U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0288 BLA

BETTY J. MARSHALL (Widow of BERNARD K. MARSHALL)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 03/15/2018
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green and Lucinda L. Fluharty (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (16-BLA-05146) of Administrative Law Judge Thomas M. Burke 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 claimant's[1] request for modification of the denial of a survivor's claim filed on August 31, 2010.

In the initial decision dated May 5, 2015, Administrative Law Judge Richard T. Stansell-Gamm found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, he found that claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Because Judge Stansell-Gamm found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), he also found that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012).

Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718,[3] Judge Stansell-Gamm found that the evidence established that the miner had clinical pneumoconiosis[4] pursuant to 20 C.F.R.

[1] Claimant is the widow of the miner, who died on February 20, 2010. Director's Exhibit 10.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Claimant cannot benefit from the automatic entitlement provisions of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), because the miner did not file a claim for benefits during his lifetime.

[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

§718.202(a). He further found that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, he found that the evidence did not establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. Accordingly, he denied benefits.

Claimant timely requested modification on June 9, 2015. Director's Exhibit 49. In a Decision and Order dated February 9, 2017, Administrative Law Judge Thomas M. Burke (the administrative law judge) credited the miner with at least twenty-one years of coal mine employment.[5] After determining that claimant was not entitled to either the Section 411(c)(3) presumption or the Section 411(c)(4) presumption, he addressed whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718. He found that the evidence established the existence of clinical and legal pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a). After finding that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), he determined that the evidence established that the miner's death was due to clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b). The administrative law judge therefore found that the evidence established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and he granted claimant's request for modification and awarded benefits accordingly.[7]

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer further contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response. The Director urges the Board to reject employer's challenge to the administrative

[5] The record indicates that the miner's coal mine employment was in Virginia and West Virginia. June 20, 2013 Hearing Transcript at 25, 33, 38. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[7] By Order on Reconsideration dated March 7, 2017, the administrative law judge granted the motion for reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director), and modified the benefits commencement date to February 1, 2010.

law judge's crediting of Dr. Perper's opinion that the miner's death was due to pneumoconiosis. The Director also requests that the Board correct "certain errors," should the Board determine that the case must be remanded for further consideration. Director's Brief at 2. Employer has filed a reply brief, stating that the Director's assertions should not be addressed because the Director did not file a cross-appeal.[8]

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).

Entitlement Under 20 C.F.R. Part 718

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause of the miner's death. Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6). Before any finding of entitlement can be made in a survivor's claim, however, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

The Existence of Pneumoconiosis

Employer contends that the administrative law judge erroneously provided claimant with a presumption that the miner suffered from clinical and legal pneumoconiosis.[9] Employer's Brief at 6-7. As a result, employer asserts that the administrative law judge

[8] Contrary to employer's assertion, the Director was not required to file a cross-appeal, because the Director's arguments are in support of the administrative law judge's decision to award benefits. *See* 20 C.F.R. §802.212(b); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc).

[9] Having found that the evidence did not establish that the miner suffered from a totally disabling respiratory impairment, the administrative law judge determined that claimant did not invoke the Section 411(c)(4) presumption. Consequently, the administrative law judge was required to address whether claimant satisfied her burden to establish all elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

improperly shifted the burden to employer to disprove the existence of both clinical and legal pneumoconiosis. *Id.* at 7. We reject employer's argument as to clinical pneumoconiosis, but because it is unclear whether the administrative law judge properly placed the burden of proof on claimant, we must vacate his finding of legal pneumoconiosis. We therefore must also vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Because we cannot affirm the administrative law judge's award of benefits, we will also address the Director's contention that the administrative law judge erred in his consideration of whether the evidence established the existence of complicated pneumoconiosis.

Clinical Pneumoconiosis

Drs. Dennis,[10] Perper, Oesterling, and Swedarsky, each a Board-certified pathologist, opined that the miner's autopsy slides revealed the existence of clinical pneumoconiosis. Director's Exhibits 12, 45, 46; Employer's Exhibits 1, 3. Dr. Spagnolo, a Board-certified pulmonologist, also diagnosed clinical pneumoconiosis based upon his review of the medical evidence. Director's Exhibit 46; Employer's Exhibit 2. Because all of the physicians diagnosed clinical pneumoconiosis, the administrative law judge found that the autopsy evidence, and accompanying medical opinion evidence, established the existence of clinical pneumoconiosis. Decision and Order at 16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[11]

Legal Pneumoconiosis

In his consideration of whether the evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Perper, Swedarsky, Oesterling, and Spagnolo.[12] All of the physicians diagnosed chronic

[10] Dr. Dennis performed the miner's autopsy on February 20, 2010. Director's Exhibit 12.

[11] Because it is unchallenged on appeal, we also affirm the administrative law judge's finding that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[12] The administrative law judge noted that Dr. Dennis did not offer an opinion regarding the cause of the miner's emphysema. Decision and Order at 17. Dr. Dennis

obstructive pulmonary disease (COPD)/emphysema, but disagreed as to its etiology. Dr. Perper diagnosed legal pneumoconiosis, in the form of COPD/emphysema due to coal mine dust exposure. Director's Exhibit 45 at 44; Director's Exhibit 46 at 23-24; Claimant's Exhibit 1 at 29. Dr. Swedarsky suspected that the miner's emphysema was caused by his cigarette smoking.[13] Director's Exhibit 46 at 6. Dr. Oesterling opined that the miner suffered from emphysema due to cigarette smoking.[14] Director's Exhibit 46 at 26; Employer's Exhibit 1. Dr. Spagnolo opined that the miner did not suffer from legal pneumoconiosis. Employer's Exhibit 2 at 34. Dr. Spagnolo specifically opined that the miner's emphysema was caused by cigarette smoking, not coal mine dust exposure. *Id.* at 14, 34.

After inaccurately noting that Dr. Spagnolo did not discuss the etiology of the miner's COPD/emphysema, the administrative law judge found that the "medical opinion evidence as a whole" supported the existence of legal pneumoconiosis:

> The pathology evidence indicates that black pigment seen on the slides is attributable to coal dust: both Dr. Perper and Dr. Oesterling reach this conclusion. Drs. Oesterling and Swedarsky conclude that the miner's emphysema was caused solely by the miner's smoking. However, the physicians do not discuss why the miner's more than 20 years of coal mine employment and dust exposure did not contribute to his COPD. Although the miner did have a significant smoking history, none of the above physicians discuss why they ruled out coal dust exposure as an additional cause of [the miner's] emphysema. Because I find Dr. Perper's opinion that

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opined only that the miner's emphysema could be due to a number of factors. Director's Exhibit 46 at 53.

[13] During a 2013 deposition, Dr. Swedarsky opined that it was "more likely that the major contributor to [the miner's] emphysema was his cigarette smoking." Director's Exhibit 46 at 27. In response to questioning during his 2016 deposition, Dr. Swedarsky agreed that he diagnosed legal pneumoconiosis because coal mine dust exposure may have had "an effect" on the miner's emphysema. Employer's Exhibit 3 at 25.

[14] Dr. Oesterling opined that the miner's emphysema was "more significant than [he] would attribute to the limited coal dust that [he] saw in [the miner's] lungs." Employer's Exhibit 1 at 34. Dr. Oesterling, therefore, opined that the miner's emphysema was "cigarette[-]induced." *Id.* Dr. Oesterling, however, acknowledged that coal mine dust exposure can cause emphysema, and noted that the miner's autopsy slides revealed limited focal emphysema around micronodules in the miner's lungs. *Id.* at 47-48.

> the miner's emphysema arose out of coal dust exposure . . . is supported by the pathological evidence and the radiographic evidence of hyperinflation[,] I find that the evidence supports a finding of legal pneumoconiosis.
>
> The evidence relied on by [e]mployer fails to rebut the presumption that the miner suffered from clinical and legal pneumoconiosis.

Decision and Order at 17.

Employer argues that the administrative law judge, in addressing whether the miner suffered from legal pneumoconiosis, improperly shifted the burden to employer to disprove the existence of the disease. Employer's Brief at 6. In support of its argument, employer notes that the administrative law judge found that the "evidence relied on by [e]mployer *fails to rebut the presumption* that the miner suffered from . . . legal pneumoconiosis." Decision and Order at 17 (emphasis added). Employer also points to the administrative law judge's finding that Drs. Oesterling and Swedarsky failed to discuss "why they *ruled out coal dust exposure* as an additional cause of [the miner's] emphysema." *Id.* (emphasis added). Because the administrative law judge's statements indicate that he may have improperly provided claimant with a presumption that the miner suffered from legal pneumoconiosis, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when considering whether claimant has satisfied her burden to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions.[15] *See Milburn*

[15] The administrative law judge should also address whether Dr. Perper's diagnosis of legal pneumoconiosis is reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). In doing so, the administrative law judge should consider all relevant evidence. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). The administrative law judge found that Dr. Perper's opinion that the miner's emphysema was due in part to his coal dust exposure was supported by pathological evidence of black pigment and radiographic evidence of hyperinflation. Decision and Order at 7. The administrative law judge, however, did not address conflicting evidence. For example, Dr. Swedarsky opined that deposition of black pigment in the lungs is innocuous since, in addition to being found in coal miners, it is "also commonly seen in urban dwellers and tobacco smokers; anyone who inhales carbon pigment." Director's Exhibit 46 at 5. The administrative law judge

Colliery Co. v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Death Due to Pneumoconiosis

In light of our decision to vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, we also vacate the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). However, in the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

In addressing whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Schor, Perper, Oesterling, Swedarsky, and Spagnolo.[16] Dr. Schor completed the miner's death certificate, listing the immediate cause of death as metastatic colon cancer. Director's Exhibit 10. Drs. Perper, Oesterling, Swedarsky, and Spagnolo agreed that the miner's death was due to metastatic colon cancer, but disagreed as to whether pneumoconiosis was also a substantially contributing factor. Dr. Perper was the only physician who opined that the miner's clinical pneumoconiosis and COPD/emphysema were significant contributory causes of the miner's death.[17] Director's Exhibit 46 at 40; Claimant's Exhibit 1 at 29. Drs. Oesterling, Swedarsky, and Spagnolo opined that neither clinical pneumoconiosis nor coal mine dust exposure contributed to the miner's death.[18]

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also did not address Dr. Spagnolo's opinion that radiographic evidence of hyperinflation is not diagnostic of coal mine dust-induced lung disease. Employer's Exhibit 2 at 13.

[16] Dr. Dennis did not address the cause of the miner's death.

[17] Dr. Perper attributed the miner's death to complicated pneumoconiosis. However, Dr. Perper opined that if the miner did not suffer from complicated pneumoconiosis, it would not affect his opinion that the miner's clinical and legal pneumoconiosis significantly contributed to the miner's death. Director's Exhibit 46 at 40.

[18] Dr. Oesterling opined that the changes in the miner's lungs that were attributable to coal mine dust exposure did not cause any functional change, and therefore were "not enough to in any way be a factor in [the miner's] death." Employer's Exhibit 1 at 39-41. Dr. Swedarsky opined that the major pathological changes identified in the miner's lungs were a consequence of the treatment he received for his advanced stage malignancy and its comorbid conditions. Director's Exhibit 46 at 5. Dr. Swedarsky further opined that the

In weighing the conflicting medical opinion evidence,[19] the administrative law noted that Drs. Oesterling, Swedarsky, and Spagnolo attributed the miner's pulmonary symptoms shortly before his death to heart failure. Decision and Order at 21. The administrative law judge, however, noted that Dr. Perper indicated that the record revealed that the miner had "complained of pulmonary symptoms, such as shortness of breath, chest pain, wheezing, and productive cough, since at least 1977." *Id.* The administrative law judge also noted that Dr. Perper opined that there was no evidence of left ventricle failure, as found by Drs. Oesterling, Swedarsky, and Spagnolo, because the left ventricle ejection values were in the "high normal" range. *Id.* The administrative law judge therefore credited Dr. Perper's opinion that the miner's respiratory symptoms exhibited shortly before his death were primarily the result of lung disease rather than heart disease.[20] *Id.* Based upon Dr. Perper's opinion, the administrative law judge found that the evidence was sufficient to establish that the pneumoconiosis was a substantially contributing cause of the miner's death. *Id.* at 22.

Employer contends that, in accepting Dr. Perper's reference to pulmonary symptoms in 1977 as evidence of long-standing pulmonary issues, the administrative law judge erred in overlooking contrary evidence in the record. We agree. Drs. Oesterling, Swedarsky, and Spagnolo indicated that the record did not reveal the existence of respiratory or pulmonary impairment prior to the miner's development of colon cancer.[21]

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miner's clinical pneumoconiosis was mild and did not hasten or contribute to his death. *Id.* Dr. Spagnolo opined that the miner's death was not in any way related to his clinical pneumoconiosis or coal mine dust exposure. Employer's Exhibit 2 at 6, 21.

[19] Because Dr. Schor provided no explanation on the death certificate for listing metastatic colon cancer as the sole cause of death, the administrative law judge found that the death certificate had "diminished probative value." Decision and Order at 20.

[20] Citing *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-613 (4th Cir. 2014), the administrative law judge noted that the Fourth Circuit has recognized that the "the relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole." Decision and Order at 22.

[21] Dr. Oesterling opined that the miner's respiratory condition was not "altered significantly." Employer's Exhibit 1 at 45. Dr. Swedarsky opined that the miner's emphysema did not produce any impairment because the "clinical record [shows that the miner] never had any episodes of respiratory failure or required any admissions for respiratory disease." Director's Exhibit 46 at 27-28. Dr. Swedarsky testified that he found "no clinical indication that [the miner] had any respiratory difficulties prior to his diagnosis

Because the administrative law judge failed to adequately address the conflicting evidence regarding the status of the miner's pulmonary function prior to the development of his colon cancer, [22] his analysis of the medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provide that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[23] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). On remand, should the administrative law judge find it necessary to reconsider whether the medical opinion evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), he should address the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Complicated Pneumoconiosis

We next address the Director's contention that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to

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of colon cancer." *Id.* at 36. Dr. Spagnolo noted that the miner's medical records reveal that the miner's lungs were reported to be clear to auscultation, without rales, rhonchi or wheezing, as late as 2009. Director's Exhibit 46 at 3. Dr. Spagnolo also noted that as late as January 2010, a month before the miner's death, an examination of the miner's lungs was "negative." *Id.* at 28. Dr. Swedarsky stated that this information reinforces the fact that [the miner] never had any major lung problem." *Id.*

[22] Dr. Perper apparently based his report of pulmonary symptoms since 1977 on a 1981 award by the West Virginia Occupational Board, wherein it was stated that the miner reported being short of breath for eight years, and wheezing for five years. The award, however, also notes that a physical examination revealed that the miner's breath sounds were "normal without rales or wheezing." Director's Exhibit 4. Moreover, it was reported that after the miner made twenty trips over two steps in ninety seconds, his respiration was not labored and his breath sounds were normal. *Id.*

[23] On remand, the administrative law judge should also address, if necessary, the conflicting evidence regarding whether the miner suffered from heart failure prior to his death.

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 massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(en banc).

In addressing whether the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b),[24] the administrative law judge considered the opinions of the Board-certified pathologists, Drs. Dennis, Perper, Oesterling, and Swedarsky. Although Drs. Dennis and Perper diagnosed the miner with

[24] The administrative law judge found that the x-rays taken from February 5, 1999 through January 28, 2010 did not reveal evidence of pneumoconiosis. Decision and Order at 18. Although the x-rays were not read for the existence of pneumoconiosis, the administrative law judge noted that very recent x-rays, the most recent of which was taken only weeks before the miner's death, did not indicate the existence of any large opacities consistent with a finding of pneumoconiosis. *Id.* The administrative law judge therefore found that the x-ray evidence "support[ed] a finding of the absence of complicated pneumoconiosis" pursuant to 20 C.F.R. §718.304(a). *Id.* The administrative law judge also found that the treatment records and medical opinion evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.* at 19.

progressive massive fibrosis,[25] Director's Exhibits 12, 45; Employer's Exhibit 1, Drs. Oesterling and Swedarsky opined that the miner did not suffer from the disease. Director's Exhibit 46. The administrative law judge properly required claimant to establish that the progressive massive fibrosis seen on autopsy 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. The administrative law judge found that Dr. Dennis's opinion did not establish that the lesion would appear as greater than one-centimeter on x-ray, and that Dr. Perper did not make an equivalency determination. Decision and Order at 19. The administrative law judge, therefore, found that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *Id.*

The Director contends that the administrative law judge erred in determining that Dr. Perper did not make an equivalency determination. Director's Brief at 2. We agree that Dr. Perper provided testimony with respect to equivalency. Dr. Perper stated that an autopsy measurement is the equivalent of an x-ray measurement:

> A pathological lesion of one centimeter is equivalent to a radiological lesion of one centimeter or larger, which is clearly the medico-legal standard for diagnosing complicated coal workers' pneumoconiosis. Pathological lesions of this size are equivalent with corresponding radiological images of the same size or slightly larger. . . . Therefore, a pathological nodule of coal workers' pneumoconiosis would be equivalent in size with its corresponding radiological opacity or the radiological shadow could be slightly larger but not smaller.

Director's Exhibit 45 at 48-49. Additionally, Dr. Perper testified that "the lesion which is seen in the tissue is equivalent to the lesion which is seen radiologically in the sense that it is the same size or larger on the [x]-ray." Director's Exhibit 46 at 39. Dr. Perper opined that the miner's autopsy slides revealed a pneumoconiotic macronodule of more than one centimeter in the miner's right lung. Director's Exhibit 45 at 44. Thus, the administrative law judge erred in not considering the totality of Dr. Perper's testimony in finding that Dr.

[25] 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). *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976) ("Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors . . . ."); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006).

Perper did not render an equivalency determination.[26] We therefore vacate the administrative law judge's finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), and instruct him to consider all of the evidence of record on this issue.

On remand, the administrative law judge is instructed to reconsider whether claimant is entitled to the irrebuttable presumption set forth at 20 C.F.R. §718.304. If the administrative law judge determines that claimant is not entitled to the irrebuttable presumption, he must reconsider whether claimant is entitled to benefits under 20 C.F.R. Part 718.

Finally, on March 7, 2017, claimant's counsel filed an attorney fee application, requesting a fee for services performed during employer's previous appeal to the Board in BRB No. 16-0460 BLA pursuant to 20 C.F.R. §802.203.[27] We decline to consider claimant's counsel's request for legal fees at this time. Claimant's counsel is entitled to fees for services rendered while the case was pending before the Board only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). In light of our decision to vacate the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. If, on remand, the administrative law judge again awards benefits, claimant may submit a revised fee petition for attorney's fees for work performed before the Board in both appeals. 20 C.F.R. §802.203(c).

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[26] We note that the regulations require that a chronic dust disease of the lung diagnosed by x-ray yield an opacity greater than one centimeter in diameter, and that any diagnosis made by means other than x-ray, biopsy or autopsy must accord with acceptable medical procedures. 20 CFR 718.304.

[27] On May 25, 2016, employer filed a Notice of Appeal of the "Notice Regarding Disclosure of Medical Information in Cases Scheduled for Hearing," issued by the Pittsburgh, Pennsylvania District Office, Office of the Administrative Law Judges, on May 17, 2016. By Order dated June 21, 2016, the Board held that the notice from which employer appealed did not constitute "a decision or order of an administrative law judge by which [employer] is adversely affected," as is required by Section 802.201(a) of the Board's Rules of Practice and Procedure. 20 C.F.R. §802.201(a). In the absence of an appealable decision or order in the case, the Board dismissed employer's appeal. *Marshall v. Consolidation Coal Co.*, BRB No. 16-0460 BLA (June 21, 2016) (Order) (unpub.).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and 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

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge