BRB No. 05-0878 BLA

MARY A. BOGUS (Widow of JOHN A. BOGUS) Claimant-Respondent v. BARNES and TUCKER COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/27/2006 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Daniel J. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensberg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custor, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (04-BLA-6737) of Administrative Law Judge Daniel L. Leland (the administrative law judge) on a survivor's 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). The administrative law judge found that claimant was entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act; 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, by establishing the existence the complicated pneumoconiosis. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's determination that the

evidence was sufficient to establish invocation of the irrebuttable presumption. Employer asserts that the administrative law judge failed to consider all of the relevant evidence, *i.e.*, hospital records containing x-rays that were negative for both simple and complicated pneumoconiosis as well as the opinions of Drs. Bush and Fino, when he found the existence of complicated pneumoconiosis established based on the autopsy reports of Drs. Ashcraft and Perper. Employer also contends that the administrative law misstated the law when he found that evidence showing a lesion which would appear as "at least" a one centimeter lesion on x-ray was sufficient to establish the existence of complicated pneumoconiosis because the law requires a greater than one centimeter lesion on x-ray to establish the existence of complicated pneumoconiosis. Further, employer contends that the Fourth Circuit's holding in *Eastern Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000) and the Board's holding in *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003), are not controlling in this case which arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Employer contends that the holding of the Third Circuit in *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981) is inapposite as an equivalency test was applied there because there was no x-ray evidence. Employer asserts that such an equivalency test cannot be applied here where there is x-ray evidence showing that claimant does not have a greater than one centimeter opacity. Claimant responds, urging affirmance of the administrative law judge's award of survivor's benefits. The Director, Office of Workers' Compensation Programs, (the Director) is not participating in this appeal.

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).

Employer first contends that the administrative law judge erred in failing to consider all the medical evidence relevant to the existence of complicated pneumoconiosis, *i.e.*, the negative x-ray evidence and the reports of Drs. Bush and Fino opining that the pathology evidence did not show an opacity close to one centimeter in size. In considering the evidence, the administrative law judge found, in relevant part:

> Although Dr. Fino interpreted a number of chest x-rays as 0/0, his readings contradict the pathological evidence of pneumoconiosis and therefore I accord his negative x-ray interpretations little weight in determining whether the §718.304 presumption has been invoked. The chest x-ray evidence neither establishes nor disproves the existence of complicated pneumoconiosis. Dr. Ashcraft, the autopsy prosector, and Dr. Perper, noted a silicotic lesion in the miner's lungs that was 1.1 cm in its greatest dimension. Dr. Ashcraft relied on

> his gross, as well as his microscopic, examination, and therefore his opinion on the size of the lesion is entitled to great weight. Dr. Bush stated that the silicotic lesion was only 0.9 by 0.5 cm but the preponderance of the pathological evidence supports a finding that the lesion was over 1 cm in diameter. *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003). Dr. Ashcraft and Dr. Perper also concluded that the 1.1 lesion would appear as at least a 1 cm lesion on a chest x-ray and there is no evidence to the contrary. Their opinions satisfy the required equivalency determination. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250 (4th Cir. 2000); *Clites v. Jones & Laughlin Steel Corp.*, 663 F. 2d 14 (3d Cir. 1981).

Decision and Order at 5.

We reject, therefore, employer's contention that the administrative law judge failed to consider all the relevant evidence in finding that the evidence established the existence of complicated pneumoconiosis. The administrative law judge correctly concluded that Drs. Ashcraft and Perper each noted lesions of exactly 1.1 centimeter at their greatest dimension and each stated that a 1.1 centimeter lesion seen on autopsy would appear as at least a 1 centimeter lesion on chest x-ray. Weighing this evidence against the contrary evidence of Dr. Bush, who noted that the lesion seen on autopsy was between 0.5 centimeters and 0.9 centimeters, the administrative law judge permissibly accorded the greater weight to the findings of Drs. Ashcraft and Perper. *See* 20 C.F.R. §718.304(a)-(c); *Braenovich*, 22 BLR 1-236; *Clites*, 663 F. 2d 14, 3 BLR 2-86; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (199); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-28 (1984).

Further, contrary to employer's argument, the findings of Drs. Ashcraft and Perper regarding the size that the lesion that would appear on x-ray, *i.e.*, their equivalency determinations, are sufficient to trigger the irrebuttable presumption. 20 C.F.R. §718.304(a). Likewise, contrary to employer's contention, the administrative law judge properly found that the opinions of Drs. Ashcraft and Perper could establish the existence of complicated pneumoconiosis as the administrative law judge is to weigh the evidence together at Section 718.304(a)-(c). Moreover, contrary to employer's contention, the administrative law judge's finding based on the equivalency determinations of Drs. Ashcraft and Perper was in keeping with the Third Circuit's pronouncement in *Clites*. We reject employer's argument that an equivalency determination is required only where there is no x-ray evidence. *See Braenovich*; *see also Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Double Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999). We affirm, therefore, the administrative law judge's finding that the evidence establishes the existence of complicated pneumoconiosis and that claimant is, thereby, entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis.

Accordingly, the Decision and Order - Awarding Benefits of administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge