BRB No. 05-0800 BLA

DOROTHY FULTZ (Widow of CLARENCE FULTZ)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 08/14/2006
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 on Remand of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Timothy W. Gresham and Tracey Alice Berry (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-0011) of Administrative Law Judge Stephen L. Purcell (the administrative law judge) awarding benefits 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).[1] This

[1]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 (2002). All

case is before the Board for the second time. In a September 29, 2000 Decision and Order, Administrative Law Judge Pamela Lakes Wood credited the miner with thirty years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Wood found that employer was properly named as the responsible operator. Judge Wood also found that the evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). Further, Judge Wood found that the evidence established the presence of complicated pneumoconiosis[2] and thereby established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Consequently, Judge Wood found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3) (2000). Accordingly, Judge Wood awarded survivor's benefits. In disposing of employer's appeal, the Board affirmed Judge Wood's unchallenged length of coal mine employment finding, her finding that employer was properly named as the responsible operator, and her findings at 20 C.F.R. §§718.202(a), 718.203(b), and 718.304(a) and (c) (2000). The Board also affirmed Judge Wood's findings at 20 C.F.R. §§718.304(b), 718.304 overall, and 718.205(c)(3) (2000). *Fultz v. Clinchfield Coal Co.*, BRB No. 01-0195 BLA (Nov. 30, 2001)(unpub.). In response to employer's appeal of the Board's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, vacated Judge Wood's finding that the evidence established complicated pneumoconiosis at Section 718.304(b) (2000), and remanded the case for further consideration of the evidence thereunder. *Clinchfield Coal Co. v. Fultz*, No. 02-1107 (4th Cir., Apr. 2, 2003)(unpub.).

On remand, the case was reassigned to the administrative law judge, who found that the evidence establishes complicated pneumoconiosis at Section 718.304. Consequently, the administrative law judge found that the evidence establishes invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence establishes complicated pneumoconiosis at Section 718.304. Claimant[3] responds,

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Although she found the evidence insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (c) (2000), Administrative Law Judge Pamela Lakes Wood found the evidence sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) (2000) and 20 C.F.R. §718.304 (2000) overall.

[3]Claimant is the widow of the miner, Clarence Fultz. The miner filed three applications for benefits on February 12, 1981, January 22, 1982, and January 17, 1983.

urging affirmance of the administrative law judge's award of benefits on remand.[4] The Director, Office of Workers' Compensation Programs, has declined to participate 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).

In order to establish entitlement to benefits in a survivor's claim pursuant to 20 C.F.R. Part 718, 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Section 718.304 provides an irrebuttable presumption

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Director's Exhibit 21. The district director determined that the miner's 1981 application was the only viable claim. On March 29, 1991, Administrative Law Judge Giles J. McCarthy issued a Decision and Order denying benefits. *Id*. Although he credited the miner with thirty years of coal mine employment based on the parties' stipulation, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) and 718.203 (2000), Judge McCarthy found that the evidence did not establish total disability at 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id*. In disposing of the miner's appeal, the Board affirmed Judge McCarthy's length of coal mine employment finding and his findings at 718.202(a)(1), 718.203, and 718.204(c)(1), (c)(2), and (c)(4) (2000). *Fultz v. Clinchfield Coal Co.*, BRB No. 91-1123 BLA (Mar. 18, 1992)(unpub.). The Board also held that Judge McCarthy's error in failing to make a finding at 20 C.F.R. §718.204(c)(3) (2000) was harmless as the record contained no evidence of cor pulmonale with right-sided congestive heart failure. *Id*. However, the Board vacated Judge McCarthy's finding at 20 C.F.R. §718.204(c)(4) (2000), and remanded the case for further consideration. *Id*. On remand, the case was reassigned to Administrative Law Judge Donald W. Mosser, who issued a Decision and Order on Remand denying benefits on January 29, 1993. Director's Exhibit 21. Judge Mosser's denial was based on the miner's failure to establish total disability at Section 718.204(c)(4) (2000). *Id*. The Board affirmed Judge Mosser's denial of benefits. *Fultz v. Clinchfield Coal Co.*, BRB No. 93-1027 BLA (Jun. 29, 1994)(unpub.). The miner died on January 6, 1999. Director's Exhibits 1, 9. Claimant filed a survivor's claim on February 10, 1999. Director's Exhibit 1.

[4]Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see also Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must weigh together the evidence at subsections 718.304(a), (b) and (c) before determining whether invocation of the irrebuttable presumption has been established. *Gray*, 176 F.3d at 389, 21 BLR at 2-629; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

The Fourth Circuit has specifically held that the administrative law judge is bound to perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562. Hence, the administrative law judge must determine whether "the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Because the law is clear that Section 718.304(a) "sets out an entirely objective scientific standard, *i.e.*, an opacity on an x-ray greater than one centimeter," which serves as "the benchmark to which evidence under the other [subsections] is compared," the record must contain substantial evidence, *i.e.*, physician's testimony, medical report, or other evidence, demonstrating that the lesions observed on autopsy would be expected to yield one or more opacities greater than one centimeter on x-ray. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-562.

Employer contends that the administrative law judge erred in finding that the evidence establishes complicated pneumoconiosis at 20 C.F.R. §718.304(b).[5] Employer contention is

[5]Section 718.304 provides in relevant part that:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

based on the premise that the opinions of Drs. Crouch and Navani are insufficient to establish complicated pneumoconiosis at Section 718.304(b), based on an equivalency determination.

In her September 29, 2000 Decision and Order, Judge Wood considered the pathological evidence of Dr. Brooks, the autopsy prosector, and Drs. Caffrey and Kleinerman. Based on the reports of Drs. Brooks and Caffrey, Judge Wood found the evidence sufficient to establish the existence of complicated pneumoconiosis at Section 718.304(b). Judge Wood specifically stated:

> Based upon consideration of the autopsy and biopsy evidence, and the reports and depositions related to them, I find that the pathological evidence shows that the [m]iner has "massive lesions in the lung" and that the requirements of subsection (b) have been satisfied. Moreover, I find that the lesions found on autopsy, regardless of whether they exceeded 2 centimeters as Dr. Brooks found or were 1.2 centimeters as Dr. Caffrey found, would be expected on x-ray to yield one or more large opacities (*i.e.*, greater than 1 centimeter in diameter) which would be classified as Category A, B, or C under the classification requirements.

2000 Decision and Order at 13. As discussed *supra*, although the Board affirmed Judge Wood's findings at Section 718.304(b), *Fultz*, BRB No. 01-0195 BLA, slip op. at 5, the Fourth Circuit vacated those findings, and remanded the case for further consideration thereunder, *Clinchfield Coal Co.*, No. 02-1107, slip op. at 9-10. The Fourth Circuit explained that "[t]here was no testimony or medical report or evidence indicating that the lesions discovered on autopsy would be expected on x-ray to yield one or more opacities of greater than one centimeter or that the size of a lesion on autopsy was equivalent or less than the expected size on x-ray." *Clinchfield Coal Co.*, No. 02-1107, slip op. at 7. Further, the Fourth Circuit noted that both Drs. Brooks and Caffrey declined to offer an opinion on this point.[6] *Id*.

> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 (emphasis in original).

[6]The United States Court of Appeals for the Fourth Circuit noted that "when

In an Order dated July 7, 2003, Judge Wood remanded the case to the district director for further development of the evidence. Director's Exhibit 65. Judge Wood specifically instructed the district director to obtain the opinion of a Board-certified pathologist and dually qualified B reader and Board-certified radiologist on the issue of what size the lesions of 1.2 centimeters found by Dr. Caffrey and 2.0 centimeters found by Dr. Brooks on autopsy would be expected to show on x-ray. *Id*. Judge Wood also instructed the district director to permit claimant and employer to each offer the opinion of a single pathologist and a single radiologist on the equivalency issue. *Id*.

Following the further development of the evidence, the administrative law judge considered the new reports of Drs. Navani, Crouch, Naeye, and Hayes. In an August 20, 2003 report, Dr. Navani noted that he was asked what would be the x-ray sizes of a 1.2 cm lesion found by Dr. Caffrey and a 2.0 cm lesion found by Dr. Brooks on autopsy. Director's Exhibit 69. In response to this question, Dr. Navani stated:

> Answer:
> If the lesion found on autopsy is of sufficient density, thickness and is located in an unobscured portion of lungs (sic) will have Same size on a standard PA chest radiograph taken at the distance of 72 inches.

Id. During a March 10, 2004 deposition, Dr. Navani opined that the size of an opacity on pathology should be the same as the size of an opacity on x-ray because there should be no magnification of x-rays taken from a standard distance of 72 inches. Employer's Exhibit 5.

In a September 9, 2003 report, Dr. Crouch stated:

> In my own practice, I currently use a > 1 cm standard, and it is my expectation that such a lesion will usually – but not always – appear as a > 1 cm diameter lesion on good quality radiographs.
>
> ***
>
> In my opinion, recent decisions that ask for extrapolations from objective pathologic data to hypothetical radiographic findings are not based on scientific evidence and cannot be objectively or reproducibly applied.
>
> Turning to the current case, it is my expectation that a coal dust-related lesion

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specifically questioned, Dr. Brooks herself was unable to correlate her findings on autopsy with the expected size of the lesions on x-ray." *Clinchfield Coal Co. v. Fultz*, No. 02-1107, slip op. at 8 (4th Cir., Apr. 2, 2003)(unpub.).

> measuring 1.2 cm or greater on pathologic exam would usually appear as large opacity (Category A) on radiographs. However, regardless of the radiographic findings, the 1.2 cm or greater lesion would satisfy a >1 cm pathological standard, and I would concur with Dr. Caffrey's diagnosis of complicated pneumoconiosis.

Director's Exhibit 70. During a January 20, 2004 deposition, Dr. Crouch opined that the miner had massive lesions in his lungs. Employer's Exhibit 3. Further, in response to a question about massive lesions in the miner's lungs, Dr. Crouch stated:

> In terms of what might be defined within the context of legislation which would suggest that something larger than one centimeter would be a mass lesion, yes, [the miner] had mass lesions, but that's a fairly subjective term and pathologists can certainly apply it across a wide range of sizes as well as other clinicians, but he had a - reportedly a lesion that was dust related and larger than one centimeter, so he had a mass lesion by that criteria.

Id.

In contrast, Dr. Naeye, in a report dated January 9, 2004, opined that the miner did not suffer from complicated pneumoconiosis.[7] Employer's Exhibit 2. Dr. Naeye explained that "[a] 1.2 cm lesion on a slide would have been much smaller on an X-ray because only the central area of a 1.2 cm diameter lesion will be thick enough to stop X-rays." *Id*. Similarly, during a February 26, 2004 deposition, Dr. Naeye opined that a 1.2 centimeter lesion found at autopsy under a microscope would not appear on a chest x-ray as greater than one centimeter. Employer's Exhibit 4 (Dr. Naeye's Deposition at 8).

In a report dated November 19, 2003, Dr. Hayes stated:

> I have reviewed numerous radiographic reports on [the miner] dating from the 1980's forward to near the time of his death. Many "B" Readers interpret these films, and none recorded any evidence of a large opacity. I share this opinion and believe that the failure to measure and/or determine the etiology of the palpable pathology at the time of autopsy has lead (sic) to metastatic squamous cell cancer being erroneously described as progressive massive fibrosis.

Employer's Exhibit 1. During a March 25, 2004 deposition, Dr. Hayes stated:

[7]In addressing the question of whether there was any basis for classifying the lesions noted pathologically in this case as complicated coal workers' pneumoconiosis, Dr. Naeye stated, "[t]he answer is categorically no!" Employer's Exhibit 2.

> I would say that most lesions that appears (sic) [as] 1.2 centimeter on a path report are going to be less than one centimeter on an x-ray almost invariably if they are stained properly and if the film is a good technique.

Employer's Exhibit 7.

Based on his finding that the opinions of Drs. Navani and Crouch outweighed the contrary opinions of Drs. Naeye and Hayes, the administrative law judge concluded that the evidence establishes complicated pneumoconiosis at Section 718.304.

Employer asserts that the administrative law judge erred in according greater weight to the opinions of Drs. Navani and Crouch than to the contrary opinions of Drs. Naeye and Hayes. Specifically, employer argues that the opinions of Drs. Navani and Crouch cannot establish complicated pneumoconiosis at Section 718.304 because they are equivocal. Based on his determination that the opinions of Drs. Navani and Crouch are well explained and well supported, the administrative law judge accorded substantial weight to them. 2005 Decision and Order on Remand at 5. The administrative law judge specifically stated:

> Dr. Navani, a B reader and Board certified radiologist, opined that the lesion found on autopsy will have the same size on x-ray if the lesion is of sufficient density and thickness and is located in an unobscured portion of the lung. His opinion is well explained and well supported and I give it substantial weight. Dr. Crouch, Board certified [p]athologist, opined that a lesion identified in an autopsy will appear fairly similar on a good quality x-ray film. Specifically, she stated that a 1.2 cm lesion from an autopsy usually will appear as a large opacity on an x-ray. Dr. Crouch fully explained the different elements that could affect the apparent size of the nodules or opacities on x-rays. I find that her opinion is well explained and well supported and I give it substantial weight.

Id.

However, as discussed, *supra*, in his August 20, 2003 report, Dr. Navani stated that "*if* the lesion found on autopsy is of sufficient density, thickness and is located in an unobscured portion of lungs (sic) will have Same size on a standard PA chest radiograph taken at the distance of 72 inches." Director's Exhibit 69 (emphasis added). Similarly, in his September 9, 2003 report, Dr. Crouch stated, "it is my expectation that a coal dust-related lesion measuring 1.2 cm or greater on pathologic exam would *usually* appear as large opacity (Category A) on radiographs." Director's Exhibit 70 (emphasis added). However, Dr. Crouch subsequently stated, "regardless of the radiographic findings, the 1.2 cm or greater lesion would satisfy a >1 cm pathological standard, and I would concur with Dr. Caffrey's

diagnosis of complicated pneumoconiosis."[8] *Id*. Although the administrative law judge noted the opinions of Drs. Crouch and Navani, he did not explicitly address the equivocal nature of their opinions. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The opinions of both Dr. Navani and Dr. Crouch are equivocal with respect to whether the underlying conditions they diagnosed would appear as opacities greater than one centimeter on x-ray. Thus, as equivalency determinations must be based on medical evidence, we hold that the administrative law judge erred in failing to explain why he relied on the opinions of Drs. Crouch and Navani to establish that the size of the opacities they observed pathologically would equate to a greater than one centimeter opacity on x-ray when those opinions appear to be equivocal. *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562.

Furthermore, employer asserts that Dr. Crouch's opinion, that regardless of the radiographic findings, the 1.2 cm or greater lesion would satisfy a greater than one centimeter pathological standard, is insufficient to establish complicated pneumoconiosis at Section 718.304(b) because the Fourth Circuit rejected a pure sized-based pathology standard. Employer's Brief at 7. In *Blankenship*, the Fourth Circuit declined to impose the "two-centimeter rule" on the Board because the Black Lung Benefits Act, 30 U.S.C. §921(c)(3), does not mandate use of a medical definition of complicated pneumoconiosis.[9] *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562. Rather, the court held that the Act requires that an equivalency determination be made. *Id*. The court explained that "[w]hen that condition is diagnosed by [pathology] rather than x-ray, it must therefore be determined whether the biopsy results show a condition that would produce opacities of greater than one centimeter in diameter on x-ray." *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. In this case, an equivalency determination cannot be made on the basis of Dr. Crouch's opinion about the

[8]Contrary to Dr. Crouch's characterization, Director's Exhibit 70, Dr. Caffrey opined, during a February 17, 2000 deposition, that the miner did not have either complicated pneumoconiosis or progressive massive fibrosis. Director's Exhibit 27 (Dr. Caffrey's Deposition at 21). In a September 8, 1999 report, Dr. Caffrey diagnosed simple coal workers' pneumoconiosis and nodular coal workers' pneumoconiosis. Employer's Exhibit 2. Although Dr. Caffrey noted that the size of the macronodular lesions that he reviewed on slides were 1.2 centimeters, he did not opine that they would show as greater than one centimeter on x-ray. *Id*. In a subsequent report dated December 28, 1999, Dr. Caffrey stated that the opinions expressed in his September 8, 1999 report are still valid. Employer's Exhibit 18.

[9]The Fourth Circuit noted that "[i]t has frequently been expressed in the medical community and by the Benefits Review Board that at least one lesion of two centimeters or greater in diameter is the minimum requirement for establishing "massive lesions" and thereby invoking the irrebuttable presumption." *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 561 (4th Cir. 1999).

pathological standard, as this opinion was made independent of Dr. Crouch's consideration of how the lesion would appear as an opacity on x-ray. Thus, we hold that Dr. Crouch's opinion, that regardless of the radiographic findings, the 1.2 cm or greater lesion would satisfy a greater than one centimeter pathological standard, is insufficient to establish complicated pneumoconiosis at Section 718.304(b).

Employer also asserts that the administrative law judge erred in discounting the opinions of Drs. Naeye and Hayes, who found no complicated pneumoconiosis, on the basis that they did not sufficiently incorporate, into the analysis of their opinions, the "shrinkage factor" of tissue samples taken at the autopsy. Employer's assertion is based on the premise that the administrative law judge irrationally failed to apply, to the opinions of Drs. Navani and Crouch, the same standard for determining whether a physician sufficiently discussed the "shrinkage factor" of tissue samples taken at the autopsy that he applied to the opinions of Drs. Naeye and Hayes. Employer's Brief at 11. The administrative law judge found that the opinions of Drs. Navani and Crouch, that the size of the opacities found on pathology would show opacities greater than one centimeter on x-ray, outweighed the contrary opinions of Drs. Naeye and Hayes, on the basis that the opinions of Drs. Navani and Crouch are supported and strengthened by Dr. Naeye's concession that it is likely that the lesions reviewed by Drs. Navani and Crouch shrank prior to measurement on the slides. 2005 Decision and Order on Remand at 5. The administrative law judge specifically stated:

> [The] opinions [of Drs. Navani and Crouch] that the 1.2 cm lesion should appear as large opacities on a good quality x-ray are well explained and supported and are strengthened by Dr. Naeye's concession that the 1.2 cm lesions are likely larger given the shrinkage factor when the autopsy material is dehydrated prior to measurement. Further, Dr. Brooks' statements that there were many 2 cm lesions identified in the autopsy are bolstered by the shrinkage testimony.

Id.

Further, despite his acknowledgment of Dr. Naeye's concession that there is some shrinkage in pathology specimens due to dehydration,[10] the administrative law judge found that "Drs. Hayes and Naeye did not sufficiently incorporate this shrinkage into their analysis." *Id*. However, the administrative law judge did not address whether Drs. Navani and Crouch considered the shrinkage of the tissue samples on the slides in offering their opinions. Although Dr. Crouch testified about the shrinkage of the tissue samples in his deposition, Dr. Navani did not mention tissue shrinkage in his report and deposition. During

[10]During a February 26, 2004 deposition, Dr. Naeye testified that there was a small amount of shrinkage of the specimens on the slides. Employer's Exhibit 4 (Dr. Naeye's Deposition at 21-22).

her deposition, Dr. Crouch stated:

> Shrinkage is something that often occurs and in rigorous studies you may take that into account, but usually we're measuring it, so it's going to be a minimum estimate. It's not something we normally correct for, but there can be some shrinkage of the tissue during processing.

Employer's Exhibit at 3 (Dr. Crouch's Deposition at 34).

Dr. Crouch further stated:

> If what you're suggesting is that there's a two-centimeter standard and somehow the tissue shrank to make it 1.3 centimeters, *I think that's unlikely*. I'm not sure what the exact factor is for shrinkage, but on the other hand it suggests that the lesion, if anything, might be somewhat larger in real life than 1.3 centimeters that was measured on the slide, but that's not something we regularly are expected to take into account with this kind of assessment. You might in a research study, measuring the size. Normally we take the measurement as that which you can measure on the slide.

Id. (Dr. Crouch's Deposition at 34-35) (emphasis added). Thus, because the administrative law judge accorded greater weight to the opinions of Drs. Navani and Crouch, on the basis of Dr. Naeye's testimony about the shrinkage of tissue samples on slides, without any discussion or analysis of this issue by Drs. Navani and Crouch, we are unable to determine whether this was a permissible basis for the administrative law judge to find that the opinions of Drs. Navani and Crouch are more persuasive. Moreover, a concession by Dr. Naeye, that there was shrinkage in the lesions in this case, cannot substitute for actual opinions that the lesions reviewed on pathological slides would show as opacities greater than one centimeter on x-ray, which are necessary for establishing complicated pneumoconiosis at Section 718.304(b).[11]

[11]Despite the administrative law judge's failure to consider the findings of Drs. Navani and Crouch about the shrinkage of lesions on slides, the administrative law judge determined that the opinions of these doctors established complicated pneumoconiosis at Section 718.304(b). Hence, the administrative law judge's error in failing to consider the findings of Drs. Navani and Crouch about the shrinkage of lesions on slides appears to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). However, in light of our decision to remand the case for further consideration of the evidence at Section 718.304(b), on the ground that the administrative law judge failed to explain why he relied on the equivocal opinions of Drs. Navani and Crouch, the administrative law judge, on remand, must consider all of the findings of the doctors about the shrinkage of lesions on slides. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer further asserts that "Dr. Navani readily agreed that the lesions found [on autopsy] in this case did not show as greater than one centimeter radiographic opacities" and therefore are insufficient to establish complicated pneumoconiosis at Section 718.304(b). Employer's Brief at 11. Contrary to employer's assertion, Dr. Navani opined that the opacities he reviewed on x-ray, rather than the lesions he reviewed on pathological slides, would not show as opacities greater than one centimeter on x-ray. Employer's Exhibit 5 (Dr. Navani's Deposition at 8). Moreover, Dr. Navani's testimony about the size that a pathologic lesion would show on an x-ray was in response to a hypothetical question, as opposed to an actual question about pathological lesions found in this case. During his deposition, Dr. Navani was asked the following question:

> Doctor, if - - if assume for the purposes of this question, if no B reader or radiologist in [the miner's] case ever reported an abnormality on a chest x-ray, greater than one centimeter, on x-rays taken within the last year of [the miner's] life, would it be likely that the lesions that are actually reported as being seen on…autopsy would have been of insufficient density or insufficient thickness to have shown up on the chest x-ray?

Employer's Exhibit 5 (Dr. Navani's Deposition at 12). In response, Dr. Navani stated, "That's correct." *Id.* Thus, we reject employer's assertion that "Dr. Navani readily agreed that the lesions found in this case did not show as greater than one centimeter radiographic opacities." Employer's Brief at 11.

In addition, employer asserts that the administrative law judge erred in giving less weight to Dr. Hayes's opinion that the pathological lesions he reviewed would not show as opacities greater than one centimeter on x-ray because it is in conflict with Dr. Crouch's opinion that a CT scan is more precise than an x-ray. In considering the opinions of Drs. Crouch and Hayes with respect to making an equivalency determination at Section 718.304(b), the administrative law judge addressed the CT scan analyses of Drs. Crouch and Hayes, as they related to the doctors' opinions about the size that the lesions would appear on x-ray. The administrative law judge stated that "Dr. Hayes…explained why he felt that the CT scan results of record were insufficient to show complicated pneumoconiosis." Decision and Order on Remand at 5. The administrative law judge further stated that "[Dr. Hayes's] testimony is in conflict with Dr. Crouch's opinion that a CT scan is more precise than an x-ray, but I entitle his opinion to some weight." *Id.* During a January 20, 2004 deposition, Dr. Crouch testified that she did not review a chest x-ray in which a radiologist interpreted an abnormality as greater than one centimeter. Employer's Exhibit 3 (Dr. Crouch's Deposition at 13). Dr. Crouch further stated, "[h]owever, the CT report which I did cite [and] was included did describe lesions of 1.3 and greater than two centimeters and that's a very precise technique that offers opportunity to measure abnormalities with quite a bit of precision, more than routine chest x-rays." *Id.*

Likewise, during a March 25, 2004 deposition, Dr. Hayes was questioned about the impact of a CT scan on his opinion that the pathological lesions would not show as opacities greater than one centimeter on x-ray. Employer's Exhibit 7 (Dr. Hayes's Deposition at 40). When asked if CT scans are more accurate than x-rays in revealing the size and type of abnormalities present in the lungs, Dr. Hayes testified that CT scans can be very accurate if they are done properly. Employer's Exhibit 7 (Dr. Hayes's Deposition at 28). Moreover, when asked if a December 10, 1997 CT scan would show nodules in the retrocardiac area better than an x-ray, Dr. Hayes stated, "[i]t would, and it would not give you any hint as to the etiology." *Id*. (Dr. Hayes's Deposition at 40-41). Thus, since both Drs. Crouch and Hayes concluded that CT scans can be more accurate than x-rays, we hold that the administrative law judge erred in according less weight to Dr. Hayes's opinion on the basis that it was in conflict with Dr. Crouch's opinion that a CT scan is more precise than an x-ray.

In view of the foregoing, we vacate the administrative law judge's finding that the evidence is sufficient to establish complicated pneumoconiosis at Section 718.304(b), and remand the case for further consideration of the evidence thereunder.

Employer additionally asserts that the administrative law judge erred in finding that the CT scan evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). In her prior Decision and Order, Judge Wood found that the evidence did not establish complicated pneumoconiosis at Section 718.304(c) (2000). The Board affirmed Judge Wood's unchallenged finding at Section 718.304(c) (2000). Although the Fourth Circuit did not explicitly address Judge Wood's finding at Section 718.304(c) (2000), it noted, "we are remanding for the ALJ to make a factual finding based on testimony, medical reports, or *other evidence* that opacities would show as greater than one centimeter." *Clinchfield Coal Co.*, No. 02-1107, slip op. 10, n.5 (emphasis added). The administrative law judge, on remand, stated that "the CT scan evidence of record, which Dr. Crouch opined is more accurate than an x-ray, showed lesions of over 2 cm." 2005 Decision and Order on Remand at 5. The administrative law judge also stated that "[t]he presence of these lesions supports the finding that large opacities would be seen on x-ray." *Id*. There does not appear to be any new CT scans since the Fourth Circuit remanded the case. Although Dr. Lepsch noted, in a December 10, 1997 CT scan, ill defined nodules that measured 1.3 centimeters and 2.0 centimeters, he did not indicate that these nodules would have appeared as an opacity greater than one centimeter in diameter on x-ray. Director's Exhibit 21; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-562. Thus, we hold that the administrative law judge erred in finding that the CT scan evidence supports a finding of complicated pneumoconiosis at Section 718.304(c).

In sum, we vacate the administrative law judge's finding that the evidence establishes complicated pneumoconiosis and thereby establishes invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, and remand the case for

further consideration of the evidence at Section 718.304(b) and at Section 718.304 overall, if reached.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge