BRB No. 01-0624 BLA

JUDITH A. PRICE (Executrix of the Estate of BONNA LYNN MALOTT, Deceased Widow of RICHARD MALOTT)	)	
Claimant-Petitioner	)	
v.	)	
EASTERN ASSOCIATED COAL COMPANY	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-0369) of Administrative Law Judge Michael P. Lesniak denying benefits on a survivor's claim[i] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[ii] This case is on appeal before the Board for a third time.[iii] In the last appeal, the Board affirmed the administrative law judge's finding that the weight of the evidence established that the miner did not have complicated pneumoconiosis, thus the evidence was insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 (2000). The Board also held that the administrative law judge did not err in finding that the opinion of the autopsy prosector, Dr. Franyutti, was entitled to less weight than the contrary opinions of Drs. Crouch and Kleinerman, and that Dr. Shureiqi's opinion, as expressed on the death certificate, did not establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). The Board agreed, however, with claimant's argument that the administrative law judge erred in assessing the relative weight to be accorded to the opinions of Drs. Crouch, Kleinerman, Goldblatt and Weiss. Consequently, the Board vacated the administrative law judge's findings under Section 718.205(c)(2) (2000), and remanded the case for the administrative law judge to determine whether the weight of the medical opinions of record established that pneumoconiosis was a contributing cause of the miner's death. *Price v. Eastern Associated Coal Co.*, BRB No. 99-1230 BLA (Sep. 8, 2000)(unpub.).

On remand, the administrative law judge denied claimant's request for readjudication of the issue of whether the evidence established that the miner had complicated pneumoconiosis, and found that the weight of the evidence was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c) (2001). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's weighing of the medical opinions of record at Section 718.205(c) (2001) and his refusal to revisit the issue of complicated pneumoconiosis at Section 718.304 (2001). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, responds, declining to address the merits of this appeal but asserting that the amendments to the regulations do not affect the outcome of this case.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner

suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304 (2001); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5) (2001); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).[iv]

After consideration of the administrative law judge's Decision and Order, the arguments on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Initially, we reject claimant's contention that the administrative law judge was required to readjudicate the issue of whether the evidence was sufficient to establish invocation of the irrebuttable presumption at Section 718.304 (2001) in light of *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), wherein the United States Court of Appeals for the Fourth Circuit acknowledged the potential divergence between medical and legal standards for establishing complicated pneumoconiosis, and found no error in an administrative law judge's reliance on a dictionary definition of "massive" in assessing whether the autopsy evidence established the existence of "massive lesions." Claimant's Brief at 3-4. While the "law of the case" doctrine permits an exception where an intervening change in controlling law dictates a result different from that directed by the appellate body, *see generally Richardson v. United States*, 841 F.2d 993 (9th Cir. 1988), claimant's reliance on *Scarbro* is misplaced. In the present case, the administrative law judge determined that Dr. Goldblatt's diagnosis of complicated pneumoconiosis was not confirmed by the other three pathologists of record, and that Dr. Kleinerman provided a clear and concise explanation of his belief that the area diagnosed by Dr. Goldblatt as complicated pneumoconiosis was in fact an apical cap rather than a pneumoconiotic nodule. The administrative law judge then acted within his discretion as trier-of-fact in finding that the weight of the autopsy evidence was insufficient to establish invocation of the presumption at Section 718.304 (2000). The Board affirmed the administrative law judge's findings thereunder, as supported by substantial evidence, and in light of the administrative law judge's reasonable conclusion that the weight of the evidence established that the miner did not have complicated pneumoconiosis, the Board rejected claimant's argument that the administrative law judge was required to make a determination as to whether the nodule viewed by Dr. Goldblatt would appear on a chest x-ray as an opacity greater than one centimeter in size pursuant to *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999), and *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). *Price v. Eastern Associated Coal Co.*, BRB No. 99-1230 BLA, slip op. at 5 (Sep. 8, 2000)(unpub.). Inasmuch as *Scarbro* does not demonstrate that the initial decision was erroneous, we hold that the law of the case doctrine is controlling on this issue and that invocation at Section 718.304 (2001) has not been established. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown,

J., dissenting).

Turning to the issue of the cause of the miner's death, claimant asserts that the administrative law judge provided inadequate or invalid reasons for crediting the opinions of Drs. Crouch, Kleinerman and Weiss, that the miner's death was unrelated to pneumoconiosis, over the contrary opinions of Drs. Goldblatt, Shureiqi and Franyutti. Claimant essentially seeks a reweighing of the evidence, which is beyond the scope of our review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the Board held in the last appeal that the administrative law judge did not err in finding that the opinion of the autopsy prosector, Dr. Franyutti, was entitled to less weight than the opinions of Drs. Crouch and Kleinerman, and that Dr. Shureiqi's opinion, as expressed on the death certificate, was insufficient to establish that the miner's death was due to pneumoconiosis, the Board's previous holdings constitute the law of the case, thus we affirm the administrative law judge's credibility determinations regarding the relative weight to be accorded to the opinions of these physicians. *See Brinkley, supra*.

Further, contrary to claimant's arguments, the administrative law judge permissibly accorded little weight to the opinion of Dr. Goldblatt, that pneumoconiosis hastened the miner's death, because he found that Dr. Goldblatt based his conclusions in part upon a misdiagnosis of complicated pneumoconiosis. Decision and Order on Remand at 4; *see generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). While the administrative law judge acknowledged that Dr. Goldblatt was a Board-certified pathologist who reviewed the autopsy evidence as well as the miner's medical records, the administrative law judge additionally found that the physician's opinion minimizing the effects of cancer on the miner's death was unreasonable and not supported by the medical records documenting extensive metastatic stomach and liver cancer. Decision and Order on Remand at 4; *see generally Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Within a proper exercise of his discretion, the administrative law judge accorded greater weight to the opinions of Board-certified pathologists Drs. Crouch and Kleinerman, buttressed by the opinion of Board-certified internist and medical oncologist Dr. Weiss, that the miner's death was caused by the effects of cancer unrelated to pneumoconiosis, as he determined that they were better supported by the x-ray and autopsy evidence of record which showed minimal simple pneumoconiosis, and Dr. Kleinerman was highly qualified in the area of black lung. Decision and Order on Remand at 5; *see Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Lastly, the administrative law judge reasonably rejected claimant's argument that Dr. Weiss's opinion must be discredited as hostile to the Act,[v] but assuming *arguendo* that it was hostile to the Act, the administrative law judge permissibly found that a preponderance of the better reasoned opinions of record, *i.e.*, the opinions of Drs. Crouch and Kleinerman, established

that pneumoconiosis did not hasten the miner's death. Decision and Order on Remand at 5-6. The administrative law judge's findings pursuant to Section 718.205(c) (2001) are supported by substantial evidence and thus are affirmed. Consequently, we affirm the administrative law judge's denial of survivor's benefits. *Shuff, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

i.Following the miner's death on October 26, 1993, Director's Exhibit 8, Bonna

Lynn Malott, the miner's widow, filed a survivor's claim on April 16, 1996. Director's Exhibit 1. Bonna Lynn Malott subsequently died on February 11, 1998, and Judith A. Price, the executrix of the widow's estate, is pursuing the survivor's claim as the claimant herein.

ii.The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

iii.The full procedural history of this case is set forth in *Price v. Eastern Associated Coal Co.*, BRB No. 99-1230 BLA (Sep. 8, 2000)(unpub.), and in *Price v. Eastern Associated Coal Co.*, BRB No. 98-0852 BLA (Mar. 17, 1999)(unpub.).

iv.This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

v.The administrative law judge determined that during his deposition, Dr. Weiss acknowledged that he was not a pulmonologist or pathologist, but testified in response to questioning that simple pneumoconiosis was not generally associated with meaningful disability, based on his training as a internist. Decision and Order on Remand at 5; Employer's Exhibit 5 at 24. The administrative law judge noted that Dr. Weiss was not asked whether he believed that simple pneumoconiosis could contribute to the miner's death, which was the only relevant inquiry herein. The administrative law judge thus reasonably concluded that Dr. Weiss's opinion regarding the extent to which simple pneumoconiosis causes disability did not necessarily affect the physician's opinion that pneumoconiosis did not hasten the miner's death. Decision and Order on Remand at 5; Employer's Exhibit 5 at 25.