

BRB No. 13-0367 BLA

VIVIAN COBB )  
(Widow of CECIL COBB, SR.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
WESTMORELAND COAL COMPANY ) DATE ISSUED: 05/07/2014  
 )  
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 on Remand - Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice, LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2008-BLA-6005) of Administrative Law Judge Linda S. Chapman rendered on a survivor's claim filed on November 9, 2007,<sup>1</sup> pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for

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<sup>1</sup> Claimant is the widow of the miner, Cecil Cobb, Sr., who died on August 18, 2007. Director's Exhibit 7.

the third time.<sup>2</sup> When the case was most recently before it, the Board held that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the Board held 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 pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The Board, therefore, vacated the administrative law judge's Decision and Order awarding benefits and remanded the case for reconsideration. *Cobb v. Westmoreland Coal Co.*, BRB No. 11-0738 BLA, slip op. at 5-6, (Aug. 30, 2012)(unpub.). The Board instructed the administrative law judge to consider only evidence that was admitted into the formal record when she weighed the evidence relevant to the existence of complicated pneumoconiosis. Further, the Board held that, before determining whether the evidence as a whole establishes complicated pneumoconiosis, the administrative law judge must first consider whether the evidence relevant to each subsection of Section 718.304, standing alone, establishes the existence of complicated pneumoconiosis at that subsection. The Board also instructed the administrative law judge to consider, if necessary, whether claimant is alternatively entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).<sup>3</sup>

On remand, the administrative law judge found that the evidence relevant to each subsection of Section 718.304 did not, standing alone, establish the existence of complicated pneumoconiosis at that subsection. Nonetheless, on weighing the totality of the relevant evidence together, the administrative law judge found that it established the existence of complicated pneumoconiosis at Section 718.304. The administrative law judge, therefore, found that claimant was entitled to invocation of the Section 411(c)(3) irrebuttable presumption that the miner's death was due to pneumoconiosis.<sup>4</sup> Accordingly, the administrative law judge awarded benefits.

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<sup>2</sup> The procedural history of this claim is set forth in the Board's prior decisions and is incorporated herein. See *Cobb v. Westmoreland Coal Co.*, BRB No. 11-0738 BLA (Aug. 30, 2012)(unpub.) and *Cobb v. Westmoreland Coal Corp.*, BRB No. 09-0837 BLA (Sept. 30, 2010)(unpub.).

<sup>3</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Amended Section 411(c)(4), 30 U.S.C. §921(c)(4)(2012), provides, in pertinent part, a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner had at least fifteen years in underground, or substantially similar, coal mine employment and that he had a totally disabling respiratory impairment.

<sup>4</sup> In response to the Board's instruction that she consider only evidence admitted into the record, the administrative law judge noted that the reference in her prior Decision

On appeal, employer contends that the administrative law judge erred in finding that the evidence as a whole established the existence of complicated pneumoconiosis pursuant to Section 718.304, after she found the evidence relevant to each subsection of Section 718.304 insufficient, standing alone, to establish the existence of complicated pneumoconiosis at that subsection. Employer also contends that the administrative law judge erred in finding that the medical opinion evidence, that the miner did not have complicated pneumoconiosis, was speculative and entitled to little weight. Consequently, employer contends that the administrative law judge erred in finding claimant entitled to the Section 411(c)(3) irrebuttable presumption that the miner's death was due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not filed briefs in response to employer's appeal.

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.<sup>5</sup> 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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) as implemented by 20 C.F.R. §718.304, provides, in pertinent part, that there is an irrebuttable presumption that the miner's death was due to 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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),

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and Order to the x-ray readings dated February 11, 2009 and March 3, 2009, which had not been admitted into the record, were "the result of a scrivener's error[.]" and were not referred to or considered by her in her prior or current Decision and Order. Decision and Order on Remand at 2.

<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 3, 5.

would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern 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 (4th Cir. 1999). Further, the introduction of legally sufficient evidence of complicated pneumoconiosis alone does not automatically qualify claimant for the irrebuttable presumption found at Section 718.304. Rather, the evidence must establish that the miner has a “chronic dust disease of the lung,” commonly known as complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993). To make such a determination, the administrative law judge necessarily must look at all of the relevant evidence presented, resolve any conflict in the evidence and make a finding of fact. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff’d sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

After consideration of the administrative law judge’s Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge’s Decision and Order awarding benefits is rational, supported by substantial evidence and in accordance with law.

The administrative law judge is charged with weighing together all of the evidence relevant to the existence of complicated pneumoconiosis, in determining whether complicated pneumoconiosis is established pursuant to Section 718.304. The administrative law judge did not err, therefore, in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304, even though the x-ray, autopsy, CT scan and medical opinion evidence did not, individually, establish the existence of complicated pneumoconiosis at their respective subsections.<sup>6</sup> *See Westmoreland Coal*

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<sup>6</sup> The administrative law judge noted that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) as the two ILO classified x-rays were read as negative for pneumoconiosis, even though many of the narrative x-ray readings in the record showed evidence of large opacities, densities and masses. Decision and Order on Remand at 2-3; Director’s Exhibits 9-11; Employer’s Exhibit 2.

The administrative law judge noted that the autopsy of the miner’s right lung, performed by Dr. Sides, and the review of autopsy slides, performed by Dr. Oesterling, showed masses that were at least two centimeters in diameter. Decision and Order on Remand at 6; Director’s Exhibit 8; Employer’s Exhibit 1. Moreover, the administrative law judge noted that Dr. Sides stated that the two nodular masses in the miner’s upper lobe were indicative of complicated pneumoconiosis. *See* Director’s Exhibit 8. Further, the administrative law judge noted that the CT scan evidence showed masses that were at

*Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); Decision and Order on Remand at 9.

In particular, the administrative law judge correctly found that the autopsy and CT scan evidence did not establish the existence of complicated pneumoconiosis at subsections (b) and (c), respectively, because the doctors reviewing the autopsy and CT scan evidence did not state that the masses seen on autopsy and CT scan would be, if seen on x-ray, greater than one centimeter in diameter. Further, the administrative law judge found that the autopsy and CT scan evidence did not, standing alone, establish the existence of complicated pneumoconiosis because the doctors reviewing that evidence did not specifically state that the masses seen were due to complicated pneumoconiosis,<sup>7</sup> and not another disease process. *See* 20 C.F.R. §718.304(b), (c); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Nonetheless, the administrative law judge properly found that the autopsy and CT scan evidence, along with the x-ray evidence, identifying large masses in the lungs, and the medical opinion evidence, identifying large masses in the lungs and attributing them to complicated pneumoconiosis,<sup>8</sup> established the existence of complicated pneumoconiosis. Specifically, the administrative law judge stated:

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least two centimeters in diameter. Decision and Order on Remand at 7; Director's Exhibits 9-11; Employer's Exhibit 5. The administrative law judge, however, noted that this evidence did not, standing alone, establish the existence of complicated pneumoconiosis pursuant to subsections (b) and (c), respectively, because the doctors did not state that those masses would appear on x-ray as greater than one-centimeter in diameter, or that they were due to complicated pneumoconiosis. Decision and Order on Remand at 6-7; *see* 20 C.F.R. §718.304(b), (c).

The administrative law judge noted that the medical opinion evidence identified large masses in the miner's lungs, but that the doctors disagreed as to the etiology of the masses. *See* 20 C.F.R. §718.304(c).

<sup>7</sup> In contrast, Dr. Sides, the autopsy prosector, indicated that the masses on the miner's lung were indicative of complicated pneumoconiosis. Decision and Order on Remand at 6; Director's Exhibit 8; Employer's Exhibit 1.

<sup>8</sup> Dr. Winegar, one of the miner's treating physicians, stated that the miner had a history of severe chronic obstructive pulmonary disease and coal workers' pneumoconiosis and that recent x-rays showed interstitial fibrosis and lobular changes consistent with pneumoconiosis. Director's Exhibit 9. He noted that the limited autopsy of the miner's lung revealed findings of complicated pneumoconiosis and emphysema. *Id.* Dr. Winegar's treatment records also include a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 10.

[c]onsidering the totality of the medical evidence, I find that [claimant] has established that [the miner] had a condition in his lungs that resulted in the development of masses that would appear on x-ray as larger than one centimeter in diameter, due to pneumoconiosis. The evidence offered by the [e]mployer does not show that these masses are not there; indeed, all of the evidence confirms the presence of these masses. Nor does the medical evidence show that these masses [were] due to a process other than pneumoconiosis. I find that [claimant] has met her burden to successfully establish her entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis under Section 718.304.

Decision and Order on Remand at 10.

Employer does not dispute the fact that the evidence shows that the miner's lungs contained large masses, greater than two centimeters in diameter, or that Drs. Winegar, Sides and Lepsch attributed the masses to complicated pneumoconiosis. Rather, employer contends that the opinions of Drs. Spagnolo, Hippensteel and Scott, which either attributed the large masses to probable granulomatous disease or did not address etiology, should have been credited. Contrary to employer's contention, however, the administrative law judge properly found that, because the record did not indicate that the miner had ever been treated for granulomatous diseases, the opinions attributing the large masses to granulomatous diseases were speculative. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; Decision and Order on Remand at 8. Consequently, the administrative law judge reasonably found that, as employer did not dispute the fact that the evidence established that the miner had large masses in his lungs, greater than two centimeters in diameter, and that the more credible medical opinion evidence established that those masses were due to complicated pneumoconiosis, claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. The administrative law judge, therefore, properly found claimant entitled to invocation of the Section 411(c)(3) irrebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3); *see Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Moreover, because 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), is unchallenged on appeal, it is affirmed. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 10.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge