

BRB No. 13-0259 BLA

EARL E. STANLEY )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 GAMBLE COAL COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 KENTUCKY EMPLOYERS MUTUAL ) DATE ISSUED: 03/18/2014  
 INSURANCE )  
 )  
 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 and the Order on Reconsideration of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Randy G. Clark (Clark & Johnson), Pikeville, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, 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 and the Order on Reconsideration (2010-BLA-5824) of Administrative Law Judge Stephen M. Reilly

rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with twenty-four years of coal mine employment, as stipulated by the parties, and adjudicated this miner's claim, filed on September 2, 2009, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b), thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further determined that employer was the properly designated responsible operator herein, and awarded benefits.<sup>1</sup>

Employer filed a timely motion for reconsideration, asserting that Dr. Dennis's pathology reports were entitled to no probative weight, because on January 17, 2013, Dr. Dennis surrendered his medical license in Kentucky for a minimum of two years. Upon review of employer's motion for reconsideration and the relevant evidence, the administrative law judge determined that Dr. Dennis was licensed when he issued his reports, and that there was no support for striking or disregarding Dr. Dennis's reports in this case. Accordingly, the administrative law judge found no basis to alter his award of benefits.

On appeal, employer challenges the administrative law judge's determination that the biopsy and medical evidence as a whole establishes complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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,

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<sup>1</sup> Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, and made it applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. In the present case, the administrative law judge determined that the evidence was insufficient to establish a totally disabling respiratory impairment and did not consider the applicability of the amended Section 411(c)(4) presumption in light of his award of benefits under 20 C.F.R. §718.304. Decision and Order at 13.

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).

Section 411(c)(3) of the Act, implemented by Section 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 or autopsy, 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. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 987 24 BLR 2-72, 2-94 (11th Cir. 2007); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *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 (1991).

Employer challenges the administrative law judge’s finding that the evidence of record as a whole is sufficient to establish complicated pneumoconiosis at Section 718.304. Employer contends that the administrative law judge erred in crediting Dr. Dennis’s wedge biopsy findings, and that he failed to adequately consider the relative qualifications of the pathologists or make specific findings when weighing their reports. Employer also asserts that the administrative law judge erred in crediting the medical opinion of Dr. Forehand over the contrary opinions of Drs. Broudy and Vuskovich. Employer’s Brief at 7-10. Employer’s arguments lack merit.

After consideration of the administrative law judge’s Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge’s decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish complicated pneumoconiosis at Section 718.304, the administrative

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant’s coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director’s Exhibit 5.

law judge initially considered the x-ray evidence of record,<sup>3</sup> and determined that it did not support a finding of complicated pneumoconiosis at Section 718.304(a), as both of the x-rays were read as negative. Decision and Order at 3-4. In considering the biopsy evidence pursuant to Section 718.304(b), the administrative law judge determined that claimant underwent a right thoracotomy on July 13, 2009, and that Dr. Dennis,<sup>4</sup> who is Board-certified in anatomical and clinical pathology, provided the initial pathology report for claimant's right lower lobe wedge biopsy. Dr. Dennis indicated by gross description that the first specimen revealed "a gray-white irregular nodule that measures 2 [centimeters in] diameter," and "a nodule that has been pre-measured at 2.2 [centimeters in] diameter that shows fibrosis. . ." In the gross description of a second specimen, Dr. Dennis noted a nodule "embedded in a middle portion of a wedge of pulmonary tissue which is red, pink, and black and measures 5 x 1.5 [centimeters]" and is "0.6 [centimeters in] diameter." Decision and Order at 6; Director's Exhibit 21; Claimant's Exhibit 1. The administrative law judge noted Dr. Dennis's diagnosis of "anthracosilicosis ...

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<sup>3</sup> In weighing the x-ray evidence at Section 718.304(a), the administrative law judge considered four interpretations of two x-rays, which were taken subsequent to claimant's thoracotomy on July 13, 2009, and the qualifications of the readers. The administrative law judge determined that the x-ray dated November 2, 2009 was negative for pneumoconiosis, as it was interpreted as negative by Dr. Wiot, a dually qualified Board-certified radiologist and B reader, and by Dr. Forehand, a B reader. The administrative law judge determined that the March 16, 2010 x-ray was negative, as it was interpreted as negative by dually qualified Dr. Wheeler and by B reader Dr. Broudy. Decision and Order at 3-4; Director's Exhibits 19, 26, 30; Employer's Exhibit 3.

<sup>4</sup> Dr. Dennis provided the following final diagnoses:

Frozen section, right lobe, lower lobe lesion: anthracosilicotic nodule with fibrosis and silica particle impregnation, black pigment deposition, no malignant features seen. Lung wedge biopsy: anthracosilicosis, progressive massive fibrosis. Lung wedge biopsy, right: emphysema, progressive massive fibrosis and inflammation minimal with congestion compatible with coal workers' pneumoconiosis, progressive massive fibrosis variety, multi-nodular in expression with macule formation ... greater than 2.2 cm diameter compatible with progressive massive fibrosis.

Director's Exhibit 21. Dr. Dennis indicated in his supplemental report that "this is indeed a case of progressive massive fibrosis," with the first specimen containing a nodule of anthracosilicosis greater than 1 cm diameter on x-ray, with an actual measurement of 2.2 cm diameter, and a second nodule present on the second specimen compatible with the same process. Claimant's Exhibit 1.

compatible with progressive massive fibrosis,” and the doctor’s microscopic pathology findings of “anthracosis with silica particles ... dense collagenous fibers and black pigment deposition ... emphysematous changes ... giant cell reaction” and “silica impregnation indicating the etiology of the nodule as anthracosilicosis.” Decision and Order at 6, 11; Director’s Exhibit 21; Claimant’s Exhibit 1. The administrative law judge then reviewed the report of Dr. Caffrey, a Board-certified anatomical and clinical pathologist,<sup>5</sup> who performed a microscopic examination of the pathology slides, finding “fairly dense fibrosis with a mild amount of anthracotic pigment scattered through the areas of fibrosis,” with “some birefringent particles of silica and silicates.” The administrative law judge also noted that Dr. Caffrey found evidence of “granulomatous or pseudogranulomatous disease with areas of fibrosis” as well as “centrilobular emphysema” and “giant cells.”<sup>6</sup> Decision and Order at 6-7, 11; Director’s Exhibit 27.

In weighing the conflicting biopsy reports, the administrative law judge permissibly accorded less weight to Dr. Caffrey’s opinion, that simple pneumoconiosis but not complicated pneumoconiosis was present, because the doctor did not explain why he concluded that the diagnosed giant cells were related to granulomatous or pseudogranulomatous disease, and could not be related to the clinical pneumoconiosis that he found. Decision and Order at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The administrative law judge further determined that Dr. Dennis, as the examining pathologist, had an advantage over Dr. Caffrey in determining the size of the macules on gross examination, and permissibly accorded Dr. Dennis’s opinion greater weight. Decision and Order at 11-12; *see Gruller v. BethEnergy Mines, Inc.*, 16 BLR 1-3 (1991). Thus, the administrative law judge reasonably concluded that Dr. Dennis’s biopsy descriptions were sufficient to support a finding of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(b); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365-6, 23 BLR 2-374, 2-385-6 (4th Cir. 2006); *Gray*, 176 F.3d at 390, 21 BLR at 2-630.

Pursuant to Section 718.304(c), the administrative law judge considered the medical opinions of Drs. Forehand, Broudy, and Vuskovich, who each examined

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<sup>5</sup> The administrative law judge noted that Dr. Caffrey was a Fellow of the American Boards of Anatomical and Clinical Pathology and a Diplomate of the American Board of Pathology. Decision and Order at 6 n. 5.

<sup>6</sup> Dr. Caffrey provided a final diagnosis of:

Granulomatous or pseudogranulomatous disease with associated giant cells,  
and simple coal workers’ pneumoconiosis, mild.

Director’s Exhibit 27.

claimant subsequent to his thoracotomy. The administrative law judge observed that although Dr. Forehand noted only parenchymal scarring by x-ray, as determined from his November 2, 2009 examination, he nevertheless diagnosed complicated pneumoconiosis, based on the pathologic findings from claimant's biopsy, and claimant's work and medical histories. Decision and Order at 7; Director's Exhibit 19; Employer's Exhibit 4. By contrast, neither Dr. Broudy nor Dr. Vuskovich diagnosed complicated pneumoconiosis. In his report dated March 16, 2010, Dr. Broudy acknowledged that claimant underwent removal of a nodule at the right lung base, but he determined that occupational pneumoconiosis was not present because claimant's lung function and arterial blood gases were virtually normal and claimant's post-surgical x-ray did not show any large opacities or pleural disease. Director's Exhibits 24, 26. Similarly, in consulting reports dated January 6, 2010 and September 30, 2010, Dr. Vuskovich reviewed claimant's medical records and testing, and explained the bases for his opinion that claimant did not have pulmonary massive fibrosis: there was no radiographic evidence of pneumoconiosis; the presence of giant cells is not characteristic of pulmonary massive fibrosis; claimant's lesions were in a lobe not typical for pulmonary massive fibrosis; claimant's pulmonary function was normal; and claimant had characteristics of extrapulmonary sarcoidosis. Director's Exhibit 25; Employer's Exhibit 1.

In evaluating the conflicting medical opinions at Section 718.304(c), the administrative law judge reviewed the relative qualifications of the physicians, and permissibly accorded probative weight to Dr. Forehand's diagnosis of complicated pneumoconiosis, finding that it took into consideration claimant's medical and work histories, and the pathological descriptions. Dr. Forehand also explained that progressive massive fibrosis does not always immediately cause total disability. Decision and Order at 7, 11; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330-1 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). While noting that Dr. Broudy found no radiographic evidence of coal workers' pneumoconiosis, the administrative law judge accurately determined that Dr. Broudy did not express an opinion regarding whether the biopsy results revealed complicated pneumoconiosis. Decision and Order at 7-8, 11; Director's Exhibits 24, 26. Thus, the administrative law judge properly accorded Dr. Broudy's opinion little weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge also permissibly discounted the opinion of Dr. Vuskovich, that claimant does not have progressive massive fibrosis, as inconsistent with the Act and regulations. Noting that Dr. Vuskovich based his conclusion, in part, on the findings that claimant is not disabled and his biopsy lesions were found in an uncharacteristic lung zone, the administrative law judge determined that the regulations recognize pneumoconiosis as a latent and progressive disease, and do not specify a particular lung zone for a finding of complicated pneumoconiosis. Decision and Order at 11; 20 C.F.R. §§718.201(c), 718.202, 718.304; 65 Fed. Reg. 79,971 (Dec. 20, 2000); *see Rowe*, 710 F.2d at 255, 5

BLR at 2-103; *Clark*, 12 BLR at 1-155. Consequently, the administrative law judge acted within his discretion in finding that the weight of the medical opinion evidence supported a finding of complicated pneumoconiosis at Section 718.304(c) and, weighing all relevant evidence together, he permissibly concluded that claimant established complicated pneumoconiosis at Section 718.304. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Perry*, 469 F.3d at 365-6, 23 BLR at 2-385-6; *Gray*, 176 F.3d at 389, 21 BLR at 2-628.

The administrative law judge, in his role as finder of fact, is charged with evaluating the relative value of conflicting medical evidence and assessing the credibility of the medical experts. *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's finding that the weight of the evidence of record is sufficient to establish complicated pneumoconiosis arising out of coal mine employment pursuant to Sections 718.304 and 718.203(b), it is affirmed. Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order on Reconsideration are 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