

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0055 BLA

ROBERT J. HUTCHINSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
COAL MAC, INCORPORATED)	DATE ISSUED: 11/07/2018
)	
and)	
)	
ARCH COAL, INCORPORATED)	
)	
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 of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05111) of Administrative Law Judge Tracy A. Daly, 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). This case involves a miner's claim filed on February 1, 2013.

Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge determined that claimant established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). He further found that employer failed to rebut the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's determination that claimant established that he has complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal. Employer filed a reply brief, reiterating its arguments on appeal.¹

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.² 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 provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one

¹ We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least forty-one years of coal mine employment in underground mines or in conditions substantially similar to those in an underground mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

² Because claimant's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5.

centimeter in diameter that would be 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 United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, “[b]ecause prong (A) sets out an entirely objective scientific standard” for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (b) or by other means under prong (c) would show as an opacity that is greater than one centimeter if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-62 (4th Cir. 1999).

The administrative law judge determined that the x-ray evidence supports a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(a), as the preponderance of readings by physicians who are dually-qualified as B readers and Board-certified radiologists is positive for the disease. Decision and Order at 10. Pursuant to 20 C.F.R. §718.304(b), the administrative law judge determined that the biopsy evidence is insufficient to establish that claimant has complicated pneumoconiosis. *Id.* at 11. At 20 C.F.R. §718.304(c), the administrative law judge considered the medical opinions of Drs. Klayton, Gallup, Copley, Fino, and Dahhan, and the treatment records of Dr. Patel. *Id.* at 11-19; Director’s Exhibit 12; Claimant’s Exhibits 1, 2, 5, 7, 8; Employer’s Exhibits 2, 7, 9. Drs. Klayton, Gallup, and Copley diagnosed complicated pneumoconiosis, while Drs. Fino and Dahhan opined that claimant does not suffer from the disease. Director’s Exhibit 12; Claimant’s Exhibits 1, 2; Employer’s Exhibits 2, 7, 9.

The administrative law judge credited the opinions of Drs. Klayton, Gallup, and Copley as “well-reasoned and consistent with the preponderant weight of the evidence.” Decision and Order at 19. In contrast, he accorded little weight to the opinions of Drs. Fino and Dahhan because they failed to adequately explain their conclusions. *Id.* He therefore concluded that the medical opinion evidence establishes the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(c). *Id.* Upon weighing all relevant evidence together, the administrative law judge determined that claimant proved that he has complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. *Id.* at 19-20.

Employer does not contest that the x-ray evidence establishes the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 9-10. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer contends, however, that the administrative law judge did not provide an adequate explanation for his discrediting of Dr. Fino’s opinion and erred in weighing the

medical opinions of Drs. Klayton, Gallup, and Copley under 20 C.F.R. §718.304(c), rather than under 20 C.F.R. §718.304(a). Employer's arguments lack merit.

In addressing Dr. Fino's opinion, the administrative law judge reviewed the physician's November 18, 2013 narrative report³ and his May 3, 2016 deposition testimony.⁴ Decision and Order at 14-15, 19; Employer's Exhibits 2, 7. The administrative law judge noted, "Dr. Fino opined that [c]laimant does not suffer from complicated pneumoconiosis based on his interpretation of the April 26, 2013 chest [x]-ray." Decision and Order at 19. The administrative law judge then referred to Dr. Fino's testimony that the coalescence of opacities he observed in claimant's right and left upper lung zones are not "solid" but instead are "opacities that are moving together, but there's still lung space in between them, so they haven't actually developed into a large opacity." Employer's Exhibit 7 at 11-12.

The administrative law judge found that Dr. Fino "did not adequately justify" how his finding of a coalescence "supports his conclusion that complicated pneumoconiosis is not present." Decision and Order at 19. He further determined that Dr. DePonte's explanation of her diagnosis of complicated pneumoconiosis, based on the same x-ray, was entitled to greater weight:

Dr. DePonte, a dually-qualified physician, unlike Dr. Fino, persuasively explained . . . that although there were other areas of coalescence seen on the [x]-ray film in the same area as the large opacity, there were also three large opacities located in the right upper lung zone. Unlike Dr. Fino, Dr. DePonte's deposition testimony specifically illuminates the basis for her

³ In his November 18, 2013 report, Dr. Fino diagnosed simple coal workers' pneumoconiosis based on his classification of the digital x-ray performed on April 26, 2013 as showing 2/2, q/q coal workers' pneumoconiosis in six lung zones and a coalescence of opacities in the right and left upper lung zones. *Id.*

⁴ During his deposition on May 3, 2016, Dr. Fino testified that he did not diagnose complicated pneumoconiosis because claimant's x-ray illustrated a "coalescence of opacities noted in the right and left upper lung zones," which he described as "opacities that are moving closer together, but there's still lung space in between them, so they haven't actually developed into a large opacity." Employer's Exhibit 7 at 11-12. When asked whether this was a "precursor or first step" in the development of complicated pneumoconiosis, Dr. Fino replied, "[p]robably" but "not every coalescence goes on to complicated" and "[n]ot every complicated starts out as coalescence," but it may progress to complicated pneumoconiosis. *Id.* at 12.

conclusion that the changes present on [x]-ray films represent a large opacity of complicated pneumoconiosis.

Id. at 20.

Weighing the credibility of expert opinions and determining their persuasiveness are tasks committed to the administrative law judge as fact-finder. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). An administrative law judge's findings in this regard will not be disturbed unless they are irrational or lack the explanation required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).⁵ *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). In this case, the administrative law judge identified Dr. DePonte's superior radiological qualifications, and her more thorough rationale, as his reasons for finding her diagnosis of complicated pneumoconiosis more persuasive than Dr. Fino's contrary opinion. We see no error in those findings. Accordingly, we affirm the administrative law judge's discounting of Dr. Fino's opinion under 20 C.F.R. §718.304(c).⁶ *See Compton*, 211 F.3d at 211 (add explanation).

Employer also contends that the administrative law judge erred in considering the medical opinions of Drs. Klayton, Gallup, and Copley at 20 C.F.R. §718.304(c) because their diagnoses of complicated pneumoconiosis were "predicated solely" on x-ray interpretations and, therefore, should have been weighed at 20 C.F.R. §718.304(a). Employer's Brief at 11-14. Employer maintains that addressing these opinions under 20 C.F.R. §718.304(c) was duplicative and "improperly slant[ed] the weighing assessment [of the evidence] towards a finding of complicated pneumoconiosis." *Id.* at 13-14.

Contrary to employer's arguments, the administrative law judge properly considered the medical opinions of Drs. Klayton, Gallup, and Copley under 20 C.F.R.

⁵ 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 30 U.S.C. §932(a).

⁶ We affirm, as unchallenged on appeal, the administrative law judge's discrediting of Dr. Dahhan's opinion that complicated pneumoconiosis is absent under 20 C.F.R. §718.304(c). *See Skrack*, 6 BLR at 1-711; Decision and Order at 19; Employer's Exhibit 9.

§718.304(c). As previously indicated, subsection (c) provides for the consideration of diagnoses of large opacities by means other than an x-ray, biopsy or autopsy. 20 C.F.R. §718.304(c). A review of Dr. Klayton's medical report indicates that he diagnosed complicated pneumoconiosis "on the basis of [forty-eight] years of coal mine employment, dyspnea with moderate exertion, mild hypoxemia on resting [arterial blood gas studies], and chest x-ray showing . . . size A large opacities (progressive massive fibrosis), and coalescence of small pneumoconiotic opacities."⁷ Director's Exhibit 12. Similarly, Dr. Gallup indicated that claimant's "pulmonary symptoms of cough and sputum production, wheezing, dyspnea on exertion" were consistent with a diagnosis of complicated pneumoconiosis, while noting the x-ray findings of type A large opacities.⁸ Claimant's Exhibit 1. He also stated that his assessment was based on claimant's "clinical presentation as well as a complete review of his pulmonary function studies, arterial blood gas determinations and radiographic review . . . during today's pulmonary evaluation." *Id.* Lastly, Dr. Copley reported that her diagnosis of complicated pneumoconiosis was based on claimant's symptoms of dyspnea and sputum production; pulmonary function tests showing mild airflow obstruction; poor exercise tolerance; and x-ray findings of a type A large opacity consistent with progressive massive fibrosis.⁹ Claimant's Exhibit 2.

As all three physicians based their diagnoses of complicated pneumoconiosis on the totality of information gleaned from their examinations of claimant, the administrative law judge properly considered their opinions pursuant to 20 C.F.R. §718.304(c). *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-248 (2003) (Gabauer, J., concurring); *Melnick*, 16 BLR at 1-34-35; Decision and Order at 18-19. We therefore reject employer's allegations of error and affirm the administrative law judge's

⁷ Dr. Klayton relied on Dr. DePonte's reading of the x-ray obtained on April 26, 2013, the date of his examination of claimant. Director's Exhibit 12. Dr. DePonte read the x-ray as positive for complicated pneumoconiosis. *Id.*

⁸ Dr. Gallup summarized Dr. Alexander's reading of the x-ray performed on January 23, 2014, the date of his examination of claimant. Claimant's Exhibit 1. Dr. Alexander interpreted the x-ray as positive for complicated pneumoconiosis. *Id.*

⁹ Dr. Copley cited Dr. Alexander's reading of the x-ray obtained during her examination of claimant on March 20, 2014. Claimant's Exhibit 2. Dr. Alexander read the x-ray as positive for complicated pneumoconiosis. *Id.* The administrative law judge considered the x-ray readings referenced by Drs. Klayton, Gallup, and Copley under 20 C.F.R. §718.304(a). Decision and Order at 9-10.

determination that the opinions of Drs. Klayton, Gallup, and Copley were sufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(c).¹⁰

Finally, employer argues that the administrative law judge failed to consider the biopsy evidence when determining whether the evidence as a whole was sufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304. Employer contends that the biopsy evidence rules out the presence of complicated pneumoconiosis and bolsters the opinions of Drs. Fino and Dahhan. Employer's Brief at 10-11. We disagree.

On July 2, 2015, Drs. Picaza and Warsay investigated whether a nodule seen in the right upper lobe of claimant's lungs was a malignancy by performing a core biopsy, a navigational forceps biopsy, a navigational needle biopsy, and a bronchial washing of the lung nodule. Employer's Exhibit 10. Dr. Gersten prepared the biopsy report after examining the material obtained during the procedures. *Id.* She noted that there was no evidence of a malignancy and that the tissue from the right lung showed benign alveolar parenchyma with multiple caseating granulomas, intra-alveolar macrophages, unremarkable squamous cells, and mixed inflammatory cells. *Id.* Dr. Warsay also prepared a report and stated that "no endobronchial lesions were found" and that "a small amount of purulent secretions were noted from the right upper lobe." *Id.*

The administrative law judge reviewed these reports in detail and accurately determined that "there is no discussion in any of the findings . . . of the presence or absence of findings of massive lesions in the lungs" and that "the various reports are focused on the absence of malignancy." Decision and Order at 11; Employer's Exhibit 10. In light of the administrative law judge's finding that there is no mention in the biopsy reports of either the presence or absence of complicated pneumoconiosis, employer has not explained how the biopsy evidence undermines the administrative law judge's conclusion that, when weighing the evidence as a whole, claimant established that he has complicated pneumoconiosis based on the x-ray evidence and medical opinions. *See Scarbro*, 220 F.3d at 255 ("[I]f the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive

¹⁰ Moreover, employer has not explained how weighing the medical opinions of Drs. Klayton, Gallup, and Copley at subsection (a) versus (c) would have made any difference, in light of the administrative law judge's uncontested finding that their diagnoses of complicated pneumoconiosis are well-reasoned and consistent with the x-ray evidence, as well as his finding that the contrary medical opinions of Drs. Fino and Dahhan are not persuasive. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

or less vivid.”); 20 C.F.R. §718.106(c) (providing that a negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis); Decision and Order at 19-20.

Because employer has not raised any other allegations of error concerning the administrative law judge’s findings under 20 C.F.R. §718.304, we affirm his determination that claimant established the existence of complicated pneumoconiosis and invoked the irrebuttable presumption of total disability due to pneumoconiosis. We also affirm the administrative law judge’s unchallenged finding that claimant’s complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). *Skrack*, 6 BLR at 1-711; *see The Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007); Decision and Order at 20.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge