BRB No. 08-0101 BLA

J.J.[1]	)	
(On Behalf of the Estate of D.C.)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AGIPCOAL U.S.A. INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/20/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Granting Request for Modification and Awarding Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

[1] Claimant, J.J., is the surviving spouse of the miner, D.C., who died on September 10, 2003, while his claim was still pending. Director's Exhibit 52.

PER CURIAM:

Employer appeals the Decision and Order – Granting Request for Modification and Awarding Benefits (06-BLA-6129) of Administrative Law Judge Larry S. Merck rendered on a subsequent miner's claim[2] 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 district director initially denied this subsequent claim on March 18, 2004, because the evidence failed to establish the presence of a totally disabling respiratory impairment. Director's Exhibit 31. On October 26, 2004, claimant submitted a supplemental autopsy report from Dr. Dennis and requested modification of the district director's decision. Director's Exhibit 39. The district director denied the request on July 19, 2005. Director's Exhibit 45. Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 46.

The administrative law judge accepted the parties' stipulation that the miner worked for thirty-eight years in coal mine employment[3] and that the autopsy evidence established the existence of simple pneumoconiosis. The administrative law judge therefore found that, because the miner's prior claim was denied for failure to establish any element of entitlement, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits of entitlement, the administrative law judge further determined that the autopsy evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), but that the x-ray and medical opinion evidence did not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). Weighing the evidence under 20 C.F.R. §718.304(a)-(c) together, the administrative law judge found that the autopsy evidence was the most reliable evidence of the existence of pneumoconiosis, and it established the existence of complicated pneumoconiosis. The administrative law judge therefore determined that claimant was entitled to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis under 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

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[2] The miner filed his first claim for benefits on December 20, 1994. Director's Exhibit 1-414. An administrative law judge denied the claim on July 1, 1997, for failure to establish any element of entitlement. Director's Exhibit 1-26. The miner requested reconsideration, which was denied on July 10, 1997. Director's Exhibit 1-4, 1-9. The record reflects that the miner took no further action until filing this subsequent claim on September 18, 2002. Director's Exhibit 3.

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc)*; Director's Exhibit 16.

On appeal, employer contends that the administrative law judge erred in invoking the irrebuttable presumption because the administrative law judge failed to consider all relevant evidence and to provide valid reasons for his credibility determinations pursuant to 20 C.F.R. §718.304(b), (c). Employer's Brief at 17-18. Claimant responds, urging affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis, or that a miner's death was due to pneumoconiosis, if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must consider all relevant evidence on this issue, i.e., evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Gray*

[4] Because no party challenges the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, or that the x-ray evidence did not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), these findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

v. SLC Coal Co., 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

Employer initially contends that the administrative law judge erred in finding that the autopsy evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Specifically, employer asserts that the reasons provided by the administrative law judge for discrediting Dr. Naeye's autopsy report under Section 718.304(b) are "irrelevant distinctions" that have nothing to do with whether the autopsy slides showed massive lesions. Employer's Brief at 20-21. Employer's contention has merit.

Relevant to 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy reports of Drs. Dennis and Naeye. Although these physicians' reports are in disagreement as to the existence of "massive lesions" in the miner's lungs,[5] the reasons that the administrative law judge provided for discounting Dr. Naeye's report do not address the credibility of Dr. Naeye's report on this point. First, the administrative law judge discounted Dr. Naeye's autopsy report because Dr. Naeye failed to explain the inconsistency between his autopsy report statement that only Slides A and E contained evidence of simple coal workers' pneumoconiosis, and his deposition statement that Slide F may have been one of the slides that contained evidence of simple pneumoconiosis. Decision and Order at 24; Employer's Exhibit 2, Employer's Exhibit 3 at 57. It is unclear, however, how this discrepancy undermines Dr. Naeye's opinion, where Dr. Naeye consistently stated in his report and deposition that the largest lesion on any of the slides was 4.5 millimeters, which was too small to meet the minimum requirements for complicated coal workers' pneumoconiosis. Employer's Exhibit 2, Employer's Exhibit 3 at 51. We therefore find merit in employer's assertion that this discrepancy does not provide a valid reason to discredit Dr. Naeye's opinion at Section 718.304(b). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Employer's Brief at 21.

[5] Dr. Dennis diagnosed complicated pneumoconiosis, "progressive massive fibrosis," based on the presence of pneumoconiotic lesions measuring more than 2.0 centimeters in diameter, which, in his opinion, "would certainly be greater than 1.0 [centimeters] in diameter" on x-ray. Director's Exhibits 11, 39. By contrast, Dr. Naeye, whose report was admitted as employer's affirmative autopsy report, found that "[t]he largest single anthracotic lesion . . . measures 4.5 x 1.0 [millimeters] in its dimensions. . . . [T]he CWP lesions in the lungs of this man described by the autopsy prosector do not exist." Director's Exhibit 2. Dr. Naeye therefore concluded that the miner did not suffer from complicated pneumoconiosis because none of the lesions he observed on the autopsy slides were "anywhere near large enough to meet the diagnosis criteria for complicated CWP." Employer's Exhibit 3 at 50.

The administrative law judge additionally found that Dr. Naeye failed to explain the inconsistency between his autopsy report statement that "[o]verall the emphysema is moderate in severity" and his subsequent deposition statement that the miner did not have "very much" emphysema. Decision and Order at 24. Because, however, the record does not necessarily support an inconsistency, the administrative law judge must further explain this finding on remand. Moreover, we agree with employer that, because complicated pneumoconiosis is established by the presence of "massive lesions," not by the degree of emphysema present, this discrepancy does not provide a valid reason to discredit Dr. Naeye's report. *See* 20 C.F.R. §718.304(b); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

The administrative law judge further found that Dr. Naeye's opinion was entitled to less weight because Dr. Naeye's conclusions were based on an unsubstantiated assumption that Dr. Dennis prepared the autopsy slides using the most diseased portions of the miner's lungs. Decision and Order at 24. The record reflects, however, that, although Dr. Naeye indicated that it is "seldom" the case that representative samples are taken during autopsy, and that x-ray and pulmonary function study evidence are useful in determining whether representative samples were taken during an autopsy, Dr. Naeye did not draw any conclusions with regard to the slides that Dr. Dennis prepared. Employer's Exhibit 3 at 42, 50. Moreover, as employer contends, Dr. Naeye's opinion as to whether the slides were a representative sample is not a valid reason for discounting his opinion that none of the slides showed any lesions large enough to be complicated pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Employer's Brief at 21; Employer's Exhibit 2.

The final reason the administrative law judge provided for discounting Dr. Naeye's opinion was that Dr. Naeye's autopsy findings were inextricably tied to his consideration of the miner's employment history, and his review of the x-ray and pulmonary function study evidence. Decision and Order at 25. Although Dr. Naeye indicated that other evidence of record supported his finding of simple pneumoconiosis, employer correctly asserts that, "Dr. Naeye set out his description of the autopsy slides alone." Employer's Brief at 21; Employer's Exhibits 2, 3 at 51. Substantial evidence therefore does not support the administrative law judge's finding that Dr. Naeye's autopsy opinion was inextricable from his review of other evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Consequently, because none of the reasons the administrative law judge provided for discounting Dr. Naeye's opinion was valid, we vacate the administrative law judge's finding that the autopsy evidence supports a finding of complicated pneumoconiosis under Section 718.304(b). On remand, the administrative law judge must reconsider the autopsy evidence at Section 718.304(b), resolve the conflict as to the presence of massive lesions in the lung, and explain his credibility determinations. *See* 20 C.F.R.

§718.304(b); *Gray*, 176 F.3d at 390, 21 BLR at 2-629-30; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer additionally asserts that the administrative law judge erred in failing to consider Dr. Caffrey's autopsy slide review in conjunction with the autopsy evidence. We agree. The record reflects that the administrative law judge considered Dr. Caffrey's report as a medical report and considered it only at Section 718.304(c). As employer contends, however, Dr. Caffrey performed a slide review.[6] Thus, Dr. Caffrey's report may constitute both an autopsy rebuttal report and a medical report. *See* 20 C.F.R. §725.414(a)(3)(ii)i; *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007) (*en banc*). Further, although the administrative law judge stated that, because he was unable to separate Dr. Caffrey's clinical and pathologic conclusions, he would discount Dr. Caffrey's report even if it were an autopsy rebuttal report, the administrative law judge failed to explain this finding. Decision and Order at 28. Consequently, to the extent that Dr. Caffrey reviewed the autopsy slides, the administrative law judge on remand must consider Dr. Caffrey's report in conjunction with the affirmative autopsy reports of Drs. Dennis and Naeye at Section 718.304(b). *See Keener*, 23 BLR at 1-239-40. In so doing, if the administrative law judge is again unable to separate Dr. Caffrey's clinical and pathological conclusions, the administrative law judge must explain this finding in light of the fact that Dr. Caffrey specifically stated that the slides showed only simple pneumoconiosis. Director's Exhibit 44 at 2-4; *see Gray*, 176 F.3d at 390, 21 BLR at 2-629-30; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

In light of the aforementioned errors in the administrative law judge's consideration of the autopsy evidence at Section 718.304(b), we vacate the administrative law judge's finding of complicated pneumoconiosis thereunder and remand the case for further consideration of the autopsy evidence at Section 718.304(b).

Employer also contends that the administrative law judge did not properly consider all of the medical opinion evidence relevant to complicated pneumoconiosis at Section 718.304(c). Specifically, employer asserts that the administrative law judge failed to state a valid reason for discrediting the opinions of Drs. Broudy and Fino that the miner did not have complicated pneumoconiosis. We agree. The administrative law judge found Dr. Broudy's opinion not well reasoned because it was based on Dr. Naeye's

[6] The record reflects that Dr. Caffrey is Board-certified in Anatomical and Clinical Pathology, and he reviewed the miner's medical records, Dr. Dennis's autopsy report, and the autopsy slides. Director's Exhibit 44. Dr. Caffrey observed pneumoconiotic lesions measuring 0.1 centimeters to 0.5 centimeters, and he opined that, contrary to Dr. Dennis's findings, there was "definitely no evidence of progressive massive fibrosis on [the] autopsy slides." *Id.*

discredited autopsy report. Decision and Order at 27. As the administrative law judge's determination to discount Dr. Broudy's opinion rests on his credibility determination at Section 718.304(b), which we have vacated, we additionally vacate the administrative law judge's determination to discount Dr. Broudy's opinion at Section 718.304(c). Consequently, the administrative law judge must reconsider the probative value of Dr. Broudy's opinion on remand. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Further, the record reflects that the administrative law judge discounted Dr. Fino's opinion, that the July 14, 2003 x-ray confirmed the lack of complicated pneumoconiosis seen on autopsy, because Dr. Fino found the July 14, 2003 x-ray to be of poor diagnostic quality. Decision and Order at 27. Contrary to the administrative law judge's determination, however, Dr. Fino did not find the July 14, 2003 x-ray to be unacceptable. Rather, Dr. Fino designated the x-ray as "quality 3" and read it "0/1, q/q." Employer's Exhibit 6. As the applicable quality standard requires only that a chest x-ray be of suitable quality for the proper classification of pneumoconiosis, 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984), the administrative law judge has not provided an adequate reason for discrediting Dr. Fino's opinion. *See Auxier v. Director, OWCP*, 8 BLR 1-109, 1-111 (1985). Consequently, the administrative law judge on remand must reconsider the probative value of Dr. Fino's opinion at Section 718.304(c).

In conclusion, prior to weighing all relevant evidence together under Sections 718.304(a)-(c) on remand, the administrative law judge must first reconsider whether the autopsy reports of Drs. Dennis, Naeye, and Caffrey tend to establish the existence of complicated pneumoconiosis at Section 718.304(b), and reassess the probative value of the opinions of Drs. Broudy and Fino at 718.304(c). The administrative law judge must then weigh the evidence supportive of a finding of complicated pneumoconiosis against the contrary probative evidence, with the burden of proof remaining at all times on claimant. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Melnick*, 16 BLR at 1-33. Should the administrative law judge find that claimant has established the existence of complicated pneumoconiosis, he must determine whether the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203. If the administrative law judge finds that the evidence does not establish the existence of complicated pneumoconiosis, he must then determine whether the evidence of record establishes that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b)(2), (c).

Accordingly, the administrative law judge's Decision and Order – Granting Request for Modification and 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.

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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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BETTY JEAN HALL
Administrative Appeals Judge