BRB No. 07-0511 BLA

D.F. (Widow of C.F.) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/28/2008 DECISION and ORDER

Appeal of the Decision and Order on Remand-Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (04-BLA-0011) of Administrative Law Judge Stephen L. Purcell (the administrative law judge) 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). This case is before the Board for the third time.[1] When this case was most recently before the Board, the Board held

[1] The relevant procedural history of this case was fully and accurately set forth in the Board's 2006 Decision and Order. [*D.F.*] *v. Consolidation Coal Co.*, BRB No. 05-0800

that the administrative law judge erred in finding claimant entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.304(b), based on a finding of complicated pneumoconiosis thereunder.[2] The Board therefore, vacated, the administrative law judge's award of benefits, and remanded the case for reconsideration at Section 718.304(b). [*D.F.*] *v. Consolidation Coal Co.*, BRB No. 05-0800 BLA, slip op. at 2, 3 n. 3 (Aug. 14, 2006)(unpub.).

On remand, the administrative law judge found that the evidence of record did not support a finding of complicated pneumoconiosis at Section 718.304(b) and that claimant was not, therefore, entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 718.304(b). *See* 20 C.F.R. §718.205(c)(3). In addition, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to the other subsections of 20 C.F.R. §718.205(c). 20 C.F.R. §718.205(c)(1), (2), (5). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish complicated pneumoconiosis and entitlement to the irrebutable presumption of death due to pneumoconiosis pursuant to Section 718.304(b). 20 C.F.R. §718.205(c)(3). Claimant also generally contends that that the administrative law judge erred in finding that claimant's death was not due to pneumoconiosis pursuant to the other subsections at Section 718.205(c). 20 C.F.R. §718.205(c)(1), (2), (5). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this 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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a);

BLA, slip op. at 2, 3 n. 3 (Aug. 14, 2006)(unpub.).

[2] The previous findings that the miner had thirty years of coal mine employment, that he had simple coal workers' pneumoconiosis, 20 C.F.R. §718.202(a), and that his pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), have been affirmed. Additionally, the finding that complicated pneumoconiosis was not established at 20 C.F.R. §718.304(a) and (c) has been affirmed.

[3] Because all of the miner's coal mine employment occurred 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 2; Director's Exhibit 21.

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

In order to establish entitlement to benefits in a survivor's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Section 718.304 provides an irrebuttable presumption that the miner's death was due to pneumoconiosis if the evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see* 20 C.F.R. §718.205(c)(3); *see also Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *see* 20 C.F.R. §718.205(c)(3). In order to establish complicated pneumoconiosis the administrative law judge must weigh together all of the relevant evidence at Section 718.304(a)-(c).[4] *See Gray*, 176 F.3d at 389, 21 BLR at 2-

[4] Section 718.304 provides in relevant part that:

> There is an irrebuttable presumption that…a miner's death was due to pneumoconiosis...if such miner...suffered from a chronic dust disease of the lung which:
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> (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

629; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge is bound to perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562. Hence, the administrative law judge must determine whether "the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. 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.*, 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.

Claimant contends that the administrative law judge did not properly consider the reports of Drs. Narani, Crouch, Naeye, and Hayes or the autopsy report of Dr. Brooks in finding that complicated pneumoconiosis was not established at Section 718.304(b).[5]

When this case was most recently before the Board, the Board vacated the administrative law judge's finding that complicated pneumoconiosis was established at Section 718.304(b) and remanded the case for the administrative law judge to reconsider the opinions of Drs. Navani, Crouch, Naeye, and Hayes. Specifically, the Board held that the administrative law judge must explain why he relied on the opinions of Drs. Navani and Crouch, who found that the size of the opacities seen on autopsy would equate to a greater than one centimeter opacity when viewed on x-ray, when those opinions appeared to be equivocal.

On remand, the administrative law judge found that the opinions of Drs. Navani and Crouch, as to the size of the opacities seen on autopsy, were equivocal. The administrative law judge, therefore, found that they were not supportive of a finding of complicated pneumoconiosis at Section 718.304(b). In reviewing the opinions of Drs. Navani and

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20 C.F.R. §718.304 (emphasis in original).

[5] Claimant also contends that there is x-ray and CT scan evidence which would establish complicated pneumoconiosis at 20 C.F.R. §718.304(a) and (c). That evidence has been previously considered, however, and was found not to have established complicated pneumoconiosis at those subsections.

Crouch, the administrative law judge found that neither physician unequivocally stated that the 1.2 centimeter lesion demonstrated on autopsy would equate to a greater than 1 centimeter opacity when viewed on x-ray.[6] In contrast, the administrative law judge found that Dr. Naeye reported that the 1.2 centimeter lesion seen on autopsy, would in its greatest dimension, appear much smaller on x-ray because only the central portion of the lesion would be thick enough to be seen on x-ray. Employer's Exhibit 2. The administrative law judge further noted that, on deposition, Dr. Naeye testified that "usually what you can see on an x-ray is about half the size or less than what you can see at autopsy." Employer's Exhibit 4. Further, the administrative law judge noted that Dr. Hayes, on deposition, testified that a macronodule or large opacity obtained from a pathological specimen "is overstated when compared to what we see on [x-ray]."[7] Employer's Exhibit 7 at 14-15. In light of this evidence, therefore, the administrative law judge concluded that the opinions of Drs. Navani, Crouch, Hayes and Naeye were, "at best," in equipoise. The administrative law judge, therefore, reasonably concluded that claimant failed to establish that the miner suffered from complicated pneumoconiosis at Section 718.304(b) based on the opinions of Drs. Navani and Crouch. 20 C.F.R. §§718.304(b); 718.205(c)(3); Decision and Order at 9; *see Wojtowicz v.*

[6] The administrative law judge noted that both Drs. Navani and Crouch agreed that the size of an opacity seen on x-ray would be dependent upon a variety of factors, including its density and thickness and that both physicians acknowledged that none of the B readers and Board-certified radiologists who reviewed the miner's chest x-rays (including those x-rays taken within one year of the miner's death) diagnosed any large opacity. Dr. Navani stated that "*if* the lesion found on autopsy is of sufficient density, thickness and is located in an unobscured portion of lungs [it] will have [the] [same] size on a standard PA chest radiograph taken at the distance of 72 inches." Director's Exhibit 69 (emphasis added). Similarly, in her September 9, 2003 report, Dr. Crouch stated, "it is my expectation that a coal dust-related lesion measuring 1.2 centimeter or greater on pathologic exam would *usually* appear as [a] large opacity (Category A) on radiographs." Director's Exhibit 70 (emphasis added). In a September 8, 1999 report, Dr. Caffrey diagnosed simple coal workers pneumoconiosis and nodular coal workers' pneumoconiosis. Employer's Exhibit 2. Although, Dr. Caffrey noted that the size of the macronodular lesions that he reviewed on slides were 1.2 centimeters, he did not opine that they would show as greater than one centimeter on x-ray. *Id.* Later, during a February 17, 2000 deposition, Dr. Caffrey opined that the miner did not have either complicated pneumoconiosis or progressive massive fibrosis. Director's Exhibit 27.

[7] The administrative law judge also noted that Dr. Hayes, on reviewing x-rays from May and December 1998, less than one year before the miner's death in 1999, saw no evidence of complicated pneumoconiosis and unequivocally stated that neither the May nor the December 1998 x-rays showed "any suggestion of large opacities." Employer's Exhibit 1.

Duquesne Light Co., 12 BLR 1-162 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

Further, pursuant to Section 718.304(b), claimant contends that the administrative law judge failed to give proper weight to the report of the autopsy prosector, Dr. Brooks, who opined that the miner suffered from complicated pneumoconiosis based on the "numerous" lesions, measuring over 2 centimeters, seen on autopsy.[8] Claimant argues that Dr. Brooks, as the autopsy prosector, was in "the best position" of any physician of record to "give [an] opinion as to the exact condition of [the miner's] lungs." Claimant's Brief at 11. Contrary to claimant's contention, however, the opinion of an autopsy prosector is not automatically entitled to greater weight. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992). Further, contrary to claimant's assertion, review of Dr. Brooks's opinion demonstrates that the physician did not specifically measure the masses revealed on autopsy. In addition, the physician did not attribute the mass to coal dust exposure. Contrary to claimant's contention, the mere mention of a 2 centimeter mass on autopsy does not satisfy the equivalency determination standard requiring that such a mass would have to be equivalent to the finding of a one centimeter opacity 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. We thus reject claimant's assertions and hold that Dr. Brooks's autopsy opinion is insufficient to support a finding of complicated pneumoconiosis at Section 718.304(b). 20 C.F.R. §718.205(c)(3). We, therefore, affirm the administrative law judge's determination that the evidence of record does not support a finding of complicated pneumoconiosis at Section 718.304(b), and at Section 718.304(a)-(c), overall.

Finally, claimant contends that the administrative law judge erred in finding that the evidence did not establish that pneumoconiosis caused, contributed to, or hastened the miner's death at Section 718.205(c)(1) (2), (5). In finding that the evidence failed to establish that the miner's death was caused, contributed to, or hastened by pneumoconiosis pursuant to Section 718.205(c)(1), (2), (5), the administrative law judge found, in summary, that the opinions of Drs. Kleinerman, Caffrey and Naeye, all of whom opined that pneumoconiosis played no role in the miner's death, were entitled to the greatest weight[9] as they were the best-reasoned and best-documented of record. Claimant's challenge to the

[8] Claimant also contends that Dr. Brooks's finding of collagen bundles, on autopsy, a finding also made by Dr. Caffrey, in his report, are further indicative of complicated pneumoconiosis. Director's Exhibit 21. This finding does not, however, support a finding of complicated pneumoconiosis at Section 718.304(b). 20 C.F.R. §718.304(b).

[9] The administrative law judge contrasted the opinions of Drs. Kleinerman, Caffrey and Naeye, with those of Dr. Brooks and Dr. Fonseca, both of whom opined that pneumoconiosis was a contributory cause of death.

administrative law judge's findings at Section 718.205(c)(1), (2), (5), is general and does not specifically allege error with regard to the administrative law judge's findings. Accordingly we have no substantive issue to review regarding the findings. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Accordingly, we affirm the administrative law judge's determination that the evidence of record did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). 20 C.F.R. §718.205(c)(1), (2), (5); *see Shuff v. Cedar Coal Co.*, 969 F.2d 977-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge