

BRB No. 12-0025 BLA

REAFORD D. SYCK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SIDNEY COAL COMPANY)	DATE ISSUED: 09/19/2012
)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

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

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2010-BLA-05179) of Administrative Law Judge Pamela J. Lakes rendered on a subsequent claim filed on February 11, 2009, pursuant to the provisions of 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). The administrative law judge found that claimant established twenty-seven years of coal mine employment. The administrative law judge also found that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, established a change

in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).¹ In addition, the administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Based on these findings, the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).² Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in weighing the x-ray evidence and in finding that it established the existence of complicated pneumoconiosis pursuant to Section 718.304. Employer also contends that the administrative law judge erred in finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b).³ Claimant responds, urging affirmance of the administrative law judge's Decision and Order Granting Benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant's prior claim for benefits was denied for failure to establish any element of entitlement. Director's Exhibit 1.

² The administrative law judge found that claimant was not entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, as claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4). That finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-seven years of coal mine employment, that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). *Skrack*, 6 BLR at 1-711.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 52.

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 of the regulations, provides an irrebuttable presumption of total disability due to pneumoconiosis if claimant 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 that 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, however, does not automatically qualify claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, the administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflicts and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

In finding that complicated pneumoconiosis was established, the administrative law judge found the x-ray evidence, which consisted of x-rays read as both positive and negative for complicated pneumoconiosis, was “on balance, positive for [complicated] pneumoconiosis” pursuant to Section 718.304(a).⁵ Turning to Section 718.304(b), the administrative law judge found that complicated pneumoconiosis was not established thereunder, as there was no biopsy evidence in the record. Next, considering the CT scan, medical opinion and treatment record evidence, which included evidence that was

⁵ The administrative law judge found that the June 5, 2008 x-ray was read as negative for both simple and complicated pneumoconiosis by Dr. Wheeler, a B reader and Board-certified radiologist, while it was read as positive for both simple and complicated pneumoconiosis by Dr. Navani, a B reader and Board-certified radiologist. Employer’s Exhibit 5; Claimant’s Exhibit 9; Decision and Order at 11-13. The administrative law judge found that the June 28, 2008 x-ray was read as positive for both simple and complicated pneumoconiosis by Dr. DePonte, a B reader and Board-certified radiologist, but as only positive for simple pneumoconiosis by Dr. Scott, a B reader and Board-certified radiologist. Director’s Exhibit 18; Employer’s Exhibit 6; Decision and Order at 12-13. The administrative law judge found that the March 12, 2009 x-ray was read as positive for both simple and complicated pneumoconiosis by Drs. DePonte, Alexander and Navani, while it was read as positive for only simple pneumoconiosis by Dr. Scott, a B reader and Board-certified radiologist, and by Dr. Repsher, a B reader. Employer’s Exhibit 6; Director’s Exhibits 16, 17; Claimant’s Exhibit 1; Decision and Order at 12-14.

both positive and negative for complicated pneumoconiosis, the administrative law judge found that it was in equipoise on the issue of complicated pneumoconiosis pursuant to Section 718.304(c). Considering all of the evidence together, the administrative law judge found that, as a whole, it established complicated pneumoconiosis pursuant to Section 718.304.

Employer contends, however, that the administrative law judge erred in finding that the x-ray evidence established complicated pneumoconiosis by shifting the burden of proof to employer to disprove the existence of complicated pneumoconiosis. Employer contends that the administrative law judge's finding that the negative readings of the June 5, 2008 and June 28, 2009 x-rays did not "refute" the existence of complicated pneumoconiosis, establishes that she shifted the burden of proof to employer. We disagree. The administrative law judge found that the x-ray readings of the June 5, 2008 and June 28, 2008 x-rays neither supported nor refuted the existence of complicated pneumoconiosis, as they consisted of readings that were both positive and negative for complicated pneumoconiosis and were, therefore, in equipoise on the issue. Notwithstanding the administrative law judge's use of the word "refute" in this context, she did not shift the burden of proof to employer to establish that the x-ray evidence did not establish complicated pneumoconiosis. Rather, she properly found that these x-rays could not be deemed as either positive or negative for complicated pneumoconiosis as the x-ray readings were in equipoise. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); Decision and Order at 14. Employer's argument is, therefore, rejected.

Next, employer contends that the administrative law judge, in weighing the x-ray evidence, failed to credit the qualifications of Drs. Wheeler and Scott who, in addition to being both B readers and Board-certified radiologists, are professors of radiology. We disagree. In weighing the negative readings of Drs. Wheeler and Scott, the administrative law judge considered the fact that both doctors were B readers and Board-certified radiologists, and weighed their readings in light of these credentials. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; Decision and Order at 11, 13. The administrative law judge was not *required* to accord their readings additional weight because they were also professors of radiology. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Employer's argument is, accordingly, rejected.

Finally, employer asserts that the administrative law judge erroneously "counted heads" in finding that the March 12, 2009 x-ray was positive for complicated pneumoconiosis. The administrative law judge found that three out of four dually-qualified readers found the March 12, 2009 x-ray to be positive for complicated pneumoconiosis. Thus, the administrative law judge did not merely "count heads" in determining that the March 12, 2009 x-ray established complicated pneumoconiosis.

Rather, she permissibly credited the x-ray as positive for complicated pneumoconiosis, based on both the quantity and *quality* of the x-ray readings. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279. Accordingly, we affirm the administrative law judge's finding that the x-ray evidence in this case established the existence of complicated pneumoconiosis pursuant to Section 718.304(a). Further, we affirm the administrative law judge's finding that complicated pneumoconiosis was established at Section 718.304 overall, based on her consideration of the x-ray, CT scan, medical opinion, and treatment record evidence together, as that finding is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge's finding that the existence of complicated pneumoconiosis was established pursuant to Section 718.304.

Cause of Complicated Pneumoconiosis

Employer contends that the administrative law judge erred in finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). Specifically, employer contends that the administrative law judge ignored Dr. Wheeler's deposition testimony "that the mass and nodules he observed [were] compatible with granulomatous disease and, in particular, histoplasmosis." Employer's Brief at 6. Employer also contends that the administrative law judge ignored Dr. Repsher's deposition testimony "that the radiographic changes he observed showed a coalescence of nodules that was distinguishable as individual nodules, which is not representative of complicated pneumoconiosis." *Id.* Employer further contends that "Dr. Repsher...testified that the changes could also be representative of granulomatous disease." *Id.*

At the outset, in finding that the Section 718.203(b) presumption was not rebutted, the administrative law judge stated:

Having considered the evidence of record, I find that, while other etiologies have been suggested, there is no reasoned, documented opinion that attributes the large opacities in [c]laimant's lungs to another etiological factor. There were two medical opinions that are relevant here, by Dr. Agarwal and Dr. Repsher, both of whom are [B]oard-certified pulmonologists. Dr. Agarwal found that the [c]laimant had complicated pneumoconiosis resulting from his coal mine dust exposure while Dr. Repsher found that he had simple but not complicated pneumoconiosis.

In his examination report, Dr. Agarwal attributed both the simple and complicated pneumoconiosis to [c]laimant's dust exposure during coal mine employment. He reached that conclusion in view of [c]laimant's work in a heavy coal dust exposure area while operating the continuous

miner and roof bolting, and he noted that the small opacities seen on the chest x-ray were not usually due to smoking related lung disease and there was no other occupational exposure. Director's Exhibit 16. I find no reason to discredit Dr. Agarwal's opinion.

As he clarified at his deposition, Dr. Repsher did not dispute that the [c]laimant had the small opacities of simple pneumoconiosis resulting from his coal mine dust exposure. Employer's Exhibits 1, 2. He stated that the small opacities had begun to coalesce but that they had not yet reached the status of large opacities, in his estimation, and he found that the changes that he observed could be due to a number of differential diagnoses, including granulomatous disease and coal dust exposure. As noted, I have credited the x-ray evidence establishing the existence of large opacities compatible with pneumoconiosis. Dr. Repsher's opinion is compatible with the coexistence of both coal dust related and non coal dust related diseases. Thus, it does not disprove an association between [c]laimant's coal mine dust exposure and his lung opacities.

Decision and Order at 16.

First, we affirm the administrative law judge's finding that Dr. Agarwal's opinion did not rebut the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment, as employer did not challenge that finding. *See Skrack*, 6 BLR at 1-711.

Second, regarding Dr. Repsher's opinion, contrary to employer's argument, the administrative law judge properly found that it did not rebut the presumption, as it was equivocal. Specifically, Dr. Repsher opined only that the opacities seen on claimant's x-ray "could be due to a number of differential diagnoses, including granulomatous disease and coal dust exposure." Decision and Order at 16 (emphasis added); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Thus, the administrative law judge properly found Dr. Repsher's opinion did not disprove a connection between coal dust exposure and large opacities, and did not, therefore, rebut the Section 718.203(b) presumption.⁶ We, therefore, affirm the administrative law judge's finding

⁶ Employer argues that the administrative law judge failed to consider Dr. Wheeler's comments regarding the causes of the masses and nodules he observed on claimant's x-ray. Contrary to employer's argument, the administrative law judge addressed Dr. Wheeler's comments in his discussion of the x-ray evidence pursuant to 20 C.F.R. §718.304.

that claimant established that his complicated pneumoconiosis arose out of coal mine employment.

Because the administrative law judge properly found that claimant established complicated pneumoconiosis pursuant to Section 718.304 and properly found that claimant was entitled to the Section 718.203(b) presumption that his complicated pneumoconiosis arose out of coal mine employment, and that such presumption was not rebutted, she properly found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge