

BRB No. 12-0377 BLA

JOHNNY D. THOMPSON )  
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 Claimant-Respondent )  
 )  
 v. )  
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 APPALACHIAN FUELS, LLC )  
 )  
 and )  
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 KENTUCKY EMPLOYERS' MUTUAL ) DATE ISSUED: 04/10/2013  
 INSURANCE )  
 )  
 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 – Award of Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order – Award of Benefits in an Initial Claim (2009-BLA-5603) of Administrative Law Judge Larry S. Merck. The

claim was filed on April 29, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge accepted the parties' stipulation that claimant had at least twenty-four years of coal mine employment. He further found that the evidence established the existence of simple clinical pneumoconiosis pursuant to 20 C.F.R. §718.202<sup>1</sup> and the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. In addition, the administrative law judge found that claimant was entitled to the rebuttable presumption that both his simple and complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Because the administrative law judge found the existence of complicated pneumoconiosis arising out of coal mine employment established, he found that claimant was entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the existence of complicated pneumoconiosis was established by a preponderance of the evidence pursuant to Section 718.304.<sup>2</sup> Employer contends that the administrative law judge erred in so finding, because neither the x-ray evidence alone, nor the CT scan evidence alone, established complicated pneumoconiosis at Section 718.304(a) and (c), respectively. Employer also contends that the administrative law judge erred in failing to make an exact finding regarding the length of claimant's smoking history, as such a finding is relevant to determining the existence of complicated pneumoconiosis overall. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to employer's 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

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<sup>1</sup> The administrative law judge found that the evidence did not establish the existence of legal pneumoconiosis.

<sup>2</sup> The administrative law judge's finding that the x-ray evidence, the biopsy evidence, and the well-documented and well-reasoned opinion of Dr. Parmet, claimant's treating physician, established the existence of simple clinical pneumoconiosis pursuant to 20 C.F.R. §718.202 is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Likewise, the administrative law judge's finding that simple and complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

may not be disturbed.<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 and 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 totally disabling 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). Claimant is entitled to the irrebuttable presumption, however, not because he has provided a single piece of relevant evidence, but because he has a “chronic dust disease of the lung,” commonly known as complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993). Further, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. Rather, the administrative law judge must examine all the evidence on the issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

In considering the x-ray evidence pursuant to Section 718.304(a), the administrative law judge found it inconclusive on the issue of complicated pneumoconiosis because, with the exception of Dr. Barrett, “every physician found evidence of [a] large opacity (greater than 1 centimeter in diameter)[,]” but disagreed as to the cause of the opacity. Decision and Order at 35. Specifically, the administrative law judge noted that Dr. Alexander read x-rays dated July 1, 2008, February 12, 2010 and November 3, 2010 as positive for complicated pneumoconiosis, Director’s Exhibits 40, 47; Claimant’s Exhibit 3, while Dr. Wheeler read the same x-rays as negative for complicated pneumoconiosis. Dr. Wheeler determined that the large mass identified on x-ray was more compatible with conglomerate granulomatous disease. Employer’s Exhibits 4, 5; Decision and Order at 35-36. The administrative law judge found that Dr.

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<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director’s Exhibit 4.

DePonte read the November 4, 2010 x-ray as positive for complicated pneumoconiosis, noting that the x-ray showed “classic findings of complicated pneumoconiosis[.]” Decision and Order at 36; Claimant’s Exhibit 2. The administrative law judge noted however, that Dr. Wheeler found this x-ray to be negative for complicated pneumoconiosis because he determined that the large mass seen on x-ray was “compatible with conglomerate granulomatous disease.” Decision and Order at 36; Employer’s Exhibit 6. Considering the x-rays in claimant’s treatment records, the administrative law judge found them inconclusive on the existence of complicated pneumoconiosis, because “Drs. Halbert and Gooding, who interpreted x-rays dated January 14, 2008 and January 18, 2008, respectively, found a large opacity in the right upper lobe that was consistent with complicated pneumoconiosis, but stated that other etiologies were also possible.” Decision and Order at 36; Director’s Exhibit 11. Consequently, as he found that the evidence, regarding the etiology of the large opacity seen on x-ray, was inconclusive, the administrative law judge found that the x-ray evidence failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a).

Considering the CT scan evidence pursuant to Section 718.304(c),<sup>4</sup> the administrative law judge found that it, like the x-ray evidence, was inconclusive on the issue of complicated pneumoconiosis. Specifically, the administrative law judge found that Drs. Wilson, Zekan and Huddleston diagnosed changes in the lungs on CT scans dated January 28, 2008, March 27, 2008, and August 14, 2008, respectively, but failed to identify the etiology of the changes seen. The administrative law judge further noted that Dr. Ammisetty, who interpreted the August 14, 2008 CT scan, found a density in the right upper lung “consistent with progressive massive fibrosis secondary to pneumoconiosis[.]” Decision and Order at 37; Director’s Exhibit 11. The administrative law judge observed, however, that Dr. Ammisetty stated that he “could not rule out other etiologies for the changes” seen on x-ray. Decision and Order at 37; Director’s Exhibit 11. The administrative law judge concluded, therefore, that the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c).

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<sup>4</sup> The administrative law judge also reviewed the medical opinion evidence, which consists of the opinions of Drs. Prakash, Broudy, Dahhan, Baker and Parmet. The administrative law judge found that, with the exception of Dr. Parmet, who diagnosed simple clinical pneumoconiosis, the medical opinion evidence is either silent or unreasoned as to the existence of simple clinical pneumoconiosis, legal pneumoconiosis, and complicated pneumoconiosis. The administrative law judge, therefore, accorded little weight to the opinions of Drs. Prakash, Broudy, Dahhan and Baker.

However, on reviewing the x-ray and CT scan evidence, along with the biopsy evidence<sup>5</sup> and the opinion of Dr. Parmet, the administrative law judge concluded that the preponderance of the evidence established that the large opacity seen on claimant's x-ray and CT scan was due to complicated pneumoconiosis, and not another disease process. Specifically, the administrative law judge found:

[a]fter reviewing the x-ray evidence and CT scan evidence, it is clear that nearly all the radiologists agree that [c]laimant has a large opacity in the right upper lung zone that could be consistent with complicated pneumoconiosis; the issue, as many of the physicians discussed, is that the opacity could also be consistent with other diseases. Thus, the disagreement is not whether the x-ray and CT scans show a large opacity, but what caused the opacity. I find the biopsy evidence and the medical opinion of Dr. Parmet established that the changes seen on the x-rays and CT scans are caused by pneumoconiosis. The pathology report indicated that the biopsy was of a right lung nodule. (Director's Exhibit 11). The biopsy results clearly showed black, carbon-like pigment with fibrotic changes, and the discharge summary following the biopsy reflected that [c]laimant was diagnosed with pneumoconiosis. Dr. Parmet further stated in a progress note that these findings on the biopsy constitute anthrasilicosis. This evidence bolsters the physicians' opinions on chest x-

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<sup>5</sup> The administrative law judge found that the biopsy evidence established the existence of simple pneumoconiosis. Specifically, the administrative law judge found that the biopsy evidence included a fine needle aspiration of the right lung performed on October 8, 2008. Dr. Susana T. Ferra found no malignant cells. Dr. Ferra found:

Numerous reactive pneumocytes and heavily pigmented histiocytes. The pigment is coarse, black and carbonlike. Cell Block material shows pulmonary interstitial fibrosis with fibrotic collagen scar and focal lymphocytic infiltrate.

Decision and Order at 15; Director's Exhibit 11. The biopsy results, which are included in claimant's hospital discharge, identified the existence of pneumoconiosis, and Dr. Parmet, a pulmonologist at the hospital, stated in a treatment note that the "growth" in claimant's lung is an "anthracotic siclicated (sic) nodule." Director's Exhibit 11. Dr. Parmet also found "anthrasilicosis" and "growing nodules." *Id.* Dr. Parmet stated that the biopsy was negative for cancer. *Id.* Dr. Parmet interpreted claimant's PET scan as showing "the start of coalescing nodules." *Id.* Dr. Caffrey examined three slides and the cytopathology report and found it to be "suggestive of simple coal workers' pneumoconiosis." Decision and Order at 16-17; Director's Exhibit 12.

ray that found the large opacity in the right upper lung is consistent with pneumoconiosis, and undermines Dr. Wheeler's opinion that the large opacity is consistent with granulomatous disease. The biopsy results did not reveal granulomatous disease or any of the other diseases that Dr. Wheeler opined could have caused the x-ray changes. Thus, the biopsy evidence confirms Drs. Alexander's and DePonte's finding that complicated pneumoconiosis is the correct diagnosis. The biopsy evidence also enhances the physicians' opinions who found that the x-ray or CT scans showed changes most likely caused by complicated pneumoconiosis, but who could not make a definitive diagnosis because other etiologies were possible.

Decision and Order at 37.

Based on the foregoing analysis, we hold that the administrative law judge properly concluded that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 overall, based on the preponderance of the evidence.<sup>6</sup> See *Westmoreland Coal Co. v. Director, OWCP [Cox]*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Scarbro*, 220 at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR 2-114, 2-117-18; *Melnick*, 16 BLR at 1-33.

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<sup>6</sup> As we affirm the administrative law judge's finding that the evidence establishes that the large opacity seen on claimant's x-ray was due to complicated pneumoconiosis, we need not address employer's contention that an exact finding as to the length of claimant's smoking history is necessary in order for the administrative law judge to make a finding as to the existence of complicated pneumoconiosis in this case. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also contends that, in crediting the opinion of Dr. Parmet, the administrative law judge did not engage in the analysis required pursuant to 20 C.F.R. §718.104(d)(1)-(5), to accord greater weight to the opinion of a treating physician. However, the basis for the administrative law judge's decision to credit the opinion of Dr. Parmet was not that Dr. Parmet was a treating physician. Rather, the administrative law judge found that Dr. Parmet's opinion, unlike the other physicians' opinions, was reasoned. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Employer's argument in this regard is, therefore, rejected.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in an Initial Claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge