

BRB No. 11-0168 BLA

HAROLD WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RIVERS EDGE MINING, INCORPORATED	)	DATE ISSUED: 11/30/2011
	)	
Employer-Petitioner	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5721) of Administrative Law Judge Richard A. Morgan, rendered on a miner's claim filed on

December 5, 2007, pursuant to the Black Lung Benefits Act, 30 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). In a Decision and Order dated October 8, 2010, the administrative law judge credited claimant with at least thirty years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge failed to explain the bases for his credibility findings, as required by the Administrative Procedure Act (APA).<sup>1</sup> Employer challenges the administrative law judge's finding that claimant has simple and complicated pneumoconiosis, and that he is entitled to the irrebuttable presumption at 20 C.F.R. §718.304. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting that if the Board does not affirm the award of benefits, the case be remanded to the district director in order for the Department of Labor to satisfy its statutory obligation to provide claimant with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406.

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203,

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<sup>1</sup> The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

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

718.204.<sup>3</sup> Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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.

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. *See Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *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, 1-33-34 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

## **I. Summary of the Medical Evidence**

The record consists of nine readings of four x-rays dated January 3, 2008, June 4, 2008, February 7, 2009 and July 10, 2009. Director's Exhibits 12, 13; Claimant's Exhibits 1-3, 10; Employer's Exhibits 1, 2. The January 3, 2008 x-ray was read by Dr. Gaziano, a B reader, as positive for simple (2/1, q/r) and complicated pneumoconiosis, Category A, by Dr. DePonte, dually qualified as a Board-certified radiologist and B reader, as positive for simple (2/2, q/p) and complicated pneumoconiosis, Category B, and by Dr. Wheeler, dually qualified as a Board-certified radiologist and B reader, as negative for simple (0/1) and complicated pneumoconiosis. Director's Exhibits 12, 13; Claimant's Exhibit 3. Dr. Wheeler wrote in the "Comments" section of the ILO form that there was a "5x2 [centimeter] mass" in the lateral periphery of the right upper lung "compatible with conglomerate granulomatous disease, histoplasmosis or [tuberculosis

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<sup>3</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant established at least thirty years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

(TB)],” but that the distribution of the small nodules favors a diagnosis of granulomatous disease “unless there is documented unprotected high dose dust exposure.” Director’s Exhibit 13. Dr. Wheeler opined that the “mass is not [a] large opacity of [coal workers’ pneumoconiosis] because [claimant] is young and [the] profusion of background nodules is low.” *Id.*

The June 4, 2008 x-ray was read by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, as positive for simple (3/2, q/p) and complicated pneumoconiosis, Category A, and by Dr. Wheeler as negative for simple (0/1) and complicated pneumoconiosis. Director’s Exhibit 13; Claimant’s Exhibit 10. In the “Comments” section of the ILO form, Dr. Wheeler identified a “6x2 [centimeter] mass . . . compatible with granulomatous disease, histoplasmosis more likely than TB.” Director’s Exhibit 13. Dr. Wheeler recommended a CT scan for an exact diagnosis and proper therapy. *Id.*

The February 7, 2009 and July 10, 2009 x-rays were read by Dr. DePonte, as positive for simple (2/2, q/p) and complicated pneumoconiosis, Category B, and by Dr. Wheeler as negative for simple (0/1) and complicated pneumoconiosis. Claimant’s Exhibits 1, 2; Employer’s Exhibits 1, 2. In the “Comments” section of the ILO forms for each x-ray, Dr. Wheeler identified an “oval 5 [centimeter] mass lateral subapical [right upper lung] and [an] ill-defined approximately 2-3 [centimeter] mass lateral [left upper lung] both involving pleura . . . compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than TB.” Dr. Wheeler further wrote:

Masses are not large opacities because they are peripheral and profusion of background nodules is low. Also he is relatively young since NIOSH and MSHA became active controlling dust levels in mines in [e]arly 1970’s . . .

*Id.* Dr. Wheeler indicated that a “diagnosis should have been made with biopsy or microbiology when lung symptoms first developed.” *Id.*

The record also includes readings of three CT scans dated January 25, 2008, September 8, 2008 and March 26, 2009 by Dr. Wheeler. Employer’s Exhibits 5, 7, 8. Dr. Wheeler interpreted each of the scans as showing a “4 [centimeter] mass” in the right upper lung compatible with conglomerate granulomatous disease, histoplasmosis or MAC. *Id.* Moreover, Dr. Scatarige, a B reader, reviewed a CT scan dated June 4, 2008 and reported tiny centrilobular nodules in all lobes and opined that coal workers’ pneumoconiosis and silicosis are “less likely,” as the nodules typically associated with those conditions are mainly found in “the upper and mid-lung regions.” Director’s Exhibit 13. Dr. Scatarige also prepared a report in which he compared the two CT scans

dated January 25, 2008 and March 27, 2009. Employer's Exhibit 6. He reported that there were many small centrilobular nodules in both lungs and a large mass in the right upper lung, measuring "2 x 4" centimeters, and other masses in the left upper lung measuring "1.5 x 2.5" and "1.5 x 2.0" centimeters. *Id.* Dr. Scatarige opined that the masses are more likely due to TB, atypical mycobacterial infection, histoplasmosis or other fungal infection and sarcoidosis. *Id.*

Dr. Navani, dually qualified as a Board-certified radiologist and B reader, reviewed the January 25, 2008, March 27, 2008 and September 8, 2008 CT scans and reported large confluent densities in the upper lung fields, consistent with complicated pneumoconiosis. Claimant's Exhibit 11. Dr. Alexander also interpreted the August 23, 2009 CT scan as showing a large opacity in the right upper lobe that measures thirty millimeters (equal to three centimeters) in length, and a fifteen millimeter large opacity in the left upper mid-lung zone. Claimant's Exhibit 9. Dr. Alexander diagnosed "Category A" complicated pneumoconiosis. *Id.*

Additionally, the record includes hospitalization records dating from 2004-2009, treatment records from Drs. Grey and Atkins, and the medical reports of Drs. Gaziano, Zaldivar and Rosenberg. Dr. Gaziano examined claimant on January 3, 2008 and obtained a chest x-ray, a "normal" pulmonary function study and a blood gas study that revealed a mild decrease in oxygen tension at rest. Director's Exhibit 12. Dr. Gaziano opined that claimant has complicated pneumoconiosis. *Id.* Dr. Zaldivar examined claimant on June 4, 2008 and conducted pulmonary function and arterial blood gas tests, which he interpreted as normal. Director's Exhibit 13. He opined that claimant does not have any lung disease. *Id.* Dr. Rosenberg reviewed the x-ray, CT scan and pulmonary function study evidence. Employer's Exhibit 3. He indicated that it was "possible" that claimant suffers from complicated pneumoconiosis, but opined that the x-rays do not support a diagnosis of complicated pneumoconiosis, since large opacities are "peripherally located rather than in a central location." *Id.* Dr. Rosenberg opined that "the most likely" diagnoses are "sarcoidosis or an old granulomatous process." *Id.* Dr. Rosenberg also noted that if claimant had complicated pneumoconiosis, "functional abnormalities would be expected." *Id.*

## **II. The Administrative Law Judge's Findings**

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge found that "[t]here is no question that the radiology establishes the presence of two large masses in the miner's lungs," and that the conflict in the evidence is over the etiology of those masses. Decision and Order at 18. He observed that "[t]he best-qualified experts, Drs. Wheeler and Scatarige, admit that [coal workers' pneumoconiosis] may be present," but they opined that the masses are "more likely" due to "histoplasmosis, sarcoidosis, or [TB]." *Id.* at 19. The administrative law judge determined that Dr. Wheeler made

several “unfounded assumptions” in rendering his opinion and that his conclusion, that claimant does not have complicated pneumoconiosis, based on his negative x-ray and CT scan readings, is “somewhat equivocal” and “discounts the one known and established factor, the miner’s lengthy coal mine dust exposure, in favor of more *speculative* possibilities, both of which have been cast into doubt by negative test results.” *Id.* at 20 (emphasis added). The administrative law judge similarly found Dr. Scatarige’s opinion to be entitled to less weight, citing claimant’s negative test results for histoplasmosis and TB. *Id.* at 19. Based on the x-ray readings of Drs. DePonte, Alexander and Gaziano, the administrative law judge determined that claimant established the existence of a large opacity consistent with complicated pneumoconiosis at 20 C.F.R. §718.304(a).<sup>4</sup>

Relevant to 20 C.F.R. §718.304(c), the administrative law judge further found that the contrary opinions of Drs. Zaldivar and Rosenberg were unpersuasive. Decision and Order at 23-24. Thus, the administrative law judge concluded that, while claimant did not establish complicated pneumoconiosis by medical opinion or CT scan evidence pursuant to 20 C.F.R. §718.304(c), this evidence did not preclude a finding of complicated pneumoconiosis based on the credible x-ray evidence. *Id.* Thus, based on his consideration of all the evidence together, the administrative law judge found that claimant satisfied his burden to establish the existence of complicated pneumoconiosis. *Id.* at 24.

### **III. Arguments on Appeal**

Initially, we reject employer’s argument that the administrative law judge’s Decision and Order fails to comply with the APA because he did not separately consider whether the x-ray evidence was positive for either simple clinical pneumoconiosis or complicated pneumoconiosis, and combined his discussion of the x-ray readings and CT scan evidence. Because the administrative law judge explained the basis for his finding that claimant has complicated pneumoconiosis, *see infra* at 10-14, his opinion satisfies the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order at 18-24.

Employer also contends that the administrative law judge improperly substituted his opinion for that of a medical expert when he rejected Dr. Wheeler’s opinion that claimant’s x-rays and CT scans do not show findings consistent with complicated pneumoconiosis. We disagree. Contrary to employer’s assertion, the administrative law judge permissibly found Dr. Wheeler’s diagnoses of possible histoplasmosis or TB to be less credible as claimant specifically tested negative for each of these diseases. *See*

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<sup>4</sup> The record in this case does not contain any biopsy evidence relevant to 20 C.F.R. §718.304(b).

*Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010); Decision and Order at 20. The administrative law judge acted within his discretion in assigning less weight to Drs. Wheeler’s opinion since he found that Dr. Wheeler could only speculate that claimant’s radiological and CT scan findings were unrelated to complicated pneumoconiosis and due to one of several alternate diseases. *Id.* In addition, the administrative law judge permissibly concluded that Dr. Wheeler’s opinion, that claimant does not have complicated pneumoconiosis, is based on an “unfounded assumption” that claimant “worked under more rigorous MSHA dust controls,” as he found “no facts of record to support this assumption.” Decision and Order at 19-20; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Because the administrative law judge has broad discretion in assessing the credibility of the medical experts, *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, we affirm his decision to accord Dr. Wheeler’s opinion little weight.<sup>5</sup> *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We, therefore, affirm the administrative law judge’s finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), based on the positive x-ray readings for complicated pneumoconiosis by Drs. Gaziano, DePonte and Alexander.<sup>6</sup> *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

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<sup>5</sup> Contrary to employer’s argument, the administrative law judge permissibly rejected the opinions of Drs. Wheeler and Scatarige, irrespective of their qualifications, as he found that their medical conclusions were not rationally explained and were disputed by negative test results for the alternate diagnoses they provided. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

<sup>6</sup> Employer contends that the administrative law judge erred in finding the x-ray evidence to be sufficient to establish complicated pneumoconiosis because the physicians were not in agreement as to the size of claimant’s large opacities - Drs. Gaziano and Alexander found Category A opacities while Dr. DePonte found Category B opacities. *Id.* Contrary to employer’s contention, the regulations do not require uniformity of readings, as complicated pneumoconiosis may be established based on an x-ray that is classified as showing a large opacity, Category A, B, or C. *See* 20 C.F.R. §718.304(a); *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

We also reject employer's argument that the administrative law judge erred in failing to consider Dr. Scatarige's negative CT scan readings at 20 C.F.R. §718.304(c). The administrative law judge discussed Dr. Scatarige's opinion, that the CT scans showed two large masses, but that "it was more likely [that claimant] ha[s] histoplasmosis, sarcoidosis or TB, with histoplasmosis more likely than TB." Decision and Order at 19. The administrative law judge permissibly found that Dr. Scatarige's CT scan readings, that claimant's masses were unrelated to coal dust exposure, were unpersuasive since claimant's "series of TB tests, between February 2008 and mid-2009, had negative results[,] and his [August 10, 2009] biological specimen test found no histoplasmosis." *Id.*; see *Cox*, 602 F.3d at 285, 24 BLR at 2-284. Thus, we affirm the administrative law judge's finding that the CT scan evidence "does not undermine" a conclusion that claimant has complicated pneumoconiosis, based on the x-ray evidence. *Id.* at 23.

Lastly, we reject employer's assertion that the administrative law judge erred in failing to address the objective testing, which does not show a respiratory disability. Contrary to employer's assertion, a totally disabling respiratory or pulmonary impairment is not a prerequisite for invocation of the irrebuttable presumption. See 20 C.F.R. §718.304(a)-(c). Moreover, Dr. Rosenberg was the only physician to discuss the relevancy of respiratory testing in determining the existence of complicated pneumoconiosis. Employer's Exhibit 2. The administrative law judge specifically rejected Dr. Rosenberg's opinion, that claimant does not have complicated pneumoconiosis because claimant does not have any respiratory impairment, noting that while Dr. Rosenberg "may be medically correct, the regulations do not require a 'functional abnormality' to find complicated [coal workers' pneumoconiosis]." <sup>7</sup> Decision and Order at 23.

Because the administrative law judge weighed all of the evidence, and explained, as required by the APA, how he resolved the conflict in the evidence, we affirm, as supported by substantial evidence, his finding that claimant established the existence of complicated pneumoconiosis due to coal dust exposure pursuant to 20 C.F.R. §§718.304,

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<sup>7</sup> We also reject employer's argument that the administrative law judge erred in rejecting Dr. Zaldivar's opinion. Contrary to employer's contention, the administrative law judge permissibly accorded no weight to Dr. Zaldivar's opinion, that claimant has no lung disease, given "the fact that [most] physicians found lung disease, albeit non-disabling." Decision and Order at 23; see *Clark*, 12 BLR at 1-155.

718.203.<sup>8</sup> *Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *see also Adkins*, 958 F.2d at 49, 16 BLR at 2-61.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>8</sup> Because we affirm the administrative law judge's finding of complicated pneumoconiosis, we decline to address employer's assertion that the administrative law judge erred by not crediting Dr. Wheeler's opinion as to the existence of simple pneumoconiosis.