BRB No. 05-0476 BLA

CHRISTINE DOUGHTEN (Widow of BENNY J. DOUGHTEN) Claimant-Petitioner v. WHITE FLAME ENERGY, INCORPORATED and WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/17/2005 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6011) of

Administrative Law Judge Jeffrey Tureck on a survivor's claim[1] 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the miner worked in qualifying coal mine employment for almost twenty-eight years and credited the parties' stipulation that the miner suffered from coal workers' pneumoconiosis arising out of coal mine employment. The administrative law judge found, however, that claimant failed to establish that the miner's pneumoconiosis substantially contributed to his death pursuant to 20 C.F.R. §718.205(c). The administrative law judge also found that the evidence of record was insufficient to establish invocation of the irrebuttable presumption of total disability and/or death due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, because the evidence did not establish the existence of complicated pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in analyzing the medical opinion evidence of record, that is, that he erred in discrediting the opinion of Dr. Perper to find that claimant failed to establish that the miner had complicated pneumoconiosis or that his death was not due to pneumoconiosis. Employer/carrier respond, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.[2]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's analysis of the medical opinion evidence, claimant argues that the administrative law judge erred in discrediting the opinion

[1] Claimant, Christine Doughten, is the widow of the miner, Benny J. Doughten, who died on March 27, 2001. Director's Exhibit 8. Claimant filed her application for survivor's benefits on March 11, 2002. Director's Exhibit 2.

[2] We affirm the administrative law judge's findings with respect to the length of coal mine employment and the existence of simple coal workers' pneumoconiosis arising out of coal mine employment inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2.

of Dr. Perper, who opined that the miner suffered from complicated pneumoconiosis and that pneumoconiosis substantially contributed to his death. Specifically, claimant contends that, even though the administrative law judge found that Dr. Perper observed a fibro-anthracotic nodule measuring at least two centimeters and proffered supportive color microphotographs of each autopsy slide, the administrative law judge erred in stating that he "was not empowered to decide" whether a fibro-anthracotic mass was the equivalent of a large opacity of pneumoconiosis since this was a "matter beyond [his] knowledge." Claimant's Brief at 4, *citing* Decision and Order at 4. Claimant argues that, because it is incumbent upon the administrative law judge to render the requisite equivalency determination in accordance with *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), the administrative law judge's finding was irrational.

In determining whether a miner is suffering or suffered from a chronic dust disease of the lung commonly known as complicated pneumoconiosis at Section 718.304, the administrative law judge must first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b) and (c), prior to finding the existence of complicated pneumoconiosis established. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). Evidence under one prong of Section 718.304 can diminish the probative value of evidence under another prong if the two kinds of evidence conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), *citing Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, 22 BLR 2-554, 2-561-562 (4th Cir. 1999). Therefore, the administrative law judge must, in every case, consider and evaluate all relevant evidence. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically 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. *See 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." *See 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. In the instant case, claimant points to no evidence in the record that would enable the administrative law judge to render the requisite equivalency determination before invoking the irrebuttable presumption of death due to pneumoconiosis under Section 718.304. Accordingly, the administrative law judge properly concluded that he was unable to determine whether Dr. Perper's findings constituted the presence of complicated pneumoconiosis because the record does not contain any physician's testimony, medical report, or other evidence demonstrating that the lesions seen on autopsy would be expected to yield one or more opacities greater than one centimeter when viewed on x-ray. Hence, contrary to claimant's argument, the administrative law judge did not err in holding that the evidence of record was insufficient to determine whether the miner suffered from an underlying condition that would have produced an opacity greater than one centimeter when viewed on x-ray or a massive lesion when viewed on autopsy.[3] *See* 20 C.F.R. §718.304(a)-(c); *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562; *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring). We, therefore, affirm the administrative law judge's finding that because the evidence of record was insufficient to establish that the miner suffered from complicated pneumoconiosis pursuant to Section 718.304, claimant failed to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304.[4]

[3] We also note that, while Dr. Perper found a pneumocotic nodule measuring at least two centimeters indicated on an autopsy slide and a mass measuring between 1.5 and two centimeters illustrated on his microphotographs, Dr. Perper did not diagnose "massive lesions," a finding which, if fully credited, is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304(b). *See* 20 C.F.R. §718.304(b); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, 22 BLR 2-554, 2-561-562 (4th Cir. 1999); Director's Exhibits 26; Claimant's Exhibit 1.

[4] The administrative law judge found that the x-ray evidence consisted of two x-ray interpretations of a film dated May 9, 2000 and that the identity of the physicians providing these readings was unknown since the reports indicated only their initials. The administrative law judge concluded that these x-ray readings had little probative value in light of the autopsy evidence. Decision and Order at 2 n.2. Although the May 9, 2000 reading was negative for the existence of simple pneumoconiosis and the May 28, 2000 reading was positive for the existence of simple pneumoconiosis, neither x-ray reading contains a finding of a large opacity of any size and is, therefore, insufficient to establish the existence of complicated pneumoconiosis in accordance with Section 718.304(a). *See* 20 C.F.R. §718.304(a); *Blankenship*, 177 F.3d at 244, 22 BLR at 2-561. Claimant has not challenged the administrative law judge's analysis of the x-ray evidence on appeal. *See Coen v.*

In challenging the administrative law judge's finding that pneumoconiosis did not cause or contribute to the miner's death, claimant argues that the administrative law judge erred in discounting Dr. Perper's opinion that the miner's pneumoconiosis was severe and would have contributed to his death. Because of Dr. Crouch's demonstrated expertise in pulmonary pathology and her opinion's consistency with that of Dr. Segen, the autopsy prosector, the administrative law judge, within a permissible exercise of his discretion, credited the opinion of Dr. Crouch; after reviewing the autopsy report and death certificate, she opined that the miner's simple coal workers' pneumoconiosis was too mild to cause, hasten, or contribute to his death. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); Decision and Order at 4. It is well established that the determination as to whether a physician's report is sufficiently documented and reasoned is essentially a credibility matter, and as such, it is for the finder of fact to decide. *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) (Board is not empowered to reweigh evidence nor substitute its inferences for those of administrative law judge); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Likewise, making credibility determinations and resolving inconsistencies in the evidence is within the sole province of the administrative law judge. *Kennellis Energies v. Director, OWCP* [*Ray*], 333 F.3d 822, 826, 22 BLR 2-591, 2-598 (7th Cir. 2003); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1190, 7 BLR 2-202, 2-208 (4th Cir. 1985). Because claimant fails to allege any specific error with respect to the administrative law judge's determination of the relative credibility of the medical opinions, we affirm the administrative law judge's crediting of the opinions of Drs. Crouch and Segen and his resultant finding that the miner's simple pneumoconiosis neither caused nor hastened his death pursuant to Section 718.205(c).

Based on the foregoing, therefore, we affirm the administrative law judge's finding that, because the evidence of record is insufficient to establish the presence of complicated pneumoconiosis, claimant was not entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. Similarly, we affirm the administrative law judge's determination that claimant failed to satisfy her burden of establishing that pneumoconiosis caused or hastened the miner's death at Section 718.205(c).

Director, OWCP, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge