BRB No. 05-0950 BLA

MOLLY SEXTON (Widow of JAMES G. SEXTON)	)	
Claimant-Respondent	)	
v.	)	
PARAMONT COAL CORPORATION	)	DATE ISSUED: 06/12/2006
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-Award of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Survivor Benefits (2004-BLA-76) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) rendered 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] On October 31, 2001, Administrative Law Judge Edward Terhune Miller issued a decision awarding claimant survivor's benefits based on his finding that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis because the evidence established that the miner had complicated pneumoconiosis. Pursuant to employer's appeal of that finding and the award of benefits, on October 30, 2002, the Board reversed Judge Miller's decision and held that his conclusion that the two centimeter mass discovered on autopsy was equivalent to a radiographic lesion greater than a one centimeter mass was unsupported by requisite medical evidence. *Sexton v. Paramount Coal Corp.*, BRB No. 02-0242 BLA (Oct. 30, 2002)(unpub.).[2] Claimant requested modification based upon reports prepared in 2004 which reviewed evidence previously submitted showing that a mistake in a determination of fact had been made in the denial of this survivor's claim. Pursuant to claimant's request for modification, the administrative law judge found that the evidence of record was now sufficient to establish the existence of complicated pneumoconiosis, and that claimant had therefore established a mistake in a determination of fact, and was therefore entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the autopsy reviews of Drs. Naeye and Perper established the existence of complicated pneumoconiosis in light of the other relevant evidence of record showing no complicated pneumoconiosis, *i.e.*, the x-ray evidence of record.[3] Employer also contends that the administrative law judge erred in his application of the equivalency test set forth in *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) responds that the autopsy reviews of Drs. Naeye and Perper provided ample support for the administrative law judge's finding of complicated pneumoconiosis.

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[1] Claimant, Molly Sexton, is the widow of the miner, James G. Sexton, who died on December 11, 1999. Director's Exhibit 8.

[2] The evidence to which the Board referred was the miner's x-ray evidence, death certificate, Dr. Coogan's 1999 autopsy report and Dr. Naeye's May 2, 2000 report and September 29, 2000 deposition.

[3] Dr. Perper was deposed July 12, 2004 and Dr. Naeye was deposed May 25, 2004.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grills Associates, Inc.*, 380 U.S. 359 (1965).

Before determining whether invocation of the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by Section 718.304, has been established, the administrative law judge must first determine whether the existence of complicated pneumoconiosis is established by considering all the relevant evidence at Section 718.304(a)-(c). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Circuit 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidated Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Complicated pneumoconiosis is established if the miner suffers from a chronic dust disease of the lung which when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C. The regulation at 20 C.F.R. §718.304(b) and (c) also permits complicated pneumoconiosis to be established when massive lesions in the lung are diagnosed by biopsy or autopsy and when a condition which could reasonably be expected to produce results equivalent to those diagnosed by chest x-rays or biopsy/autopsy are diagnosed by other means. Because radiographic evidence of one or more large opacities categorized as size A, B, or C represents the most objective measure of the condition, it sets the benchmark by which other methods for proving complicated pneumoconiosis are measured. Thus, whether a massive lesion or other diagnostic result represents complicated pneumoconiosis requires an equivalency evaluation based on the x-ray criteria, *e.g.*, if diagnosed by biopsy or autopsy, a miner must have "massive lesions" which would, if x-rayed, show as opacities greater than one centimeter in diameter. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).[4]

In considering the evidence relevant to the existence of complicated pneumoconiosis, the administrative law judge found that the x-ray evidence did not establish the existence of complicated pneumoconiosis because none of the x-rays was positive for the presence of a large opacity.[5] Contrary to employer's argument, the

[4] Because the miner last worked in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[5] Employer concedes the existence of simple pneumoconiosis. Employer's Brief at 15. Decision and Order at 10.

administrative law judge did consider the x-ray evidence along with the autopsy evidence, Decision and Order at 21. Further, contrary to employer's argument, Section 718.304(a)-(c) provides alternative methods for establishing the existence of complicated pneumoconiosis, as long as all the relevant evidence is considered, *Melnick*, 16 BLR 1-31, and, as the administrative law judge stated, *Scarbro* requires only that an equivalency determination be made, not that there be actual radiographic evidence of complicated pneumoconiosis. Decision and Order at 21; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (probative force of evidence under one prong not reduced because the evidence under some other prong is inconclusive or less vivid).

Turning to the autopsy evidence, the administrative law judge found that Dr. Coogan, the autopsy prosector, and Drs. Perper and Naeye, board-certified pathologists, who reviewed autopsy slides, all found lesions on autopsy that were greater than one centimeter. The administrative law judge observed that although Dr. Naeye was initially uncertain as to whether it was possible to determine whether a two centimeter lesion seen on autopsy would appear on x-ray as greater than one centimeter, he later stated, on deposition, that a two centimeter nodule on autopsy would be consistent with a one centimeter nodule on x-ray. Likewise, the administrative law judge observed that Dr. Perper opined that the two centimeter lesions he saw on the autopsy slides would appear on x-ray as greater than one centimeter. The administrative law judge further noted that both Dr. Perper and Dr. Naeye indicated that autopsy evidence was superior to x-ray evidence, as x-rays often underestimate the size of opacities. *See Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Thus, the administrative law found that the autopsy results were equivalent to a finding of an opacity greater than one centimeter on x-ray.[6] We find no error in this determination, as the administrative law judge has permissibly relied on Dr. Perper's opinion, which he found to be well-reasoned, that the lesions observed on the autopsy slides were equivalent to the findings required on x-ray pursuant to *Scarbro*. The administrative law judge did not substitute his opinion for that of Dr. Perper. Moreover, the administrative law judge did not disregard the negative x-ray evidence of record, Decision and Order at 10, but rationally relied on the opinions of Drs. Naeye and Perper, as autopsy evidence is

[6] Upon gross examination, Dr. Coogan identified a two centimeter mass of coalesced anthracosis macules. On microscopic examination she confirmed the presence of multiple variably sized densely hyalinized macules which coalesced and were associated with anthrasilicotic pigment deposition consistent with coal workers' pneumoconiosis. On microscopic examination, Dr. Perper found pneumoconiosis lesions measuring up to two centimeters. On microscopic examination, Dr. Naeye observed masses containing silicotic crystals admixed with black pigment that was coal workers' pneumoconiosis. The masses exceeded one centimeter in size, measuring up to 1.2 centimeters.

superior to x-ray evidence in diagnosing the existence of pneumoconiosis. This is not inconsistent with the intent of the regulations. Decision and Order at 19-21; Claimant's Exhibit 1; Director's Exhibit 42; *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Blankenship*, 177 F.3d 240, 22 BLR 2-554; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).[7]

Finally, the administrative law judge considered the other medical evidence of record which included objective tests and the medical opinions pursuant to Section 718.304(c). Applying the holding in *Scarbro*, the administrative law judge accorded little weight to the opinions of Dr. Naeye and Dr. Bush, who found the presence of simple coal workers' pneumoconiosis, but no complicated pneumoconiosis, as these doctors disagreed with the legal definition of complicated pneumoconiosis; also, Dr. Bush stressed the absence of the classic symptoms of complicated pneumoconiosis in the miner, yet he failed to indicate an alternative etiology for the pulmonary lesions found on the autopsy slides. This was rational as the administrative law judge accurately characterized the doctors' opinions and the doctors were required to consider the legal, not the medical definition of complicated pneumoconiosis. Decision and Order at 25-26; Employer's Exhibits 1, 2, 5; Director's Exhibits 11, 13, 38, 42; *Scarbro*, 220 F.3d 250, 22 BLR 2-93. It was also permissible for the administrative law judge to credit Dr. Perper's diagnosis of complicated pneumoconiosis as he found it consistent with the legal definition of complicated pneumoconiosis and found the opinion to be well-reasoned. Moreover, Dr. Perper's opinion regarding the miner's objective test results and work history, is not undermined by his status as a pathologist, rather than a radiologist.[8] Decision and Order at 26; Claimant's Exhibit 1; *Trumbo*, 17 BLR 1-85; *Fields*, 10 BLR 1-19; *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we agree with the Director that substantial evidence supports the administrative law judge's equivalency finding, and we affirm the administrative law judge's finding that claimant has established the existence of complicated pneumoconiosis and has, therefore, established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, and therefore, a mistake in a determination of fact pursuant to Section 725.310. *Scarboro*, 220 F.3d 250, 22 BLR 2-93; *Jessee v. Director, OWCP*, 5 F.3d 723, 19 BLR 2-

[7] The administrative law judge acknowledges that these were the only physicians to address the radiographic equivalency issue concerning the large pulmonary mass seen on autopsy. Decision and Order at 20.

[8] We also reject employer's argument that Dr. Perper failed to consider the miner's smoking history, since Dr. Perper's report clearly lists the smoking history that the miner gave to each doctor whose report Dr. Perper reviewed. Claimant's Exhibit 1.

26 (4th Cir. 1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-15 (1990); We therefore, affirm the finding that claimant is entitled to benefits. *Blankenship*, 177 F.3d 240, 22 BLR 2-554.

Accordingly, the administrative law judge's Decision and Order-Award of Survivor's Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge