

BRB No. 13-0301 BLA

EVERETT KEITH STILTNER )  
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 Claimant-Respondent )  
 )  
 v. )  
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 OAKWOOD MINING COMPANY ) DATE ISSUED: 02/18/2014  
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 and )  
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 LIBERTY MUTUAL INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford, & Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5909) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed on December 17, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2012) (the Act). The administrative law judge determined that claimant established sixteen years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. In considering the medical evidence, the administrative law judge found that claimant established that he has complicated pneumoconiosis and, therefore, was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge's method of weighing the x-ray evidence was erroneous and that he mischaracterized the evidence in concluding that claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). Employer asserts that the administrative law judge gave undue weight to the positive x-ray evidence and did not properly analyze the contrary CT scan and medical opinion evidence at 20 C.F.R. §718.304(c), prior to finding that claimant satisfied his burden of proof. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

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<sup>1</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked sixteen years in coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

<sup>2</sup> Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

### **I. The X-Ray Evidence – 20 C.F.R. §718.304(a)**

In considering whether claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eight readings of four analog x-rays, dated January 22, 2009, May 29, 2009, October 26, 2011, and November 5, 2011.<sup>3</sup> The record reflects that the January 22, 2009 x-ray was read by Dr. Forehand, a B reader, and by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, as positive for simple and complicated pneumoconiosis, Category B. *See* Director’s Exhibit 11; Claimant’s Exhibit 2. Dr. Wheeler, also a dually qualified radiologist, read the x-ray as negative for simple and complicated pneumoconiosis. Employer’s Exhibit 2. In the “comments” section of the ILO form, Dr. Wheeler noted a “6 [centimeter] partly irregular and partly well[-]defined mass” in the left upper lung and a “4.5 [centimeter] mass” in the medial right upper lung, each of which was “compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis].” *Id.* Dr. Wheeler further stated:

Masses in upper lobes are not large opacities because there are no adjacent background small nodules. Any nodules in lateral periphery right apex and subapical [right upper lobe] are not [coal workers’ pneumoconiosis] because they are unilateral and some probably involve pleura. Also he is very young. NIOSH and MSHA became active controlling dust levels in mines in early 1970s mandated to prevent [coal workers’ pneumoconiosis]. [Coal workers’ pneumoconiosis] gives symmetrical small nodular infiltrates in central mid and upper lungs from which opacities merge.

*Id.* Dr. Wheeler recommended clinical correlation because “an exact diagnosis is needed for proper therapy.” *Id.*

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<sup>3</sup> One reading by Dr. Barrett of the January 22, 2009 x-ray was for quality purposes only. Director’s Exhibit 12.

The May 29, 2009 x-ray was read by Dr. Alexander as positive for simple and complicated pneumoconiosis, Category B, and by Dr. Wheeler as negative for simple and complicated pneumoconiosis. See Claimant's Exhibit 4; Employer's Exhibit 1. In the "comments" section of the ILO form, Dr. Wheeler described a "well-defined 5 [centimeter mass]" in the medial right upper lung, "a partly ill[-]defined 5 [centimeter] mass" in the central left upper lung and a "2x1 [centimeter] mass" in the lateral subapical right upper lung. Employer's Exhibit 1. The rationale he provided for excluding complicated pneumoconiosis, was similar to the rationale in his reading of the January 22, 2009 x-ray. *Id.*

The October 26, 2011 x-ray had only one reading by Dr. Wheeler, which was negative for simple and complicated pneumoconiosis. Employer's Exhibit 4. In the "comments" section of the ILO form, Dr. Wheeler noted a "6 [centimeter] mass" in the left upper lung and "4.5 [centimeter] mass" in the medial right upper lung "compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." *Id.* He stated that the masses were not large opacities for pneumoconiosis because there are "no symmetrical small nodular infiltrates in mid and upper lungs" and he further observed that claimant is relatively young to suspect a diagnosis of complicated pneumoconiosis since high, unprotected dust exposures are required for formation of large opacities of coal workers' pneumoconiosis and such exposures have been illegal for decades. *Id.*

Finally, the November 5, 2011 x-ray was read by Dr. DePonte, a dually qualified radiologist, as negative for simple pneumoconiosis, but as positive for complicated pneumoconiosis, Category B. Claimant's Exhibit 5. Dr. Wheeler read this same x-ray as negative for both simple and complicated pneumoconiosis, but in the "comments" section of the ILO form, he noted a "6 [centimeter] mass" in the left upper lung and a "4.5 [centimeter] mass" in the medial right upper lung. Employer's Exhibit 8. Dr. Wheeler opined that the masses were not large opacities for coal workers' pneumoconiosis for the same reasons he expressed in his reading of the October 26, 2011 x-ray. *Id.*

In resolving the conflict in the x-ray evidence, the administrative law judge considered Drs. Alexander and Wheeler to be equally qualified because they "have the same credentials" and further found that their readings of the January 22, 2009 x-ray "essentially cancel each other out." Decision and Order at 22. However, the administrative law judge determined that the January 22, 2009 x-ray was positive for complicated pneumoconiosis, because "the additional B-reading by Dr. Forehand renders the weight of the evidence regarding this film as positive for the presence of both simple and complicated pneumoconiosis." *Id.* The administrative law judge also found, based on the "essentially equal credentials" of Drs. Alexander and Wheeler, that the May 29, 2009 x-ray was inconclusive for the presence or absence of complicated pneumoconiosis. *Id.* The administrative law judge considered the October 26, 2011 x-ray to be negative

for complicated pneumoconiosis, based on Dr. Wheeler's uncontradicted reading. *Id.* With respect to the November 5, 2011 x-ray, the administrative law judge found that "given the equal credentials of Drs. DePonte and Wheeler . . . the weight of the evidence regarding this x-ray is inconclusive." *Id.*

In considering the x-ray evidence as a whole, the administrative law judge noted:

When each x-ray is viewed separately . . . the x-ray evidence is very close. However, when the x-ray evidence is viewed [in its] entirety, this closeness is revealed as not the product of an equal, or even close to equal split of opinion among experts; but rather, the presence of a lone dissenter. Of the four B-readers who interpreted the Claimant's chest x-ray[s], three of them – Drs. [Forehand], Alexander, and DePonte – in other words, a clear majority, detected the presence of large B-size opacities.

Decision and Order at 22-23. The administrative law judge specifically assigned less weight to Dr. Wheeler's negative readings, based on Dr. Wheeler's rationale that claimant was too young to develop complicated pneumoconiosis because claimant worked in the mines after federal dust standards were implemented. *Id.* at 23. The administrative law judge explained:

Although Dr. Wheeler acknowledged that it was not a given that all coal companies complied with these standards, he theorized that if a coal company did not abide by the laws, then "there would be an epidemic of the complex coal workers' pneumoconiosis." I do not find this reasoning persuasive, as Dr. Wheeler would not have any basis to know the incidence of complicated pneumoconiosis among the various mines that the Claimant worked, nor does such logic seem to take into account the variance of susceptibility to complicated pneumoconiosis among individual miners.

*Id.* (citations omitted). Thus, the administrative law judge concluded that the weight of the credible x-ray readings established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.*

Employer asserts that the administrative law judge erred in resolving the conflict in the evidence, based on "the numerical superiority of the *readers*." Employer's Brief at 5 (emphasis added). Employer contends that Dr. Wheeler's opinion is entitled to the greatest weight because he reviewed multiple x-rays and had "a better overall picture of the radiological evidence." Employer's Brief at 4. We disagree.

Contrary to employer's contention, there is no requirement that an administrative law judge credit the readings of a doctor because he reviewed multiple x-rays. *See J.V.S*

[*Stowers*]. *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78 n. 13 (2008). We also reject employer's argument that the administrative law judge "mischaracterized" the evidence in giving Dr. Wheeler's negative readings less weight. Dr. Wheeler opined that claimant does not have complicated pneumoconiosis, in part, because he found no small background nodules of simple pneumoconiosis. Employer's Exhibits 2, 4. The administrative law judge noted, however, that "three of the four" physicians who read claimant's x-rays identified small nodules in claimant's lungs, of varying profusions, ranging from 0/1, 1/0, and 1/1. *See* Decision and Order at 23. Contrary to employer's argument, the administrative law judge did not mischaracterize Dr. DePonte's 0/1 reading as positive for simple pneumoconiosis. Rather, the administrative law judge observed that a reading of 0/1 is not sufficient to establish the existence of pneumoconiosis under the regulations but "does indicate some evidence of small [opacities] consistent with pneumoconiosis." *Id.*

We also affirm the administrative law judge's decision to accord less weight to Dr. Wheeler's negative x-ray readings in light of the statements he made on the ILO forms, with regard to claimant's age and the imposition of dust control standards in the mines where claimant worked, which undermine the credibility of his opinion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Because the administrative law judge properly analyzed the quality and quantity of the x-ray evidence, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

## **II. Other Evidence – 20 C.F.R. §718.304(c)**

Relevant to 20 C.F.R. §718.304(c), the administrative law judge found that claimant established the existence of complicated pneumoconiosis, based on the medical report of Dr. Forehand. Employer, however, asserts that the administrative law judge did not give proper consideration to the contrary evidence, including the negative CT scan reading by Dr. Wheeler and Dr. Wheeler's deposition testimony. Employer maintains that the administrative law judge erred in rejecting Dr. Wheeler's opinion because it conflicted with the administrative law judge's findings with regard to the x-ray evidence. Employer's assertions of error, however, have no merit.

The administrative law judge noted that there were two readings of a CT scan dated June 15, 2009.<sup>4</sup> Dr. Sefczek, a Board-certified radiologist, read the scan as showing “bilateral upper lobe masses measuring approximately 5.0 x 2.0 [centimeters] in diameter,” consistent with progressive massive fibrosis. Director’s Exhibit 14. Dr. Wheeler also read the June 15, 2009 CT scan and noted masses of six centimeters, one centimeter, and five centimeters, respectively. Employer’s Exhibit 3. The administrative law judge observed that while Dr. Wheeler was “more qualified” than Dr. Sefczek, Dr. Wheeler “employed the same discredited rationale for dissenting on the CT scan evidence as he did on the x-ray evidence.” Decision and Order at 25.

Contrary to employer’s argument, the administrative law judge permissibly assigned little weight to Dr. Wheeler’s negative CT scan reading because Dr. Wheeler provided the same discredited rationale that, given his age, claimant “would not have been exposed to sufficient volumes of dust to cause complicated pneumoconiosis.” Decision and Order at 29; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Additionally, we see no error in the administrative law judge’s overall finding that, while the CT scan evidence, “when viewed in isolation,” does not establish complicated pneumoconiosis, it also “does not rule out complicated pneumoconiosis,” since both Drs. Sefczek and Wheeler identified large masses in claimant’s lungs. Decision and Order at 29; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553.

Turning to the medical opinion evidence,<sup>5</sup> we affirm the administrative law judge’s finding that Dr. Forehand provided a reasoned and documented opinion that claimant has complicated coal worker’s pneumoconiosis. *See Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). The administrative law judge permissibly relied on Dr. Forehand’s opinion, as he found that it was based on multiple factors, including Dr. Forehand’s physical examination of claimant, a positive x-ray

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<sup>4</sup> The administrative law judge noted that there was no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b). Decision and Order at 7.

<sup>5</sup> The record contains three additional medical opinions by Drs. Haver, Gallai, and Dahhan. The administrative law judge gave little weight to the diagnoses of complicated pneumoconiosis by Drs. Haber and Gallai, since they based their opinions solely on the positive x-ray reading by Dr. DePonte. Decision and Order at 27. In addition, the administrative law judge found that employer’s expert, Dr. Dahhan, did not give a definitive opinion as to whether claimant had complicated pneumoconiosis, or another disease process. *Id.* at 28-29. Because employer does not challenge the administrative law judge’s credibility finding with regard to Dr. Dahhan, it is affirmed. *See Skrack*, 6 BLR at 1-711.

reading, Dr. Forehand's review of Dr. Sefczek's CT scan reading, and a series of laboratory tests that were conducted to rule out alternative diagnoses for claimant's condition.<sup>6</sup> See *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 26; Director's Exhibit 11.

We also reject employer's argument that Dr. Wheeler's deposition testimony was not properly considered by the administrative law judge. Although Dr. Wheeler testified that claimant suffers from a disease other than complicated pneumoconiosis, the administrative law judge permissibly determined that his opinion is not credible, in light of the testing conducted by Dr. Forehand, which either eliminates or "reduce[s] the possibility that the masses were a form of histoplasmosis or other types of fungal diseases." Decision and Order at 29; *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge rationally rejected Dr. Wheeler's opinion in this case, as there is no evidence that claimant suffers from any of the alternate diseases identified by Dr. Wheeler as possible etiologies for the masses identified in claimant's lungs. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). We therefore affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

Contrary to employer's contentions in this appeal, the administrative law judge has thoroughly discussed all of the relevant evidence of record, for and against a finding of complicated pneumoconiosis, in reaching his conclusions. See *Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick*, 16 BLR at 1-33-34. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant suffers from complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.*

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<sup>6</sup> Dr. Forehand had claimant undergo a series of laboratory tests to rule out other diseases, which resulted in negative findings for tuberculosis, histoplasma, pigeon serum, *Aspergillus fumigatus*, and other markers. Director's Exhibit 14. During his deposition, Dr. Forehand ruled out sarcoidosis, based on claimant's normal testing for the angiotensin converting enzyme. Employer's Exhibit 6. He also indicated that claimant did not show evidence for cancer. *Id.*

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge