BRB No. 99-1217 BLA

MILDRED F. GOLLIE (Widow of JOE GOLLIE)	)	
Claimant-Respondent	)	
v.	)	
ELKAY MINING COMPANY	)	DATE ISSUED:
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0891) of Administrative Law Judge Daniel L. Leland awarding benefits 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 found that employer

[1] Claimant is the widow of the miner, Joe Gollie, who died on June 8, 1996, Director's Exhibit 22. The miner originally filed a claim on July 31, 1990, which was ultimately denied on modification by Administrative Law Judge John C. Holmes in a Decision and Order issued on November 1, 1995, because claimant failed to establish the existence of complicated pneumoconiosis, *see* Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, or total disability due to pneumoconiosis, *see* 20 C.F.R.

stipulated to thirty years of coal mine employment and to the existence of simple pneumoconiosis. The administrative law judge then considered the evidence submitted in conjunction with the survivor's claim and found it sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b)-(c), thereby entitling claimant to the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, *see also* 20 C.F.R. §718.205(c)(3). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in excluding part of the evidence submitted by employer in response to post-hearing evidence submitted by claimant. In addition, employer contends that the administrative law judge erred in finding the evidence of record sufficient to establish the existence of complicated pneumoconiosis. Claimant responds, urging that the Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to 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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in restricting the kind of evidence employer could submit in response to the post-hearing evidence submitted by claimant. Claimant responds that the Administrative Procedure Act (APA) commands the administrative law judge to exclude "irrelevant, immaterial, or unduly repetitious evidence," *see* 5 U.S.C. §556(d), as implemented by 20 C.F.R. §725.455(c), and which the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held has little or no probative value, *see Underwood v. Elkay Mining, Inc.*,105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

At the hearing, the administrative law judge noted that he had previously granted claimant's motion to leave the record open in order to allow the submission of post-hearing reports from two pathologists who had reviewed the autopsy evidence, Hearing Transcript at 6. There is no indication in the record that employer objected to the submission of this evidence. The administrative law judge allowed claimant to submit this evidence and

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§718.204. Director's Exhibit 35. No further action was taken on the miner's claim and it is not at issue herein. Subsequent to the miner's death, claimant filed a survivor's claim on June 20, 1996, Director's Exhibit 1, at issue herein.

[2] Inasmuch as the administrative law judge's finding that claimant established good cause for the submission of her post-hearing evidence, *see* Hearing Transcript at 9, is unchallenged on appeal, it is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710

allowed employer an opportunity to submit rebuttal evidence, *see* Hearing Transcript at 7-9. However, the administrative law judge limited employer's rebuttal to the submission of new reports by pathologists who had already submitted reports into the record. The administrative law judge precluded the employer's submission of reports from pulmonary specialists as they would be "less relevant," Hearing Transcript at 8.

Subsequently, the administrative law judge admitted into the record claimant's post-hearing pathology reports from Drs. Green and Perper, as well as the pathology reports submitted by employer in response from Drs. Naeye, Kleinerman, Hansbarger, Bush and Hutchins. Decision and Order at 2; *see* Claimant's Exhibits 1, 2; Employer's Exhibits 12-16. However, the administrative law judge denied employer's motion for reconsideration requesting that employer be allowed to also submit reports from four pulmonary specialists. The administrative law judge held that it was within his discretion to limit the evidence submitted in response to untimely submitted evidence and that a party does not have carte blanche to submit any amount and type of evidence which it desires.

Any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing, *see* 20 C.F.R. §725.456(b)(1); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Pursuant to 20 C.F.R. §725.456(b)(2), the administrative law judge may admit, at his discretion, documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing, if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged, *see* 20 C.F.R. §725.456(b)(2); *Miller*, *supra*; *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). If the administrative law judge admits "late" evidence into the record, 20 C.F.R. §725.456(b)(3) requires that the record be left open for at least thirty days after the hearing to permit the parties the opportunity to respond to such evidence, *see* 20 C.F.R. §725.456(b)(3); *Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984). The Fourth Circuit has held, however, that the APA, *see* 5 U.S.C. §556(d), as implemented by 20 C.F.R. §725.455(c), makes clear that a party is only entitled to such rebuttal "as may be required for a full and true disclosure of the facts," *see Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991); *see also* 20 C.F.R. §725.456(b)(3).

Contrary to employer's contention that the administrative law judge did not provide any basis for limiting employer's rebuttal evidence, the administrative law judge determined that opinions of pulmonologists would be "less relevant" than pathologists' opinions. *See* Hearing Transcript at 8; *Underwood*, *supra*. Moreover, in deciding the case on the merits, the administrative law judge ultimately relied on the opinions of the pathlogists, allowing employer to submit five pathologists' opinions in response to the opinions of the two

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(1983).

pathologists submitted by claimant. Thus, employer's right to establish a full and true disclosure of the facts on rebuttal was satisfied, *see Henderson, supra*. Consequently, we affirm the administrative law judge's exclusion of additional reports from pulmonologists, proffered by employer in response to claimant's post-hearing evidence, as a proper exercise of his discretion.

Turning to the merits, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304. Before determining whether invocation of the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c), has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis and then all relevant evidence pursuant to Section 718.304(a)-(c) must be considered and weighed together, *see Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). However, the irrebuttable presumption under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," nor incorporate a purely medical definition of "complicated pneumoconiosis," but rather the presumption is triggered by the application of congressionally defined criteria, *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000)*;*

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[3] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that ... a miner's death was due to pneumoconiosis ... if such miner is suffering or 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) ...; 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.

20 C.F.R. §718.304.

Double B Mining, Inc. v. Blankenship, 177 F.3d 240, BLR (4th Cir. 1999). Thus, the Fourth Circuit has held that the irrebuttable presumption at Section 411(c)(3) of the Act provides three different ways of establishing the triggering condition and requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the presumption, *i.e.*, if a diagnosis is by biopsy or autopsy, a miner must have "massive lesions" which are defined as lesions which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship, supra*.

The administrative law judge only considered the relevant evidence submitted in conjunction with the survivor's claim. The autopsy report from Dr. Dy diagnosed an area of massive progressive fibrosis of complicated anthracotic pneumoconiosis measuring 5.5 by 5 by 3 centimeters on both gross and microscopic examination. Director's Exhibit 23. Drs. Green and Perper both board-certified pathologists, reviewed the autopsy evidence and also diagnosed complicated pneumoconiosis and a lesion of progressive massive fibrosis based on a lesion greater than two centimeters. Claimant's Exhibits 1, 2. Employer submitted opinions from Drs. Naeye, Hansbarger, Kleinerman, Hutchins and Bush, all of whom were board-certified pathologists, who reviewed the autopsy evidence. Dr. Naeye found a two centimeter lesion, Employer's Exhibits 1, 5, 9, 12, which he noted would look like complicated pneumoconiosis on gross examination and on an-x-ray, Employer's Exhibit 9 at 20. However, Dr. Naeye opined that because it was only coalesced individual anthracotic nodules and was not two centimeters in all dimensions, it was not a lesion of progressive massive fibrosis and/or complicated pneumoconiosis. Dr. Kleinerman found a 1.6 centimeter mass which he described as a confluence of lesions of silicosis and tumor, but opined that it was not complicated pneumoconiosis , which he stated must be at least two centimeters, Employer's Exhibits 2, 10, 13. Dr. Kleinerman also noted that the lesion would look like progressive massive fibrosis on x-ray, Employer's Exhibit 10 at 68. Dr. Hansbarger found masses up to 1.8 centimeters and nodules greater than two centimeters, but noted that they were adjacent to and/or in combination with tumor and, therefore, were not progressive massive fibrosis or complicated pneumoconiosis, Employer's Exhibits 1, 14. Dr. Bush diagnosed simple coal workers' pneumoconiosis, but opined that the description of large lesions of pulmonary massive fibrosis on gross examination was not confirmed on microscopic examination, which he stated revealed that they were composed mostly of adenocarcinoma, Employer's Exhibits 4, 15. Finally, Dr. Hutchins found that the lesions which met the size criteria for pulmonary massive fibrosis were actually a fusion or mixture of lesions of coal workers' pneumoconiosis and carcinoma, Employer's Exhibits 3, 16.

[4] In addition, employer submitted opinions from Drs. Fino, Employer's Exhibit 7, Stewart, Employer's Exhibit 7, Zaldivar, Employer's Exhibit 8, and Loudan, Employer's Exhibits 8, 11, who are pulmonologists, as well as the opinion of Dr. Chillag, Employer's Exhibit 6. All of these physicians reviewed the evidence of record and found that the miner had simple pneumoconiosis which played no role in his death. Drs. Fino and Loudan also concluded that the miner did not have complicated pneumoconiosis.

The administrative law judge initially noted that there were no x-ray readings indicating large opacities and gave more weight to the opinions of the pathologists over the opinions of the pulmonologists, who had not reviewed the autopsy slides, Decision and Order at 6-7. The administrative law judge found that although the pathologists, whose opinions were submitted by employer, declined to diagnose complicated pneumoconiosis in part because the lesions found were not two centimeters in diameter, there was no such requirement in the Act or regulations. Rather, the administrative law judge noted that a diagnosis of massive lesions has been found by the Fourth Circuit to be sufficient to invoke the Section 718.304 presumption, even when less than two centimeters in diameter. *See Blankenship, supra*. Further, the administrative law judge found no authority for the proposition that the effect of the miner's adenocarcinoma on the lungs rules out a diagnosis of massive lesions, specifically holding that Dr. Naeye's finding of a two centimeter lesion of coalesced anthracotic macronodules is sufficient to be termed a massive lesion under the Act, *see* 20 C.F.R. §718.304(b). The administrative law judge also held that Dr. Naeye's opinion that the lesion would look like complicated pneumoconiosis on x-ray was sufficient to satisfy the equivalency criteria, *i.e.*, that the lesion, if x-rayed, would show as opacities greater than one centimeter in diameter, *see Blankenship, supra*. Ultimately, the administrative law judge gave greatest weight to the opinion of Dr. Dy, the autopsy prosector, as he was the only pathologist who had conducted a gross examination of the miner's lungs and had, therefore, found the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b)-(c), thereby entitling claimant to the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, *see also* 20 C.F.R. §718.205(c)(3).

Employer contends that the administrative law judge erred in failing to weigh all of the relevant evidence of record, *i.e.*, x-ray and medical opinions from the miner's claim, and in mechanically crediting Dr. Dy's opinion because he was the autopsy prosector without considering the qualifications of reviewing physicians. As employer contends, the Fourth Circuit has held that an administrative law judge must consider the quality of the autopsy prosector's opinion and the quality of the reviewing pathologists' contrary opinions and provide an adequate rationale for concluding, under the facts of the case, that the autopsy prosector's opportunity to conduct a gross examination, rather than merely review slides, renders his opinion superior to the reviewing pathologists' opinions, *see BethEnergy Mines*,

[5] In *Blankenship*, as the administrative law judge held, the Fourth Circuit declined to impose a rule that complicated pneumoconiosis can only be diagnosed by a biopsy or autopsy if it reveals evidence of a lesion at least two centimeters in diameter in order establish "massive lesions," which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship, supra*. The Fourth Circuit also held that the irrebuttable presumption at Section 411(c)(3) of the Act does not incorporate a purely medical definition of "complicated pneumoconiosis," *see Scarbro, supra*.

Inc. v. Director, OWCP [Rowan], 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996)(Hall, J., dissenting).

In addition, although the administrative law judge found that Dr. Naeye's opinion, that the lesion he described would look like complicated pneumoconiosis on x-ray, was sufficient to satisfy the equivalency criteria, *i.e.*, that the lesion, if x-rayed, would show as opacities greater than one centimeter in diameter, Dr. Naeye did not specifically find that the lesion would show as greater than one centimeter in diameter on an x-ray, *see Blankenship*, *supra*. Moreover, the administrative law judge did not make an equivalency determination as to whether the findings of Dr. Dy of "massive progressive fibrosis" and "complicated anthracotic pneumoconiosis," Director's Exhibit 23, and the findings of Drs. Green and Perper of "complicated pneumoconiosis" and a "lesion" of "progressive massive fibrosis," Claimant's Exhibits 1-2, would, if x-rayed, show as a one centimeter opacity, *see Blankenship*, *supra*.

Finally, the administrative law judge did not consider relevant x-ray and medical opinion evidence from the miner's claim, *see* Director's Exhibit 35, which indicated the existence of a large opacity, *see Lester*, *supra*. While the evidence in the miner's claim provides conflicting opinions regarding whether the large opacity represented complicated pneumoconiosis or cancer, the Fourth Circuit has held that the irrebuttable presumption at Section 411(c)(3) of the Act is triggered not by the medical definition of "complicated pneumoconiosis," but by application of congressionally defined criteria, *see Scarbro, supra*. Thus, contrary to employer's contentions, even the opinions submitted by employer from Drs. Naeye and Kleinerman, as well as Drs. Hansbarger, Hutchins, Bush and the relevant x-ray and medical opinion evidence from the deceased miner's claim, diagnosing the existence of lesions and opacities, all could potentially be sufficient to trigger the irrebuttable presumption at Section 411(c)(3) of the Act if the administrative law judge determines that their findings would, if x-rayed, show as a one centimeter opacity, *see Blankenship, supra*.

Consequently, we vacate the administrative law judge's finding and remand the case for the administrative law judge to reconsider all the relevant evidence of record in accordance with the holdings enunciated by the Fourth Circuit in *Rowan*, *supra*, *Lester*, *supra*, *Blankenship*, *supra*, and *Scarbro*, *supra*. The administrative law judge, within his discretion, may reopen the record on remand if he finds that further development of the evidence is warranted, *see* 20 C.F.R. §725.456(e); *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). Finally, even if claimant establishes the irrebuttable presumption under Section 411(c)(3) of the Act in this survivor's claim, she must still establish, by direct

[6] Similarly, Dr. Kleinerman also noted that the lesion would look like progressive massive fibrosis on x-ray, *see* Employer's Exhibit 10 at 68; Director's Exhibit 35.

proof or presumption, that the miner's pneumoconiosis arose out of his coal mine employment, *see* 20 C.F.R. §718.203. Thus, inasmuch as the administrative law judge did not make any findings pursuant to Section 718.203, the administrative law judge should, if reached, consider on remand whether pneumoconiosis arising out of coal mine employment is established pursuant to Section 718.203.

Accordingly, the Decision and Order awarding benefits by the administrative law judge is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge