BRB No. 08-0709 BLA

L.C.S. (Widow of T.A.S.) Claimant-Respondent v. ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2009 DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, LC), Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (07-BLA-5894) of Administrative Law Judge Michael P. Lesniak on a survivor's claim[1] filed pursuant to the

[1] Claimant is the widow of the miner, who died on April 17, 2006. The death certificate, signed by Dr. J.E. Stollings, the miner's treating physician, lists as the cause of death: carotid artery rupture due to hypertension, due to atherosclerotic cardiovascular

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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with ten years of qualifying coal mine employment. The administrative law judge found that the record supported employer's stipulation that the miner suffered from simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). The administrative law judge also found that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Additionally, the administrative law judge found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3) because the miner had complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, benefits were awarded on the survivor's claim.

On appeal, employer, citing *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), argues that the administrative law judge erred in finding complicated pneumoconiosis established at Section 718.304(b) based on the autopsy evidence, because he failed to determine whether the lesions identified on the miner's autopsy would be equivalent to an opacity of greater than one centimeter in diameter, if seen on x-ray. Employer also contends that the administrative law judge erred in failing to weigh all of the relevant evidence together in determining that complicated pneumoconiosis was established at Section 718.304(b). Further, employer contends that the administrative law judge erred in according greater weight to the report of Dr. Dennis, because he was the autopsy prosector, than to the contrary reports of Drs. Caffrey and Bush, who only reviewed the lung autopsy slides. Additionally, employer contends that the administrative law judge did not properly consider the opinions of Drs. Crisalli and Zaldivar, who found that the miner did not have complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.[2]

---

disease. Director's Exhibit 9. Claimant filed her survivor's claim for benefits on November 14, 2006. Director's Exhibit 2.

[2] We affirm the administrative law judge's findings that the miner worked in qualifying coal mine employment for ten years and suffered from simple coal worker's pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b), as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2, 7-8.

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 the applicable law, they are binding upon this Board and may not be disturbed.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) of the Act, as implemented by Section 718.304 of the regulations, provides an irrebuttable presumption of death due to pneumoconiosis if the miner suffers 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 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(a)-(c). Because prongs (A), (B), and (C) provide three different ways of diagnosing complicated pneumoconiosis, the administrative law judge must perform an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Because prong (A) sets out an entirely objective scientific standard, it provides the mechanism for determining equivalencies under prong (B) or prong (C). Thus, for complicated pneumoconiosis to be established under prong (B) or prong (C), the condition diagnosed must, under those prongs, be a condition that would produce opacities of greater than one centimeter in diameter on an x-ray. Further, while Section 718.304 sets forth three different ways by which the irrebuttable presumption of death due to pneumoconiosis can be invoked, the administrative law judge must still review all the relevant evidence together, before determining whether complicated pneumoconiosis is established. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

In addressing the evidence of complicated pneumoconiosis, the administrative law judge first noted that because Drs. Dennis, Caffrey and Bush were all highly qualified as Board-certified pathologists, their opinions were equally persuasive on the basis of their qualifications. Decision and Order at 9. Nonetheless, the administrative law judge found

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner was employed in coal mining in West Virginia. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

complicated pneumoconiosis established by the autopsy evidence at Section 718.304(b)[4] because he accorded greater weight to the opinion of Dr. Dennis, the autopsy prosector, due to his "experience in performing the autopsy and examining the actual lung tissue."[5] *Id*. Further, the administrative law judge noted that Dr. Dennis's deposition testimony was credible. The administrative law judge accorded less weight to the opinions of Drs. Caffrey and Bush, pathologists who reviewed the lung autopsy slides and the autopsy report but found no evidence of complicated pneumoconiosis, because "they mischaracterize[ed] Dr. Dennis's autopsy findings."[6] *Id*. The administrative law judge also accorded less weight to the opinions of Drs. Crisalli and Zaldivar, who did not find complicated pneumoconiosis, as they relied on the opinions of Drs. Caffrey and Bush, instead of making "independent medical findings." *Id*.

[4] The administrative law judge did not render determinations on complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (c).

[5] Under the final anatomic diagnoses contained in his autopsy report, Dr. Dennis, who is Board-certified in Anatomic and Clinical Pathology, diagnosed "simple coal workers' pneumoconiosis with progressive massive fibrosis present in focal areas with macular development greater than [two centimeters] associated with black pigment deposition, fibrosis, and silica particle impregnation in and about the pigmented clusters and scattered throughout the lung." Director's Exhibit 10. Additional findings listed by Dr. Dennis included: severe atherosclerotic cardiovascular disease with left ventricular hypertrophy; moderate to severe pulmonary congestion and edema; pulmonary hemorrhage; and recent myocardial infarction with thrombus in left main artery. Director's Exhibit 12.

[6] Dr. Caffrey, who is Board-certified in Anatomic and Clinical Pathology, found, on review of the miner's death certificate, autopsy slides and the report of Dr. Dennis, that the miner had simple coal workers' pneumoconiosis, occupying approximately five percent of the lung tissue, but "the sections of lung tissue definitely do not show evidence of complicated [coal workers' pneumoconiosis] as the pathologist described." Employer's Exhibit 1 [emphasis in original].

Dr. Bush, who is Board-certified in Anatomic and Clinical Pathology, found, on review of the miner's death certificate, autopsy slides and the report of Dr. Dennis, that the miner "had simple coal workers' pneumoconiosis and did not have any evidence of progressive massive fibrosis in the lungs" and that his "death resulted from dissection and rupture of an extensive aortic aneurysm resulting from atherosclerotic disease causing secondary ischemic changes in all vital organs." Employer's Exhibit 4.

Employer first asserts that the administrative law judge erred in mechanically according controlling weight to the opinion of Dr. Dennis solely because he conducted the autopsy, without sufficiently weighing the contrary opinions of Drs. Caffrey and Bush, who only reviewed the miner's lung autopsy slides. Employer also argues that the administrative law judge's reliance on Dr. Dennis's opinion is undermined because of the doctor's inconsistent testimony taken during two different depositions, his lack of knowledge of all the circumstances surrounding the miner's death, and his failure to review additional medical records that were reviewed by other physicians.

As employer contends, the administrative law judge may not accord controlling weight to the opinion of an autopsy prosector solely on that basis, without explaining why that status confers more credibility on his opinion than the opinions of the physicians who only reviewed the autopsy lung slides. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *accord Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992). In this case, the administrative law judge summarily stated that Dr. Dennis's autopsy report was entitled to controlling weight because he "perform[ed] the autopsy and examin[ed] the actual lung tissue." Decision and Order at 9. The administrative law judge did not, however, explain how these factors provided Dr. Dennis with a more accurate picture of whether the miner had complicated pneumoconiosis, than that of Drs. Caffrey and Bush, who reviewed the miner's lung autopsy slides and found no evidence of complicated pneumoconiosis.[7] *See Urgolites*, 17 BLR at 1-23. Nor did the administrative law judge consider any other factors relevant to the credibility of Dr. Dennis's opinion on autopsy. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, the administrative law judge erred in summarily according greater weight to Dr. Dennis's autopsy report because he was the autopsy prosector. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-262. We, therefore, vacate the administrative law judge's accordance of greater weight to Dr. Dennis's report and his resultant finding of complicated pneumoconiosis at Section 718.304(b), and remand the case for the administrative law judge to reconsider the opinions of Drs. Dennis, Caffrey and Bush.

Employer also argues that the administrative law judge erred in finding that Dr. Dennis's diagnosis of progressive massive fibrosis was sufficient to establish complicated pneumoconiosis, without first determining whether the lesions identified on autopsy would be equivalent to a "greater than one centimeter opacity" if seen on x-ray. In addition, employer avers that, despite the administrative law judge's failure to render the

[7] Employer points out that Dr. Dennis testified that he believed that a physician who reviewed his slides should be in the same position as a physician standing at the autopsy table. Employer's Brief at 9; Employer's Exhibit 7 at 11.

requisite equivalency determination, Dr. Dennis's autopsy report and deposition testimony are insufficient to provide the information necessary to make such an equivalency determination because Dr. Dennis: did not find evidence of massive lesions; discounted the size requirements imposed by the regulations for diagnosing complicated pneumoconiosis; and obfuscated the issue of whether the macular pneumoconiosis he identified would be evident on x-ray.

It is well established that the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption set forth in Section 718.304, when conflicting evidence is presented. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Lester*, 993 F.2d at 1145-1146, 17 BLR at 2-117-118; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). 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.*, a 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.

In the instant case, in analyzing the autopsy evidence at Section 718.304(b), the administrative law judge must determine whether it is sufficient to establish that the lesion or lesions seen on autopsy are equivalent in size to an opacity seen on x-ray.[8]

[8] Contrary to employer's contention, a review of the record reveals that Dr. Dennis's deposition testimony does contain a discussion of whether the lesions seen on autopsy would be expected to yield one or more opacities greater than one centimeter when viewed on x-ray. During his deposition on January 15, 2008, Dr. Dennis answered questions under direct examination posed by claimant's counsel. Dr. Dennis testified as follows:

Q: Under the law there needs to be an equivalency to x-ray findings.

A: I don't know if they show fibrosis on the x-ray. I know they—

Q: Okay. To a reasonable degree of medical certainty, do you understand that these two centimeter areas that you're describing.

A: Yes.

Q: Would they be the equivalent, if an x-ray picked them up, to a one centimeter finding on an x-ray?

A: That makes sense, yes, sir.

Q: So in your opinion, they would be equivalent to an x-ray finding of that nature?

A: That's correct.

Accordingly, the case must also be remanded for the administrative law judge to make the requisite equivalency determination in order to determine whether the autopsy evidence in this case is sufficient to establish complicated pneumoconiosis, and thereby, invocation of the irrebuttable presumption of death due to pneumoconiosis. *See* 30 U.S.C. §923(b); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, *citing Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring).

Additionally, employer contends that the administrative law judge erred when he concluded that Drs. Caffrey and Bush mischaracterized Dr. Dennis's autopsy findings regarding the size of the lesions seen on the autopsy slides.[9] Specifically, employer contends that Drs. Caffrey and Bush did not mischaracterize Dr. Dennis's autopsy findings since they concluded, based on their independent review of the autopsy slides, that only five percent of the miner's total lung tissue was affected by simple coal workers' pneumoconiosis and that the micronodules seen only measured between five and seven millimeters. Consequently, we agree with employer that the administrative law judge erred in rejecting the opinions of Drs. Caffrey and Bush for the reason given. On remand, the administrative law judge must discuss the findings of Drs. Caffrey and Bush and weigh them with the findings of Dr. Dennis.

Q: How many of them did you find?

A: I didn't numerate them, but finding one two and a half centimeters or two centimeters, and this having a 1.5, those are the significant features rather than the total number. The total number is helpful as well. And if you find more and more of these varying sizes and shapes, that's significant as well. At least five or six.

Claimant's Exhibit 4 at 16-17.

[9] Dr. Dennis stated that when macules, pigment deposition and fibrosis are present in two to three lobes of the right and left lung, he diagnoses progressive massive fibrosis. He also stated that sometimes nodules coalesce. Dr. Dennis testified that he could not get all of the largest nodule, (2.5 centimeters) on one slide, so the slides prepared were limited to showing only a portion of the large macules. Claimant's Exhibit 4. Drs. Caffrey and Bush, however, saw discrete nodules on the lung slides. Specifically, Dr. Caffrey found that the lung slides did not show any lesions of progressive massive fibrosis and that the lesion of coal workers' pneumoconiosis seen occupied only 5% of the lung tissue on the lung slides. Dr. Bush opined that the largest nodule of coal workers' pneumoconiosis seen was 0.7 centimeters and that less than 5% of the lung tissue was affected by coal workers' pneumoconiosis. Employer's Exhibit 4.

Employer also argues that the administrative law judge did not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in summarily dismissing the opinions of Drs. Crisalli and Zaldivar, that the miner did not have complicated pneumoconiosis. Specifically, employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Crisalli and Zaldivar because they did not provide independent medical findings, but merely relied on the findings of Drs. Caffrey and Bush. Employer contends, however, that both physicians provided documented and reasoned opinions that the abnormalities evident on the autopsy slides were not consistent with progressive massive fibrosis.

The administrative law judge found that Drs. Crisalli and Zaldivar, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, relied "primarily on the conclusions reached in the pathological review reports by Drs. Caffrey and Bush" when rendering their opinions that the miner did not suffer from progressive massive fibrosis. Decision and Order at 9. The administrative law judge, therefore, accorded less weight to the opinions of Drs. Crisalli and Zaldivar because their opinions "[did] not add significant independent medical findings" to the instant case. *Id*.

We agree with employer, however, that Drs. Crisalli and Zaldivar each provided an independent opinion based on a review of the miner's death certificate, the notes of Dr. Stolling, the miner's treating physician, and the pathology opinions of Drs. Dennis, Caffrey and Bush. The administrative law judge erred, therefore, in disregarding their medical conclusions solely because he found that they relied on the findings of Drs. Caffrey and Bush. *See Amax Coal Co. v. Director, OWCP* [*Rehmel*], 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48-49 (7th Cir. 1992); Employer's Exhibits 2, 3. The opinions of consulting or reviewing physicians are relevant. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Turner v. Director, OWCP*, 927 F.2d 778, 15 BLR 2-6 (4th Cir. 1991). Accordingly, on remand, in determining whether complicated pneumoconiosis is established at Section 718.304(b), the administrative law judge must consider the opinions of Drs. Crisalli and Zaldivar insofar as they are relevant to determining whether claimant has met her burden under Section 718.304(b). *See Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-31.

In light of the foregoing, the administrative law judge must reconsider and weigh together the opinions of Drs. Dennis, Caffrey, Bush, Crisalli and Zaldivar in determining whether claimant has carried her burden of establishing complicated pneumoconiosis at Section 718.304(b). If, on remand, the administrative law judge finds that complicated pneumoconiosis is not established and that claimant is not thereby entitled to the irrebuttable presumption of death due to pneumoconiosis, 20 C.F.R. §718.205(c)(3), he

must then determine whether the evidence establishes death due to pneumoconiosis pursuant to Section 718.205(c)(1) or (2).

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

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge