BRB No. 04-0901 BLA

MARY HALE (Widow of DONALD HALE) Claimant-Respondent v. BETHENERGY MINES, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/28/2005 DECISION and ORDER

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

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

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

Rita Roppolo (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-6027) of Administrative Law

Judge Daniel L. Leland awarding benefits 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 involves a survivor's claim filed on March 18, 2002.[1] The administrative law judge properly noted that the only issue before him was whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis.[2] Although the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) and (c)(2), he found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3). Accordingly, the administrative law judge awarded benefits. The administrative law judge subsequently summarily denied employer's motion for reconsideration. On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, arguing that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1]The miner filed a claim for benefits on March 13, 1987. Director's Exhibit 1. By letter dated May 26, 1987, the district director informed the miner that if he did not file a response within thirty days, his claim would be considered abandoned. *Id.* The miner did not file any response. Consequently, on July 7, 1987, the district director denied the miner's claim by reason of abandonment. *Id.* There is no indication that the miner took any further action in regard to his 1987 claim.

[2]The existence of pneumoconiosis and whether the miner's pneumoconiosis arose out of his coal mine employment were not listed as contested issues. *See* Director's Exhibit 26.

[3]Claimant is the surviving spouse of the deceased miner who died on March 10, 2001. Director's Exhibit 6.

Because the instant 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).[4] *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 evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) and (c)(2), *see* Decision and Order at 4-5, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 718.205(c)(3) provides that a miner's death will be considered to be due to pneumoconiosis where the presumption set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(3). Section 718.304 provides that 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 in diameter; (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.

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[4]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).

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 the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Because no party challenges the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), this finding is affirmed.[5] *Skrack*, *supra*.

Autopsy findings can support a finding of complicated pneumoconiosis where a physician diagnoses "massive lesions" or where an evidentiary 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); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981)[6]; *Neeley*, *supra*; *Lohr v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984).

In this case, three physicians, Drs. Jourdain, Rizkalla and Bush, addressed the autopsy evidence. Dr. Jourdain performed the miner's autopsy on March 12, 2001. In

[5]The administrative law judge did not identify any evidence that was relevant to 20 C.F.R. §718.304(c). We note that none of the parties has identified any evidence relevant to a finding of complicated pneumoconiosis pursuant to this subsection.

[6]In *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981), the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that an administrative law judge not only has the authority, but has an obligation to make equivalency determinations between autopsy findings and x-ray findings when an evidentiary basis exists for doing so. In *Clites*, the administrative law judge found that the nodules described in a pathologist's autopsy report were "massive lesions of the lung" even though those precise words did not appear in the autopsy report. In reaching his conclusion, the administrative law judge credited the pathologist's deposition testimony to the effect that, had the nodules he found been x-rayed while the miner was alive, they would show opacities measuring between 1 and 1.5 centimeters. Taking the pathologist's autopsy report and deposition testimony together, the administrative law judge found that the miner had massive lesions in his lungs. In reinstating the administrative law judge's award of benefits, the Third Circuit rejected the Board's determination that the administrative law judge lacked the competence to make an equivalency determination between autopsy findings and x-ray findings.

his Autopsy Report dated May 17, 2001, Dr. Jourdain described his findings on gross examination, noting the presence of "nodules varying in size from 0.3 to 1.4 cm. in maximum diameter." Director's Exhibit 6. Dr. Jourdain characterized the nodules as having an "anthracosilicosic appearance." *Id.* On microscopic examination of the miner's lungs, Dr. Jourdain noted, *inter alia*, the presence of "small groups of macrophages containing anthracosilicotic pigment." *Id.* Dr. Jourdain's final pathologic diagnoses included: "[m]ixed dust pneumoconiosis with silicatosis, anthracosis duct macules and silicotic nodules." *Id.*

Dr. Rizkalla reviewed the miner's autopsy slides and the medical evidence. In a report dated February 14, 2002, Dr. Rizkalla diagnosed, *inter alia*, macronodular coal workers' pneumoconiosis (progressive massive fibrosis of the lungs). Director's Exhibit 7. Dr. Rizkalla found, *inter alia*, that the miner "had macronodular coal workers' pneumoconiosis and [that] some of the nodules reach[ed] 1.4 cm. in maximum diameter."[7] *Id.*

Dr. Bush also reviewed the miner's autopsy slides and the medical evidence. In a report dated November 8, 2002, Dr. Bush opined that the miner suffered from a mild to moderate degree of simple coal workers' pneumoconiosis. Director's Exhibit 8. Dr. Bush found that the miner's autopsy slides revealed a single subpleural nodule measuring 1.4 cm in greatest dimension. *Id.* However, because the nodule's width was only 0.4 centimeters, Dr. Bush opined that it did not represent a macronodular lesion of progressive massive fibrosis.[8] *Id.*

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[7]During a deposition on February 5, 2004, Dr. Rizkalla opined that the miner suffered from moderately severe coal workers' pneumoconiosis. Claimant's Exhibit 3 at 9. Dr. Rizkalla also found the evidence sufficient to establish a diagnosis of progressive massive fibrosis, a condition he noted was synonymous with coal workers' pneumoconiosis. *Id.* at 10. Dr. Rizkalla noted that the largest lesion was 1.4 centimeters. *Id.* at 9, 16-17. Dr. Rizkalla also opined that claimant suffered from complicated pneumoconiosis. *Id.* at 17.

[8]Dr. Bush noted his disagreement with Dr. Rizkalla's diagnosis of progressive massive fibrosis, stating that:

> The report of Dr. Rizkalla records his diagnosis of progressive massive fibrosis based on a single lesion with an elongated contour measuring 1.4 cm in greatest dimension. This does not constitute a lesion of progressive massive fibrosis but a lesion following the contour of the pleura. Progressive massive fibrosis lesions are typically 2 cm or more in all dimensions. Progressive massive fibrosis is found in lungs severely affected by coal workers' pneumoconiosis which is not present in [the

During a deposition on September 12, 2003, Dr. Bush reiterated that the miner did not suffer from progressive massive fibrosis. Employer's Exhibit 4 at 18-19. Dr. Bush also opined that he did not find the presence of any pathologic lesion that would project radiographically as one centimeter or more. *Id.* at 22-23. However, on cross-examination, Dr. Bush conceded that the 1.4 centimeter lesion on the miner's autopsy slide would show up as the same size on a chest x-ray. *Id.* at 32-33. Dr. Bush, however, explained that it "might show up as a density that might look like a thickened pleura or a blood vessel or something along that line." *Id.* at 33. Dr. Bush also testified that the 1.4 centimeter lesion was "a thin scar that, by itself, would not be expected to be represented on an x-ray as a coal worker lesion." *Id.* at 34. Dr. Bush additionally opined that claimant did not suffer from complicated pneumoconiosis. *Id.* at 42.

In his consideration of whether the autopsy evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge stated that:

> In determining whether the autopsy evidence invokes the presumption at §718.304, it is not necessary that the nodule measure 1 cm. or 2 cm. or that it meets the medical definition of progressive massive fibrosis or complicated pneumoconiosis. In all cases the administrative law judge must first make an equivalency determination that the nodule or lesion would if x-rayed show a one centimeter opacity. *Double B Mining Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999). *See also Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14 (3d Cir. 1981); *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003).
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> Dr. Jourdain, Dr. Rizkalla, and Dr. Bush noted the presence of a macronodule of pneumoconiosis in the decedent's lungs measuring 1.4 cm. in greatest dimension. Dr. Jourdain did not diagnose progressive massive fibrosis or make an equivalency determination. Dr. Rizkalla determined that the nodule represented progressive massive fibrosis, but he did not make a finding that the nodule would appear as a 1 cm. opacity on a chest x-ray. Dr. Bush testified that the 1.4 cm. nodule was of insufficient size to qualify as progressive massive fibrosis, but he stated that the nodule would

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> miner]. Progressive massive fibrosis is found in patients who are symptomatic from lung disease which is not the case of [the miner]. Progressive massive fibrosis typically produces large radiologic densities not evident in the chest x-rays of [the miner]. I conclude that the lungs show no evidence for progressive massive fibrosis.

Director's Exhibit 8.

> appear as a 1.4 cm. opacity on x-ray. This is precisely the kind of equivalency determination made by the pathologists in *Clites* and *Braenovich*. It is also immaterial that the chest x-rays do not show large opacities as Dr. Wolfe's x-ray interpretations are contrary to the autopsy evidence and have been discredited. *See Braenovich* at p. 1-245. Dr. Bush's statement that the 1.4 cm. nodule would appear as a 1 cm. opacity on a chest x-ray is sufficient to invoke the presumption at §718.304(b).

Decision and Order at 5-6 (footnote omitted).[9]

Thus, the administrative law judge found invocation of the Section 718.304 presumption based on his determination that the evidence was sufficient to establish that the 1.4 centimeter lesion observed on the miner's autopsy slides would have produced an opacity of equivalent size if viewed on a chest x-ray. In making this finding, the administrative law judge relied upon Dr. Bush's deposition testimony that the 1.4 centimeter lesion observed on the miner's autopsy slides would have appeared as a 1.4 centimeter opacity on a chest x-ray.[10]

Employer contends that the administrative law judge erred in finding that Dr. Bush's deposition testimony was sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304 since Dr. Bush did not opine that the 1.4 centimeter lesion found on autopsy would, if x-rayed, produced a *pneumoconiotic* opacity in excess of 1.0 centimeters. In his decision, the administrative law judge noted that "Dr. Jourdain, Dr. Rizkalla, and Dr. Bush noted the presence of a macronodule of pneumoconiosis in the decedent's lungs measuring 1.4 cm. in greatest dimension." Decision and Order at 5. Employer, however, argues that the administrative law judge erred in finding that Dr.

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[9]The administrative law judge noted that:

> Although Dr. Bush stated that the nodule might show up on x-ray as thickened pleura or a blood vessel and that it would not be represented on an x-ray as a "coal worker lesion," *see Id.* at pp. 33, 34, this does not negate his finding that the 1.4 cm. nodule would appear as a 1.4 cm. opacity on a chest x-ray.

Decision and Order at 6 n.2.

[10]The administrative law judge apparently relied upon Dr. Bush's opinion because neither Dr. Jourdain nor Dr. Rizkalla rendered equivalency determinations, *i.e.*, opinions regarding whether the 1.4 centimeter nodule which they observed during the miner's autopsy and/or on the miner's autopsy slides would have produced an opacity of one centimeter or more, if viewed on an x-ray.

Bush characterized the 1.4 centimeter lesion found on autopsy as pneumoconiosis. The Director agrees with employer that the administrative law judge erred in concluding that Dr. Bush's opinion was sufficient to establish invocation of the irrebuttable presumption inasmuch as the doctor did not clearly opine that the 1.4 centimeter lesion that he diagnosed was pneumoconiosis. We agree with employer and the Director. Although the administrative law judge permissibly found that Dr. Bush's opinion was sufficient to establish that the 1.4 centimeter lesion observed on autopsy would have produced an opacity of equivalent size if viewed on a chest x-ray, the administrative law judge erred in not addressing whether the lesion in question constituted pneumoconiosis. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Consequently, we vacate the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304 and remand the case to the administrative law judge to address whether the evidence of record provides a sufficient basis upon which to make an equivalency finding pursuant to 20 C.F.R. §718.304. If so, the administrative law judge must also consider and address all other relevant evidence regarding this issue. *See Melnick*, *supra*. On remand, should the administrative law judge find the evidence sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304, claimant is entitled to survivor's benefits. *See* 20 C.F.R. §718.205(c)(3).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration 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