BRB No. 98-1169 BLA

ROBERTA RITCHIE (Widow of BILLY M. RITCHIE)	)	
Claimant-Petitioner	)	
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: _____
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Perry D. McDaniel (Crandall Pyles Haviland & Turner, LLP), Charleston, West Virginia, for claimant.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Denying Benefits (97-BLA-0947) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge initially noted that employer no longer controverted the issues of, *inter alia*, length of coal mine employment and the existence of occupationally related pneumoconiosis. Decision and Order at 2 n.3, *see* Hearing Transcript at 7, 26. The administrative law judge credited the miner with at least

thirty-seven years of coal mine employment. On the merits of the claim, he found that the evidence failed to establish that the miner had complicated pneumoconiosis and thus, was insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. The administrative law judge further found that the evidence was insufficient to meet claimant's burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c) pursuant to *Shuff v. Cedar Coal Co.,* 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge committed reversible error in determining that claimant was not entitled to the irrebuttable presumption of death due to pneumoconiosis provided at Section 718.304, and in finding that claimant failed to meet her burden to establish death due to pneumoconiosis at Section 718.205(c). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in the appeal.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In asserting her entitlement to the irrebuttable presumption provided at Section 718.304, claimant relies on Dr. Green's diagnosis of complicated pneumoconiosis and progressive massive fibrosis, Claimant's Exhibits 1, 5. Claimant also argues that contrary to the administrative law judge's decision, the findings of the autopsy prosector, Dr. Hansbarger, who diagnosed "very severe simple coal workers' pneumoconiosis" with "pulmonary nodules measuring up to 1.5 cm in greatest dimension," Director's Exhibit 11, support, as opposed to refute, a finding that the miner had complicated pneumoconiosis. Claimant further relies on Dr. Hayes' x-ray finding of, "nodular fibrosis throughout both lungs compatible with occupational pneumoconiosis," Director's Exhibit 11 at 4. Lastly, claimant notes the report of Dr. Kleinerman, employer's expert, who found nodular lesions on the autopsy slides, Employer's Exhibit 3 at 8, and argues that Dr. Kleinerman's position that nodules must measure at least two centimeters to constitute complicated pneumoconiosis, is contrary to the regulation at Section 718.304 and the Board's decision in *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, Director's Exhibit 6; *Shupe v. Director, OWCP*, 12 BLR

1-200 (1989)(*en banc*), recently addressed the requirements of Section 718.304 in *Double B Mining, Inc. v. Blankenship*, 1999 WL 321560 (4th Cir. May 21, 1999). In *Blankenship*, the court held that the administrative law judge, in finding that a physician's diagnosis, on biopsy, of "pneumoconiosis with massive fibrosis" satisfied the "massive lesions" requirement entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 718.304(b), failed to make the equivalency determination required by Section 411(c)(3) of the Act. Specifically, the court held that the administrative law judge must determine whether the 1.3 centimeter nodule diagnosed on biopsy would, if x-rayed prior to removal of that portion of the miner's lung, have shown a greater-than-one centimeter opacity on x-ray as required under Section 411(c)(3)(A) of the Act, 30 U.S.C. §921 (c)(3)(A), and the promulgating regulation at Section 718.304(a). Slip opinion at 3. The court further declined to impose a rule that a lesion or nodule diagnosed by biopsy or autopsy evidence must be 2 centimeters or larger in diameter in order to equate to a greater-than-one centimeter opacity on x-ray. *Id.*

The administrative law judge in the instant case, considering the autopsy evidence upon which claimant relies at Section 718.304(b),[1] emphasized that Dr. Hansbarger, the autopsy prosector, diagnosed *simple* coal workers' pneumoconiosis and did not diagnose complicated pneumoconiosis or progressive massive fibrosis "[d]espite his observation of nodular areas measuring up to 1.5 cm. in greatest dimension." Decision and Order at 12. The administrative law judge also noted that of the three pathologists who reviewed the autopsy report and slides, namely Drs. Kleinerman, Naeye and Green, only Dr. Green diagnosed complicated pneumoconiosis, based on the autopsy finding of nodules measuring up to 1.5 centimeters. *Id.* With regard to Dr. Green's opinion, the administrative law judge indicated,

> Furthermore, he stated that because massive fibrosis is primarily a diagnosis made on gross evaluation of the lungs at autopsy, that Dr. Hansbarger was in a better position to make such a diagnosis than

[1]Claimant's reliance on Dr. Hayes' interpretation of the May 10, 1974 x-ray as showing nodular fibrosis compatible with occupational pneumoconiosis, Director's Exhibit 11, is misplaced as this evidence is insufficient to establish complicated pneumoconiosis under 20 C.F.R. §718.304(a).

> was Dr. Naeye, who only reviewed the autopsy slides. However, as stated above, Dr. Hansbarger diagnosed simple pneumoconiosis despite his finding on gross examination of lesions measuring up to 1.5 cm. in diameter.

Id. The administrative law judge then noted that both Drs. Kleinerman and Naeye testified that in order to diagnose complicated pneumoconiosis based on autopsy evidence, there must be a lesion of at least 2 centimeters in diameter, per the pathologic standards set forth by the National Institute of Occupational Safety and Health in 1979. The administrative law judge continued,

> Dr. Kleinerman explained that the standards upon which Dr. Green relied, requiring a diagnosis of complicated pneumoconiosis if there is a lesion measuring greater than 1 centimeter, were x-ray standards, used in interpreting radiological films rather than autopsy gross examination. Dr. Naeye opined that the autopsy slides revealed a conglomerate of several lesions, which may have looked like one large lesion on gross examination.
>
> Giving greater weight to the finding of Dr. Hansbarger that the miner suffered very severe simple CWP, in addition to the supporting opinions of Drs. Naeye and Kleinerman, I find that the autopsy evidence is not sufficient, in and of itself, to substantiate a diagnosis of complicated pneumoconiosis.[footnote omitted]

Decision and Order at 12-13.

The administrative law judge's weighing of the autopsy evidence at Section 718.304(b) cannot stand, given the decision of the Fourth Circuit in *Blankenship*. To the extent that the administrative law judge applied the "two-centimeter rule," he erred; the court in *Blankenship* specifically declined to impose this rule, espoused by Dr. Kleinerman. *Blankenship*, slip opinion at 3. The court stated,

> We decline, however, to impose the two-centimeter rule on the Benefits Review Board. The statute does not mandate use of the medical definition of complicated pneumoconiosis. Rather, it requires, if diagnosis is by biopsy, that a miner have "massive lesions," which, as we have noted, are lesions that would show on an x-ray as opacities of at least one centimeter.
>
> In short, 30 U.S.C. §921(c)(3) requires that an equivalency determination be made.

Id. at 3. Further, the administrative law judge placed great emphasis on the fact that Dr. Hansbarger did not diagnose complicated pneumoconiosis despite his finding of pulmonary nodules measuring up to 1.5 centimeters. *Blankenship* instructs that the pertinent issue is, however, whether these nodules or lesions[2] constitute "massive lesions" sufficient to support a finding of complicated pneumoconiosis by autopsy evidence at Section 718.304(b); i.e. whether these nodules would equate, when x-rayed, to a showing of opacities greater than one centimeter in diameter, *see* 20 C.F.R. §718.304(a). The court determined that such an "equivalency determination" must be made by the administrative law judge. Slip opinion at 3-4. Because the administrative law judge, in the instant case, made no relevant findings, we vacate his determination at Section 718.304(b) that claimant failed to establish complicated pneumoconiosis by autopsy evidence. We remand the case to the administrative law judge for further findings consistent with the decision in *Blankenship*.

Claimant next contends that the administrative law judge erred in finding that claimant did not establish death due to pneumoconiosis at Section 718.205(c), as the evidence demonstrates that coal workers' pneumoconiosis was a substantially contributing factor in the miner's death. The administrative law judge, accepting that the existence of occupational pneumoconiosis has been established, found the record evidence to be insufficient to establish claimant's burden of showing that the miner's death was due to pneumoconiosis under Section 718.205(c) pursuant to *Shuff*. Claimant argues that the administrative law judge improperly emphasized the absence of a diagnosis of coal workers' pneumoconiosis or chronic obstructive pulmonary disease in Dr. Sakkal's discharge summary pertaining to the miner's final hospitalization, Employer's Exhibit 1, since Dr. Sakkal diagnosed chronic obstructive pulmonary disease in his treatment notes, Claimant's Exhibit 4, and opined that the initiating process of the miner's demise was respiratory in nature, Employer's Exhibit 1. Claimant's Brief at 5. Claimant further argues that the administrative law judge disregarded Dr. Green's credible opinion in favor of the opinions of employer's experts, Drs. Kleinerman and Naeye. Claimant asserts that Dr. Kleinerman's opinion is "very suspect since he obviously downplayed the existence of pneumoconiosis" by diagnosing mild coal workers' pneumoconiosis when all other pathologists found the miner's pneumoconiosis to be moderate or severe. *Id.*

The administrative law judge's weighing of the evidence at Section 718.205(c) cannot be upheld. Claimant relies, in part, on Dr. Green's opinion that the miner died as a result of complications of ischemic heart disease and that his death was hastened and contributed to by pre-existing lung diseases related to his coal mine

[2]The court in *Blankenship* equates the terms "lesion" and "nodule." Slip opinion at 3.

employment, including pneumoconiosis, emphysema, and chronic bronchitis, Claimant's Exhibit 1. In weighing this opinion, the administrative law judge found,

> Because Dr. Green bases his findings regarding the cause of death at least in part on his diagnosis of complicated pneumoconiosis, the existence of which has not been proven in this case, I give greater weight to the opinions of Drs. Naeye and Kleinerman.

Decision and Order at 16. Since the administrative law judge's finding at Section 718.205 is tainted by his consideration of the evidence relevant to the issue of claimant's entitlement to the irrebuttable presumption of death due to pneumoconiosis provided at Section 718.304, we vacate that finding and further remand the case. On remand, if the administrative law judge finds that the evidence is sufficient to establish claimant's entitlement to the irrebuttable presumption provided at Section 718.304, then claimant has established her entitlement to survivor's benefits. 20 C.F.R. §718.304. If, however, the administrative law judge finds the evidence insufficient at Section 718.304, he must then reassess the evidence relevant to the cause of the miner's death at Section 718.205(c) under *Shuff.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge