BRB No. 09-0117 BLA

M.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	
	)	DATE ISSUED: 10/28/2009
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 Third Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Third Remand Awarding Benefits (05-BLA-6258) of Administrative Law Judge Richard A. Morgan issued on a request for modification of the denial of 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).[1] In his Decision and Order Awarding Benefits dated December 29, 2006, the administrative law judge credited the miner with at least thirty-four years and five months of coal mine employment, and adjudicated claimant's modification request pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of simple pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203, but failed to prove that the miner's death was due to simple pneumoconiosis pursuant to 20 C.F.R. §718.205(c). However, the administrative law judge also found that the evidence was sufficient to establish that the miner suffered from complicated pneumoconiosis and, thus, that claimant was entitled to invoke the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant established that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that she demonstrated a mistake in a

[1] Claimant is the widow of the deceased miner, who died on June 8, 1996. Director's Exhibit 2. Claimant filed a survivor's claim on June 20, 1996. In a Decision and Order issued on July 30, 1999, Administrative Law Judge Daniel L. Leland determined that the evidence was sufficient to establish the existence of complicated pneumoconiosis and awarded benefits pursuant to 20 C.F.R. §718.304. Employer appealed and the Board held that the administrative law judge erred in failing to make a specific equivalency determination as to whether the lesions identified by the pathologists would show as opacities greater than one centimeter in diameter on x-ray, and thus, vacated the award and remanded the case for further consideration. [*M.G.*] *v. Elkay Mining Co.*, BRB No. 99-1217 BLA, slip op. at 7 (Nov. 2, 2000) (unpub.); Director's Exhibit 45. In a Decision and Order on Remand dated February 1, 2001, Judge Leland determined that the findings of Drs. Naeye and Kleinerman met the equivalency standard set forth in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), and awarded benefits. Director's Exhibit 55. On appeal, however, the Board held that the administrative law judge misconstrued the evidence and remanded the case for further consideration as to the issue of equivalency. [*M.G.*] *v. Elkay Mining Co.*, BRB No. 01-0507 BLA (Mar. 29, 2002) (unpub.). On June 28, 2002, Judge Leland issued a Decision and Order on Remand denying benefits, Director's Exhibit 63, which the Board affirmed. [*M.G.*] *v. Elkay Mining Co.*, 22 BLR 1-306 (2003). Pursuant to claimant's appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *Gollie v. Elkay Mining Co.*, No. 03-2131 (4th Cir. Apr. 8, 2004), *cert. denied*, 543 U.S. 925 (2004). Claimant took no further action with regard to the denial of her claim until she filed a request for modification on December 23, 2004. Director's Exhibit 78.

determination of fact pursuant to 20 C.F.R. §725.310 (2000).[2] Accordingly, the administrative law judge awarded survivor's benefits.

Employer appealed, and the Board held that the administrative law judge erred in concluding that the lesions identified on autopsy did not have to be comprised solely of anthracotic or pneumoconiotic material in order to invoke the irrebuttable presumption. *M.G. v. Elkay Mining Co.*, BRB No. 07-0375 BLA, slip op. at 7 (Jan. 31, 2008) (unpub.). The Board also held that the administrative law judge erred in concluding that employer's pathological experts failed to explain the basis for their opinions that the miner did not have complicated pneumoconiosis. *Id*. at 8. Thus, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration pursuant to Sections 718.304, 718.203 and 725.310 (2000). *Id*.

On remand, the administrative law judge considered the composition of the lesions identified by the pathologists and found that claimant was entitled to invocation of the irrebuttable presumption because "eight experts, who were in the best position to make the determination, found the criteria of the congressionally-defined condition established" pursuant to Section 718.304. Decision and Order on Third Remand at 11. The administrative law judge also determined that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203 and, thus, found that claimant established a mistake in a determination of fact pursuant to Section 725.310 (2000).

On appeal, employer contends that, because the administrative law judge failed to provide a rationale for finding the evidence to be sufficient to invoke the irrebuttable presumption, his decision fails to comply with the Administrative Procedure Act (APA).[3] Employer further argues that the administrative law judge erred in giving claimant the

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The amended version of 20 C.F.R. §725.310 does not apply to a request for modification filed with respect to a claim pending on January 19, 2001. 20 C.F.R. §725.2.

[3] The Administrative Procedure Act provides 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d), 932(a).

benefit of a presumption regarding disease causation, and that he erred in failing to identify a specific mistake in a determination of fact with regard to the prior denial of claimant's survivor's claim. Claimant responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging the Board to reject employer's arguments with respect to Sections 718.203(b) and 725.310 (2000). Employer also filed a reply brief.

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).

Section 411(c)(3) of the Act, as implemented by Section 718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffers 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.

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 examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *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).

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) would show 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).

In this case, the administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304(b). Employer

contends that the administrative law judge "failed to indicate which eight experts he relied on or why they were in the 'best position' to make a determination as to the existence of complicated pneumoconiosis" and further "that [such] information is not ascertainable from the remainder of his discussion of the evidence." Employer's Brief in Support of Petition for Review at 10. Employer therefore maintains that the administrative law judge's decision fails to comply with the APA. Employer's assertion of error is without merit. Based on our review of the administrative law judge's Decision and Order on Third Remand, the evidence of record and the arguments of the parties on appeal, we conclude that substantial evidence supports the administrative law judge's award of benefits.

In accordance with the Board's directive, the administrative law judge reweighed the evidence on remand to determine whether claimant established a mass or lesion, consisting entirely of pneumoconiotic material, that would appear as an opacity greater than one centimeter if viewed on x-ray. Decision and Order on Third Remand at 5. Although employer's experts diagnosed lesions on autopsy that were greater than one centimeter, but were a mixture of simple pneumoconiosis and cancer, the administrative law judge found that it was possible to resolve whether the miner had complicated pneumoconiosis, based on the existence of purely pneumoconiotic lesions that satisfied the requirements of Section 718.304. *Id*. The administrative law judge found that Drs. Perper and Green "identified nodules of complicated pneumoconiosis yielded by coal mine dust exposure and made the requisite equivalency determinations."[4] *Id*. at 11. The administrative law judge noted that Dr. Kahn, who performed the miner's 1990 lobectomy, diagnosed complicated pneumoconiosis, as did the reviewing pathologist, Dr. Klapporth.[5] *Id*. The administrative law judge noted that the autopsy prosector, Dr. Dy,

[4] The administrative law judge found that Dr. Perper "identified a 2.3 [centimeter] mass that he opined would appear to be one or more centimeters in size on x-ray" and that "Dr. Green likewise observed pathological nodules on slides over 2.0 [centimeters,] which he reported would appear slightly greater than one centimeter on [x]-ray." Decision and Order on Third Remand at 8-9.

[5] Dr. Kahn performed the miner's thoracotomy with left upper lung lobectomy and observed that there were typical changes of complicated coal workers' pneumoconiosis. Director's Exhibit 35. Dr. Klapporth reviewed the biopsy slides and diagnosed progressive massive fibrosis. *Id*. Dr. Dy, the autopsy prosector, reported on gross examination that there was progressive massive fibrosis in both lungs, with an area of 5.5 by 5.0 by 3.0 centimeters in the upper right lung, and two large masses (7.0 by 5.0 by 3.0 centimeters and 2.5 by 2.5 centimeters) with surrounding areas of anthracosis in the lower, mid and upper right lung. Director's Exhibit 25; *see* Decision and Order on Third Remand at 8.

identified a specific lesion of pulmonary massive fibrosis, measuring 5.5 by 5.0 by 3.0 centimeters. Although Dr. Dy did not address whether the dimensions of the lesions he saw on autopsy would correspond to an opacity greater than one centimeter on x-ray, the administrative law judge applied Dr. Perper's equivalency analysis and reasoned that Dr. Dy's findings would establish that the miner had complicated pneumoconiosis.[6] *Id.*

Additionally, the administrative law judge found that three of employer's pathological experts, Drs. Kleinerman, Hansbarger and Naeye, "identified *pneumoconiotic lesions larger than one centimeter* apart from the confluent lesions that they determined were constituted with non-pneumoconiotic material."[7] Decision and Order on Third Remand at 11 (emphasis added). The administrative law judge concluded:

> Given the fact that eight experts, who were in the best position to make the determination, found the criteria of the congressionally-defined condition established, I find that claimant has met her burden . . . . As earlier, I give the pathology evidence the greater weight over the consulting pulmonologists as to the cause of death. While the employer's pathologists

[6] Dr. Perper conducted an experiment evaluating the relationship between the actual size of a lesion and its appearance on x-ray. He observed that opacities on x-ray would appear larger than the actual lesions identified on autopsy. He concluded that "any pathologic lesion found at the autopsy cannot appear on the chest x-ray film as smaller than its actual size, but must be the same size or larger than its actual size." Director's Exhibit 81. The Board has affirmed, as a matter of discretion, the administrative law judge's reliance on Dr. Perper's equivalency analysis. [*M.G.*], BRB No. 07-0375 BLA, slip op. at 4-5 n.4 (Jan. 31, 2008) (unpub).

[7] The administrative law judge noted that Dr. Naeye found a 2.0 centimeter by 1.0 centimeter anthracotic macronodule, distinct from the confluent nodules, on autopsy, and that he also identified a 1.2 centimeter anthracotic nodule on the slides from the lobectomy. Employer's Exhibit 1; Decision and Order on Third Remand at 9. Dr. Fino testified that "several of the lesions would have been viewed on x-ray as greater than [one centimeter]," but he did not diagnose complicated pneumoconiosis because there were no purely pneumoconiotic lesions that measured greater than two centimeters. Employer's Exhibit 10. The administrative law judge also noted that Dr. Hansbarger found masses ranging up to 1.8 centimeters in size, aside from confluent lesions, and that Dr. Kleinerman found "a 1.6 homogenous lesion characteristic of a silicotic mass," on autopsy slide from the right upper lung. Decision and Order on Third Remand at 9; Director's Exhibit 36, 37.

> cast some doubt on whether complicated pneumoconiosis, as defined "medically," may exist, they themselves found lesions meeting the congressionally-defined condition; that is, they found requisite-sized lesions, yielded by a chronic coal mine dust disease, which were not "confluent, coincidential, or combinations" of cancerous or other non-pneumoconiotic material.

Id. Thus, the administrative law judge found that claimant was entitled to invocation of the irrebuttable presumption pursuant to Section 718.304(b), and that she established a mistake in a determination of fact under Section 725.310 (2000).[8]

Contrary to employer's assertion, we conclude that the administrative law judge's decision satisfies the APA insofar as he identified portions of the eight opinions by Drs. Perper, Green, Kahn, Klapporth, Dy, Kleinerman, Naeye and Hansbarger that he considered to be sufficient to establish that the miner had a pathological lesion of pneumoconiosis that would appear as an opacity larger than one centimeter on x-ray pursuant to Section 718.304. S*ee Perry v. Mynu Coals, Inc*. 469 F.3d 360, 365, 23 BLR 2-374, 2-384-85 (4th Cir. 2006); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because employer has not assigned specific error to the administrative law judge's characterization of the evidence, we affirm the administrative law judge's finding that claimant established complicated pneumoconiosis pursuant to Section 718.304(b), as it is supported by substantial evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer also argues that because the administrative law judge found that the miner suffered from "legal complicated pneumoconiosis not medical pneumoconiosis," claimant is not entitled to a presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203. Employer's Brief in Support of Petition for Review at 7. This argument is without merit as the administrative law judge did not make a finding of "legal pneumoconiosis;" rather, he found that claimant

[8] The administrative law judge determined that the x-ray evidence was in equipoise, since three Board-certified radiologists and B readers interpreted seven x-rays of record as positive for complicated pneumoconiosis, while three equally qualified radiologists read the same x-rays as negative for complicated pneumoconiosis. Decision and Order on Third Remand at 8. We affirm the administrative law judge's finding that claimant was unable to establish complicated pneumoconiosis under 20 C.F.R. §718.304(a), as it is unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

established complicated pneumoconiosis, which is a form of clinical pneumoconiosis. As noted by the Director, the regulation at 20 C.F.R. §718.201 defines clinical pneumoconiosis as "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. The Fourth Circuit has also recognized:

> Clinical pneumoconiosis in coal miners results from their inhalation of coal dust over an extended time. The dust irritates sensitive lung tissue, causing nodular lesions to form. The less severe form of the disease, characterized by relatively few smaller lesions, is known as "simple' pneumoconiosis. The disease may evolve, however, to the 'complicated' stage which "involves progressive massive fibrosis as a complex reaction to dust and other factors[.]"

Gulf & Western Industries v. Ling, 176 F.3d 226, 231 n.10, 21 BLR 2-570, 2-579 n.10 (4th Cir. 1999), *quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 96 S.Ct. 2882 (1976). We agree with the Director that the congressionally defined criteria for establishing the existence of complicated pneumoconiosis "do[es] not change the nature of complicated pneumoconiosis into 'legal' pneumoconiosis; [rather, it] merely define[s] the *size* of the opacities or lesions large enough to invoke the irrebuttable presumption." Director's Letter Brief at 4 (emphasis added). Thus, we affirm the administrative law judge's finding that claimant was entitled to the Section 718.203 presumption, that the miner's complicated pneumoconiosis arose out of coal mine employment, based on the miner's history of at least ten years in coal mine employment.[9] *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Additionally, we reject employer's contention that the administrative law judge erred in granting claimant's modification request without first identifying a specific mistake in a determination of fact with respect to the prior denial. Employer made this identical argument in the prior appeal, which was rejected by the Board. [*M.G.*], BRB No. 07-0375 BLA, slip op. at 8 n.7. Since employer has not set forth any valid exception to the law of the case doctrine, we reject employer's arguments with respect to Section 725.310 (2000). *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

[9] We also affirm, as unchallenged by employer on appeal, the administrative law judge's finding that the presumption at 20 C.F.R. §718.203 was not rebutted. *Skrack*, 6 BLR at 1-711; Decision and Order on Third Remand at 11.

We therefore affirm, as supported by substantial evidence, the administrative law judge's findings that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304, that she established disease causation based on the Section 718.203 presumption, which was not rebutted, and that she is entitled to modification pursuant to Section 725.310 (2000). *Mitchell*, 479 F.3d at 321, 24 BLR at 2-1; *Perry*, 469 F.3d at 365, 23 BLR at 2-384-85. Thus, we affirm the administrative law judge's finding that claimant is entitled to survivor's benefits.

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

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