BRB No. 11-0612 BLA

TRECY M. VANDYKE (Widow of RAY VANDYKE)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/19/2012
CONSOLIDATION COAL COMPANY	)	
and	)	
BEATRICE POCAHONTAS COMPANY	)	
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 on Remand of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Jeffrey R. Soukup and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (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.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (06-BLA-5638) of Associate Chief Administrative Law Judge William S. Colwell rendered 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).[1] This case involves a survivor's claim filed on December 4, 2003, and is before the Board for the second time.[2] Director's Exhibit 2.

Initially, in a Decision and Order issued on June 24, 2008, the administrative law judge credited the miner with thirty-three years of coal mine employment,[3] and found that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. Specifically, the administrative law judge credited the biopsy reports of Drs. Bechtel and Naeye, diagnosing complicated pneumoconiosis, over the contrary report of Dr. Hansbarger. In so finding, the administrative law judge determined that the large nodule described by Dr. Bechtel on the biopsy would measure more than one centimeter in diameter if viewed on x-ray, "because Dr. Naeye, using the pathologist's equivalency standard of at least 2 [centimeters] in diameter by autopsy or pathology, described the nodule as complicated pneumoconiosis and Dr. Hansbarger did not dispute the size." 2008 Decision and Order at 18. Further, based on his analysis of the biopsy evidence, the administrative law judge discounted the medical reports of Drs. Hippensteel, Rosenberg, and Spagnolo, that the miner did not have complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's decision to admit, over employer's objection, Dr. Naeye's biopsy report, which was not

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[1] Claimant is the widow of the miner, who died on October 15, 2003. Director's Exhibit 7. Because claimant filed her survivor's claim before January 1, 2005, recent amendments to the Act do not affect this case. *See* Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).

[2] The full procedural history of this case is set forth in the Board's prior decision in *T.M.V.* [*Vandyke*] *v. Consolidation Coal Co.*, BRB No. 08-0744 BLA (July 29, 2009)(unpub.).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

timely exchanged with employer, and remanded the case to the administrative law judge for reconsideration of that issue. *T.M.V.* [*Vandyke*] *v. Consolidation Coal Co.*, BRB No. 08-0744 BLA (July 29, 2009)(unpub.), slip op. at 6-10. Based on its decision to vacate the administrative law judge's admission of Dr. Naeye's biopsy report, the Board vacated the administrative law judge's award of benefits, and remanded the case for the administrative law judge to reconsider the biopsy and the medical opinion evidence regarding the existence of complicated pneumoconiosis.[4] *Id*., slip op. at 10.

On remand, in an Order issued on March 8, 2011, the administrative law judge excluded Dr. Naeye's biopsy report from the record because it was not timely exchanged, in violation of the twenty-day rule, pursuant to 20 C.F.R. §725.456(b)(2), and he took official notice of Dr. Bechtel's qualifications. Subsequently, in a Decision and Order on Remand issued on May 12, 2011, the administrative law judge credited Dr. Bechtel's biopsy report over that of Dr. Hansbarger, and found that the biopsy evidence supported a finding that the miner suffered from complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b). Further, the administrative law judge discounted the contrary medical reports of Drs. Hippensteel, Rosenberg, and Spagnolo, pursuant to 20 C.F.R. §718.304(c). Finding that Dr. Bechtel's biopsy report "outweigh[ed] the other medical data," the administrative law judge found that claimant invoked the irrebuttable presumption of death due to pneumoconiosis. 2011 Decision and Order on Remand at 9. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Specifically, employer argues that Dr. Bechtel's biopsy report is insufficient to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis, because it contains no equivalency determination. Employer also argues that the administrative law judge erred in taking official notice of Dr. Bechtel's qualifications. Employer argues further that the administrative law judge erred in crediting Dr. Bechtel's biopsy report over that of Dr. Hansbarger, and in discounting the medical reports of Drs. Hippensteel, Rosenberg, and Spagnolo. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a

[4] In remanding the case, the Board rejected employer's argument that the irrebuttable presumption of death due to pneumoconiosis was unavailable to claimant because the miner died of a self-inflicted gunshot wound. *Vandyke*, slip op. at 4-6. The Board, however, found merit in employer's argument that the administrative law judge erred in taking official notice of Dr. Bechtel's qualifications without identifying the source of the information he obtained, and without providing employer an opportunity to show the contrary. *Id*. at 14.

substantive response brief, but notes that claimant may establish entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304, despite the fact that the miner died due to a traumatic injury.[5] Employer filed a reply to claimant's brief.

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

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, and before January 1, 2005, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

Pursuant to Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 of the regulations, 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

[5] We decline to address employer's argument that claimant's entitlement to benefits is precluded because the miner died due to a traumatic injury. The Board previously addressed this issue, and held that the irrebuttable presumption is available, if the evidence is sufficient to establish complicated pneumoconiosis. *See Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-246 (2003)(Gabauer, J., concurring); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-22 (1999)(en banc); *Vandyke*, slip op. at 4-6; Employer's Brief at 7-19.

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). Further, the United States Court of Appeals for the Fourth Circuit has held that 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. Specifically, the court has held that '"[b]ecause prong (A) sets out an entirely objective scientific standard'" - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what, under prong (B), is a "massive lesion" and what, under prong (C), is an equivalent diagnostic result reached by other means. *Scarbro v. Eastern Assoc. Coal Corp.*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Although the court indicated in *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006), that a diagnosis of massive lesions, standing alone, can satisfy 20 C.F.R. §718.304(b), it did not overrule its holdings in *Scarbro* and *Blankenship*, that "massive lesions" are those which, when x-rayed, would appear as opacities greater than one centimeter in diameter. *Perry*, 469 F.3d at 366, 23 BLR at 2-387.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge reconsidered, on remand, the biopsy reports of Drs. Bechtel and Hansbarger, as instructed by the Board, after having excluded Dr. Naeye's biopsy report.[6] Dr. Bechtel observed a 4 centimeter x 3.5 centimeter x 3.5 centimeter nodule in the upper lobe of the right lung. Director's Exhibit 24 at 1. Dr. Bechtel stated that the right upper lobe showed complicated coal workers' pneumoconiosis with progressive massive fibrosis, with a secondary fungal infection. *Id*. at 2. Dr. Bechtel stated that it was common for nodules of progressive massive fibrosis to develop secondary fungal infections. *Id*. at 3. Dr. Hansbarger disagreed with Dr. Bechtel's diagnosis of complicated coal workers' pneumoconiosis or progressive massive fibrosis. Director's Exhibit 29 at 1. Dr. Hansbarger opined that Dr. Bechtel mistook a healing pulmonary granulomata for coal workers' pneumoconiosis, or progressive massive fibrosis. *Id*. at 2.

The administrative law judge credited Dr. Bechtel's biopsy report over that of Dr. Hansbarger, and thus found that claimant established entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Decision and Order on Remand at 5-6. The administrative law judge found that Dr. Bechtel's biopsy report was more detailed than that of Dr. Hansbarger, and that Dr. Bechtel persuasively explained his opinion, both in light of his findings and the testing that he performed. *Id*. at 6. On the other hand, the administrative law judge found

[6] As noted earlier, the administrative law judge had previously relied on Dr. Naeye's report to support his equivalency determination. 2008 Decision and Order at 18.

that Dr. Hansbarger's biopsy report was less detailed than that of Dr. Bechtel, and the administrative law judge further stated that he could not determine whether Dr. Hansbarger relied on evidence outside the record to support his opinion. *Id*. Additionally, the administrative law judge found that Dr. Hansbarger provided no reason for his opinion that Dr. Bechtel confused a healing granulomata for progressive massive fibrosis, and thus, did not adequately refute Dr. Bechtel's statement that it was common for nodules of progressive massive fibrosis to develop secondary fungal infections. *Id*.

As stated above, employer argues that Dr. Bechtel's biopsy report is insufficient to establish claimant's entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304(b) because the record contains no equivalency determination. Employer's Brief at 21; Employer's Reply Brief at 2-3. We agree with employer.

Under the applicable law in this case, the administrative law judge erred in finding that the progressive massive fibrosis, diagnosed on biopsy, entitled claimant to invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304(b), as there is no medical evidence to establish that the lesion would appear as an opacity of greater than one centimeter, if seen on x-ray. *See Scarbro*, 220 F.3d at 255-56, 22 BLR at 1-101; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. In *Blankenship*, the court required additional medical evidence showing that a biopsy lesion, measuring 1.3 centimeters, if x-rayed, would appear as an opacity of greater than one-centimeter, in order "[t]o determine whether Blankenship's condition [met] the statutory criteria . . . ." *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562. In *Scarbro*, the court reiterated that "x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion'. . . . " *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100.

The Fourth Circuit has not overruled *Blankenship* and thus, the administrative law judge erred in finding that claimant established invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis, absent medical evidence that the progressive massive fibrosis seen on biopsy would appear as a greater than one-centimeter opacity on x-ray. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61; *see also Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003). In *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365-67, 23 BLR 2-374, 2-384-87 (4th Cir. 2006), the court continued to apply its equivalency determination standard, holding that the autopsy prosector's uncontradicted opinion, that the lesions he observed would have been greater than one centimeter if they had been x-rayed, supported invocation of the irrebuttable presumption. The court further held that the administrative law judge improperly discounted that equivalency determination testimony from the autopsy prosector, and it reversed the denial of benefits. *Perry*, 469 F.3d at 366-67, 23 BLR at 2-385-87. The court's additional observation, that the autopsy prosector's uncontradicted description of "massive lesions" was itself "sufficient to

trigger the presumption under [subsection] (b) of 20 C.F.R. §718.304," *Perry*, 23 BLR at 2-384-85, was not essential to the determination of the case and therefore, was arguably dicta.[7] *See New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 241 (4th Cir. 2012).

In this case, there is no medical evidence that the nodule seen on biopsy would be seen as an opacity measuring greater than one centimeter on x-ray. *See Blankenship*, 177 F.3d at 243, 22 BLR at 2-561 (holding that "'massive lesions,' as described in prong (B), are lesions that when x-rayed, show as opacities greater than one centimeter in diameter"). Further, in this case, unlike in *Perry*, the diagnosis of progressive massive fibrosis was not uncontradicted. As the record does not contain any medical evidence so that an equivalency determination could be made, the administrative law judge erred in finding that the progressive massive fibrosis diagnosed on biopsy was legally sufficient to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *Id.* Consequently, the administrative law judge's finding that claimant established invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304 is reversed, as it is not in accordance with law. As the record contains no other evidence to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), claimant is unable to establish her entitlement to benefits. We therefore reverse the award of benefits.[8]

[7] Neither circuit court that discussed and declined to follow the Fourth Circuit's equivalency determination requirement for autopsy evidence gave any indication that it viewed *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006) as undermining or retreating from that requirement. *See Bridger Coal Co. v. Director, OWCP* [*Ashmore*], 669 F.3d 1183, BLR (10th Cir. 2012); *Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007).

[8] In light of our reversal of the administrative law judge's award of benefits, we need not address employer's remaining arguments.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision to decline to address employer's renewed argument that the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, is unavailable to claimant because the miner died of a self-inflicted gunshot wound, based on the Board's previous rejection of that argument. *See Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-246 (2003)(Gabauer, J., concurring); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-22 (1999)(en banc); *T.M.V.* [*Vandyke*] *v. Consolidation Coal Co.*, BRB No. 08-0744 BLA (July 29, 2009)(unpub.), slip op. at 4-6; Employer's Brief at 7-19; *supra*, n.5.

However, I respectfully dissent from the majority's determination to reverse the administrative law judge's decision awarding survivor's benefits. Based upon the administrative law judge's crediting of Dr. Bechtel's biopsy report diagnosing complicated coal workers' pneumoconiosis, progressive massive fibrosis, I would affirm the administrative law judge's decision awarding benefits in this survivor's claim.

As an initial matter, I observe that the Fourth Circuit stands alone in requiring that an equivalency determination be made with regard to autopsy and biopsy reports, and the Tenth and Eleventh Circuits recently have declined to adopt such a requirement. *See Bridger Coal Co. v. Director, OWCP* [*Ashmore*], 669 F.3d 1183, 1196, BLR (10th Cir. 2012); *Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986, 24 BLR 2-72, 2-94 (11th Cir. 2007).

Additionally, I believe that the Fourth Circuit has issued conflicting rulings with regard to its equivalency determination requirement. Specifically, in 1999, as the majority states, the Fourth Circuit held that the administrative law judge should perform equivalency determinations 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, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). One year later, the Fourth Circuit continued to require an equivalency determination be made regarding autopsy and biopsy evidence, by requiring that the medical evidence prove that the massive lesion seen on autopsy (or biopsy, as here), would appear on x-ray as a nodule measuring greater than one centimeter in diameter. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000). The majority correctly observes that the Fourth Circuit has not overruled its holding, in either *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 or *Blankenship*, 177 F.3d at 243, 22 BLR at 560-61, that the "massive lesions" described at 20 C.F.R. §718.304(b) are those which, when x-rayed, would show as opacities greater than one centimeter.

However, in its most recent case addressing the subject, the Fourth Circuit seems to have retreated from the equivalency determination for autopsy and biopsy evidence. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006). In *Perry*, the Fourth Circuit held that the administrative law judge erred in finding that claimant failed to establish entitlement to the irrebuttable presumption at 20 C.F.R. §718.304(b), both because the autopsy prosector's testimony was sufficient to provide an equivalency determination, and because the prosector's description of massive lesions in both lungs provided a "statutory ground for application of the presumption."[9] *Id.* Thus, in *Perry*, the court provided two independent grounds to invoke the irrebuttable presumption. In *Perry*, the court acknowledged, with approval, the Director's recognition that the prosector's testimony was sufficient to provide an equivalency determination and therefore, invocation of the presumption. However, the court also recognized that evidence of massive lesions measuring four and six centimeters provided "another" ground, a "statutory ground" for invocation of the presumption. *Perry*, 469 F.3d at 365, 23 BLR at 2-384. Thus, the court appeared to signal that evidence of an equivalency determination is not always necessary when autopsy or biopsy evidence is used to establish complicated pneumoconiosis at 20 C.F.R. §718.304(b).

Here, the administrative law judge credited Dr. Bechtel's diagnosis of complicated coal workers' pneumoconiosis, progressive massive fibrosis, and found that it was

[9] The Act, at 30 U.S.C. §921(c)(3), provides, in relevant part, that the irrebuttable presumption attaches "If a miner . . . suffered from a chronic dust disease of the lung which . . . when diagnosed by biopsy or autopsy, yields massive lesions in the lung . . . ."

sufficient to invoke the irrebuttable presumption at 20 C.F.R. §718.304. The administrative law judge's finding is consistent with *Perry*. Moreover, in this case, as in *Perry*, the nodule described is a very large one (4 centimeters x 3.5 centimeters x 3.5 centimeters), similar to the four- and six-centimeter masses detected in *Perry*. Thus, the biopsy mass here is much larger than the 1+ centimeter size nodules that were at issue in *Blankenship* and *Scarbro*. The large size of the mass here, which Dr. Bechtel identifies as "progressive massive fibrosis," is significantly more compelling.

Because, according to my reading of *Perry*, Dr. Bechtel's biopsy report diagnosis of complicated coal workers' pneumoconiosis with progressive massive fibrosis is legally sufficient to establish the statutory ground for application of the presumption, I would affirm the administrative law judge's finding that Dr. Bechtel's biopsy report established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Thus, I would reject employer's argument and hold that no equivalency determination was required in light of Dr. Bechtel's diagnoses of complicated coal workers' pneumoconiosis, progressive massive fibrosis.

With regard to employer's remaining arguments, which the majority did not address, I would affirm the administrative law judge's crediting of Dr. Bechtel's biopsy report over that of Dr. Hansbarger. Contrary to employer's contention, the administrative law judge acted within his discretion in finding that Dr. Hansbarger did not explain his opinion that Dr. Bechtel confused a healing granulomata for complicated coal workers' pneumoconiosis or progressive massive fibrosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-287 (4th Cir. 2010); *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, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Moreover, the administrative law judge permissibly found that Dr. Bechtel's report was more persuasive, since it was based on testing.[10] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155.

[10] I also would hold that the administrative law judge, on remand, committed no abuse of discretion in taking official notice of Dr. Bechtel's qualifications as Board-certified in Anatomical and Clinical Pathology. 29 C.F.R. §18.45; *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). On remand, as instructed, the administrative law judge identified the source of the information that he relied on, and provided notice to employer of his intent to take official notice of Dr. Bechtel's qualifications, and he took official notice only after considering employer's response in opposition. March 8, 2011 Order at 2; Order Requesting Position Statements on Remand dated January 6, 2010; Employer's Response dated February 4, 2010, at 13-15.

In addition, the administrative law judge properly considered the x-ray and autopsy evidence, but rationally found that the biopsy evidence of the right upper lobe of the miner's lung was the most probative evidence. *See Braenovich*, 22 BLR at 1-246; *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-691 (1985); *Vandyke*, slip op. at 15; Decision and Order on Remand at 7. Moreover, pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the medical reports of Drs. Hippensteel, Rosenberg, and Spagnolo, all of whom stated that the miner did not have complicated pneumoconiosis, but reasonably found that those reports were "compromised," because they were based on Dr. Hansbarger's biopsy report, which the administrative law judge had discounted. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Employer's Exhibit 3 at 4-5; Employer's Exhibit 4 at 5; Employer's Exhibit 5 at 6; Employer's Exhibit 6 at 11-14.

In sum, in light of *Perry*, 496 F.3d at 365, 23 BLR at 2-384-85, I believe the administrative law judge correctly found that Dr. Bechtel's biopsy report diagnosing complicated coal workers' pneumoconiosis with progressive massive fibrosis, which the administrative law judge rationally credited, was legally sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Further, substantial evidence supports the administrative law judge's credibility determinations with respect to the relevant evidence of record. Accordingly, I would affirm the administrative law judge's Decision and Order on Remand awarding benefits in this survivor's claim.

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BETTY JEAN HALL
Administrative Appeals Judge