.304(a). Relevant to 20 C.F.R. §718.304(c)<sup>4</sup>, the administrative law judge considered digital x-ray interpretations, CT scan readings, treatment records, and medical opinions by Drs. Rasmussen, Fino, Repsher, and Gaziano. The administrative law judge found all but one interpretation of the digital x-rays identified a large right hilar mass, but found the evidence did not support a finding of complicated pneumoconiosis as no physician conclusively diagnosed the disease. The administrative law judge further found the CT scan evidence did not establish the presence of complicated pneumoconiosis, but the treatment records of Dr. Porterfield provided a persuasive explanation linking the claimant's right upper lung mass to pneumoconiosis, instead of cancer. Turning to the medical opinion evidence, the administrative law judge credited Dr. Gaziano's diagnosis of complicated pneumoconiosis, and afforded reduced weight to the medical opinions of Drs. Repsher, Fino and Rasmussen. Considering the evidence as a whole, the administrative law judge found Dr. Gaziano's opinion outweighed the contrary evidence of record and establishes that claimant suffers from complicated pneumoconiosis.

Employer argues the administrative law judge erred in selectively analyzing the medical opinion evidence.<sup>5</sup> We disagree. The determination of whether a medical report

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<sup>3</sup> Drs. Meyer, Wiot, and Tarver, dually-qualified Board-certified radiologists and B readers, found the right hilar mass to likely represent a carcinoma. Director's Exhibits 25, 26; Employer's Exhibit 3. Dr. Alexander, a dually-qualified Board-certified radiologist and B reader, found this mass to either represent complicated pneumoconiosis or cancer. Claimant's Exhibit 4. Dr. Rasmussen, a B reader, found claimant to be suffering from complicated pneumoconiosis. Director's Exhibit 13.

<sup>4</sup> The record does not contain any biopsy evidence under 20 C.F.R. § 718.304(b).

<sup>5</sup> Dr. Rasmussen's medical opinion received less weight as his diagnosis is dependent on a chest x-ray which the administrative law judge found to be inconclusive as to the presence of complicated pneumoconiosis. Decision and Order at 26. This finding is affirmed as unchallenged on this appeal. *Skrack*, 6 BLR at 1-711.

is documented and reasoned is committed to the discretion of the administrative law judge. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998). In this case, the administrative law judge permissibly afforded reduced weight to Dr. Repsher's diagnosis of granulomatous disease because Dr. Repsher did not point to any evidence of record showing claimant has suffered from an infectious process.<sup>6</sup> See *Cox*, 602 F.3d 276, 24 BLR 2-269. Employer's assertion that the administrative law judge failed to consider the evidence showing a lack of a disabling impairment is also without merit. A review of the opinions offered by Drs. Repsher and Fino shows neither physician relied on the absence of a disabling impairment as a factor to exclude a diagnosis of complicated pneumoconiosis. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Furthermore, the administrative law judge reasonably found Dr. Fino offered no explanation for his "conclusory" opinion that claimant does not suffer from complicated pneumoconiosis.<sup>7</sup> Decision and Order at 26. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Substantial evidence supports this permissible finding. See *Clark-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

There is also no merit to employer's contention that the administrative law judge improperly placed the burden of proof on employer to demonstrate that claimant does not suffer from complicated pneumoconiosis. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). It is within the administrative law judge's discretion as fact-finder to weigh the credibility of the experts, and to determine the persuasiveness of their opinions. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997). The administrative law judge acted within her discretion in crediting Dr. Gaziano's diagnosis to find the medical opinion

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<sup>6</sup> Dr. Repsher initially diagnosed claimant with probable bronchogenic cancer with metastases to the right hilum and mediastinum. Employer's Exhibit 1. After reviewing additional records, Dr. Repsher eliminated a diagnosis of cancer and found claimant to suffer from probable histoplasmosis or tuberculosis. Employer's Exhibit 7 at 16.

<sup>7</sup> Dr. Fino's April 12, 2012 report is based on his review of medical records wherein the physician found "[t]he majority of chest film readings are positive for simple pneumoconiosis. Therefore, I would make that diagnosis. I would not make a diagnosis of complicated pneumoconiosis." Employer's Exhibit 5. Dr. Fino reviewed additional records and stated in a July 5, 2012 report: "I do not find a CT scan interpretation to suggest any complicated coal workers' pneumoconiosis. Therefore, it is my opinion that [claimant] does have simple pneumoconiosis, but he does not have complicated pneumoconiosis." Employer's Exhibit 8.

evidence establishes that claimant suffers from complicated pneumoconiosis.<sup>8</sup> *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Considering the evidence as a whole, the administrative law judge rationally found that the x-ray and other medical evidence ruled out a diagnosis of lung cancer. *Hicks*, 138 F.3d 524, 21 BLR 2-323. He further found Dr. Gaziano's medical opinion establishes that claimant suffers from complicated pneumoconiosis and therefore invoked the irrebuttable presumption at 20 C.F.R. §718.304. *See also Compton*, 211 F.3d 203, 22 BLR 2-162; Decision and Order at 27.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>8</sup> Dr. Gaziano's July 16, 2012 report is based on a review of medical records wherein the physician found claimant's right lung mass represents complicated pneumoconiosis. Claimant's Exhibit 6. Dr. Gaziano excluded a diagnosis of cancer based on claimant's status as a lifetime nonsmoker, and the stability of claimant's lung mass over the years. The physician eliminated a diagnosis of tuberculosis and histoplasmosis because those diseases are not endemic to where claimant lives, and claimant has shown no signs of these diseases.