

BRB No. 10-0535 BLA

THEODORE F. AKERS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ROBINSON PHILLIPS COAL COMPANY)	
)	DATE ISSUED: 05/24/2011
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Second Decision and Order on Remand Awarding Benefits (05-BLA-6235) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim,¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30

¹ Claimant's first claim, filed on September 28, 2000, was denied by the district director on November 30, 2000, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing this claim on July 23, 2004. Director's Exhibit 3.

U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the third time.²

In the Board's last decision, pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the new medical evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and remanded the case for further consideration. *T.F.A. [Akers] v. Robinson Phillips Coal Co.*, BRB No. 07-0552 BLA (Apr. 25, 2008)(unpub.). Specifically, the Board instructed the administrative law judge to address whether the computerized tomography (CT) scan evidence supported a finding of pneumoconiosis, to consider Dr. Wiot's deposition testimony, and to provide valid reasons for her weighing of the medical opinion evidence under 20 C.F.R. §718.202(a)(4). On the merits, the Board vacated the administrative law judge's finding that claimant established complicated pneumoconiosis, and invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304.³ The Board held that the administrative law judge improperly shifted the burden of proof to employer to establish that the x-ray and CT scan interpretations diagnosing Category A large opacities were incorrect. The Board instructed the administrative law judge, on remand, to make specific findings as to whether the x-ray evidence supported a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(a), whether the CT scan and medical opinion evidence supported a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(c), and to then weigh all of the relevant evidence under the standard set out in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

On remand, the administrative law judge found that the new evidence established both simple pneumoconiosis and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304, and that claimant therefore established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the new evidence merited greater weight than the evidence submitted with claimant's prior claim. The administrative law judge therefore found that

² The Board previously set forth this claim's full procedural history. *T.F.A. [Akers] v. Robinson Phillips Coal Co.*, BRB No. 07-0552 BLA, slip op. at 2 (Apr. 25, 2008)(unpub.). We incorporate our prior discussion of the procedural history.

³ Since there is no evidence that claimant is totally disabled by a respiratory impairment under 20 C.F.R. §718.204(b)(2), he must establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304, in order to qualify for benefits. *Akers*, slip op. at 9 n.12.

claimant established complicated pneumoconiosis that arose out of his coal mine employment, and was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of both simple pneumoconiosis at 20 C.F.R. §718.202(a) and complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs declined to file a response brief in this appeal.⁴

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.⁵ 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).

To establish entitlement to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

⁴ The recent amendment to the Act, which became effective on March 23, 2010, and which applies to claims filed after January 1, 2005, does not apply to this claim, filed on July 23, 2004. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

⁵ The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 1. 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*).

One method of establishing pneumoconiosis and total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §§718.202(a)(3), 718.204(b)(1). Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, 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 that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The administrative law judge must consider all relevant evidence on this issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered nine interpretations of two new x-rays dated September 27, 2004 and July 6, 2005.⁶ The administrative law judge observed that every physician who reviewed claimant's two new x-rays noted the presence of a disease process in his upper lungs, and that Drs. Alexander and Zaldivar reported that this disease process qualified as Category A large opacities. Finding that the x-ray interpretations of employer's experts, Drs. Wheeler, Scott, and Scatarige "do not contradict the presence of the masses that are the subject of Dr. Alexander's and Dr. Zaldivar's [diagnoses of category A opacities]," the administrative law judge found that "there is no question that the masses exist." Decision

⁶ Dr. Alexander, a Board-certified radiologist and B reader, interpreted the September 27, 2004 x-ray as positive for a Category A large opacity of "complicated CWP" in the right upper lung zone. Director's Exhibit 25. Dr. Ranavaya, a B reader, and Dr. Miller, a Board-certified radiologist and B reader, interpreted the same x-ray as positive for simple pneumoconiosis only. Director's Exhibit 14; Claimant's Exhibit 5. Drs. Scott, Scatarige, and Wheeler interpreted the September 27, 2004 x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibits 2, 3, 8. These physicians noted scarring and fibrosis in claimant's upper lung zones. *Id.* Dr. Zaldivar, a B reader, interpreted the July 6, 2005 x-ray as positive for Category A large opacities. Claimant's Exhibit 2. Dr. Miller interpreted the same x-ray as positive for simple pneumoconiosis only. Claimant's Exhibit 6. Drs. Wiot and Scatarige interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibits 1, 5. Dr. Wiot noted the presence of abnormalities consistent with old granulomatous disease, Employer's Exhibit 1, and Dr. Scatarige noted the presence of nodular opacities in the upper lobes that "favor TB or histoplasmosis." Employer's Exhibit 5.

and Order on Remand at 12. The administrative law judge therefore determined that claimant established the existence of an opacity measuring greater than one centimeter on x-ray. *Id.*

Turning next to the etiology of the masses seen on x-ray, the administrative law judge found that “the record contains no evidence that [claimant] was exposed to causative agents other than coal dust.” Decision and Order on Remand at 13. Consequently, the administrative law judge discounted the conclusions of employer’s experts, that the masses on claimant’s x-rays were likely due to tuberculosis, histoplasmosis, or granulomatous disease, because the record does not contain “any treatment records indicating that [claimant] was ever diagnosed with or treated for tuberculosis, granulomatous disease, or any other pulmonary impairment that would produce opacities on an x-ray.” *Id.* Thus, the administrative law judge determined that “the preponderance of the newly submitted medical evidence points to coal dust exposure as the etiology for [claimant’s] radiographic abnormalities,” and that claimant established complicated pneumoconiosis under 20 C.F.R. §718.304(a). *Id.*

Employer argues that the administrative law judge again improperly shifted the burden of proof to employer to establish that the abnormalities seen on x-ray are not complicated pneumoconiosis. Specifically, employer contends that the administrative law judge “summarily” concluded that the preponderance of the evidence points to coal dust exposure as the etiology of the radiographic abnormalities, without requiring claimant to establish the etiology of the radiographic abnormalities. Employer’s Brief at 11, 25.

We disagree. The administrative law judge’s analysis makes clear that she found the presumption established not because she placed any unmet burden on employer, but rather because the consistent x-ray evidence of large opacities,⁷ when considered in light

⁷ Substantial evidence supports the administrative law judge’s finding that the x-ray interpretations Drs. Wheeler, Scott, and Scatarige do not contradict the presence of the masses that are the subject of the Category A diagnoses of Drs. Alexander and Zaldivar. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); Decision and Order on Remand at 12. As summarized by the administrative law judge, all of the physicians who read claimant’s x-rays noted the presence of abnormalities in his upper lungs. Dr. Alexander noted that claimant’s September 27, 2004 x-ray showed an “[a]pparent large opacity of complicated CWP in right upper zone,” and an “[e]nlarged and lobular left hilum.” Director’s Exhibit 25. Dr. Wheeler stated that the same x-ray showed “ill defined infiltrate or fibrosis subapical and lateral portion r[ight] u[pper] l[obe] and probable left lateral pleural fibrosis near scapula.” Employer’s Exhibit 3. Similarly, Dr. Scott stated this x-ray showed “possible left hilum enlargement” and “peripheral fibrosis upper lungs.” Employer’s Exhibit 2.

of the other evidence of record, established statutory complicated pneumoconiosis under Section 718.304(a). Contrary to employer's assertion, the administrative law judge explained that the preponderance of evidence "points to coal dust exposure as the etiology for [claimant's] radiographic abnormalities," because the record documents that coal dust is the only causative agent to which claimant was exposed.⁸ Decision and Order on Remand at 13. In this context, the administrative law judge permissibly accorded less weight to the readings of physicians who attributed the abnormalities on claimant's x-rays to diseases such as tuberculosis and granulomatous disease, given that there was no evidence in the record that claimant had any of those alternative diseases. *See Westmoreland Coal Co., v. Cox*, 602 F.3d 276, 284, 24 BLR 2-269, 2-283 (4th Cir. 2010). Consequently, we reject employer's argument that the administrative law judge shifted the burden of proof, and we affirm the administrative law judge's finding under Section 718.304(a).

Relevant to 20 C.F.R. §718.304(c)⁹, the administrative law judge considered eight interpretations of two CT scans dated December 16, 2004¹⁰ and July 6, 2005,¹¹ and Dr.

Dr. Scatarige noted scarring in claimant's right upper lobe, and a possible mass in his left hilum. Employer's Exhibit 8. Dr. Zaldivar found Category A large opacities on claimant's July 6, 2005 x-ray, and commented on claimant's July 6, 2005 computerized tomography (CT) scan, that "[t]here are masses present in the left upper and right upper lobe compatible with large pneumoconiosis nodules of complicated pneumoconiosis." Claimant's Exhibit 2. Dr. Wiot interpreted claimant's July 6, 2005 x-ray as showing "old granulomatous disease [in] both apices." Employer's Exhibit 1. Dr. Scatarige stated that this x-ray showed "[n]odular opacities in periphery both upper lobes, R>L, and calcified mediastinal and L[eft] hilar nodes: favor TB or histoplasmosis, probably healed." Employer's Exhibit 5.

⁸ Employer does not challenge the administrative law judge's findings of thirteen years of coal mine employment, and that "[t]he record contains no evidence that [claimant] was exposed to causative agents other than coal dust, such as asbestos or tuberculosis." Decision and Order on Remand at 13; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁹ The record contains no biopsy or autopsy evidence under 20 C.F.R. §718.304(b).

¹⁰ The December 16, 2004 CT scan was interpreted by Drs. Alexander, Rieser, and Wiot. Dr. Alexander diagnosed Category A complicated pneumoconiosis and "probable anthrosilicosis" based on the CT scan. Claimant's Exhibit 1. Dr. Alexander described a 30mm (3 cm) mass in the right upper zone as a "large opacity" that was "quite characteristic in appearance of the conglomerate fibrosis seen in complicated [c]oal

Castle's medical opinion. The administrative law judge found that both the December 16, 2004 and the July 6, 2005 CT scans supported a finding of complicated pneumoconiosis. Decision and Order on Remand at 14. In finding the December 16, 2004 CT scan to be supportive of complicated pneumoconiosis, the administrative law judge credited the interpretations of Drs. Rieser and Alexander¹² over that of Dr. Wiot, because Drs. Rieser and Alexander described their findings in detail and Dr. Wiot did not explain how his CT scan findings were necessarily inconsistent with complicated pneumoconiosis. *Id.* Further, in finding the July 6, 2005 CT scan to be supportive of complicated pneumoconiosis, the administrative law judge credited the "detailed reports" of Drs. Cordell and Zaldivar over those of Drs. Wheeler and Wiot. *Id.* In so finding, the administrative law judge noted that Dr. Wiot stated this CT scan was similar to the previous scan, and that Dr. Wheeler "did not explain or otherwise discuss how he was able to exclude pneumoconiosis as an etiology" for the abnormalities that he observed. *Id.*

Employer asserts that the administrative law judge erred in finding the CT scan evidence supports a finding of complicated pneumoconiosis. Specifically, employer asserts that the administrative law judge's finding is conclusory and fails to explain why

[w]orkers' [p]neumoconiosis." *Id.* at 1. Dr. Rieser stated that the CT scan revealed multiple pulmonary nodules, including a 10mm (1 cm) nodule in the left upper lobe, "consistent with old granulomatous disease as well as coalminers pneumoconiosis." Employer's Exhibit 14. In contrast, Dr. Wiot found no evidence of pneumoconiosis on the December 16, 2004 CT scan. Employer's Exhibit 1. Dr. Wiot noted the presence of abnormalities consistent with granulomatous disease. *Id.*

¹¹ The July 6, 2005 CT scan was interpreted by Drs. Zaldivar, Cordell, Wheeler, and Wiot. Dr. Zaldivar opined that there were "masses present in the left upper and right upper lobe compatible with large pneumoconiotic nodules of complicated pneumoconiosis." Claimant's Exhibit 2. Dr. Cordell stated that the changes were consistent with occupational pneumoconiosis and "conglomerate fibrosis." Claimant's Exhibit 3. In contrast, Drs. Wheeler and Wiot opined that there was no evidence of pneumoconiosis, and that the abnormalities seen in claimant's lungs were most consistent with granulomatous disease. Employer's Exhibits 1, 10.

¹² The administrative law judge mistakenly stated that she was crediting the December 16, 2004 CT scan interpretations of Drs. Rieser and Zaldivar over that of Dr. Wiot, after summarizing the readings of this scan by Drs. Rieser, Alexander, and Wiot. Decision and Order on Remand at 13-14. Dr. Zaldivar did not read the December 16, 2004 CT scan.

she credits the diagnoses of complicated pneumoconiosis over the contrary interpretations of employer's experts. Employer's Brief at 25-26. We disagree. Substantial evidence supports the administrative law judge's findings that Drs. Alexander, Cordell, Rieser, and Zaldivar provided detailed reports, attributing the abnormalities seen on claimant's CT scans to coal dust exposure. Contrary to employer's assertion, therefore, the administrative law judge permissibly relied on the opinions of Drs. Alexander, Cordell, and Rieser, and Zaldivar as to the etiology of the radiographic abnormalities. *See Cox*, 602 F.3d at 284, 24 BLR at 2-283; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998). Further, contrary to employer's assertion, the administrative law judge permissibly credited the opinions of these physicians over those of Drs. Wiot and Wheeler, because Drs. Wiot and Wheeler did not adequately explain how they eliminated coal dust exposure as an etiology for the observed abnormalities, which they attributed to granulomatous disease. *Id.* As discussed above, in weighing the x-ray evidence, the administrative law judge found that the record contains no evidence that claimant was exposed to causative agents other than coal dust, nor any treatment records indicating that he was ever diagnosed with or treated for granulomatous disease. Decision and Order on Remand at 13. Consequently, we affirm the administrative law judge's finding that the CT scan evidence supports a finding of complicated pneumoconiosis.¹³ *See Cox*, 602 F.3d at 284, 24 BLR at 2-283; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336.

We also reject employer's assertion that the administrative law judge erred in discounting Dr. Castle's opinion¹⁴ under Section 718.304(c). Contrary to employer's

¹³ We reject employer's assertion that "it is irrational to conclude that Dr. Rieser's opinion better supports the opinion of Dr. Alexander rather than those of Drs. Wiot and Wheeler," where Dr. Rieser stated that the changes seen on the December 2004 CT scan are consistent with old granulomatous disease as well as coal miner's pneumoconiosis. Employer's Brief at 26. As noted, *supra*, the administrative law judge rationally determined that the record contains no evidence that claimant was exposed to causative agents other than coal dust.

¹⁴ Dr. Castle submitted a consultative opinion dated July 27, 2006. Employer's Exhibit 7. Dr. Castle reviewed the x-ray and CT scan reports of Drs. Wheeler, Alexander, Rieser, Wiot, Zaldivar, and Cordell, and opined that "based upon the expertise of Dr. Wiot and the other radiologists in reviewing the CT scans, it is my opinion that [claimant] did not have evidence radiographically of complicated coal workers' pneumoconiosis." *Id.* at 7. Further noting that claimant's pulmonary function and blood gas studies were normal, Dr. Castle stated that "it is my opinion with a reasonable degree of medical certainty that [claimant] does not suffer from complicated pneumoconiosis It is my opinion that he does have radiographic findings consistent with significant old granulomatous disease." *Id.*

assertion, the administrative law judge permissibly found Dr. Castle's opinion undermined by his reliance on claimant's normal objective studies, given that Section 718.304 does not require a showing of respiratory impairment. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-104; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Further, the administrative law judge acted within her discretion in discounting Dr. Castle's opinion, that there was no radiographic evidence of complicated pneumoconiosis, because he did not have the benefit of reviewing Dr. Alexander's detailed CT scan report diagnosing a three-centimeter mass of complicated pneumoconiosis, a reading the administrative law judge credited.¹⁵ *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; Decision and Order on Remand at 15. We therefore affirm the administrative law judge's permissible credibility determination.

Considering all of the relevant evidence together, the administrative law judge found that claimant established the existence of statutory complicated pneumoconiosis under Section 718.304, and that the cause of the complicated pneumoconiosis was coal mine employment. Because the administrative law judge validly explained her credibility determinations, and substantial evidence supports her findings, we affirm the administrative law judge's finding of complicated pneumoconiosis, and of a change in an applicable condition of entitlement pursuant to Sections 718.304, 725.309(d).

On the merits, the administrative law judge accorded greater weight to the new evidence of record than to the evidence submitted in claimant's prior claim, given that pneumoconiosis may be progressive. Decision and Order on Remand at 16. Employer does not challenge the administrative law judge's reliance on the more recent evidence. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's finding of complicated pneumoconiosis on the merits of entitlement, and affirm the award of benefits. Thus, we need not address employer's challenges to the administrative law judge's finding of simple pneumoconiosis under 20 C.F.R. §718.202(a).

¹⁵ Because the administrative law judge provided valid reasons for discounting Dr. Castle's opinion, we decline to address employer's other assertions regarding the weight the administrative law judge accorded to that opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge