

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0590 BLA

ELVIS PRESLEY SAYLOR)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DIXIE FUELS COMPANY, LLC)	
)	
and)	
)	
INSURANCE OF WAUSAU c/o)	DATE ISSUED: 08/14/2017
LIBERTY MUTUAL MIDDLE MARKET)	
)	
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 Larry A. Temin,
Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05848) of Administrative Law Judge Larry A. Temin, rendered on a subsequent claim filed on July 23, 2013,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 12.73 years of coal mine employment and, therefore, found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found, however, that the new evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also found, weighing the evidence on the merits, that claimant established the existence of complicated pneumoconiosis. Finally, the administrative law judge found that the evidence established that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Existence of Complicated Pneumoconiosis – 20 C.F.R. §718.304

¹ The current claim is claimant's fourth. Claimant's most recent prior claim, filed on December 1, 2008, was denied by the district director on June 24, 2009, for failure to establish total disability. Decision and Order at 2-3, 15; Director's Exhibit 3. Claimant took no further action and his claim was administratively closed. *Id.*

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 6.

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides 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 x-ray, yields one or more opacities greater than one 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, would be a condition that could reasonably be expected to yield the results described in (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 entitle claimant to the irrebuttable presumption. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-624 (6th Cir. 1999); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003). Claimant bears the burden of proof to establish the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

In this case, the administrative law judge found that claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(c) based on the computed tomography (CT) scan and medical opinion evidence.³ Decision and Order at 22, 24-25. Weighing the evidence as a whole, the administrative law judge found that claimant satisfied his burden of proof to establish that he suffers from complicated pneumoconiosis and that he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *Id.*

20 C.F.R. §718.304(c)-CT Scans

The administrative law judge considered interpretations of three CT scans taken on August 26, 2011, February 9, 2015, and October 28, 2015, noting that each scan was read once as positive and once as negative for the existence of complicated

³ The administrative law judge found that all of the x-rays are negative for the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a), and that there is no evidence in the record relevant to 20 C.F.R. §718.304(b). Decision and Order at 18-19.

pneumoconiosis.⁴ Decision and Order at 22. Specifically, Dr. Lockey, a B reader and Board-certified pulmonologist, read the August 26, 2011 CT scan, as showing two pulmonary nodules “measuring greater than [one centimeter] in size.”⁵ Dr. Lockey concluded that these findings were consistent with complicated pneumoconiosis, Category A.⁶ Decision and Order at 8-9, 19, 20; Claimant’s Exhibits 1, 2. Dr. Meyer, a B reader and Board-certified radiologist, stated that the abnormalities reflected on this scan may be sequelae of prior granulomatous disease and are “not characteristic of [coal workers’ pneumoconiosis].”⁷ Decision and Order at 9; Employer’s Exhibit 2. Dr. Meyer

⁴ The administrative law judge found that Dr. Meyer’s statements established that CT scans are a medically acceptable technique for diagnosing the presence or absence of complicated pneumoconiosis for all of the computed tomography (CT) scans of record. See 20 C.F.R. §718.107(b); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 135-136 (2006) (en banc) (Boggs, J., concurring), *aff’d on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order at 8, 19; Employer’s Exhibit 2.

⁵ Dr. Lockey described multiple pulmonary nodules located along the pleural surface mostly in the left upper lobe, including two pulmonary nodules measuring greater than one centimeter, various smaller pulmonary nodules, and hilar and mediastinal calcified lymph nodes. Decision and Order at 8-9, 19, 20; Claimant’s Exhibits 1, 2. Dr. Lockey opined that the peripheral location of the pulmonary nodules was somewhat atypical but still consistent with Category A complicated pneumoconiosis in an individual with a history of prolonged exposure to coal and/or silica dust and other potential causes ruled out. Dr. Lockey concluded that the CT scan, coupled with claimant’s length of coal dust exposure, was consistent with complicated coal workers’ pneumoconiosis. Claimant’s Exhibit 1.

⁶ The administrative law judge noted that claimant’s treatment records contain an additional reading of the August 26, 2011 CT scan by Dr. Kennedy, a Board-certified radiologist. Dr. Kennedy identified multiple pleural nodules in the left upper lobe, measuring 1.8 x 0.7 x 1.2 cm and 1.4 x 0.9 x 0.9 cm, as well as subpleural nodules measuring less than 1 cm and multiple calcified subcarinal and hilar lymph nodes. Decision and Order at 8-9, 19-20; Director’s Exhibit 23 at 2. Dr. Kennedy opined that while the changes may be due to black lung, malignancy could not be excluded. Director’s Exhibit 23 at 2. The administrative law judge noted that the record contained no evidence that claimant ever suffered from lung cancer. Decision and Order at 20.

⁷ Dr. Meyer stated that “[t]here are no small centrilobular or perilymphatic nodules” but “there are subpleural nodular opacities present in the periphery of the upper lobes, left much greater than right,” with “several densely calcified nodules . . . seen

explained that “the absence of diffuse nodules on [the] images” made a diagnosis of coal workers’ pneumoconiosis “improbable” and noted that “other causes of subpleural opacities include sarcoidosis, cryptogenic organizing pneumonia and vasculitis.” Employer’s Exhibit 2.

Dr. Crum, a B reader and Board-certified radiologist, read the February 9, 2015 CT scan as showing several nodules measuring over a centimeter in size in the left upper lobe, with “the largest measuring approximately 2.3 [centimeters].” Decision and Order at 10, 21; Claimant’s Exhibits 5, 6. Dr. Crum concluded that “[g]iven [claimant’s] history of coal dust exposure as well as background of small subcentimeter pulmonary nodules this is likely consistent with complicated black lung.” Claimant’s Exhibit 5. Dr. Meyer interpreted this CT scan as showing peripheral sub-pleural nodules, several densely calcified nodules, and calcified lymph nodes, which he stated were “most consistent” with prior granulomatous disease. Decision and Order at 10, 21; Employer’s Exhibit 3. Dr. Meyer explained that the “absence of associated diffuse small nodules” made the diagnosis of coal workers’ pneumoconiosis “unlikely.”⁸ *Id.*

Dr. Moser, a Board-certified internist, read the October 28, 2015 CT scan as showing multiple ill-defined sub-pleural nodules, with the largest nodules in the left upper lobe measuring 18 x 8 mm and 11 mm, respectively. Decision and Order at 10-11, 21-22; Claimant’s Exhibit 3. Dr. Moser acknowledged that the changes “could relate to either old granulomatous disease or prior asbestos exposure,” but ultimately concluded that they “are indicative of [c]omplcated coal miners’ pneumoconiosis.” Claimant’s Exhibit 3.

Dr. Meyer interpreted this CT scan as showing bilateral peripheral sub-pleural nodules, several calcified pulmonary nodules, and calcified lymph nodes. Dr. Meyer stated that these findings were “most consistent” with prior granulomatous disease and that the “absence of diffuse parenchymal nodules” made a diagnosis of coal workers’

bilaterally.” Decision and Order at 9, 19; Employer’s Exhibit 2. Dr. Meyer also identified linear parenchymal bands in both lower lobes and enlarged hilar and subcarinal lymph nodes with stippled calcification. *Id.*

⁸ Dr. Meyer stated that “[t]here are no small centrilobular or perilymphatic nodules” but identified “[s]cattered sub-pleural nodules are present bilaterally” along with several densely calcified pulmonary nodules, additional ground glass opacities, smooth septal lines at the lung bases with small left pleural effusion, and calcified mediastinal and hilar lymph nodes. Employer’s Exhibit 3.

pneumoconiosis “much less likely.”⁹ Decision and Order at 10, 21-22; Employer’s Exhibit 7.

In evaluating the CT scan interpretations, the administrative law judge initially noted that three different physicians interpreted the August 26, 2011, February 9, 2015, and October 28, 2015 CT scans as consistent with complicated pneumoconiosis. Decision and Order at 22. In contrast, Dr. Meyer interpreted each scan as negative for pneumoconiosis. The administrative law judge discredited the negative interpretations of Dr. Meyer, in part, as speculative and unpersuasive because he found there was no evidence in the record that claimant had ever suffered from any of the alternative diagnoses provided by Dr. Meyer for the abnormalities he observed in claimant’s lungs. Decision and Order at 20, 22.

The administrative law judge further noted that Dr. Meyer excluded complicated pneumoconiosis based, in part, on the absence of a background of diffuse small nodules. Decision and Order at 20, 22. The administrative law judge found, however, that Dr. Meyer did not explain how the subpleural nodular opacities he identified on each of the CT scans differed from diffuse small nodules, and that the other CT scan evidence of record also showed evidence of small nodules.¹⁰ *Id.* Thus, the administrative law judge found that Dr. Meyer’s basis for excluding a diagnosis of complicated pneumoconiosis was inadequately explained. *Id.* Conversely, the administrative law judge found that the opinions of Drs. Lockey, Crum and Moser were better reasoned and better supported by the other evidence of record. *Id.* at 22. The administrative law judge therefore found that the CT scan evidence weighs in favor of a finding that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.*

Initially, employer argues that the administrative law judge “failed to take into account” that Drs. Lockey and Moser have lesser radiological qualifications than Dr. Meyer, who is a Board-certified radiologist. Employer’s Brief at 3. Employer’s argument lacks merit. While the administrative law judge must consider the

⁹ Dr. Meyer again stated that “[t]here are no centrilobular or perilymphatic nodules” but identified “bilateral subpleural nodular opacities . . . present in the periphery of both upper lobes” along with several scattered calcified granulomas, septal thickening and irregularity, and hilar and mediastinal lymphadenopathy with stippled and peripheral calcification. Employer’s Exhibit 7.

¹⁰ In particular, Dr. Crum, who possesses equal radiological qualifications to Dr. Meyer, identified a background of small subcentimeter pulmonary nodules on the February 9, 2015 CT scan. Claimant’s Exhibit 5.

qualifications of all of the physicians, he need not credit the opinions authored by the physicians with superior qualifications, but must rationally assess the probative value of their opinions. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Here, the administrative law judge accurately characterized the respective qualifications of Drs. Lockey, Moser, Crum, and Meyer. Decision and Order at 9-10; Claimant's Exhibit 6; Employer's Exhibit 2; Director's Exhibit 23 at 2. However, the administrative law judge permissibly discredited Dr. Meyer's negative interpretations as inadequately explained, speculative, and unsupported by record evidence indicating that claimant had any of the alternative diseases that could account for the CT scan abnormalities.¹¹ See *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), cert. denied, 537 U.S. 1147 (2003); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); see also *Cox*, 602 F.3d at 287, 24 BLR at 2-287; Decision and Order at 22. We therefore reject employer's argument that the administrative law judge failed to adequately consider the radiological credentials of the interpreting physicians.

Employer further argues that the administrative law judge should have discounted Dr. Lockey's positive interpretation of the August 26, 2011 CT scan because it referenced "certain statements made to him by claimant" regarding claimant's medical history that "are not part of the record." Employer's Brief at 3-4. As employer asserts, Dr. Lockey's August 26, 2011 CT scan references a telephone conversation with claimant, in which claimant apparently informed Dr. Lockey that other potential causes of his lung abnormalities had been excluded by his physicians.¹²

¹¹ Because the administrative law judge provided valid reasons for discounting the opinions of Dr. Meyer, we need not address employer's remaining arguments regarding the weight he accorded to his opinions. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 4-5.

¹² After stating that the abnormalities he observed on the August 26, 2011 CT scan were consistent with complicated pneumoconiosis, Category A, Dr. Lockey stated:

Based on the information provided to me by telephone, you indicated that you did work in low seam coal mining from 1977 through 1992, approximately 15 years. This type of job task for this duration of time is consistent with an increased risk for simple as well as complicated coal workers pneumoconiosis in a susceptible

In his summary of Dr. Lockey's August 26, 2011 CT scan reading, the administrative law judge acknowledged Dr. Lockey's statement that the abnormalities he observed were consistent with complicated pneumoconiosis "in an individual with a history of prolonged exposure to coal and/or silica dust and other potential causes ruled out." Decision and Order at 9; Claimant's Exhibit 1. However, the administrative law judge concluded that Dr. Lockey based his opinion on claimant's "CT scan of the chest along with [his] 15 year history of occupational exposure to coal dust is consistent with complicated coal workers['] pneumoconiosis."¹³ Decision and Order at 9, 19. Thus we are unable to conclude that the administrative law judge failed to consider this aspect of Dr. Lockey's opinion. Moreover, the administrative law judge specifically found, and employer does not dispute, that "there is no evidence of record" that claimant had, or has, "granulomatous disease, sarcoidosis, cryptogenic organizing pneumonia, or vasculitis." Decision and Order at 22. In light of this independent finding, employer has failed to show prejudice, and any error in the administrative law judge's failure to address the significance of Dr. Lockey's reference to evidence outside the record is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

individual. I understand from our phone conversations that your chest x-rays and CT scans have been stable, and other potential causes for these abnormalities such as sarcoidosis and chronic fungal infection such as histoplasmosis has been ruled out.

Claimant's Exhibit 1.

¹³ Specifically, the administrative law judge noted:

[T]he August 26, 2011 CT scan was also read by Dr. Lockey, who identified multiple pulmonary nodules located along the pleural surface mostly in the upper lobe with two of the nodules being greater than 1 cm in size. (CX1). He stated that the peripheral location of the nodules was somewhat atypical but still consistent with complicated pneumoconiosis (Category A) and concluded that the CT scan findings, coupled with the claimant's years of occupational exposure to coal dust, were consistent with complicated coal workers' pneumoconiosis.

Decision and Order at 19; *see also Id.* at 9 (making similar finding).

We also reject employer's assertion that the administrative law judge erred in relying on the opinions of Drs. Lockey, Crum, and Moser to find complicated pneumoconiosis established because none of their reports made an "equivalency finding[]." Employer's Brief at 5. Contrary to employer's characterization, Dr. Lockey specifically stated that the left lung nodules he observed on claimant's August 26, 2011 CT were "greater than [one centimeter]" and "consistent with complicated coal workers['] pneumoconiosis (Category A)." Claimant's Exhibit 1. As Dr. Lockey equated his CT reading to a Category A x-ray reading, as described at 20 C.F.R. §718.304(a), his opinion fulfills the regulatory requirement that a condition "diagnosed by means other than [x-ray or biopsy] . . . could reasonably be expected to yield [similar] results" to a diagnosis made by x-ray or biopsy. See 20 C.F.R. §718.304(a), (c); Claimant's Exhibit 1. Thus, as Dr. Lockey's interpretation is analogous to a diagnosis of a large opacity by x-ray, the administrative law judge rationally found that it supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). See *Gray*, 176 F.3d at 387, 21 BLR at 2-624; Decision and Order at 22. Further, the administrative law judge noted that Drs. Crum and Moser also diagnosed complicated pneumoconiosis based on the presence of nodules in the left lung measuring greater than one centimeter, consistent with Dr. Lockey's interpretation. Decision and Order at 22; Claimant's Exhibits 3, 5. Thus, the administrative law judge permissibly found that the "analogous interpretations" of Drs. Crum and Moser also "weigh[] in favor" of a finding that claimant suffers from complicated pneumoconiosis. Decision and Order at 22. Based on the foregoing, the administrative law judge rationally determined that the August 26, 2011, February 9, 2015, and October 28, 2015 CT scans establish the existence of complicated pneumoconiosis. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002); *Gray*, 176 F.3d at 387, 21 BLR at 2-624; Decision and Order at 22.

Finally, we reject employer's argument that the administrative law judge "failed to consider" three additional CT scans contained in claimant's treatment records. Employer's Brief at 2. Contrary to employer's argument, the administrative law judge summarized the results of the three remaining CT scans contained in claimant's treatment notes, dated January 17, 2012, June 28, 2013, and August 30, 2013. Decision and Order at 9-10. The administrative law judge noted that while each CT scan reflected the presence of subpleural nodules, none was interpreted as reflecting changes that might correspond to an x-ray diagnosis of complicated pneumoconiosis. Decision and Order at 12, 20-21. Noting further, however, that none of the CT scans was specifically read for the purpose of determining the existence of complicated pneumoconiosis, the administrative law judge permissibly found these CT scans did not establish the presence, or absence, of the disease. See *Church v. E. Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-

216, 1-218-19 (1984); Decision and Order at 20-21, 22. Because employer raises no other contentions of error, we affirm the administrative law judge's finding that the new CT scan evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).¹⁴

Employer has not raised any other allegations of error concerning the administrative law judge's findings on the issue of complicated pneumoconiosis.¹⁵ We therefore affirm the administrative law judge's finding that, based on the evidence as a whole, claimant established the existence of complicated pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(3), 718.203(b)¹⁶ and 718.304, a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and entitlement to benefits.

¹⁴ The administrative law judge also found that the weight of the new medical opinion evidence supports the existence of complicated pneumoconiosis, pursuant to 718.304(c). Decision and Order at 22-25. As this finding is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983).

¹⁵ Specifically, the administrative law judge found that all of the new evidence, when weighed together, establishes the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a)-(c), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 25-26. The administrative law judge also found that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Id.* Finally, the administrative law judge found that considering all of the evidence of record, on the merits, claimant has established the existence of complicated pneumoconiosis, and his entitlement to benefits. *Id.* at 26.

¹⁶ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to the presumption at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of his coal mine employment, and that employer did not rebut the presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge