BRB No. 07-0375 BLA

M.G. (Widow of J.G.)	)	
Claimant-Respondent	)	
v.	)	
ELKAY MINING COMPANY	)	DATE ISSUED: 01/31/2008
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-6258) of Administrative Law Judge Richard A. Morgan (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). The claim was before the administrative law judge pursuant to claimant's request for modification of the previous denial of her claim.[1] *See* 20 C.F.R. §725.310 (2000). The administrative law judge credited the miner with at least thirty-four years and five months of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the evidence established the presence of complicated pneumoconiosis and, thereby, invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Further, the administrative law judge found that the evidence established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).[2] Consequently, the administrative law judge found that the evidence established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the Board should remand the case for reconsideration of the

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[1] Claimant is the widow of the deceased miner. He died on June 8, 1996. Director's Exhibit 2. Claimant filed her survivor's claim on June 20, 1996. Director's Exhibit 3. On July 30, 1999, Administrative Law Judge Daniel L. Leland issued a Decision and Order awarding benefits, Director's Exhibit 45, which the Board vacated and remanded for further consideration of the evidence. [*M.G.*] *v. Elkay Mining Co*., BRB No. 99-1217 BLA (Nov. 2, 2000)(unpub.). On February 1, 2001, Judge Leland issued a Decision and Order on Remand awarding benefits, Director's Exhibit 55, which the Board vacated and remanded for further consideration of the evidence. [*M.G.*] *v. Elkay Mining Co*., BRB No. 01-0507 BLA (Mar. 29, 2002)(unpub.). On June 28, 2002, Judge Leland issued a Decision and Order on Remand denying benefits, Director's Exhibit 63, which the Board affirmed. [*M.G.*] *v. Elkay Mining Co*., 22 BLR 1-306 (2003). Pursuant to claimant's appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. [*M.G.*] *v. Elkay Mining Co*., No. 03-2131 (4th Cir. Apr. 8, 2004), *cert. denied*, 543 U.S. 925 (2004). Claimant filed a request for modification on December 23, 2004. Director's Exhibit 78.

[2] The administrative law judge additionally 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).

medical opinion evidence at 20 C.F.R. §718.304, because the administrative law judge misinterpreted the pertinent regulation.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[3] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the presumption set forth at 20 C.F.R. §718.304 is applicable. *See* 20 C.F.R. §§718.205(c)(3), 718.304.

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(1), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner 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 one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other

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[3] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) 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).

means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 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. In determining whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

At Section 718.304(b), the administrative law judge considered the autopsy report by Dr. Dy, and the reports that were based at least in part on pathological evidence by Drs. Klapproth, Perper, Green, Kahn, Bush, Hutchins, Hansbarger, Naeye, Kleinerman, Fino, Crisalli, and Stewart. Drs. Dy, Klapproth, Perper, and Green opined that the miner had progressive massive fibrosis (PMF). Director's Exhibits 2, 25. In supplemental reports, Drs. Perper and Green additionally opined that the miner had pathologically diagnosed lesions of complicated pneumoconiosis that were equivalent to radiological nodular lesions that were greater than one centimeter. Claimant's Exhibits 1, 2. Dr. Kahn also opined that the miner had complicated pneumoconiosis. Director's Exhibit 2. By contrast, Drs. Bush, Hutchins, Hansbarger, Naeye, Kleinerman, Fino, Crisalli, and Stewart opined that the miner did not have massive lesions of complicated pneumoconiosis, but instead, had lesions that were a mixture of simple pneumoconiosis and cancer. Director's Exhibits 2, 37; Employer's Exhibits 1-3, 5, 7, 9.

Although the administrative law judge indicated that Drs. Kahn, Klapproth, and Dy did not make the necessary equivalency determinations with regard to whether the lesions that were observed on pathological slides would have been seen on an x-ray reading as greater than one centimeter, he concluded that Drs. Perper and Green had made the required equivalency determinations for establishing invocation of the irrebuttable presumption at 20 C.F.R. §718.304.[4] Decision and Order at 17. Next, the

[4] Employer argues that the administrative law judge substituted his opinion for that of the employer's medical experts. The administrative law judge stated, "Dr. Hutchins

administrative law judge indicated that Drs. Bush, Hutchins, Hansbarger, Naeye, and Kleinerman, employer's pathologists, did not make an explicit equivalency determination. *Id*. at 18. Rather, the administrative law judge determined that Drs. Bush, Hutchins, and Naeye focused more on whether the lesions satisfied the medical definition of complicated pneumoconiosis. *Id*. The administrative law judge specifically stated:

> More specifically, unlike claimant's pathologists, they [Drs. Bush, Hutchins, and Naeye] opined the composition of a lesion detected on pathology is determinative. That is, only the pneumoconiotic (or anthracotic) portion of such a lesion may be considered in making an equivalency determination. Drs. Perper and Green did not distinguish lesions based on their composition.

Id. Further, the administrative law judge noted that Drs. Crisalli, Fino, and Stewart, employer's pulmonary experts, explained that the new reports of Drs. Perper and Green did not change their prior opinion that the miner did not have complicated pneumoconiosis. *Id*. The administrative law judge then stated that the regulation at 20 C.F.R. §718.304 refers to a legal standard for establishing the presence of complicated pneumoconiosis, rather than a medical condition of either PMF or complicated pneumoconiosis. *Id*. at 18-20. Because the administrative law judge determined that Drs. Bush, Hutchins, Hansbarger, Naeye, and Kleinerman relied on a false premise that lesions must be comprised solely of anthracotic or pneumoconiotic material, he discredited their opinions that the miner did not have complicated pneumoconiosis. *Id*. at 20.

Employer argues that the administrative law judge misinterpreted the regulation at 20 C.F.R. §718.304 for establishing invocation of the irrebuttable presumption of death

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commented that the degree of magnification of a radiologically detectable lesion is negligible." Decision and Order at 18. The administrative law judge additionally stated, "[h]owever, given that Appendix A requires a distance of six feet from the source or focal spot to the film, it is more likely that Dr. Perper is correct; that is that the opacities would appear larger than the actual lesions." *Id*. It is within the administrative law judge's discretion, as trier-of-fact, to determine the weight and credibility to be accorded to the medical experts, *see Mabe v. Bishop Coal Co*., 9 BLR 1-67 (1986), and to assess the evidence of record and draw his own conclusions and inferences therefrom. *See Maddaleni v. the Pittsburg & Midway coal Mining Co*., 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989). Thus, because the administrative law judge acted within his discretion in finding that Dr. Perper's opinion about how opacities would appear on x-rays was more credible than Dr. Hutchins's contrary opinion, we reject employer's assertion that the administrative law judge erred by substituting his opinion for that of employer's medical experts.

due to pneumoconiosis by finding that the evidence must establish the presence of "legal complicated pneumoconiosis." Employer maintains that the administrative law judge's holding that entitlement to benefits was established if as little as 1% of the lesion in the miner's lungs was anthracotic material violated the Act, the regulations, and the case law. The Director agrees with employer that the administrative law judge misinterpreted the regulation at 20 C.F.R. §718.304 to mean that if a claimant has proven a chronic dust disease of the lung, any lung lesion that is minimally composed of pneumoconiotic material was yielded by the chronic dust disease. The arguments of employer and the Director have merit.

The administrative law judge initially determined that the specific composition of the lesions at 20 C.F.R. §718.304 was not addressed by either the regulations or the case law. Decision and Order at 19. The administrative law judge then noted that the regulation at 20 C.F.R. §718.304 requires that a chronic dust disease of the lung yield either a greater-than-one centimeter opacity or a massive lesion. *Id*. The administrative law judge further stated:

> However, once a miner is shown to suffer a "chronic dust disease of the lung," the regulation does not then implicate the portion which must be pneumoconiotic or anthracotic, but only that the dust disease "yields" such a lesion or opacity. Clearly then, the opacity or lesion must contain some pneumoconiotic or anthracotic material or macule, but a specific amount, e.g., 1% or 50%, is not required.

Id.

However, the administrative law judge did not provide any support for his interpretation of the regulation at 20 C.F.R. §718.304. In addition, the administrative law judge's interpretation of the regulation at 20 C.F.R. §718.304 ignored that claimant must still establish the presence of "massive lesions" under the Fourth Circuit's standard. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. As noted, employer's experts opined that massive lesions of complicated pneumoconiosis were not present, but instead, lesions that were a mixture of simple pneumoconiosis and cancer.

As noted above, the Director agrees with employer that the administrative law judge misinterpreted the regulation at 20 C.F.R. §718.304 regarding the standard for establishing invocation of the irrebuttable presumption of death due to pneumoconiosis. The Director argues that a chronic dust disease of the lung must produce, by a natural process, large x-ray opacities or lesions to invoke the irrebuttable presumption at 20 C.F.R. §718.304. The Director maintains that a lesion that was a coincidental fusion of simple pneumoconiosis and some other non-pneumoconiotic material does not establish

invocation of the irrebuttable presumption at 20 C.F.R. §718.304, because it was not produced by a chronic dust disease. The Director therefore requests a remand of the case for the administrative law judge to reconsider the issue of complicated pneumoconiosis.

In this case, the administrative law judge's determination that lesions do not have to be comprised solely of anthracotic or pneumoconiotic material to invoke the irrebuttable presumption at 20 C.F.R. §718.304 is in error. The Director's interpretation of the regulation at 20 C.F.R. §718.304 (that a chronic dust disease of the lung must produce, by a natural process, large x-ray opacities or lesions in order to invoke the irrebuttable presumption) is consistent with the statute, is reasonable, and we accept it. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). Thus, we vacate the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304,[5] and remand the case to the administrative law judge for reconsideration of the evidence in accordance with the applicable standard thereunder.[6] *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561.

Employer additionally asserts that the administrative law judge mischaracterized the medical opinions of employer's pathological experts. We agree. The administrative law judge indicated that employer's pathological experts failed to explain why they did not diagnose complicated pneumoconiosis, based on the lesions in the lungs that they

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[5] Employer also argues that the administrative law judge substituted his opinion for that of employer's pathological experts by finding that their opinion, that a lesion in the lung must be comprised solely of pneumoconiotic or anthracotic material, was based on a false premise. In light of our decision to remand the case for reconsideration of all of the relevant evidence at 20 C.F.R. §718.304, employer's argument is rendered moot.

[6] Employer further argues that the case should be reassigned to Judge Leland, the administrative law judge who adjudicated the instant survivor's claim prior to claimant's request for modification, in the interest of judicial continuity. However, employer points to no evidence of bias or recalcitrance by Administrative Law Judge Richard A. Morgan. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Further, based on our review of the Judge Morgan's Decision and Order, there is no evidence that this case has reached the point where a "fresh look" at the evidence is required. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998). Thus, because it is permissible for the administrative law judge to give *de novo* consideration to the issues in this case on modification, *see Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992), we decline to reassign the case to another administrative law judge.

observed on slides. Decision and Order at 19. Contrary to the administrative law judge's finding, employer's pathological experts, Drs. Bush, Hutchins, Hansbarger, Naeye, and Kleinerman, adequately explained their opinions. Director's Exhibits 2, 37; Employer's Exhibits 2, 11. Dr. Bush explained that PMF was ruled out because cancer was a part of the large lesions that were observed on pathological slides. Employer's Exhibit 11. Dr. Hutchins explained that a lesion in the pathological specimens met the size criteria for PMF, but was not complicated pneumoconiosis, because it was a fusion of lesions of simple pneumoconiosis and wide spread non-small cell carcinoma. Director's Exhibit 37; Employer's Exhibit 2. Dr. Hansbarger explained that the miner did not have complicated pneumoconiosis, but a confluence of lesions that were composed of simple pneumoconiosis and scar tissue or fibrosis from tumors. Director's Exhibit 2. Similarly, Dr. Naeye explained that the lesion that was two centimeters in diameter that he observed on pathological slides did not have the features of complicated pneumoconiosis, because it was comprised of individual anthracotic micronodules and macronodules that became confluent, rather than an immunologic disease process that spread and became bigger. Director's Exhibit 37. Lastly, Dr. Kleinerman explained that the pathological lesions were not complicated pneumoconiosis, but a confluence of several different pathological lesions that were composed of small nodules of silicosis with adjacent tumor masses and caseating necrosis. *Id.* Thus, because the administrative law judge mischaracterized the medical opinions of employer's pathological experts, he must reconsider this evidence at 20 C.F.R. §718.304 on remand.

Furthermore, the administrative law judge must consider whether the evidence establishes a mistake in a determination of fact at 20 C.F.R. §725.310 (2000).[7] *See Jessee v. Director, OWCP*, 5 BLR 723, 18 BLR 2-26 (4th Cir. 1993).

Finally, the administrative law judge must consider whether the evidence establishes that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, if reached. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

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

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[7] We also reject employer's assertion that the administrative law judge erred in finding that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), because he did not review and delineate the specific factual errors in Judge Leland's prior analysis of the evidence. Contrary to employer's assertion, the Fourth Circuit has held that there is no need for a "smoking-gun factual error" for a fact-finder to modify a decision based on a mistake in a determination of fact. *Jessee v. Director, OWCP*, 5 BLR 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge