

BRB No. 13-0513 BLA

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| BONNIE S. YOUNG |) | |
| (Widow of JAMES E. YOUNG) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| V & M COAL COMPANY |) | DATE ISSUED: 06/18/2014 |
| |) | |
| and |) | |
| |) | |
| A.T. MASSEY |) | |
| |) | |
| Employer/Carrier- |) | |
| Petitioners |) | |
| |) | |
| 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 and Order Denying Reconsideration of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant

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

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand and Order Denying Reconsideration (07-BLA-5069) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to the provisions of the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on December 6, 2005, and is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with nineteen years of coal mine employment,¹ and found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant² to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Young v. V & M Coal Co.*, BRB No. 11-0368 BLA (Feb. 29, 2012) (unpub.). Specifically, the Board held that the administrative law judge failed to adequately explain her credibility determinations, and failed to resolve the conflict in the evidence regarding whether "massive lesions" of complicated pneumoconiosis were detected on the miner's autopsy. *Id.* Accordingly, the Board instructed the administrative law judge, on remand, to reevaluate whether the autopsy and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* The Board further instructed the administrative law judge that if she found that claimant did not invoke the irrebuttable presumption, she should determine whether claimant could otherwise establish entitlement to benefits. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.205.

On remand, the administrative law judge again found that the autopsy evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the presumption that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Employer timely moved for reconsideration, asserting that the administrative law

¹ The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

² Claimant is the surviving spouse of the miner, who died on November 28, 2005. Director's Exhibit 9.

judge should reconsider the weight she accorded to Dr. Dennis's autopsy report, because on January 17, 2013, Dr. Dennis surrendered his medical license in Kentucky for a minimum of two years. Upon review of employer's motion for reconsideration and the relevant evidence, the administrative law judge determined that the events giving rise to Dr. Dennis's license suspension occurred well after he issued his autopsy report, and that the allegations of misconduct against Dr. Dennis were unrelated to his expertise in pathology. Accordingly, the administrative law judge found no basis to alter her award of benefits, and denied employer's motion for consideration.

On appeal, employer contends that the administrative law judge erred in finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its earlier contentions.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, 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 that would be classified as Category A, B, or C; (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. 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 regarding the presence or absence of simple and complicated pneumoconiosis, resolve any conflict, and make appropriate findings of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Employer contends that the administrative law judge erred in finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20

C.F.R. §718.304(b).³ Employer specifically argues that the administrative law judge erred in finding that autopsy evidence established the existence of progressive massive fibrosis. A diagnosis of progressive massive fibrosis has been held to be equivalent to a diagnosis of “massive lesions” under 20 C.F.R. §718.304(b). *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006). Thus, in its previous consideration of this case, the Board recognized that findings of progressive massive fibrosis, if credited, are supportive of a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *Young*, BRB No. 11-0368 BLA, slip op. at 7.

Summary of the Evidence

The record contains the autopsy reports of four pathologists, Drs. Dennis, De Lara, Roggli, and Caffrey. Drs. Dennis and De Lara diagnosed the miner with progressive massive fibrosis, and Drs. Roggli and Caffrey opined that the miner did not suffer from the disease.

Dr. Dennis performed the miner’s autopsy on November 29, 2005. In an autopsy report dated March 29, 2006, Dr. Dennis noted, on gross examination, that the “visceral surface of the lung is marked by macular development greater than 2 [centimeters] in diameter.” Director’s Exhibit 11. Dr. Dennis further identified “[c]onfluent areas of black pigment deposition with fibrous connective tissue deposition and macular development.” *Id.* Dr. Dennis identified “[o]ne large macule measure[ing] greater than 5 [centimeters] in diameter.” *Id.* On microscopic examination, Dr. Dennis reported “features . . . compatible with macular development greater than 1.5 [centimeters] with subtended fibrosis, emphysematous changes, and also coal workers’ pneumoconiosis with features suggestive of progressive massive fibrosis as well.” *Id.* Dr. Dennis diagnosed: (1) progressive massive fibrosis, coal workers’ pneumoconiosis with macular development greater than 3 centimeters in diameter with intensive black pigment deposition, silica particle impregnation, and emphysematous changes; (2) moderate degree of fibrosis scattered throughout the pulmonary parenchyma with apical expressions of panlobular and cystic emphysematous changes, moderate to severe; and (3) cor pulmonale. *Id.*

Dr. De Lara reviewed the miner’s autopsy slides. In a report dated September 13, 2007, Dr. De Lara identified “dense fibrous tissue proliferation with anthracotic pigments forming nodules and macules ranging in size from 0.3 to 1.5 [centimeters] in diameter.”

³ The administrative law judge found that the x-ray evidence was inconclusive regarding the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order on Remand at 20.

Claimant's Exhibit 3. Based upon these findings, Dr. De Lara diagnosed progressive massive fibrosis. *Id.*

After reviewing the miner's autopsy slides and Dr. Dennis's autopsy report, Dr. Roggli prepared a medical report dated August 4, 2006. Dr. Roggli opined that the miner's slides showed changes of simple coal workers' pneumoconiosis with a few subpleural silicotic nodules and scattered coal dust macules. Employer's Exhibit 1. However, Dr. Roggli opined that there was no histologic evidence of progressive massive fibrosis. *Id.* During an October 24, 2006 deposition, Dr. Roggli testified that he disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis:

Dr. Dennis describes macules that are 3 centimeters, or up to 3 centimeters in maximum dimension.

A macule, by definition, is an area of pigmentation, which you can see, but you cannot feel. It's not fibrotic, and therefore it does not constitute an area of massive fibrosis.

Secondly, if there were areas that Dr. Dennis saw that represented areas of fibrosis, of progressive massive fibrosis type, that were greater than 1 or 2 centimeters in dimension, he did not sample those in the slides that I had to review.

So, in the material that I had to review, there was no evidence of progressive massive fibrosis, and his description is not consistent with that diagnosis.

Employer's Exhibit 3 at 14-15.

Dr. Caffrey also reviewed the autopsy slides and Dr. Dennis's autopsy report. In a report dated June 21, 2006, Dr. Caffrey diagnosed simple coal workers' pneumoconiosis, but opined that the miner did not suffer from progressive massive fibrosis. Employer's Exhibit 2. Dr. Caffrey found a 1.3 centimeter nodule in a lymph node that he described as showing characteristic changes of complicated coal workers' pneumoconiosis, but explained that a diagnosis of complicated coal workers' pneumoconiosis or progressive massive fibrosis is based on "a lesion which is present in the lung tissue not just lymph node tissue." *Id.* During two subsequent depositions, taken on April 2, 2007 and November 8, 2007, Dr. Caffrey reiterated that the miner did not suffer from progressive massive fibrosis. Dr. Caffrey specifically explained that Dr. Dennis's description of macules was not sufficient to support a diagnosis of progressive massive fibrosis. Employer's Exhibits 7 at 20; 10 at 10-11.

The Administrative Law Judge's Finding

In weighing the conflicting autopsy evidence, the administrative law judge accorded the greatest weight to Dr. Dennis's opinion, as supported by that of Dr. De Lara, because she found that Dr. Dennis, as the prosector, "had the benefit of both a gross and microscopic examination of the [m]iner's lungs." Decision and Order on Remand at 23. The administrative law judge determined that Dr. Dennis's perspective made his opinion "more probative," because Dr. Dennis credibly explained that he detected macules on gross examination that were larger than he could fit on a slide. *Id.* at 21, 23-24. Additionally, the administrative law judge specifically rejected the opinions of Drs. Roggli and Caffrey, that Dr. Dennis's use of the term "macules" undermined his diagnosis of complicated pneumoconiosis, finding that Dr. Dennis made sufficiently clear that he described massive lesions in the miner's lungs, thereby supporting a finding of complicated pneumoconiosis. *Id.* at 22. The administrative law judge, therefore, found that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *Id.* at 25.

Discussion

Employer argues that the administrative law judge committed numerous errors in finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Employer initially argues that Dr. Dennis's diagnosis of progressive massive fibrosis is insufficient because the doctor based his diagnosis on findings of "macules" and "macular development," rather than "lesions." Employer's Brief at 9-12. We disagree. Although Drs. Roggli and Caffrey questioned Dr. Dennis's reliance upon "macules" to support his diagnosis of progressive massive fibrosis, the administrative law judge noted that one of the doctors, Dr. Caffrey, acknowledged that he was uncertain as to what Dr. Dennis meant when he described "macules" and "macular development." Decision and Order on Remand at 21-22. The administrative law judge found, however, that Dr. Dennis provided a sufficient explanation for his use of the word "macule" in his autopsy report:

Dr. Dennis noted observations of a single large macule over 5 cm in diameter and macular development greater than 2 cm in diameter. Furthermore, in his final diagnosis he wrote: "Progressive massive fibrosis. Coal workers' pneumoconiosis, macular development greater than 3 cms in diameter with intensive black pigment deposition, silica particle impregnation, and emphysematous changes." Thus, I conclude that his use of the word "macule" in this context clarified his meaning. . . . [R]egardless of the terminology he used, Dr. Dennis described massive lesions in the [m]iner's lungs.

Decision and Order on Remand at 22.

Thus, the administrative law judge permissibly found that Dr. Dennis was describing “massive lesions in the [m]iner’s lungs,” Decision and Order on Remand at 22; *see Perry*, 469 F.3d at 365, 23 BLR at 2-384-85, and determined that Dr. Dennis’s autopsy findings supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).⁴ *See Gray*, 176 F.3d at 390, 21 BLR at 2-629-30.

Employer next contends that the administrative law judge should not have credited Dr. Dennis’s opinion over those of Drs. Roggli and Caffrey, when Dr. Dennis “failed to adequately document the lung tissue findings on the slides.” Employer’s Brief at 9. The administrative law judge noted that Dr. Dennis explained that he attempted to prepare representative autopsy slides, but was limited in his ability to do so by the size of the slides themselves. Decision and Order on Remand at 24. Specifically, the administrative law judge noted that it was “apparent from Dr. Dennis’[s] description that he found ‘macules’ which were larger than could fit on a slide.”⁵ *Id.* Thus, the administrative law judge found that the “measurements that [Dr. Dennis] noted in his gross description, were based on information that was not available to the physicians solely reviewing the autopsy slides.”⁶ *Id.* The administrative law judge, therefore, permissibly found that Dr.

⁴ On microscopic examination, Dr. De Lara identified “dense fibrous tissue proliferation with anthracotic pigments forming *nodules* and macules ranging in size from 0.3 to 1.5 [centimeters] in diameter.” Claimant’s Exhibit 3 (emphasis added). Consequently, the administrative law judge found that Dr. Dennis’s findings were supported by those of Dr. De Lara. Decision and Order on Remand at 25.

⁵ Dr. Dennis explained the limitations of the autopsy slides:

The reality we’re dealing with here is the size of the cassette into which this tissue was placed. It is 3 centimeters by 2 centimeters. It’s a height of about 0.3 centimeters. So you can’t get so much in there. Now, the mark of a good pathologist is to be able to get the maximum amount of information that you can. So having given you those precepts, yes, I think what we try to do is capture the involvement process as much as we can do on this. The slide can – I can’t put a 3 x 5 or anything on that.

Claimant’s Exhibit 4 at 44-45.

⁶ Although the autopsy slides were of limited usefulness, the administrative law judge found that Dr. De Lara’s “measurements and observations, based solely on examination of the slides, were similar to those [obtained] by Dr. Dennis.” Decision and Order on Remand at 24.

Dennis's perspective as the prosector provided him with an advantage over the reviewing pathologists in determining whether the miner suffered from progressive massive fibrosis. See *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Remand at 24.

Employer next asserts that the administrative law judge erred in finding that Dr. Caffrey's interpretation of a 1.3 centimeter lesion in the miner's lymph nodes supported a finding of complicated pneumoconiosis. Dr. Caffrey interpreted a 1.3 centimeter nodule in a lymph node as showing "characteristic changes of a lesion of complicated coal workers' pneumoconiosis. . . ." Employer's Exhibit 2 at 4. Employer accurately notes that the doctor explained that his interpretation was not a diagnosis by him of complicated coal workers' pneumoconiosis or progressive massive fibrosis, because the nodule was not present in the lung tissue. Employer's Exhibit 2. However, in considering whether a claimant has invoked the irrebuttable presumption at 20 C.F.R. §718.304, an administrative law judge must consider "all relevant evidence" See *Gray*, 176 F.3d at 389, 21 BLR at 2-629 (holding that "all relevant evidence" means "all evidence that assists the [administrative law judge] in determining whether a miner suffers from complicated pneumoconiosis"). Here, the administrative law judge did not find that Dr. Caffrey's description established complicated pneumoconiosis. Rather, the administrative law judge determined that Dr. Caffrey's interpretation of a lymph node slide as showing "a 1.3 [centimeter] coal nodule *with characteristics of complicated pneumoconiosis,*" accompanied by the doctor's diagnosis of at least simple pneumoconiosis, "add[ed] weight to the diagnosis of complicated pneumoconiosis by Drs. Dennis and De[Lara]." Decision and Order on Remand at 23; Employer's Exhibit 2. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. See *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Gray*, 176 F.3d at 388, 21 BLR at 2-626. The Board will not substitute its inferences for those of the administrative law judge. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we reject employer's allegation of error in the administrative law judge's determination that Dr. Caffrey's opinion regarding the lymph node tissue at least "added weight" to the diagnoses of complicated pneumoconiosis by Drs. Dennis and De Lara.

In sum, the administrative law judge permissibly assigned greater weight to Dr. Dennis's opinion, as bolstered by Dr. De Lara's opinion, because Dr. Dennis performed the autopsy and saw the miner's entire respiratory system as well as the autopsy slides. See *Urgolites*, 17 BLR at 1-23; Decision and Order on Remand at 23. Since Dr. Dennis identified massive lesions on both gross examination and microscopic examination, substantial evidence supports the administrative law judge's determination to accord additional weight to his opinion as prosector. See *Urgolites*, 17 BLR at 1-23; *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991). Further, because Dr. De Lara's microscopic

findings corroborated those of Dr. Dennis, the administrative law judge rationally found that the opinions of Drs. Dennis and De Lara outweighed the contrary opinions of Drs. Roggli and Caffrey, and established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).⁷ Decision and Order on Remand at 25.

Finally, employer argues that the administrative law judge erred in declining to discredit Dr. Dennis's opinion, based upon the doctor's surrender of his medical license. In a complaint filed with the Kentucky Board of Medical Licensure, Dr. Dennis was alleged to have improperly prescribed controlled substances to one or more patients from May 2011 through May 2012. On January 17, 2013, Dr. Dennis admitted that he had "engaged in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public," Ky. Rev. Stat. §311.595(9), and voluntarily surrendered his license to practice medicine in Kentucky for at least two years. In addressing whether Dr. Dennis's surrender of his medical license affected his credibility, the administrative law judge noted that "the events giving rise to [the] suspension occurred well after [Dr. Dennis] authored his autopsy report in this case." Order Denying Reconsideration at 2. The administrative law judge further found that Dr. Dennis's ethical violations were "not related to his competency in performing autopsies or preparing autopsy reports." *Id.* The administrative law judge, therefore, concluded that "the conduct for which Dr. Dennis was suspended is not sufficiently similar to his work as a pathologist to cast doubt upon the validity of his medical opinions." *Id.* at 3. We hold that the administrative law judge permissibly exercised her discretion in finding that the suspension of Dr. Dennis's medical license did not affect the credibility of his opinion in this case. *See Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977).

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Moreover, the administrative law judge acted within her discretion in according greatest weight to the autopsy evidence as the most reliable evidence regarding the existence of complicated pneumoconiosis.⁸ *See*

⁷ As the administrative law judge provided a valid basis for crediting Dr. Dennis's opinion, as supported by that of Dr. De Lara, over the contrary opinions of Drs. Roggli and Caffrey, which we have affirmed, we need not address employer's additional contentions regarding the weight that she accorded to the opinions of Drs. Roggli and Caffrey. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985).

⁸ The administrative law judge also considered Dr. Ghio's medical opinion. 20 C.F.R. §718.304(c). Dr. Ghio reviewed the autopsy reports of Drs. Dennis, Roggli, and Caffrey, along with other medical evidence. Dr. Ghio opined that the miner did not

Gray, 176 F.3d at 387, 21 BLR at 2-626; *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order on Remand at 20. We, therefore, affirm the administrative law judge's determination that claimant invoked the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Additionally, we affirm, as unchallenged, the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). See *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983). We, therefore, affirm the administrative law judge's award of benefits.

suffer from progressive massive fibrosis, explaining that his opinion was based upon his acceptance of the opinions of Drs. Roggli and Caffrey. Employer's Exhibit 5 at 13-14. Because the administrative law judge found that the opinions of Drs. Roggli and Caffrey were entitled to less weight than that of Dr. Dennis, the administrative law judge permissibly accorded "little probative weight" to Dr. Ghio's opinion regarding the existence of complicated pneumoconiosis. Decision and Order on Remand at 24; see *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits and Order Denying Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge