

BRB No. 14-0131 BLA

ALFRED N. PARKS )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 PINNACLE MINING COMPANY, LLC ) DATE ISSUED: 11/24/2014  
 )  
 and )  
 )  
 BRICKSTREET MUTUAL INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Christine L. Kirby,  
Administrative Law Judge, United States Department of Labor.

Alfred N. Parks, Maybeury, West Virginia, *pro se*.

Jonathan P. Rolfe (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and  
BOGGS, Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order Denying Benefits (2012-BLA-05411) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed on April 1, 2010, 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-seven years of coal mine employment. Considering the claim under the regulations at 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of simple or complicated pneumoconiosis. The administrative law judge also found that claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment. Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that the administrative law judge erred in weighing the evidence relevant to whether claimant has complicated pneumoconiosis.

In an appeal filed by a claimant, without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the findings of the administrative law judge if they are 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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<sup>1</sup> Ron Carson, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 24.

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; *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

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. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered thirteen interpretations of four x-rays dated April 21, 2010, June 4, 2010, March 24, 2011, and February 6, 2012. The x-ray evidence is summarized as follows. Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, and Dr. Forehand, a B reader, each read the April 21, 2010 x-ray as positive for simple and complicated pneumoconiosis, Category B, while Dr. Wheeler, a dually qualified radiologist, and Dr. Hippensteel, a B reader, each read the film as negative for both simple and complicated pneumoconiosis. Director's Exhibits 13, 33, 36. Dr. Hippensteel identified a partially calcified "4.5 x 6" centimeter opacity in claimant's left upper lobe, a partially calcified "4 x 5" centimeter opacity at the right hilum, and a one centimeter opacity in the right upper lobe attached to the pleura. Director's Exhibit 33. He stated that the x-ray findings "strongly suggest granulomatous inflammation and scarring rather than coal workers' pneumoconiosis." Director's Exhibit 33.

The June 4, 2010 x-ray was read as positive for simple and complicated pneumoconiosis, Category B, by Drs. Alexander and Miller, dually qualified radiologists, but as negative for complicated pneumoconiosis by Drs. Wheeler and Scott, also dually qualified. Director's Exhibits 28; 38; Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Wheeler indicated that the x-ray findings were "compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Director's Exhibit 38. Dr. Wheeler also stated:

Masses in upper lobes are not large opacities of [coal workers' pneumoconiosis] because there are only a few small nodules with asymmetrical pattern. [Coal workers' pneumoconiosis] gives symmetrical small nodular infiltrates in central[,] mid and upper lungs from which large opacities merge and high profusions are required. Large opacities of [coal workers' pneumoconiosis] were typically in unprotected drillers working during and before [World War II] and such exposures have been illegal for decades.

*Id.* Dr. Scott opined that claimant's large opacities were "probably due to granulomatous disease: sarcoid, [tuberculosis], atypical [tuberculosis], or fungal infection." Employer's Exhibit 1. He also stated that the masses were "unlikely to be due to silicosis/[coal workers' pneumoconiosis,] as there is no background of small opacities." *Id.* Dr. Scott recommended that a diagnosis by biopsy be obtained. *Id.*

The March 24, 2011 x-ray was read as positive for simple and complicated pneumoconiosis, Category B, by Drs. Alexander and Miller, and as negative for both diseases by Drs. Wheeler and Scott.<sup>3</sup> Director's Exhibit 28; Claimant's Exhibit 1; Employer's Exhibit 2. The February 6, 2012 x-ray was read as negative for simple and complicated pneumoconiosis by Dr. Scott. Employer's Exhibit 6. In the "Comments" section of the ILO form, Dr. Scott noted:

5-6 [centimeter] masses projected over superior right hilum and left apex. No background of small opacities to suggest silicosis/[coal workers' pneumoconiosis]. Atypical [tuberculosis], [tuberculosis], sarcoid, fungal infection and lymphoma are possible diagnoses. Obtain tissue diagnosis.

*Id.*

In weighing the conflicting x-ray evidence, the administrative law judge determined that the April 21, 2010, June 4, 2010 and March 24, 2011 x-rays were in equipoise, as there were an equal number of positive and negative readings by the dually qualified radiologists of each of these films. Decision and Order at 7. She also determined that the February 6, 2012 x-ray was negative, based on Dr. Scott's uncontradicted reading. Thus, the administrative law judge found that claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.* at 8.

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<sup>3</sup> Dr. Scott again stated that the radiographic findings were "probably granulomatous masses due to [tuberculosis], atypical [tuberculosis], histoplasmosis, or possibly sarcoid." Employer's Exhibit 2.

Relevant to 20 C.F.R. §718.304(c),<sup>4</sup> the administrative law judge considered two medical opinions.<sup>5</sup> She gave little weight to Dr. Forehand’s diagnosis of complicated pneumoconiosis because it was based, in part, on Dr. Forehand’ own positive interpretation of the April 21, 2010 x-ray, contrary to the administrative law judge’s specific findings regarding that film, and the x-ray evidence as a whole. Decision and Order at 9. In contrast, the administrative law judge credited Dr. Hippensteel’s opinion, that claimant does not have complicated pneumoconiosis because he “explained the basis for his findings by reference to specific characteristics of x-ray evidence.” *Id.* Accordingly, the administrative law judge concluded that claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304(c), and based on her consideration of the evidence overall. Applying her findings with respect to the x-ray evidence, the administrative law judge also found that claimant does not have simple pneumoconiosis, and that he did not establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718.

The Director contends that the administrative law judge erred in “doing a head count of the x-ray readers” and by failing to perform a qualitative analysis of the x-ray evidence, prior to finding that claimant does not have complicated pneumoconiosis. Director’s Letter Brief at 1. We agree. An administrative law judge must consider the entirety of an x-ray report in determining the existence of pneumoconiosis. *See Melnick*, 16 BLR at 1-37. In this case, the physicians agree that claimant’s x-rays show large masses in his lungs, but they disagree as to whether those masses constitute large opacities of complicated pneumoconiosis. Dr. Wheeler identified a 6 centimeter mass in the left upper lobe, a 5-6 centimeter mass in the upper right hilum, and two nodules in the lateral right lung, measuring “1 to 1.2”centimeters. Director’s Exhibit 38. He stated that, “all [are] compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis].” *Id.* Dr. Hippensteel indicated that the x-ray abnormalities were related to “some type of granulomatous inflammation,” and Scott identified histoplasmosis, mycobacterium avium complex, tuberculosis, and sarcoidosis, as possible alternative diagnoses for claimant’s radiological findings. *Id.* Dr. Forehand diagnosed complicated pneumoconiosis, “based on [c]laimant’s work history and chest x-ray,” but recommended a CT scan to rule out cancer, infection, and granulomatous disease. Director’s Exhibit 13.

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<sup>4</sup> There is no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

<sup>5</sup> The administrative law judge also noted that there was one digital x-ray reading in the record, which was interpreted as negative for pneumoconiosis by Dr. Hippensteel. *See* Decision and Order at 9.

As the Director points out, although the administrative law judge specifically observed that “claimant designated treatment records, which indicate that he does not have tuberculosis, histoplasmosis, or sarcoidosis,” she did not address the credibility of the x-ray evidence in light of this relevant evidence.<sup>6</sup> Decision and Order at 10. Similarly, employer points to Dr. Forehand’s remarks and Dr. Hippensteel’s testimony concerning negative test results for tuberculosis and histoplasmosis.<sup>7</sup> Because the administrative law judge failed to explain the weight she accorded all the relevant evidence on the issue of whether claimant has complicated pneumoconiosis, we vacate her finding that claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester*, 993 F.2d at 1145-46; *Director, OWCP v. Rowe* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Melnick*, 16 BLR at 1-37. Additionally, to the extent that the administrative law judge’s x-ray findings affected her credibility determinations with regard to the medical opinions of Drs. Forehand and Hippensteel, we also vacate her finding that claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304(c), and her determination that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2).<sup>8</sup> Thus, we vacate the denial of benefits and remand this case for

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<sup>6</sup> Claimant’s treatment records indicate that he tested negative for histoplasmosis on September 9, 2010, negative for tuberculosis on September 15, 2010, and negative for sarcoidosis on December 13, 2012. See Director’s Exhibit 28; Claimant’s Exhibit 3. As noted by the Director, Office of Workers’ Compensation Programs, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, specifically held in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), that an administrative law judge has discretion to reject, as speculative and equivocal, the opinions of physicians who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions, such as tuberculosis, histoplasmosis, granulomatous disease or sarcoidosis, if they fail to point to evidence in the record indicating that the miner suffers, or suffered, from any of the alternative diseases. *Id.*

<sup>7</sup> Employer argues that Dr. Hippensteel has explained why claimant’s treatment records and the negative test results did not alter his opinion that claimant’s radiographic findings are attributable to some type of granulomatous disease that has not been specifically diagnosed as to type from the laboratory tests. Employer’s Reply Brief at 7.

<sup>8</sup> The administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), as there are no qualifying pulmonary function or arterial blood gas studies in the record. Decision and Order at 10; Director’s Exhibits 13, 33. Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge rejected Dr. Forehand’s opinion that claimant is totally disabled because it was based, in

further consideration. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 33-34.

On remand, the administrative law judge is instructed to reweigh all the relevant evidence on the issue of complicated pneumoconiosis. The administrative law judge should resolve the conflict in the x-ray evidence by conducting a qualitative analysis, which takes into consideration the qualifications of the physicians, and the explanations they provided as the bases for their x-ray interpretations.<sup>9</sup> *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84; *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Melnick*, 16 BLR at 1-37. If the administrative law judge does not find complicated pneumoconiosis established, she should consider whether claimant is entitled to invoke the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>10</sup> In rendering all of her findings on remand, the administrative law judge must explain the bases for her conclusions in accordance with the Administrative Procedure Act.<sup>11</sup> *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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part, on Dr. Forehand's belief that claimant has complicated pneumoconiosis. *See* Decision and Order at 8; Director's Exhibit 13.

<sup>9</sup> The administrative law judge should also address on remand the credibility of Dr. Wheeler's opinion, taking into account the totality of his comments as to why claimant does not have complicated pneumoconiosis. *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).

<sup>10</sup> Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

<sup>11</sup> The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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 30 U.S.C. §932(a).

Accordingly, the Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge