

BRB No. 99-0737 BLA

FRANKLIN GOSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA B MINING COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	
Party-in-Interest	)	

Appeal of the Decision and Order-Denying Benefits of John C. Holmes,  
Administrative Law Judge, United States Department of Labor.

Daniel E. Sachs, Springfield, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge),  
Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH,  
Administrative Appeals Judge, and NELSON, Acting Administrative  
Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-BLA-1144) of  
Administrative Law Judge John C. Holmes on a claim filed pursuant to the  
provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as  
amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> The administrative law judge

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<sup>1</sup>The instant claim, filed January 8, 1997, is a duplicate claim. Claimant  
initially filed a claim on January 28, 1991, which was denied by the district director  
on June 10, 1991, because claimant failed to establish a totally disabling respiratory  
impairment. Director’s Exhibit 53. Claimant took no further action until the filing of a  
second claim on July 25, 1994. Director’s Exhibit 54. This claim was denied by the

considered the entirety of evidence of record, *i.e.*, that evidence submitted with the previous claim and that evidence submitted with the instant claim, and concluded that the objective evidence and the medical opinion evidence failed to support a finding of a totally disabling respiratory impairment. Decision and Order at pp. 2-3 (unpaginated). The administrative law judge further found that the evidence of record failed to demonstrate the presence of complicated pneumoconiosis as defined at 20 C.F.R. §718.304. Decision and Order at pp. 3-10 (unpaginated). Accordingly, benefits were denied.

On appeal, claimant contends that the evidence of record establishes the existence of complicated pneumoconiosis pursuant to Section 718.304 and that the administrative law judge erred in requiring claimant to establish that the large opacities shown on x-rays were due to pneumoconiosis. Employer, in response, urges that the administrative law judge's denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal. Claimant has filed a Reply in which he reiterates his earlier contentions and again requests that the administrative law judge's findings be vacated and the case remanded for further consideration.<sup>2</sup>

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district director because claimant again failed to establish a totally disabling respiratory impairment and therefore failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 54. Claimant took no further action until the filing of the instant claim. Director's Exhibit 1.

<sup>2</sup>Although the administrative law judge erred in failing to provide a specific material change analysis pursuant to 20 C.F.R. §725.309, inasmuch as his findings provide the analysis and evaluation of the evidence as a whole required for a

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After careful consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the relevant evidence of record, we conclude that the administrative law judge's decision denying benefits is supported by substantial evidence, contains no reversible error and, therefore, it is affirmed.

Claimant asserts that the evidence of record supports a finding of complicated pneumoconiosis as there is no dispute that large opacities of greater than one centimeter are present in his lungs and that the evidence also demonstrates "massive scarring" of the lungs. Claimant's Brief at 4. Claimant contends that the record demonstrates the presence of simple pneumoconiosis progressing to complicated pneumoconiosis.

The burden of demonstrating the presence of complicated pneumoconiosis rests affirmatively with claimant. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In order to establish invocation of the irrebutable presumption at Section 718.304, an administrative law

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decision on the merits of entitlement, *cf. Hagerman v. Island Creek Coal Co.*, 11 BLR 1-116 (1988), we will accordingly review the administrative law judge's findings.

Further, inasmuch as claimant has failed to challenge the administrative law judge's finding that the evidence of record failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), the determination is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge must consider all relevant evidence found at each subsection pursuant to Section 718.304(a)-(c), and then weigh together such evidence prior to invocation of the presumption. See *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993); *Melnick, supra*. Further, the Board has held that, while not specifically provided for in the regulations, CT scans generally constitute relevant evidence of the presence of complicated pneumoconiosis, that are to be considered under Section 718.304(c). See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*).

In concluding that the evidence of record failed to demonstrate the presence of complicated pneumoconiosis, the administrative law judge found that, of the eighty-two x-ray interpretations of record, only three were positive for complicated pneumoconiosis.<sup>3</sup> Decision and Order at pp. 3 (unpaginated); Director's Exhibits 14, 16, 33. The administrative law judge thus concluded that the weight of the x-ray readings failed to support a finding of complicated pneumoconiosis pursuant to Section 718.304(a). In concluding that the remainder of the evidence, *i.e.*, the medical opinion evidence and CT scan evidence, failed to support a finding of complicated pneumoconiosis, the administrative law judge addressed the entirety of this evidence and concluded that the weight of such evidence failed to establish the existence of complicated pneumoconiosis. The administrative law judge found that the weight of such evidence was "inconsistent" and not sufficient to carry claimant's burden of demonstrating the existence of complicated pneumoconiosis. Decision and Order at pp. 3-10 (unpaginated).

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<sup>3</sup>Section 718.304(a) states, in pertinent part, that an x-ray demonstrates complicated pneumoconiosis when it "...yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B, or C...." 20 C.F.R. §718.304.

The mere presence of evidence in the record which diagnoses the presence of complicated pneumoconiosis or is supportive of such a finding does not automatically entitle claimant to the irrebutable presumption, found at 20 C.F.R. §718.304, of total disability due to pneumoconiosis. See *Lester, supra*; *Melnick, supra*. In the instant case, contrary to claimant's assertion, the administrative law judge has not imposed an improper burden on claimant, but rather has properly addressed and weighed the entirety of relevant evidence and has concluded that such evidence has failed to affirmatively carry claimant's burden of establishing the existence of complicated pneumoconiosis.<sup>4</sup> See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); see also *Lester, supra*; *Melnick, supra*.<sup>5</sup> Claimant's assertion that certain evidence entitles him to a finding of complicated pneumoconiosis is tantamount to a request for the Board to reweigh the evidence, a function outside the Board's purview. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we affirm the administrative law judge's finding that claimant has failed to establish the presence of complicated pneumoconiosis and is thus unable to establish entitlement to the irrebutable presumption of total disability due to pneumoconiosis. See 20 C.F.R. §718.304.

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

SO ORDERED.

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<sup>4</sup>In reaching this conclusion, therefore, we reject claimant's specific assertion that the administrative law judge erred in requiring him to prove that large opacities were due to pneumoconiosis. Inasmuch as the administrative law judge has properly weighed the entirety of evidence in a manner consistent with *Lester* and *Melnick*, we hold that any error in this regard is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); see generally *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

<sup>5</sup>In reaching this determination, we reject claimant's assertion that the administrative law judge erred in failing to apply the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, in *Robinson v. Pickands Mather Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). *Robinson* is inapposite to the instant case inasmuch as the standard enunciated by the Fourth Circuit is applicable only when the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) has been established. See *Robinson, supra*. Here, it is undisputed that claimant is unable to establish, without the aid of a presumption, the presence of a totally disabling respiratory impairment.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge