

BRB No. 97-0866 BLA

DENVER BOWEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
ROBERTS & BENNETT MINING)	
)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (United Mine Workers of America), Castlewood, Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1095) of Administrative Law Judge Robert G. Mahony denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed this application for benefits on September 5, 1979. Director's Exhibit 1. After several administrative law judge decisions, the Board affirmed the denial of benefits as supported by substantial evidence.¹ *Bowen v. Roberts & Bennett Mining Co.*, BRB No. 93-2387 BLA (Jul. 22, 1994)(unpub.); Director's Exhibit 64. Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310 and

¹ We discussed fully this claim's procedural history in our previous decision. *Bowen v. Roberts & Bennett Mining Co.*, BRB No. 93-2287 BLA (Jul. 22, 1994)(unpub.), at 1-2.

submitted new evidence. Director's Exhibit 65.

On modification, the administrative law judge found that the evidence of record failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) and concluded that neither a change in conditions nor a mistake in a determination of fact was demonstrated pursuant to Section 725.310. Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge failed to determine whether one of the x-ray readings was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(3)(A) of the Act. 30 U.S.C. §921(c)(3)(A). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.²

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, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the x-ray evidence establishes the existence of complicated pneumoconiosis and that, therefore, the administrative law judge should have invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3)(A).³ Claimant's Brief at 4-5. Section 411(c)(3)(A) 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 when diagnosed by chest x-ray, "yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization." 30 U.S.C. §921(c)(3)(A).

The record contains forty-four readings of ten x-rays. Thirty-four readings were

² We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(2)-(4). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Because claimant raised complicated pneumoconiosis at the hearing and the administrative law judge heard argument on the issue, [1996] Hearing Transcript at 7-9, we reject employer's contention that claimant waived the issue. Employer's Brief at 12.

negative for simple pneumoconiosis, nine were positive for simple pneumoconiosis, and one report classified an x-ray as unreadable. Of the negative readings, thirty were by physicians who are Board-certified radiologists, B-readers, or both, while eight of the positive readings were by similarly qualified physicians. The administrative law judge found that, “the clear majority of the better qualified physicians interpreted the [c]laimant’s x-rays as negative for pneumoconiosis,” and concluded that invocation was not established pursuant to Section 727.203(a)(1). Although the administrative law judge permissibly weighed the x-rays insofar as they related to simple pneumoconiosis, see *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), he failed to discuss a reading as it related to the issue of complicated pneumoconiosis. Dr. Enrico J. Cappiello, a Board-certified radiologist and B-reader, read the December 12, 1995 x-ray as “1/2” for small opacities, but also checked box “A” in block 2C, the “Large Opacities” section of the ILO x-ray classification form. Claimant’s Exhibit 4 at 2. In his narrative report accompanying the x-ray classification form, Dr. Cappiello wrote:

There is an ill-defined 1 cm. right upper lobe nodule . . .
IMPRESSION: Complicated pneumoconiosis category A, 1/2,
p/s. Patient should consult family physician regarding the
above noted 1 cm. ill-defined right upper lobe nodule, as on a
single examination neoplasm⁴ cannot be ruled out.

Claimant’s Exhibit 4 at 1. The record indicates that several equally qualified physicians noted the same right upper lobe nodule as a possible neoplasm but none of them checked any of the “Large Opacity” boxes on the ILO classification form or otherwise diagnosed complicated pneumoconiosis. Director’s Exhibits 74, 77, 78, 88; Claimant’s Exhibits 1, 4; Employer’s Exhibits 1-3. Dr. Cappiello subsequently read the January 29, 1996 x-ray as “1/1” for small opacities, indicated the absence of large opacities by checking “O” in block 2C, and wrote that, “there are no large opacities identified.” Director’s Exhibit 82.

⁴ A neoplasm is any new and abnormal growth of tissue; a tumor. *Dorland’s Illustrated Medical Dictionary* 1024 (25th ed. 1974).

After consideration of the record in light of the arguments raised, we conclude that the administrative law judge's omission constitutes a harmless error that does not require remand. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The primary reason is that Dr. Cappiello's x-ray report, read as a whole, describes a one-centimeter opacity, not an opacity *greater than* one centimeter in diameter as required by the Act for a diagnosis of complicated pneumoconiosis. See 30 U.S.C. §921(c)(3)(A); *Handy v. Director, OWCP*, 16 BLR 1-73, 1-75-76 (1990). Thus, the physician's x-ray report is legally insufficient to invoke the presumption pursuant to Section 411(c)(3)(A). In addition, we note that Dr. Cappiello's impression that the nodule might be a neoplasm was echoed by all other physicians who observed it, none of whom diagnosed complicated pneumoconiosis. Director's Exhibits 74, 77, 78, 88; Claimant's Exhibit 1, 4; Employer's Exhibits 1-3. Furthermore, Dr. Cappiello read another x-ray taken less than two months later as positive for simple pneumoconiosis only and negative for any large opacities.⁵ Director's Exhibit 82. Under these facts, a remand for the administrative law judge to reweigh Dr. Cappiello's reading of the December 12, 1995 x-ray is unnecessary. Therefore, we affirm the administrative law judge's finding pursuant to Section 727.203(a)(1), and his otherwise unchallenged conclusion that no basis for modification was established pursuant to Section 725.310.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁵ Once contracted, both simple and complicated pneumoconiosis are irreversible. *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976).