

BRB No. 04-0699 BLA

SHIRLEY KLONOWSKI )  
(Widow of ROBERT T. KLONOWSKI) )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 TJS INCORPORATED )  
 )  
 and )  
 )  
 ROCKWOOD CASUALTY INSURANCE ) DATE ISSUED: 04/18/2005  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Raymond F. Keisling (Carpenter, McCadden & Lane, LLP), Wexford, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (02-BLA-5106) of Administrative Law Judge Daniel L. Leland rendered on a claim 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). This case has been before the Board previously. In *Klonowski v. TJS Inc.*, BRB No. 03-0374 BLA (Dec. 15, 2003)(unpub.), the Board affirmed the administrative law judge’s finding that Dr. Perper’s opinion that the miner’s emphysema, caused by cigarette smoking and coal mine employment, was sufficient to establish that pneumoconiosis contributed to the miner’s death. The Board however vacated the award of benefits and remanded the case for reconsideration because the administrative law judge erred in his consideration of the opinion of Dr. Bush. On remand, the administrative law judge found that Dr. Perper’s opinion was entitled to little weight because it was not well-reasoned or well-documented and he determined that Dr. Bush’s opinion that pneumoconiosis did not contribute to the miner’s death was well-reasoned and entitled to the most weight. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the evidence on remand and in his initial finding that complicated pneumoconiosis is not established.<sup>1</sup> Employer, responds, urging affirmance. The Director, Office of Workers’ Compensation Programs, (the Director) responds, urging affirmance of the administrative law judge’s finding that the evidence does not establish the existence of complicated pneumoconiosis.

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).

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<sup>1</sup> In the administrative law judge’s first Decision and Order in this case, dated February 12, 2003, the administrative law judge considered the relevant evidence and determined that the preponderance of the evidence was insufficient to establish entitlement to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Claimant did not appeal this finding, though she raised the argument that this finding was incorrect, as the administrative law judge awarded benefits. The administrative law judge incorporated these findings by reference in his current decision.

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant initially contends that she is entitled to the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 because Dr. Perper's opinion establishes that claimant suffered from complicated pneumoconiosis. In considering the issue of complicated pneumoconiosis, the administrative law judge first found that the record contains several x-rays which were read for the purpose of diagnosing and tracking the miner's lung cancer. February 12, 2003 Decision and Order at 5. The administrative law judge found that these x-rays were not probative to establishing complicated pneumoconiosis pursuant to Section 718.304(a). *Id.* Next, the administrative law judge considered the three medical opinions contained in the record and found that only Dr. Perper diagnosed complicated pneumoconiosis.<sup>2</sup> *Id.*; Director's Exhibits 9, 13; Employer's Exhibit 1. The administrative law judge found that Dr. Perper did not make an equivalency determination that the hyalino-anthracotic lesions would appear as a one-centimeter opacity on chest x-ray, and it was not clear that the lesions Dr. Perper observed constitute massive lesions. Regarding the other medical reports, the administrative law judge found that neither the autopsy prosectors nor Dr. Bush found evidence of complicated pneumoconiosis, and thus complicated pneumoconiosis was not established pursuant to Section 718.304(b). The administrative law judge also found that the record does not contain any CT scans or other diagnostic tests which could establish

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<sup>2</sup> Dr. Perper observed irregular areas of hyalino-anthracosis measuring 2.3 cm and 3 cm in the right middle lobe. The physician stated that the large pneumoconiotic lesion in the right middle lobe did not include some features seen in complicated coal workers' pneumoconiosis, but that such features were not critical for a diagnosis of coal workers' pneumoconiosis. Dr. Perper further observed that on microscopic slides, the hyalino-anthracotic lesions in the right middle lobe exceeded 2.0 cm, and that a diagnosis of complicated pneumoconiosis was appropriate in this case. Director's Exhibit 13.

complicated pneumoconiosis pursuant to Section 718.304(c). Finally, weighing all the evidence as a whole, the administrative law judge found that the evidence was insufficient to invoke the irrebuttable presumption.

We disagree with claimant's assertion that a single piece of evidence entitles her to the irrebuttable presumption of death due to pneumoconiosis. While Section 718.304(a), (b), and (c) set forth three different methods by which a claimant can invoke the irrebuttable presumption, the administrative law judge must in every case review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*. 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*); *see also Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Further, as Section 718.304 offers no opportunity for rebuttal, failure to require an administrative law judge to consider all relevant evidence at the invocation stage may violate an opposing party's right to due process. *Melnick*, 16 BLR at 1-33. As the administrative law judge properly considered all of the relevant evidence, and rationally concluded that it was insufficient to establish complicated pneumoconiosis, we affirm his determination that the preponderance of the evidence fails to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. *Mullins Coal Co. of Va. v. Director, OWCP*. 484 U.S. 135, 11 BLR 2-1; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick*, 16 BLR at 1-33.

Claimant next contends that the administrative law judge erred in finding on remand that Dr. Perper's opinion is not well-reasoned or documented. The administrative law judge noted that Dr. Perper's microscopic diagnoses included "slight, mainly macular pneumoconiosis in other areas [than the right middle lobe] with very few nodules' and 'centrilobular emphysema, focal, slight to moderate,'" while (under the section entitled conclusion) Dr. Perper stated that the miner had suffered from "significant coal workers' pneumoconiosis...with associated severe centrilobular emphysema." Director's Exhibit 13; Decision and Order on Remand at 3. The administrative law judge accorded little weight to the physician's statement that coal workers' pneumoconiosis and centrilobular emphysema contributed to the death because it was not clear whether this opinion was based on the physician's microscopic diagnoses of slight pneumoconiosis and slight to moderate emphysema or his conclusions of significant pneumoconiosis and severe emphysema. *Id.* Claimant contends that the "description of the coal workers' pneumoconiosis in the right lung certainly is not a description of slight pneumoconiosis." Claimant's Brief at 2 (unpaginated). Claimant is requesting the administrative law judge to make a medical determination, which he is not empowered to do. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). As the administrative law judge permissibly questioned the credibility of Dr. Perper's opinion based on the inconsistent diagnoses in his report, we affirm the administrative law judge's finding that Dr. Perper's opinion was

entitled to little weight. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Lastly, claimant contends that the administrative law judge erred in according determinative weight to Dr. Bush's opinion because the physician's opinion that one percent of the miner's lung tissue was destroyed by coal worker micronodules and associated focal dust emphysema conflicts with the autopsy prosectors' findings that coal worker macules involved thirty percent of the lung parenchyma. Claimant is requesting a reweighing of the evidence in a manner favorable to her claim. The Board is not empowered to do this. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Further, the administrative law judge acted within his discretion in finding that Dr. Bush's opinion was well-reasoned, and we affirm his finding that claimant failed to establish that pneumoconiosis was a contributory cause of the miner's death pursuant to Section 718.205(c) as it is supported by substantial evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge