BRB Nos. 08-0500 BLA
and 09-0401 BLA
Case Nos. 2004-BLA-93
and 2004-BLA-5960

DELORES ASHMORE (Widow of and on behalf of MERLE LAMBRIGHT)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 10/26/2009
BRIDGER COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER on RECONSIDERATION *EN BANC*
Party-in-Interest	)	

Appeal of the Decision and Order Denying Living Miner and Survivor Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Delores Ashmore, LeMars, Iowa, *pro se*.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer has filed a timely Motion for Reconsideration and Suggestion for Reconsideration *En Banc* of the Board's Decision and Order in *D.A.* [*Ashmore*] *v. Bridger Coal Co.*, BRB Nos. 08-02500 BLA and 09-0401 BLA (Oct. 26, 2009)(Smith, J., dissenting)(unpub.). In *Ashmore*, the Board's second decision in this case, a majority of the three judge panel acknowledged that, subsequent to the Board's prior decision, the

United States Court of Appeals for the Eleventh Circuit issued *Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007), which created a split among the circuit courts on the issue of whether an equivalency determination is necessary to establish the existence of complicated pneumoconiosis under subsection (b) of 20 C.F.R. §718.304. Consistent with the position of the Director, Office of Workers' Compensation Programs, and the ruling in *Cornelius*, the majority held that a claimant is not required to establish that the condition diagnosed at 20 C.F.R. §718.304(b) is equivalent to a finding on chest x-ray of an opacity greater than one centimeter in diameter.[1]

Accordingly, the majority vacated the administrative law judge's 2008 Decision and Order on Remand, denying benefits in the miner's claim and the survivor's claim, and reinstated the administrative law judge's previous decision in this case, awarding benefits in both claims. The majority then affirmed the administrative law judge's finding that the autopsy evidence was sufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304(b) and affirmed the award of benefits in both claims. The majority also rejected employer's objections to the administrative law judge's selection of March 1998 as the date for the commencement of benefits in the miner's claim.

The dissenting panel member maintained that, because the Director, Office of Workers' Compensation Programs, has yet to promulgate regulations prescribing a clear and rational definition of "massive lesions," as set forth in Section 411 (c)(3) of the Act, 30 U.S.C. §921(c)(3), the Board should apply the equivalency requirement adopted by the United States Court of Appeals for the Fourth Circuit in all cases involving 20 C.F.R. §718.304. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Consequently, the dissenting judge indicated that he would not reinstate the administrative law judge's 2005 Decision and Order, but would review

[1] Prior to the issuance of the Board's 2009 Decision and Order, the parties were given the opportunity to submit supplemental briefs addressing whether the Board should apply an equivalency requirement at 20 C.F.R. §718.304(b) in a case arising within the jurisdiction of United States Court of Appeals for the Tenth Circuit, and whether, if the Board applied the reasoning in the decision of the United States Court of Appeals for the Eleventh Circuit in *Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007), to hold that 20 C.F.R. §718.304(b) does not include an equivalency requirement, the Board should reinstate the administrative law judge's 2005 Decision and Order awarding benefits and affirm that decision. *D.A.* [*Ashmore*] *v. Bridger Coal Co.*, BRB Nos. 08-0500 BLA and 09-0401 BLA (June 30, 2009)(unpub. Order).

the administrative law judge's 2008 Decision and Order on Remand to determine whether it was supported by substantial evidence.

On reconsideration, employer contends that the majority erred in raising the issue of complicated pneumoconiosis *sua sponte* in considering claimant's appeal of the 2008 Decision and Order on Remand. In support of its position, employer asserts that the issue was decided by the Board in its 2006 decision and there has been no controlling, intervening Tenth Circuit case law to justify an exception to the law of the case doctrine. Employer further maintains that the findings in the administrative law judge's 2008 Decision and Order on Remand, that the evidence was insufficient to establish total disability due to pneumoconiosis and death due to pneumoconiosis, are supported by substantial evidence and should have been affirmed. Alternatively, employer argues that the majority erred in affirming the administrative law judge's 2005 complicated pneumoconiosis finding and his finding that benefits commence in March 1998. Employer also contends that, even if the Board adopted the holding of the Eleventh Circuit in *Cornelius*, the administrative law judge's 2005 Decision and Order cannot be affirmed. Employer alleges that, contrary to the administrative law judge's finding, the autopsy evidence is insufficient to establish the presence of massive lesions or massive fibrosis at 20 C.F.R. §718.304(b).

Pursuant to 20 C.F.R. §802.407(d), "[r]econsideration *en banc* shall be granted upon the affirmative vote of the majority of the permanent members of the Board. A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members." 20 C.F.R. §802.407(d). Upon consideration of employer's Motion for Reconsideration and Suggestion for Reconsideration *En Banc*, two permanent members of the Board voted to deny employer's motion and reaffirm the majority's decision. Two permanent members voted to grant employer's motion, vacate the majority's decision and address only claimant's appeal of the administrative law judge's 2008 Decision and Order denying benefits. One permanent member voted to reaffirm the majority's determination that 20 C.F.R. §718.304(b) does not include an equivalency requirement. However, this member also voted to remand the case to the administrative law judge for reconsideration of the evidence at 20 C.F.R. §718.304(b), applying the appropriate standard.

Because there is no disposition in which at least three permanent members concur, the Board's October 26, 2009 decision in *Ashmore* stands. 20 C.F.R. §802.407(d).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge