

U.S. Department of Labor

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



BRB No. 17-0664 BLA

JERRY WAYNE MURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APPOLO FUELS, INCORPORATED	)	DATE ISSUED: 10/25/2018
	)	
and	)	
	)	
SECURITY INSURANCE OF HARTFORD,	)	
c/o HARTFORD CAPITAL	)	
	)	
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 on Remand Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Award of Benefits (2013-BLA-06134) of Administrative Law Judge Daniel F. Solomon, rendered on a miner's subsequent claim filed on October 9, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.<sup>1</sup>

In a Decision and Order issued on September 8, 2015, the administrative law judge awarded benefits. On appeal, the Board affirmed the administrative law judge's findings that claimant established: eleven years of coal mine employment; the existence of simple, clinical pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1),<sup>2</sup> (4), 718.203; total disability pursuant to 20 C.F.R. §718.204(b)(2); and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *Murley v. Appolo Fuels, Inc.*, BRB No. 15-0516 BLA, slip op. at 3 n.5, 6 (Oct. 21, 2016) (unpub.). The Board vacated the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 4-9. Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id.* at 9. The Board instructed the administrative law judge on remand to initially determine whether claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* at 10. If claimant was unable to invoke the irrebuttable presumption, the Board instructed the administrative law judge to reconsider the issues of legal pneumoconiosis and disability causation under 20 C.F.R. §§718.202(a)(4), 718.204(c). *Id.*

On remand, the administrative law judge found that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and thereby invoked the irrebuttable presumption of total disability due to pneumoconiosis. He further found that claimant established total disability due to clinical pneumoconiosis under 20 C.F.R. §718.204(c), and awarded benefits accordingly.

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<sup>1</sup> We incorporate the procedural history of the case as set forth in *Murley v. Appolo Fuels, Inc.*, BRB No. 15-0516 BLA, slip op. at 1 n.1 (Oct. 21, 2016) (unpub.).

<sup>2</sup> The Board affirmed the administrative law judge's findings that Dr. Scott's negative x-ray negative readings for simple pneumoconiosis were equivocal. *Murley*, BRB No. 15-0516 BLA, slip op. at 6.

Employer appeals, asserting that the administrative law judge erred in finding that claimant has complicated pneumoconiosis. Employer also challenges the administrative law judge's finding that claimant established total disability due to simple, clinical pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a 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, and in accordance with applicable law.<sup>3</sup> 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).

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 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; the administrative law judge must weigh all of the evidence relevant to the presence or absence of complicated pneumoconiosis together. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six interpretations of four x-rays, dated October 23, 2012, May 15, 2013, August 15, 2013, and April 14, 2014. Director's Exhibits 12, 15, 16; Claimant's Exhibit 1; Employer's Exhibits 1, 2. Dr. Ahmed, a Board-certified radiologist and B reader, read the October 23, 2012 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Dr. Scott, who is also dually qualified, read it as negative for both simple and complicated pneumoconiosis. Director's Exhibits 12, 15. Dr. Scott read the May 15, 2013 and August 15, 2013 x-rays as negative for simple and complicated pneumoconiosis. Director's Exhibit 16; Employer's Exhibit 1. Dr. Ahmed read the April 14, 2014 x-ray as positive for

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<sup>3</sup> Because claimant's coal mine employment was in Kentucky and Tennessee, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

simple and complicated pneumoconiosis, Category A, while Dr. Adcock, who also is also dually qualified, read it as showing simple but not complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 2.

The administrative law judge determined that Dr. Scott's negative reading of the October 23, 2012 x-ray was equivocal because Dr. Scott used question marks on the ILO form.<sup>4</sup> Decision and Order on Remand at 5. The administrative law judge also discredited Dr. Scott's negative readings of the May 15, 2013 and August 15, 2013 x-rays to the extent that Dr. Scott attributed the claimant's radiographic irregularities and "1.5 centimeter" nodule to "probable" histoplasmosis, tuberculosis or sarcoidosis, in the absence of evidentiary support for those diagnoses.<sup>5</sup> Director's Exhibit 16; *see* Decision and Order on Remand at 5; Employer's Exhibit 1. The administrative law judge noted that "when Dr. Scott's readings are discounted the weight of the evidence favors a finding of complicated pneumoconiosis." Decision and Order on Remand at 6. Thus, the administrative law judge found that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.*

Employer argues that Dr. Scott's readings are not equivocal because Dr. Scott clearly indicated on each of the three ILO classifications he completed that he saw no large

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<sup>4</sup> On the ILO classification form for the October 23, 2012 x-ray, Dr. Scott inserted a question mark over a box he check-marked as showing tuberculosis on the x-ray. Under "OD [other diseases]" - Dr. Scott wrote "[p]robable interstitial fibrosis in mid and lower lungs. Advise CT scan to further evaluate." Director's Exhibit 15. He also noted "[f]ocal fibrosis/infiltrate . . . right upper lung - probably due to [tuberculosis], probably healed. Small scar left upper lung. Possible few calcified granulomata left lower lung. Possible bullae right apex." *Id.*

<sup>5</sup> On the ILO classification form he completed for the May 15, 2013 x-ray, Dr. Scott wrote, "scarring or small infiltrates upper lungs - possible [tuberculosis], pneumonia, scarring from prior infection. Cannot [rule out] 1.5 centimeter nodule [right upper lung]." Director's Exhibit 16.

On the ILO classification form he prepared for the August 15, 2013 x-ray, Dr. Scott inserted a question mark over a box he check-marked as showing tuberculosis on the x-ray. Under "OD [other diseases]" he wrote, "Peripheral minimal infiltrates or fibrosis upper lungs. This could be [tuberculosis] or sarcoid. The distribution of changes is not compatible with silicosis/CWP [coal workers' pneumoconiosis]. . . ." Employer's Exhibit 1.

opacities for complicated pneumoconiosis. Employer asserts that the administrative law judge improperly shifted the burden of proof to employer to disprove that claimant has complicated pneumoconiosis. Employer's assertions of error are without merit.

The administrative law judge permissibly discredited Dr. Scott's x-ray readings because there is no evidence that claimant suffers from any of the alternate diseases identified by Dr. Scott as possible etiologies for the large opacity he identified in claimant's lungs. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010). Employer's reliance on *Johnston v. Double Bonus Coal Co.*, BRB No. 10-0444 BLA (Apr. 29, 2011) (unpub.) (McGranery, J., dissenting) to support its argument that the administrative law judge erred in rejecting Dr. Scott's x-ray readings is misplaced.<sup>6</sup> Moreover, we conclude that the administrative law judge permissibly found Dr. Scott's x-ray readings to be equivocal to the extent that Dr. Scott used qualified language and question marks on the ILO forms. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522 (6th Cir. 2002). We therefore affirm the administrative law judge's decision to give Dr. Scott's negative readings for complicated pneumoconiosis little weight.

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<sup>6</sup> In *Johnston v. Double Bonus Coal Co.*, BRB No. 10-0444 BLA (Apr. 29, 2011) (unpub.) (McGranery, J., dissenting), the Board held that an administrative law judge erred in rejecting as equivocal Dr. Scott's negative readings for complicated pneumoconiosis because the doctor specifically marked the ILO classification forms as showing no parenchymal abnormalities consistent with pneumoconiosis, which would be classified as Category A, B or C. *Id.* On remand, the administrative law judge again rejected Dr. Scott's readings as equivocal and the Board affirmed his rationale pursuant to *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010). The Board specifically held:

The administrative law judge explained [on remand] that he had not accorded less weight to Dr. Scott's x-ray interpretations because it was unclear whether Dr. Scott had diagnosed complicated pneumoconiosis. The administrative law judge was aware that Dr. Scott interpreted the x-rays in question as negative for complicated pneumoconiosis. Rather, the administrative law judge found that Dr. Scott's x-ray interpretations were entitled to less weight because the doctor's diagnosis *constituted speculation on possible etiologies for the abnormalities in claimant's lungs without any corroborating support in the record for the doctor's alternative diagnoses.*

*Johnston v. Double Bonus Coal Co.*, BRB No. 12-0382 BLA, slip op. at 5-6 (Apr. 4, 2013) (unpub.) (emphasis added).

We also reject employer's assertion that the administrative law judge erred in giving greater weight to Dr. Ahmed's positive x-ray readings. The administrative law judge permissibly found that Dr. Adcock's negative readings were less persuasive because Dr. Adcock "did not provide a narrative and did not acknowledge the many abnormalities that were present on the x-rays that both Dr. Ahmed and Dr. Scott recognized." Decision and Order on Remand at 5; *see Napier*, 301 F.3d at 713-714; *Stephens*, 298 F.3d at 522. The administrative law judge also permissibly credited Dr. Ahmed's opinion because Dr. Ahmed had the opportunity to review two x-rays, while Dr. Adcock reviewed only one x-ray. Decision and Order on Remand at 5; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As the administrative law judge law judge rationally explained his credibility determinations, we affirm his finding that "both quantitatively and qualitatively Dr. Ahmed's [positive] readings appear more accurate and thorough and warrant a finding that the x-rays show complicated pneumoconiosis going back to October 2012." Decision and Order on Remand at 6; *see Napier*, 301 F.3d at 713-714; *Stephens*, 298 F.3d at 522. We therefore affirm the administrative law judge's determination that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).<sup>7</sup> *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 58-60 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993).

The administrative law judge correctly found that claimant was unable to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c), as the only relevant evidence under that subsection was Dr. Scott's negative reading of a CT scan dated August 12, 2010.<sup>8</sup> Decision and Order on Remand at 6. The administrative law judge stated that Dr. Scott's opinion was "defective" and "not credible for the reasons that the Board affirmed." *Id.*

Employer notes that the Board did not specifically affirm the administrative law judge's discrediting of Dr. Scott's CT scan reading in the prior appeal. It asserts that the case should be remanded in order for the administrative law judge to explain the weight he accorded Dr. Scott's negative CT scan reading, as required by the Administrative

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<sup>7</sup> The administrative law judge correctly found that there is no biopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b). Decision and Order on Remand at 6.

<sup>8</sup> Dr. Scott noted the following: "Calcified granulomata in hilar and mediastinal nodes. Few calcified granulomata lower lungs. Irregular scar in both upper lungs which contain calcified granulomas. These changes are probably due to healed histoplasmosis. Bullous emphysema upper lungs. The findings are not those expected for silicosis/CWP." Employer's Exhibit 3.

Procedure Act.<sup>9</sup> Contrary to employer’s contention, although the administrative law judge’s discussion on remand of Dr. Scott’s CT scan reading was cursory, it is not necessary to remand this case. If a reviewing court can discern what the administrative law judge did and why he or she did it, the duty of explanation under the APA is satisfied. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316 (4th Cir. 2012). The administrative law judge specifically explained in his initial decision that he considered Dr. Scott’s CT scan reading to be equivocal and “unsupported by the record.” 2015 Decision and Order at 13, *quoting* Employer’s Exhibit 3.

Because the administrative law judge gave a permissible rationale for discrediting Dr. Scott’s CT scan reading, his credibility determined is affirmed. *Cox*, 602 F.3d at 287. We therefore affirm the administrative law judge’s finding that the negative CT scan evidence does not outweigh the positive x-ray evidence for complicated pneumoconiosis. Because it is supported by substantial evidence, we affirm the administrative law judge’s findings that claimant established complicated pneumoconiosis<sup>10</sup> and that he invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.<sup>11</sup> *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; Decision and Order on Remand at 6.

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<sup>9</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 30 U.S.C. §932(a).

<sup>10</sup> We further affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant’s complicated pneumoconiosis arose out of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>11</sup> Because we affirm the administrative law judge’s finding of complicated pneumoconiosis, we need not address employer’s other arguments on appeal with regard to disability causation under 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge