BRB No. 10-0332 BLA

JUDY L. HALL (Widow of EARL HALL) Claimant-Petitioner v. AGIPCOAL USA, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/15/2011 DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (08-BLA-5763) of Administrative Law Judge Daniel L. Leland denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a survivor's claim filed on August 24, 2007. After crediting the miner with twenty-one years and seven months of coal mine employment,[2] the administrative law judge found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant further argues, *inter alia*, that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response brief regarding the merits of this case.

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. 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant is the surviving spouse of the deceased miner, who died on February 7, 2007. Director's Exhibit 9. Claimant died on December 16, 2008. Hearing Transcript at 20-21. Bonnie Estep, the claimant's daughter, has been was appointed the representative of claimant's estate. *Id.* at 15.

[2] The record indicates that the miner's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the pneumoconiosis arose out of coal mine employment pursuant to 20 CF.R §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Additionally, the United States Court of Appeals for the Fourth Circuit 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 a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000).

Claimant contends that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).[3] Autopsy findings can support a finding of complicated pneumoconiosis where a physician diagnoses "massive lesions" or where an evidentiary

[3] Claimant does not contend that the evidence establishes complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c).

basis exists for the administrative law judge to make an equivalency finding between autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304(b); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100 (4th Cir. 2000).

In regard to the issue of complicated pneumoconiosis, the administrative law judge considered the opinions of two physicians who reviewed the miner's autopsy slides, Drs. Dennis and Oesterling.[4] In his initial report, Dr. Dennis, the autopsy prosector, included a gross description of the miner's lungs, but failed to provide a detailed microscopic description, noting only that his microscopic evaluation confirmed his diagnoses. These diagnoses included "pulmonary congestion and edema with fibrosis, interstitial, associated with black pigment deposition and macule formation," and "emphysematous changes associated with focal bronchopneumonia and macule formation, 0.5 cms in diameter." Director's Exhibit 10. In a second autopsy report, Dr. Dennis included a more detailed microscopic description of the miner's autopsy slides. Dr. Dennis interpreted slide G as revealing "macule formation measuring greater than 1 cm [in] diameter." Claimant's Exhibit 1. Dr. Dennis also included the following new diagnosis in his second autopsy report:

> Anthracosilicosis, simple with extreme fibrosis compatible with progressive massive fibrosis seen on microscopic sections. Macular development measuring 0.2 – 0.3 cm. Emphysema is moderate to severe.

Claimant's Exhibit 1.

Based on his review of the autopsy slides, Dr. Oesterling diagnosed "very mild" coal workers' pneumoconiosis. Employer's Exhibit 7 at 24. However, Dr. Oesterling found that the necessary findings for a diagnosis of complicated pneumoconiosis were not present, explaining that the largest macules that he observed did not exceed three millimeters. *Id.* at 26. Dr. Oesterling also noted his disagreement with Dr. Dennis's diagnosis of progressive massive fibrosis, characterizing it as a "totally false diagnosis."[5] Employer's Exhibit 9.

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[4] Dr. Caffrey also reviewed the miner's autopsy slides. Based on his review of the autopsy slides, Dr. Caffrey opined that the miner did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 1. Although the administrative law judge did not consider Dr. Caffrey's opinion pursuant to 20 C.F.R. §718.304(b), the administrative law judge's error is harmless since Dr. Caffrey's opinion does not support a finding of complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5] Dr. Oesterling explained why he disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis:

In his consideration of the conflicting autopsy evidence, the administrative law judge noted that Dr. Dennis did not identify any macules greater than one centimeter in his initial autopsy report. Decision and Order at 7. Moreover, while Dr. Dennis, in his second autopsy report, identified one of the miner's slides as revealing a macule greater than one centimeter, the administrative law judge noted that Dr. Dennis referenced only macules measuring 0.2 to 0.3 centimeters *in support of his diagnosis of progressive massive fibrosis*. *Id.* The administrative law judge, therefore, found that Dr. Dennis's second autopsy report was "inconsistent with his first autopsy report and . . . [was] internally inconsistent as well." *Id.* The administrative law judge, therefore, accorded no weight to Dr. Dennis's diagnosis of progressive pulmonary fibrosis. The administrative law judge further found that Dr. Dennis did not address whether any of the nodules that he observed would produce an opacity measuring greater than one centimeter if seen on a chest x-ray. *Id.* The administrative law judge accorded greater weight to Dr. Oesterling's opinion, based upon his status as "most qualified pathologist [of] record," and because he "wrote a very thorough report in which he carefully described photomicrographs of each autopsy slide." *Id.* The administrative law judge, therefore, found that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

In challenging the administrative law judge's finding pursuant to 20 C.F.R. §718.304(b), claimant contends that Dr. Dennis's opinion is entitled to greater weight than that of Dr. Oesterling, based upon Dr. Dennis's status as the autopsy prosector. We disagree. When evaluating pathology-related evidence, an administrative law judge must first determine the credibility and weight of the reviewing pathologists' contrary opinions before giving complete deference to a doctor's opinion based upon his status as the autopsy prosector. *See generally Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20

> Progressive massive fibrosis is by definition a complication of coal workers' pneumoconiosis, in which we begin to have the consolidation of micronodules, some macronodules, fusion into a conglomerate mass of nodular tissue, fibrous tissue and black pigment.
>
> Often said proportion becomes necrotic in large cases, so there's a very definite entity that occurs in nodular coal workers' pneumoconiosis with fibrosis.
>
> Macules he's referring to, there's no fibrosis, so how can you have progressive massive fibrosis without fibrosis. Macules are not fibrotic. His very use of the terms is a total conflict, as far as I am concerned, with the normal nomenclature.

Employer's Exhibit 8 at 46.

(1992). In this case, claimant does not challenge the administrative law judge's specific credibility determinations with respect to Dr. Dennis's diagnosis of complicated pneumoconiosis. These credibility determinations are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Moreover, the administrative law judge permissibly accorded greater weight to Dr. Oesterling's opinion, based upon his superior qualifications.[6] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge also acted within his discretion in crediting Dr. Oesterling's opinion, based upon his "very thorough" explanations. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Because it is based on substantial evidence, we affirm the administrative law judge's finding that complicated pneumoconiosis was not established by the autopsy evidence pursuant to 20 C.F.R. §718.304(b). Consequently, we affirm the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

Applicability and Impact of the Recent Amendments

Subsequent to the issuance of the administrative law judge's Decision and Order, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, *inter alia*, a rebuttable presumption that the miner died due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[6] We reject claimant's contention that the administrative law judge failed to explain his basis for determining that Dr. Oesterling's qualifications are superior to those of Dr. Dennis. Citing Dr. Oesterling's deposition testimony, the administrative law judge explained that Dr. Oesterling has "far greater expertise in occupational lung disease than Dr. Dennis." Decision and Order at 6. Dr. Oesterling, in fact, testified that, while working in Pennsylvania, he worked "a great deal on occupational lung diseases," and conducted over "100 autopsies a year on coal miners." Employer's Exhibit 8 at 7-9. Dr. Oesterling also testified that he is a member of the Pulmonary Pathology Society, an international society of pathologists who practice "predominantly pulmonary pathology." *Id.* at 10. By contrast, Dr. Dennis's qualifications are not found in the record. [Although claimant purportedly submitted Dr. Dennis's qualifications as Claimant's Exhibit 2, this exhibit actually contains the qualifications of Dennis H. Halbert.]

The Director contends that the new amendments are applicable in this case, as the survivor's claim was filed after January 1, 2005, and claimant established that the miner had twenty-one years and seven months of coal mine employment.[7] *See* 30 U.S.C. §921(c)(4). The Director, therefore, requests that this case be remanded to the administrative law judge to consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's death was due to pneumoconiosis. The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

Employer contends that the amendments should not affect this claim due to the absence of any evidence of a totally disabling respiratory or pulmonary impairment. Thus, employer urges affirmance of the administrative law judge's denial of benefits. Alternatively, employer contends that retroactive application of the amendments is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property.[8]

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings, and the denial of benefits, must be vacated and the case remanded to the administrative law judge. The Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that was not relevant to this survivor's claim before the recent amendments. Thus, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.203(b) and 718.205(c), and remand the case to the administrative law judge for further consideration.

[7] Claimant contends that the miner should have been credited with 26.23 years of qualifying coal mine employment. Claimant's Brief at 7. We decline to address claimant's contention of error since the administrative law judge's finding of twenty-one years and seven months of coal mine employment is sufficient to qualify claimant for consideration under the Section 411(c)(4) presumption. *See Larioni,* 6 BLR at 1-1278.

[8] We deny employer's request to hold this case in abeyance until such time as the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. We also deny employer's request to hold the case in abeyance because the constitutionality of the new amendments has been challenged, as employer does not indicate that any court has enjoined the application of the recent amendments to the Act.

On remand, the administrative law judge must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[9] If the administrative law judge, on remand, finds that claimant is entitled to the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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

[9] Section 1556 of Public Law No. 111-148 also amended Section 422(*l*) of the Act, 30 U.S.C §932(*l*), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's previous claims for benefits were denied. Unmarked Exhibit.