BRB No. 13-0213 BLA

RICHARD L. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL COAL COMPANY	)	DATE ISSUED: 12/23/2013
	)	
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 Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-6129) of Administrative Law Judge Michael P. Lesniak rendered on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Based on the August 4, 2010 filing date of the claim, the administrative law judge adjudicated this case under 20 C.F.R. Part 718, and credited claimant with twenty-nine years of underground coal mine employment. Considering the x-ray, biopsy, and other evidence of record pursuant to 20 C.F.R. §718.304(a)-(c), respectively, the administrative law judge found the x-ray evidence sufficient to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and that the weight of all of the evidence considered together established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the x-ray evidence established the presence of simple

pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). He, therefore, found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 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 award of benefits, arguing that the administrative law judge erred in his weighing of the x-ray and medical opinion evidence. Employer further contends that the administrative law judge failed to weigh all of the evidence, like and unlike, in finding the presence of complicated pneumoconiosis established pursuant to Section 718.304. Claimant has not responded in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he is not submitting a substantive response.[1]

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

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

[1] We affirm the administrative law judge's findings that claimant established twenty-nine years of coal mine employment and that the biopsy evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), as unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

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, 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 United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all of the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34; *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199 (1979).

Pursuant to Sections 718.202(a)(1) and 718.304(a), the administrative law judge noted that the record contains three positive readings, and one negative reading, of a single analog x-ray film dated November 9, 2010.[3] Decision and Order at 4, 13-14.

[3] Dr. Alexander, who is Board-certified in radiology and a B reader, read the film as positive for simple pneumoconiosis, p/t 1/2, and Category A, large opacities. Dr. Alexander commented that "lung cancer or old granulomatous disease should be excluded." Claimant's Exhibit 3.

Dr. Shipley, a Board-certified radiologist and a B reader, read the film as negative for both simple and complicated pneumoconiosis. While noting that that there was a 5 centimeter mass in the right upper zone, Dr. Shipley further stated that because of

Weighing the readings, the administrative law judge found that Dr. Alexander and Dr. Shipley, the most qualified physicians of record, read the x-ray as positive for simple and complicated pneumoconiosis, and as negative for simple and complicated pneumoconiosis, respectively. Claimant's Exhibit 3; Employer's Exhibit 3. The administrative law judge found, however, that Dr. Alexander's positive reading was supported by the positive readings of Drs. Abrahams and Gaziano.[4] Further, the administrative law judge found that the comments on the positive x-ray readings did not detract from the credibility of the readings of large opacities, as the comments addressed the possible causes of the opacities, not their existence. The administrative law judge, therefore, found that the x-ray evidence supported the presence of simple and complicated pneumoconiosis pursuant to Sections 718.202(a)(1) and 718.304(a).

Turning to Section 718.304(b), the administrative law judge found that the record contained the pathology report of a needle biopsy performed on September 18, 2009.[5]

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the absence of small, rounded opacities in the upper lung zones, the mass is more likely due to lung cancer and, that lung cancer should be ruled out. Employer's Exhibit 3.

Dr. Abrahams, a B reader, read the film as positive for simple pneumoconiosis, q/q 1/1, and Category A, large opacities. Dr. Abrahams also stated that there was a "nodule, RUL, probably PMF, r/o other pathology." Director's Exhibit 12.

Dr. Gaziano, a B reader, also read the film as positive for simple pneumoconiosis, q/q 1/0, and Category A, large opacities. Dr. Gaziano further commented, "rule out tumor." Claimant's Exhibit 6.

[4] The administrative law judge accorded little weight to the reading of Dr. Shipley, who found that claimant did not have simple or complicated pneumoconiosis, because "contrary to Dr. Shipley's suggestion, the [r]egulations do not require a finding of rounded opacities in order to diagnose simple [coal workers' pneumoconiosis] [and] Dr. Shipley acknowledged that [claimant's] pacemaker could have been obscuring additional opacities." Decision and Order at 14 n.18.

[5] The pathologist, Dr. Turnicky, whose qualifications are not in the record, stated that the sample (a fine needle aspirate from the right upper lung) was negative for any malignancy, but that it was "predominantly pigment laden macrophages and reactive fibrous tissue." Director's Exhibit 13. Dr. Turnicky further stated that the sample was "considered marginal for review in the absence of a definitive pulmonary parenchyma or bronchial epithelial cells" but that "while the number of pigment-laden macrophages and fibrous tissue are not specific, clinical exclusion of pneumoconiosis could be warranted." *Id*.

The administrative law judge found, however, that as the pathologist, Dr. Turnicky, did not find evidence of a large opacity or massive lesion, his opinion did not support a finding of complicated pneumoconiosis pursuant to Section 718.304(b). Decision and Order at 14-15. The administrative law judge concluded, therefore, that the biopsy evidence was insufficient to support a finding of the presence of complicated pneumoconiosis pursuant to Section 718.304(b).

Finally, pursuant to Section 718.304(c), the administrative law judge considered the "other evidence of record,"[6] including the CT scan evidence, as well as the medical opinion evidence and the claimant's treatment records. Decision and Order at 15-18. With regard to the CT scan evidence, the administrative law judge found that the record contained the interpretations of three CT scans, dated August 21, 2009, February 2, 2010 and June 2, 2010, included within claimant's treatment records. He found, however, that these readings were insufficient to establish the presence of complicated pneumoconiosis because the physicians who read the CT scans did not either provide measurements of the opacities seen or state whether the opacities seen were due to coal dust exposure. Decision and Order at 16; Director's Exhibit 13. The administrative law judge, therefore, found that the CT scan evidence was inconclusive and failed to establish the presence of complicated pneumoconiosis. 20 C.F.R. §§718.107, 718.304(c).

Regarding the medical opinion evidence, the administrative law judge considered the opinions of Drs. Jaworski,[7] Gaziano,[8] Basheda[9] and Maxwell.[10] The administrative

[6] The administrative law judge did not include the three readings of the January 31, 2011 digital x-ray by Drs. Basheda, Alexander and Ahmed, in his weighing of the "other evidence of record" pursuant to 20 C.F.R. §718.304(c), as none of the reports of this x-ray contained a statement regarding the medical acceptability or relevance of digital x-rays in the diagnosis of pneumoconiosis, as required under 20 C.F.R. §718.107(b). Director's Exhibit 14; Claimant's Exhibits 1, 4; *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.* 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting).

[7] Dr. Jaworski, who administered the Department of Labor examination and reviewed the pathology findings from claimant's needle biopsy, diagnosed coal workers' pneumoconiosis (CWP)/progressive massive fibrosis (PMF) based on claimant's history of coal dust exposure and his chest x-ray. Director's Exhibit 12. Dr. Jaworski further diagnosed, in addition to cardiac conditions requiring the placement of a pacemaker, a mild obstructive airway disease secondary to cigarette smoking and coal dust exposure. *Id.* Dr. Jaworski then opined that claimant's CWP/PMF was secondary to his coal dust exposure, noting that, based on the results of his needle biopsy, malignancy was less likely. *Id.*

law judge accorded greater weight to the opinions of Drs. Jaworski and Gaziano, finding CWP/PMF and complicated pneumoconiosis, respectively,[11] than to the opinions of Drs.

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[8] Dr. Gaziano reviewed the medical evidence of record, and opined that claimant has simple pneumoconiosis and that he would be totally disabled from performing his usual coal mine employment. Claimant's Exhibits 6, 7. Dr. Gaziano further stated that, "I believe the preponderance of evidence indicates that [claimant] has complicated pneumoconiosis and would meet the irrefutable evidence of total disability [sic]." *Id*. Dr. Gaziano further opined that the findings from claimant's needle biopsy, did not demonstrate a neoplasm, but that needle biopsies are performed to diagnose lung cancer, and are "usually not sufficient to establish the presence of pneumoconiotic disease." *Id*.

[9] Dr. Basheda examined claimant and reviewed the medical evidence of record on behalf of employer, and opined that claimant's symptoms are compatible with a smoking related obstruction. Dr. Basheda also noted that a bronchial asthma could not be excluded, based on the variability in claimant's pulmonary function testing. Director's Exhibit 14. Dr. Basheda opined that claimant's x-ray abnormalities are not due to CWP/PMF, because PMF usually occurs with a background of changes of simple CWP, which are not present in this case. *Id*. Dr. Basheda further opined that the needle biopsy was "apparently substandard" and, therefore, felt that a malignant process could still not be excluded. *Id*. Dr. Basheda reiterated these findings in his July 2, 2012 deposition. Employer's Exhibit 2.

[10] Dr. Maxwell, one of claimant's treating physicians, provided an opinion by deposition on August 11, 2011. Employer's Exhibit 1. In discussing the nodule seen on claimant's x-rays, Dr. Maxwell stated that he did not officially diagnose claimant with CWP because, at the time he was treating claimant, he was concerned with claimant's other conditions, specifically his heart issues. *Id*. at 15-16. In addition, Dr. Maxwell stated that, from his understanding of the literature, a finding of PMF should have a background of smaller opacities because PMF is a coalesce of the smaller nodules as they come together. *Id*. Therefore, Dr. Maxwell stated that, because he did not see these changes, he did not consider coal dust exposure as a cause of the nodules seen on x-ray. Dr. Maxwell further stated that the needle biopsy is not adequate to fully rule out a diagnosis of a malignancy and, therefore, suggested that claimant undergo further testing in the form of a lung resection. *Id*. at 21-22.

[11] The administrative law judge noted that Dr. Jaworski did not review additional evidence in rendering his opinion. Decision and Order at 16. Similarly, the administrative law judge noted that Dr. Gaziano did not fully explain the bases for his conclusions. Despite these shortcomings, the administrative law judge noted that, while the opinions of Drs. Jaworski and Gaziano were not independently determinative of the

Basheda and Maxwell, who did not find complicated pneumoconiosis, because they were in keeping with the x-ray evidence showing the presence of complicated pneumoconiosis. The administrative law judge, therefore, found that the medical opinion evidence supported a finding of complicated pneumoconiosis pursuant to Section 718.304(c).

Weighing all of the relevant medical evidence together, the administrative law judge concluded that the analog x-ray evidence established the presence of a Category A large opacity, thereby establishing the presence of complicated pneumoconiosis pursuant to Section 718.304(a). Citing *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), the administrative law judge concluded that the contrary evidence was not sufficient "to weaken the claimant's x-ray evidence showing large opacities that satisf[y] the statutory definition of complicated pneumoconiosis." Decision and Order at 18. Consequently, the administrative law judge found that the evidence, as a whole, established the presence of complicated pneumoconiosis pursuant to Section 718.304, and that claimant was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act.

Pursuant to Section 718.304(a), however, employer contends that the administrative law judge failed to consider that Drs. Alexander, Abrahams and Gaziano, who, while classifying the x-rays as showing Category A large opacities, also included comments on their x-ray reports that these opacities might not be opacities of complicated pneumoconiosis, but might reflect a tumor or malignancy. Employer argues that the administrative law judge failed to consider the comments, which render the readings equivocal as to the presence of complicated pneumoconiosis. Employer further argues that, in failing to consider subsequently these comments pursuant to Section 718.203(b), the administrative law judge's finding that the claimant's pneumoconiosis arose out of his coal mine employment is arbitrary and capricious.

Contrary to employer's argument, however, the administrative law judge rationally found that the x-ray evidence established complicated pneumoconiosis pursuant to Section 718.304(a). In weighing the x-ray evidence of record, the administrative law judge considered the ILO classifications provided by Drs. Alexander, Abrahams and Gaziano, as well as their comments. Decision and Order at 14. He properly found that the x-ray readings of Drs. Alexander, Abrahams and Gaziano were positive for complicated pneumoconiosis because the physicians identified Category A

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presence of complicated pneumoconiosis, they supported the x-ray evidence showing the presence of complicated pneumoconiosis. Decision and Order at 18.

large opacities.[12] Contrary to employer's argument, the administrative law judge properly found that the physicians' comments did not detract from the physicians' identification of the presence of Category A large opacities, as the comments only addressed the cause, not the existence, of the large opacities. *Melnick*, 16 BLR at 1-33-34; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999)(recon. en banc). The administrative law judge, therefore, properly found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304(a).

Turning to the administrative law judge's consideration of the other evidence at Section 718.304(c), there is no merit to employer's contention that the administrative law judge erred in crediting Dr. Jaworski's diagnosis of complicated pneumoconiosis. The administrative law judge permissibly determined that Dr. Jaworski's diagnosis of complicated pneumoconiosis was reasoned and documented, based on the parameters of his examination and treatment of claimant, which included an x-ray, objective testing and relevant work, medical and smoking histories, as well as his consideration of the results of claimant's needle biopsy. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 16.

Additionally, employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Basheda and Maxwell is rejected. The administrative law judge permissibly assigned little weight to their opinions, that claimant does not have complicated pneumoconiosis, because they found, contrary to his own finding, that the x-ray evidence did not show the existence of simple pneumoconiosis. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 17. Consequently, the administrative law judge reasonably found the medical opinion evidence supported a finding of complicated pneumoconiosis pursuant to Section 718.304(c).

Moreover, contrary to employer's argument, although an administrative law judge is obligated to make findings pursuant to each subsection of Section 718.304(a)-(c), the Fourth Circuit has made clear that the relevant analysis, prior to invocation of the irrebuttable presumption, is whether the evidence, considered as a whole, is sufficient to establish the existence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; Decision and Order at 18. In this case, contrary to employer's contentions, the administrative law judge properly

[12] Drs. Alexander, Abrahams and Gaziano, in addition to diagnosing a Category A large opacity, further indicated that the x-ray included "[p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis." Director's Exhibit 12; Claimant's Exhibits 3, 6.

assessed the credibility of the evidence in light of *Cox* and explained the bases for his credibility determinations in accordance with the Administrative Procedure Act.[13] Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

Finally, Section 718.203(b) provides a rebuttable presumption that claimant's pneumoconiosis arose out of coal mine employment if the presence of pneumoconiosis is established and claimant has at least ten years of coal mine employment. 20 C.F.R. §718.203(b). In order to rebut the presumption, the party opposing entitlement must affirmatively establish, through credible medical evidence, that the source of claimant's pneumoconiosis was not coal mine employment. *See* 20 C.F.R. §718.203(b).

In this case, based on his finding that the x-ray evidence established the presence of simple and complicated pneumoconiosis pursuant to Sections 718.202(a)(1) and 718.304(a), respectively, and claimant established more than ten years of coal mine employment, the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment under Section 718.203(b). Noting the x-ray commentary as well as the other evidence, the administrative law judge nonetheless found that employer failed to offer any contrary evidence rebutting the presumption. Decision and Order at 19.

After review of the relevant evidence, we affirm that determination. Because employer must affirmatively establish that the source of claimant's pneumoconiosis was not coal mine employment, it was within a reasonable exercise of the administrative law judge's discretion to find that the comments, which suggested that other conditions, e.g., a tumor, lung cancer, or a granulomatous disease should be ruled out, are not sufficient to *affirmatively* rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); Decision and Order at 19. We, therefore, affirm the administrative law judge's award of benefits.

[13] 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to affirm the administrative law judge's Decision and Order Awarding Benefits. Instead, I would vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case for further consideration of the relevant evidence pursuant to 20 C.F.R. §718.304. On remand, the administrative law judge should consider the x-ray readings of complicated pneumoconiosis in light of the comments made by the physicians who read those x-rays, as the comments bring into question whether the disease process seen on x-ray is reflective of complicated pneumoconiosis or of another disease process. Specifically, the administrative law judge must reconsider the positive x-ray interpretations of Drs. Alexander, Abrahams and Gaziano, wherein the physicians noted the presence of simple and Category A complicated pneumoconiosis, but included comments regarding additional factors to be considered in providing a diagnosis.[14]

[14] As set forth in the majority opinion, *see* discussion, *supra* at 5 n.3, Dr. Alexander, in addition to reading the x-ray film as positive for simple and complicated pneumoconiosis, further commented that "lung cancer or old granulomatous disease should be excluded." Claimant's Exhibit 3. Similarly, Drs. Abrahams and Gaziano both read the film as positive for simple and complicated pneumoconiosis, but further stated that there was a "nodule, RUL, probably PMF, r/o other pathology" and "rule out tumor[,]" respectively. Director's Exhibit 12; Claimant's Exhibit 6.

With regard to similar x-ray interpretations, the Board has held that comments which relate to whether the disease being diagnosed is pneumoconiosis or whether the diagnosis of pneumoconiosis is equivocal must be considered at 20 C.F.R. §718.202(a)(1). *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(en banc) (recognizing that a comment as to ruling out cancer must be considered by the administrative law judge to determine whether the diagnosis of pneumoconiosis was equivocal). Conversely, comments which do not undermine the credibility of the positive ILO classification, but instead relate to the source of the pneumoconiosis must be considered at 20 C.F.R. §718.203. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999)(recon. en banc). The Board, in *Cranor*, distinguished the two kinds of comments as follows: "…the Board in *Melnick* concluded that an administrative law judge should consider internal inconsistencies within an x-ray reading that detract from the credibility of the x-ray interpretation under 20 C.F.R. §718.202(a)(1). The instant case differs from *Melnick* in that Dr. Sargent's comment regarding the source of the diagnosed pneumoconiosis does not undermine the credibility of the positive ILO classification." *Cranor*, 22 BLR at 1-5. (holding that "Dr. Sargent's comment indicating that the diagnosed pneumoconiosis was not coal workers' pneumoconiosis is to be considered by the fact-finder pursuant to Section 718.203." *Cranor*, 22 BLR at 1-6).

In this case, citing *Cranor*, the administrative law judge did not consider the comments on the x-rays at Sections 718.202(a)(1) and 718.304(a). Decision and Order at 14 n.19. Then, in addressing 20 C.F.R. §718.203, he found "[e]mployer has failed to offer any contrary evidence rebutting the presumption; therefore, the presumption stands." *Id*. at 19. Furthermore, in a footnote, he stated, "[t]o the extent that the x-ray comments are properly considered at this juncture, suggestions that [claimant's] x-rays showed lung cancer or an old granulomatous disease do not constitute contrary evidence, as these disease processes would not cause pneumoconiosis." *Id*. at 19 n.31.[15] The effect of the administrative law judge's decision was that he did not consider the comments substantively at any point.

However, Dr. Shipley read the x-ray film as negative for both simple and complicated pneumoconiosis, noting the presence of a 5 centimeter mass in the right upper zone. Employer's Exhibit 3. Dr. Shipley also stated that because of the absence of small, rounded opacities in the upper lung zones, the mass is more likely due to lung cancer, and that lung cancer should be ruled out. *Id*.

[15] This observation by the administrative law judge was on the mark and underscores exactly why consideration of the comments is required at 20 C.F.R. §§718.202(a)(1) and 718.304(a).

The administrative law judge erred in applying *Cranor*. *Cranor*, in conjunction with *Melnick*, requires that comments addressing the credibility of the pneumoconiosis diagnosis be considered by the administrative law judge at Section 718.202(a)(1). The comments concerning cancer and granulomatous disease related to the issue of whether the claimant had pneumoconiosis or some other disease, as well as to whether the doctor's pneumoconiosis diagnosis was equivocal. Under Board precedent, the administrative law judge should have addressed them at Sections 718.202(a)(1) and 718.304(a), but failed to do so. Moreover, because he used his x-ray determinations under Sections 718.202(a)(1) and 718.304(a) to determine whether the physicians' opinions were credible pursuant to Section 718.304(c), the error permeated the rest of his opinion.

Pursuant to Sections 718.304(b) and (c), the administrative law judge also erred in not considering the comments contained in Dr. Turnicky's pathology report from claimant's fine needle aspirate biopsy that "clinical exclusion of pneumoconiosis could be warranted[,]" Director's Exhibit 13, and in failing to consider whether the CT scan and PET scan results suggested that pneumoconiosis was less likely. The administrative law judge considered each category of evidence, *see* 20 C.F.R. §718.304(a)-(c), from the perspective of whether that particular category of evidence established complicated pneumoconiosis; however, when considering all of the relevant evidence, like and unlike, the question is whether the medical evidence that did not establish complicated pneumoconiosis also undercut the credibility of the evidence to the contrary (and vice versa). *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283, 24 BLR 2-269, 2-280-81 (4th Cir. 2010); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 22 BLR at 2-174 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick*, 16 BLR at 1-33-34.

Consequently, I would vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case for the administrative law judge to consider all of the relevant evidence. *Cox*, 602 F.3d at 283; 24 BLR at 2-280-81; *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

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JUDITH S. BOGGS
Administrative Appeals Judge