U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0534 BLA

ROGER DALE BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA B MINING COMPANY	)	DATE ISSUED: 09/27/2018
	)	
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 on Request for Modification of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits on Request for Modification (2016-BLA-05188) of Administrative Law Judge Alan L. Bergstrom,

rendered on a subsequent claim[1] filed 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 accepted the parties' stipulation that claimant established at least twenty-three years of underground coal mine employment and found that the evidence established that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge therefore found that claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge improperly shifted the burden of proof, erred in weighing the x-ray and CT scan evidence, and did not adequately explain his finding that claimant established the existence of complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to 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 by 30

[1] Claimant filed a claim for benefits on February 7, 2005, which was denied by the district director on November 29, 2005, because the evidence did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on March 23, 2010, which was denied for failure to establish total disability. Director's Exhibit 2. Claimant's current subsequent claim was filed on August 22, 2013. Director's Exhibit 4. The district director issued a Proposed Decision and Order denying benefits on June 5, 2014. Director's Exhibit 27. Claimant requested a hearing, but while the case was being prepared for referral to the Office of Administrative Law Judges, the claims examiner discovered a letter from claimant's counsel, postmarked June 4, 2014, submitting additional evidence. Director's Exhibit 29. Because the Proposed Decision and Order had been issued without consideration of claimant's timely submitted evidence, the district director treated the correspondence as a request for modification. *Id*. On July 21, 2015, the district director issued a revised Proposed Decision and Order awarding benefits, finding that the new evidence established that claimant has complicated pneumoconiosis. Director's Exhibit 40. Employer requested a hearing, which was held before the administrative law judge on July 28, 2016. Director's Exhibit 44.

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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, provides an irrebuttable presumption that a miner is totally disabled 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 prongs (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, within whose jurisdiction this case arises, 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 an opacity that is greater than one centimeter if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-62 (4th Cir. 1999). In determining whether claimant is entitled to invocation of the irrebuttable presumption 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 (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).

X-ray Evidence

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered readings of three x-rays. Decision and Order at 7-10, 23-25. Drs. Crum and Miller, dually-qualified as Board-certified radiologists and B readers, read the September 27, 2013 x-ray as positive for complicated pneumoconiosis, Category B and A, respectively.[3] Director's Exhibits 10, 36. Dr. Wolfe, also dually-qualified, read this x-

States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (en banc).

[3] On the ILO classification form, Dr. Crum noted under "Other Abnormalities" that there was a "coalescence of small pneumoconiosis opacities and a large 5.5 [centimeter] opacity in right upper lung." Director's Exhibit 10. Dr. Miller also identified a "3

ray as negative for complicated pneumoconiosis, but also noted an "ill-defined 4 [centimeter] mass in right upper lung suspicious for lung neoplasm." Director's Exhibit 13.

The administrative law judge accorded greater weight to the positive readings by Drs. Crum and Miller and explained:

> Despite opining that [c]laimant had no abnormalities on his chest x-ray consistent with pneumoconiosis, Dr. Wolfe then noted the presence of a mass in Claimant's right upper lung. Yet, he failed to document the shape and profusion of this mass. It is imperative that the size, shape, location, and profusion of opacities observed on an x-ray be documented. The Regulations provide that the profusion of opacities in the lungs may be used as evidence of the existence of pneumoconiosis. 20 C.F.R. § 718.102. *By failing to properly document his findings, Dr. Wolfe failed to set forth the reasoning behind his opinion that the mass he observed indicates the presence of cancer and that it is not characteristic of pneumoconiosis.* Further, the ILO classification form "requires the reviewing radiologist to indicate whether the patient has any parenchymal or pleural abnormalities 'consistent with pneumoconiosis,' regardless of whether pneumoconiosis is caused by coal dust exposure." *Shrewsbury v. Itmann Coal Co.*, BRB Nos. 09-0864-BLA and 09-0865-BLA (Sept. 29, 2010).

Decision and Order at 23 (emphasis added). Thus, the administrative law judge determined that the September 27, 2013 x-ray was positive for complicated pneumoconiosis. *Id*.

Considering the next two x-rays in the record, the administrative law judge noted that: Dr. Smith, a dually-qualified radiologist, read the April 23, 2014 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Fino, a B reader, read the same x-ray as negative; and that Dr. Miller read the April 20, 2016 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Fino read the film as negative. Decision and Order at 24-25; Director's Exhibits 14, 39; Claimant's Exhibit 7; Employer's Exhibit 1. Dr. Miller specifically described that claimant had a "4 [centimeter] right upper lung large opacity compatible with complicated pneumoconiosis; coalescence of small opacities." Claimant's Exhibit 7. Dr. Fino described a 3 centimeter mass in the right upper lung with calcification. Employer's

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[centimeter] right upper lung mass compatible with complicated pneumoconiosis but malignancy cannot be excluded." Director's Exhibit 36.

Exhibit 1. Crediting the radiological qualifications of Drs. Smith and Miller over those of Dr. Fino, the administrative law judge determined that the 2014 and 2016 x-rays were positive for pneumoconiosis. Decision and Order at 25. Thus, the administrative law judge found that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id*.

Employer asserts that in finding that Dr. Wolfe did not adequately explain why the mass he observed on the September 27, 2013 x-ray was indicative of cancer and not complicated pneumoconiosis, the administrative law judge improperly shifted the burden of proof. Employer contends that Dr. Wolfe was not required to explain his opinion, since he clearly reported on the ILO classification form that there were no parenchymal abnormalities consistent with complicated pneumoconiosis.

Contrary to employer's contention, we see no error in the administrative law judge's findings that Dr. Wolfe "failed to set forth the reasoning behind his opinion that the mass he observed indicates the presence of cancer and that it is not characteristic of pneumoconiosis," and is therefore less credible than the two other dually-qualified radiologists, Drs. Crum and Miller, who identified the same mass as complicated pneumoconiosis. Decision and Order at 24. Further, as the administrative law judge's comprehensive review of the evidence reflects, there is no other evidence in the record to substantiate Dr. Wolfe's alleged etiology for the mass.[4] *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010).[5] Because the administrative law judge did

[4] As the administrative law judge accurately noted, Dr. Fino specifically opined, after reviewing claimant's treatment records and the CT scan evidence, that claimant does not have a malignant mass. Decision and Order at 15; Director's Exhibit 14. Dr. Al-Jaroushi agreed with Dr. Fino that the mass was not cancer because it was stable over time. Decision and Order at 14; Claimant's Exhibit 2. Similarly, Dr. Miller indicated that the slow progression of the mass was characteristic of complicated pneumoconiosis and not cancer. Decision and Order at 17; Claimant's Exhibit 13.

[5] In *Cox*, the Fourth Circuit explained that a physician's alternative diagnosis is "speculative" where it is "not based on evidence that [the miner] suffered from any of the diseases suggested." *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010). Thus, the Court determined that when a physician renders a speculative opinion, an administrative law judge acts "well within her discretion" in rejecting that opinion as being "unsupported by a sufficient rationale." *Id*., *quoting Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). Based on the administrative law judge's finding that Dr. Wolfe "failed to set forth the reasoning" behind his diagnosis of cancer, as well as the lack of any evidence to support such a diagnosis, we disagree with our dissenting colleague's

not shift the burden of proof and permissibly found Dr. Wolfe's reading to be unexplained and outweighed by the preponderance of the positive readings by Drs. Crum and Miller, we affirm the administrative law judge's finding that the September 27, 2013 x-ray is positive for complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992).

Employer next argues that the administrative law judge should have credited Dr. Fino's negative readings of the April 23, 2014 and April 20, 2016 x-rays, because Dr. Fino is Board-certified in pulmonary medicine and is also a B reader.[6] We disagree that the administrative law judge was required to give Dr. Fino's opinion greater weight based on his qualifications in pulmonary medicine. The administrative law judge properly considered the *radiological* qualifications of the physicians, and permissibly gave Dr. Fino's negative readings less weight because he is not dually-qualified as a Board-certified radiologist and B reader, whereas Drs. Smith and Miller are dually-qualified. 20 C.F.R. §718.202(a)(1); *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We, therefore, affirm the administrative law judge's findings that the April 23, 2014 and April 20, 2016 x-rays are positive for complicated pneumoconiosis. Thus, we affirm the administrative law judge's conclusion that claimant established complicated pneumoconiosis by a preponderance of the x-ray evidence pursuant to 20 C.F.R. §718.304(a). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000).

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views that the administrative law judge did not find Dr. Wolfe's diagnosis to be speculative and that the holding in *Cox* is not applicable to the facts of this case.

[6] Employer argues that B readers must be considered equally-qualified to physicians who are both B readers and Board-certified radiologists, and thus the administrative law judge erred in giving less weight to Dr. Fino's negative readings. The case cited by employer in support of its argument, *Whitman v. Califano*, 617 F.2d 1055 (4th Cir. 1980), is not relevant. *Whitman* involved a claim filed before the promulgation of 20 C.F.R. Part 718, when the applicable quality standards did not acknowledge Board certification in radiology as a qualification to be considered when determining whether the existence of pneumoconiosis is established by x-ray evidence. *Compare* 20 C.F.R. §§718.102(e), 718.202(a)(1) *with* 20 C.F.R. §§410.428, 410.490(b)(1)(i) (1978). Accordingly, the decision in *Whitman* discusses only the comparative weighing of x-ray readings performed by B readers, and does not preclude an administrative law judge from crediting a physician who is dually-qualified as a Board-certified radiologist and B reader, over a physician who is only a B reader.

Other Evidence – CT Scans and Medical Opinions[7]

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered fourteen interpretations of seven CT scans. Decision and Order at 16-19. Drs. Miller and Fino read each of these scans.[8] Dr. Miller consistently reported that the CT scans showed a mass that was characteristic of complicated pneumoconiosis, Category A. In

[7] The administrative law judge found that there is no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

[8] The first scan, dated December 7, 2004, was read by Dr. Fino as showing three nodular lesions in the right upper lobe that were less than one centimeter in diameter. Director's Exhibit 14. Dr. Miller read the scan as showing nodules ranging up to 10 millimeters, and indicated that the nodules could be complicated pneumoconiosis or tuberculous or another inflammatory process. Claimant's Exhibit 14. The second scan, dated December 7, 2010, was read by Dr. Fino as showing a 2.6 x 2.5 centimeter upper right lung lesion with calcification. Director's Exhibit 14. Dr. Miller read the scan as showing a coalescence of small opacities in the left apex, which was not present in the prior scan, and a partially calcified 3 x 2.5 centimeter right apical mass that had increased in size from the prior scan. Claimant's Exhibit 13. The third scan, dated April 26, 2011, was read by Dr. Fino as showing the same mass with calcification, measuring 3 x 1.9 centimeters. Director's Exhibit 14. Dr. Miller read the scan as showing a right upper lung mass, measuring 3 x 2.5 centimeters, indicative of complicated pneumoconiosis, Category A. Claimant's Exhibit 12. The fourth scan, dated April 19, 2012, was read by Dr. Fino as showing the same 3 x 1.9 centimeter mass. Director's Exhibit 14. Dr. Miller also indicated that the mass had not changed in size from 2011, measuring 3 x 2.5 centimeters, and was characteristic of complicated pneumoconiosis, Category A. Claimant's Exhibit 11. The fifth CT scan, dated May 31, 2013, was read by Dr. Fino as showing a right upper lung mass measuring 3.2 x 1.7 centimeters in size with definite calcification and some small associated nodular lesions. Director's Exhibit 14. The scan was read by Dr. Miller as showing a right upper lung mass measuring 3 x 3 centimeters and characteristic of complicated pneumoconiosis, Category A. Claimant's Exhibit 10. The sixth scan, dated May 5, 2014, was read by Dr. Fino as showing the same mass in the right upper lung measuring 3.1 x 2.8 centimeters in size with calcification. Employer's Exhibit 1. Dr. Miller read the scan as showing a 3.2 x 3 centimeter mass, characteristic of complicated pneumoconiosis, Category A. Claimant's Exhibit 9. The seventh scan, dated April 6, 2015, was read by Dr. Fino as showing the same 3.1 x 2.8 centimeter mass as seen in the prior scan. Employer's Exhibit 1. Dr. Miller read the scan as showing the same 3.2 x 3 centimeter mass as seen in the prior scan, characteristic of complicated pneumoconiosis, Category A. Claimant's Exhibit 8.

an initial report, dated May 29, 2014,[9] Dr. Fino reviewed a series of five CT scans dating from December 2004 to May 31, 2013, and opined that the scans showed a mass in the right upper lobe that was not complicated pneumoconiosis but was a "granulomatous lesion that had coalesced over the years." Director's Exhibit 14. In a subsequent report, dated June 8, 2016, Dr. Fino reviewed two additional scans from May 5, 2014 and April 5, 2015. Employer's Exhibit 1. He stated that he was "concerned that possibly, since 2015, this mass lesion could be getting bigger or some other process is going on in the lungs. . . . Nevertheless, it is still my opinion that [claimant] does not have a dust-related condition." Employer's Exhibit 1. The administrative law judge determined that Dr. Fino's opinion was not well-reasoned and found that claimant established he has complicated pneumoconiosis, based on the CT scan evidence pursuant to 20 C.F.R. §718.304(c) and on a weighing of all the relevant evidence together under 20 C.F.R. §718.304. *Id.*

Employer asserts that the administrative law judge failed to explain how he resolved the conflict in the CT scan evidence. Contrary to employer's contention, the administrative law judge rationally explained why he gave less weight to Dr. Fino's CT scan readings and Dr. Fino's May 29, 2014 and June 8, 2016 reports, which discuss the CT scans and treatment records. Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge correctly noted that Dr. Fino eliminated complicated pneumoconiosis as the cause of the mass because there was "no background of small opacities." Employer's Exhibit 1; Decision and Order at 27. The administrative law judge permissibly found, however, that this explanation is "not well reasoned" in light of Dr. Fino's own interpretations, which "clearly note[ ] that the mass in [c]laimant's right upper lung was present in the form of smaller, separate nodules at least as early as 2004, that subsequently fused together to produce the large mass."[10] Decision and Order at 27; *see Milburn Colliery Co. v. Hicks,*

[9] Dr. Fino indicated that he had examined claimant on April 23, 2014, and had been provided copies of claimant's medical treatment records and a CD-ROM of five CT scans, dated December 7, 2004, December 7, 2010, April 26, 2011, April 19, 2012, and May 31, 2103. Director's Exhibit 14.

[10] Specifically, the administrative law judge noted that Dr. Fino interpreted the December 7, 2004 CT scan as "showing three nodular lesions in the posterior segment of the right upper lobe less than 1 centimeter in diameter," and that "Dr. Fino's own [subsequent] CT scan interpretations show that the mass was slowly increasing in size from 2.6 x 2.5 centimeters on the December 7, 2010, scan, to 3.1 x 2.8 centimeters in size on the April 6, 2015, CT scan interpretation." Decision and Order at 25, 27; Employer's Exhibit 14. As the administrative law judge observed, Dr. Fino initially attributed these changes to a "granulomatous lesion that had coalesced over the years," but later stated his concern

138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Conversely, the administrative law judge rationally credited Dr. Miller's opinion that claimant has complicated pneumoconiosis to the extent he "repeatedly observed coalescence of small opacities on [c]laimant's CT scans." Decision and Order at 27. The administrative law judge also rationally rejected Dr. Fino's explanation that the mass was in an unusual place, because "the mere fact that a mass is not in Dr. Fino's 'typical' location for complicated pneumoconiosis to develop, does not preclude a finding of complicated pneumoconiosis." Decision and Order at 27; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Lastly, we see no error in the administrative law judge's decision to give Dr. Fino's opinion less weight, to the extent that Dr. Fino was "inconsistent" in his conclusions regarding the etiology of the mass, first attributing it to granulomatous disease and then, in a subsequent report, stating that the "mass could be getting bigger or some other process is going on." Employer's Exhibit 1; *see Cox*, 602 F.3d at 286-87; *Hicks*, 138 F. 3d at 533; Decision and Order at 27. Thus, we affirm the administrative law judge's finding that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c), based on the CT scan readings by Dr. Miller.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that, "considering all [of] the credible evidence [of] record," claimant satisfied his burden to establish that he has complicated pneumoconiosis. Decision and Order at 27. We therefore affirm the administrative law judge's finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Scarbro*, 220 F.3d at 255. Additionally, we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).[11] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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that "some other process is going on in the lungs." Decision and Order at 27, *quoting* Employer's Exhibits 1, 14.

[11] We also affirm, as unchallenged on the appeal, the administrative law judge's finding that granting modification renders justice under the Act. Decision and Order at 28; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's award of benefits, based on his finding that claimant established complicated pneumoconiosis and invoked the irrebuttable presumption pursuant to 20 C.F.R. §718.304. In reviewing the x-ray evidence, the administrative law judge did not give a proper reason for discrediting Dr. Wolfe's negative reading for complicated pneumoconiosis of the September 27, 2013 x-ray. The administrative law judge also did not explain the weight he accorded the conflicting CT scan readings by Drs. Fino and Miller, as required by the

Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[12]

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge found Dr. Wolfe's negative reading less credible for the following reason:

> Despite opining that [c]laimant had no abnormalities on his chest x-ray consistent with pneumoconiosis, Dr. Wolfe then noted the presence of a mass in Claimant's right upper lung. Yet, he failed to document the shape and profusion of this mass. *It is imperative that the size, shape, location, and profusion of opacities observed on an x-ray be documented. The Regulations provide that the profusion of opacities in the lungs may be used as evidence of the existence of pneumoconiosis. 20 C.F.R. § 718.102. By failing to properly document his findings, Dr. Wolfe failed to set forth the reasoning behind his opinion that the mass he observed indicates the presence of cancer and that it is not characteristic of pneumoconiosis.* Further, the ILO classification form "requires the reviewing radiologist to indicate whether the patient has any parenchymal or pleural abnormalities "consistent with pneumoconiosis," regardless of whether pneumoconiosis is caused by coal dust exposure." *Shrewsbury v. Itmann Coal Co.*, BRB Nos. 09-0864-BLA and 09-0865-BLA (Sept. 29, 2010).

Decision and Order at 23 (emphasis added). The administrative law judge's finding is not supported by either the regulation or the ILO form.

The regulation at 20 C.F.R. §718.103 provides that certain opacities greater than 0/1 may support a finding of pneumoconiosis, but it does not impose a requirement for a physician to identify the size and shape of every radiographic irregularity. The ILO classification form requires the physician interpreting the x-ray film to first determine whether there are any parenchymal abnormalities consistent with pneumoconiosis. If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size of the opacities, *i.e.*, small opacities or large opacities of size A, B, or C. *See* Form CM-933, questions 2A, 2B and 2C. However, if the physician answers the question in the

[12] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), 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 . . . ." 5 U.S.C. §557(c)(3)(A).

negative, then he/she is instructed to skip the section regarding the size of the opacities. *See* Form CM-933, question 2A.

In this case, Dr. Wolfe stated on the ILO form that there were no parenchymal or pleural abnormalities consistent with pneumoconiosis. Dr. Wolfe checked the "No" box in response to Question 2A, thus opining that there were no parenchymal abnormalities consistent with pneumoconiosis and thus obviating the need to identify the size and shape and location of any other type of opacity. Dr. Wolfe indicated that there were no findings consistent with pneumoconiosis. He saw a mass that was suspicious for a malignancy. He was not required to further fill out the ILO form. For this reason, the administrative law judge's finding that Dr. Wolfe's negative reading was not "documented" because he did not properly classify his findings on the ILO classification form is not rational and creates a standard that completely ignores the regulations and the instructions on the ILO form. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Although the majority believes that Dr. Wolfe's negative reading may be discredited based on *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010), the administrative law judge did not indicate that Dr. Wolfe's reading was "speculative" or otherwise cite to *Cox* as his rationale for rejecting Dr. Wolfe's reading. When an administrative law judge does not make the necessary findings of fact, the proper course is to remand the case, as the Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Because the administrative law judge's weighing of the evidence is not adequately explained in accordance with the APA, I would vacate his finding that claimant established complicated pneumoconiosis under 20 C.F.R. §718.304(a).

In considering the CT scan evidence pursuant to 20 C.F.R. §718.304, the administrative law judge offered no explanation as to why he credited Dr. Miller's positive readings for complicated pneumoconiosis over Dr. Fino's negative readings. One of the reasons Dr. Fino provided for not diagnosing complicated pneumoconiosis was the calcifications he saw on the CT scans, which he opined were inconsistent with the disease. Employer's Exhibit 1. The administrative law judge rejected Dr. Fino's explanation because "Dr. Miller noted the calcifications on [c]laimant's CT scans but continued to opine the mass was characteristic of complicated pneumoconiosis." Decision and Order at 27. The administrative law judge's cursory finding does not resolve the conflict in the evidence and does not satisfy the APA. *Wojtowicz*, 12 BLR at 1-165. In the absence of an adequate explanation as to why Dr. Miller's positive readings are more credible than Dr. Fino's negative readings of the CT scan evidence, I would vacate the administrative law

judge's finding that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id*.; *McCune*, 6 BLR at 1-998.

I would therefore vacate the award of benefits and remand this case for further consideration and explanation in accordance with the APA.

RYAN GILLIGAN
Administrative Appeals Judge