

BRB No. 01-0372 BLA

EARNEL P. LUSK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STONECOAL BRANCH MINING,)	
INCORPORATED)	
)	
Employer-Respondent)	DATE ISSUED: _____
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (00-BLA-0546) of Administrative Law Judge Edward Terhune Miller denying benefits on a miner's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended,

¹Claimant is Earnel P. Lusk, the miner, who filed his claim for benefits on May 25, 1999. Director's Exhibit 1.

30 U.S.C. §901 *et seq.* (the Act).² Initially, the administrative law judge credited claimant

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.

with “at least” twenty-four years of coal mine employment. Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b) (2000). Decision and Order at 5-6. However, the administrative law judge also found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 6-7. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to consider whether claimant has established complicated pneumoconiosis and is, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Claimant’s Brief at 4-6. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

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’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Supp.2d 47 (D.D.C. 2001).

³We affirm, as unchallenged on appeal, the administrative law judge’s findings of “at least” twenty-four years of coal mine employment, simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b) (2000), no pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000), and no total respiratory disability at 20 C.F.R. §718.204(c) (2000). 20 C.F.R. §§718.202(a)(1), (a)(2), (a)(4), 718.203(b), 718.204(b); see *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant asserts that the administrative law judge failed to consider the evidence in the record regarding complicated pneumoconiosis. Claimant's Brief at 4-6. In considering the applicability of the presumptions at 20 C.F.R. §718.202(a)(3) (2000), the administrative law judge found the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 (2000) to be unavailable to this claim "because there is no evidence of complicated pneumoconiosis, because the claim was filed after 1981, and because the miner is living." Decision and Order at 5. However, the record does contain evidence of complicated pneumoconiosis which may, if credited, support invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Dr. Patel, a B-reader⁴ and a Board-certified radiologist, found that there were no large opacities, but then diagnosed a 1.2 centimeter coin density in the right upper lung on the October 1, 1999 x-ray.⁵ Director's Exhibit 14. Dr. Aycoth interpreted the December 22, 1999 CT scan as showing complicated pneumoconiosis category A, a faint 1 centimeter right upper lobe nodule, and "scattered rounded and irregular density opacities measuring up to 3 mm. in diameter throughout both lungs." Claimant's Exhibit 1. Dr. Ahmed, a Board-certified radiologist, read the CT scan dated December 22, 1999 and noted that it revealed a "1.5 cm. speculated nodule right upper lobe [that] could be complicated pneumoconiosis A or a neoplasm." Claimant's Exhibit 2. Thus, the administrative law judge incorrectly stated that the record contains no evidence of complicated pneumoconiosis and failed to consider all the relevant evidence in the record as required by the Administrative Procedure Act,⁶ *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Therefore, we vacate the administrative law judge's denial of benefits and instruct the administrative law judge on remand to consider whether claimant has

⁴A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

⁵In his medical report, Dr. Rasmussen noted a right upper lung density on claimant's October 1, 1999 x-ray. Director's Exhibit 12.

⁶Contrary to claimant's contention, Dr. Aycoth's finding of no large opacities and "scattered rounded and irregular density opacities measuring up to 3 mm. in diameter throughout both lungs" on the January 19, 2000 x-ray, Claimant's Exhibit 1, would be insufficient to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Section §718.304(a) requires an x-ray to show an opacity greater than one centimeter in diameter to be interpreted as a reading of complicated pneumoconiosis.

established the existence of complicated pneumoconiosis.

When considering all the relevant evidence regarding complicated pneumoconiosis on remand, Section 718.304 does not simply provide alternative means of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge first to evaluate the evidence in each category and then to weigh the contrary evidence from Section 718.304(a)-(c) together to determine whether or not invocation is established. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *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)(*en banc*). Additionally, in evaluating the CT scan evidence at Section 718.304(c) on remand, we instruct the administrative law judge in accordance with *Scarbro* and *Blankenship* to render an equivalency determination, *i.e.* whether the opacities found on the CT scan interpretations would be equivalent to an opacity greater than one centimeter in diameter on an x-ray. 20 C.F.R. §718.304(c); *Blankenship, supra*; *see also Scarbro, supra*.

If on remand the administrative law judge finds that claimant has failed to establish complicated pneumoconiosis and, therefore, is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, then benefits must be denied because the administrative law judge found that claimant failed to establish total respiratory disability, which we have affirmed as unchallenged, *see n.3, supra*. Claimant cannot be entitled to benefits without a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b) or invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 because total respiratory disability is a requisite element of entitlement under Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and 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

BETTY JEAN HALL
Administrative Appeals Judge