BRB No. 09-0278 BLA

E.C. (Widow of R.C.) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 10/19/2009 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet Walker Rundle & Associates), Pineville, West Virginia, for claimant.

Barry H. Joyner (Carol A. DeDeo, 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 McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order - Denying Benefits (07-BLA-5532) of Administrative Law Judge Thomas M. Burke rendered 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 miner died on December 27, 2005, and claimant filed her claim for survivor's benefits on May 1, 2006. Director's Exhibits 2, 10. The administrative law judge credited the miner with seven years and six

months of coal mine employment.[1] The administrative law judge found that claimant established the existence of simple pneumoconiosis by autopsy pursuant to 20 C.F.R. §718.202(a)(2), but that claimant did not establish that the miner's simple pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Additionally, the administrative law judge found that claimant did not establish entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis by establishing that he had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding pursuant to Section 718.304. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.[2]

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).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at Section 718.304 is applicable, or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially

[1] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 3, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's crediting of the miner with seven years and six months of coal mine employment, and his findings that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but did not establish that the simple pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(a), are unchallenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

Section 718.304 provides that there is an irrebuttable presumption 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 and would be classified in 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* 20 C.F.R. §718.304.[3]

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for invocation of the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the

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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 . . . 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 1 centimeter in diameter) and would be classified in Category A, B, or C...; 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.

evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge should perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). A diagnosis of progressive massive fibrosis is equivalent to a diagnosis of "massive lesions." *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006); 20 C.F.R. §718.304(b). However, the Fourth Circuit has not overruled its holding in either *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000) or *Blankenship*, 177 F.3d at 243, 22 BLR at 560-61, that the "massive lesions" described at Section 718.304(b) are those which, when x-rayed, would show as opacities greater than one-centimeter.

The record contains no x-ray, biopsy, CT scan, or medical opinion evidence relevant to claimant's entitlement to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a) or (c). The administrative law judge found that the only relevant evidence, pursuant to Section 718.304(b), was the autopsy report completed by Dr. Huang, a pathologist. Dr. Huang diagnosed the miner with "PROGRESSIVE MASSIVE FIBROSIS, RIGHT MIDDLE AND LOWER LOBES, AND ONE COAL NODULE (1.0 CM), CONSISTENT WITH **COMPLICATED COAL WORKER'S [sic] PNEUMOCONIOSIS**." Director's Exhibit 12. Dr. Huang subsequently rendered an addendum to the autopsy to include a microscopic description of the lungs, in which he noted, "There are changes of progressive massive fibrosis in [the] right and lower lobes including at least one 1.0 cm coal nodule." Director's Exhibit 16.

The administrative law judge considered Dr. Huang's diagnosis of progressive massive fibrosis and a coal nodule measuring one-centimeter, consistent with complicated coal workers' pneumoconiosis, and found that it was insufficient to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304. Decision and Order at 8. Specifically, the administrative law judge found that because there was no medical evidence that the one-centimeter nodule diagnosed by autopsy would appear as a greater than one-centimeter opacity if seen on x-ray, he could not make the equivalency determination required by the Fourth Circuit. *Id.*

Claimant argues that the administrative law judge erred in finding that Dr. Huang's diagnosis on autopsy of progressive massive fibrosis is insufficient to establish her entitlement to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304.[4] Claimant relies on the decision by the United States Court of Appeals for the Eleventh Circuit in *Pittsburg & Midway Coal Mining Co.* [*Cornelius*], 508 F.3d 975, 987 n.7, 24 BLR 2-72, 2-94-95 n.7 (11th Cir. 2007), which specifically rejected the Fourth Circuit's requirement that an equivalency determination be made between autopsy and x-ray evidence. The Director responds that the Board need not decide whether Dr. Huang's autopsy diagnosis of progressive massive fibrosis is sufficient to establish claimant's entitlement to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304, as Dr. Huang's report is unreasoned, in that it is inconsistent and equivocal.[5]

Contrary to claimant's contention, under the applicable law in this case, the administrative law judge properly found that the progressive massive fibrosis, or the massive lesion, diagnosed on autopsy did not entitle claimant to invocation of the irrebuttable presumption pursuant to Section 718.304(b), as there was no medical evidence to establish that it would appear as an opacity of greater than one-centimeter if seen on x-ray. *See Scarbro*, 220 F.3d at 255-56, 22 BLR at 1-101; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. In *Blankenship*, the court required additional medical evidence showing that a biopsy lesion, measuring 1.3 centimeters, if x-rayed, would appear as an opacity of greater than one-centimeter, in order "[t]o determine whether

[4] The administrative law judge relied on the holding in *Clinchfield Coal Co. v. Fultz*, No. 02-1107 (4th Cir. Apr. 2, 2003), that there must be medical evidence to support the administrative law judge's equivalency determination under *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000) and *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Claimant asserts that the administrative law judge erred in relying on the Fourth Circuit's decision in *Fultz*, as it was an unpublished decision, and thus, is not binding precedent. Any error in the administrative law judge's reliance on *Fultz* is harmless, as *Fultz* merely applied existing case law in the Fourth Circuit. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] We decline to address the assertion of the Director, Office of Workers' Compensation Programs, that Dr. Huang's autopsy diagnosis of progressive massive fibrosis is insufficient to establish claimant's entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304(b), because it is unreasoned. The administrative law judge weighs the medical evidence and draws his own conclusions; the Board cannot assess the credibility of the evidence. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Blankenship's condition [met] the statutory criteria . . . ." *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562. In *Scarbro*, the court reiterated that "x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion'. . . . " *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100.

The Fourth Circuit has not overruled *Blankenship*, and thus the administrative law judge properly required claimant to establish that the progressive massive fibrosis seen on autopsy, in the form of a one-centimeter opacity, would appear as a greater than one-centimeter opacity on x-ray.[6] *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61; *see also Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003). As claimant did not submit any medical evidence so that an equivalency determination could be made, the administrative law judge properly found that the progressive massive fibrosis seen on autopsy, in the form of a one-centimeter nodule, was insufficient to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304(b). *Id.* Consequently, the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304 is affirmed, as it is in accordance with law. As the administrative law judge properly found that the record contains no other evidence to support a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), claimant is unable to establish her entitlement to benefits.[7]

[6] In *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384-85 (4th Cir. 2006), the court held that an uncontradicted diagnosis of progressive massive fibrosis with lung lesions measuring four and six centimeters "may only lead one to conclude that massive lesions were present . . . sufficient to trigger the presumption under [subsection] (b) of 20 C.F.R. §718.304." *Id.* However, *Perry* involved lesions substantially larger than one-centimeter, and there was an uncontradicted equivalency determination made by a physician, upon which the court also relied. *Id.* In this case, there is no medical evidence that the one-centimeter nodule seen on autopsy would be seen as an opacity greater than one-centimeter on x-ray.

[7] The only other evidence relevant to the miner's death was the miner's death certificate, listing cardiopulmonary arrest as the immediate cause of death with bilateral pneumonia and chronic obstructive pulmonary disease (COPD) as conditions leading to the immediate cause of death. Director's Exhibit 10. Additionally, COPD was identified as a "discharge diagnosis" on the miner's medical records from his last hospitalization. Director's Exhibit 13. As noted by the administrative law judge, the miner's COPD was not attributed to his coal mine employment, and thus the COPD entries found on the death certificate and the medical records from the miner's last hospitalization are insufficient to establish that the miner died due to pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 7 n.5.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's decision denying Black Lung benefits. Based upon the administrative law judge's crediting of the autopsy prosector's findings of complicated coal workers' pneumoconiosis, progression massive fibrosis, I would reverse the administrative law judge's decision denying benefits and remand the case for payment of benefits in this survivor's claim.

Although the administrative law judge credited the autopsy prosector's finding of complicated coal workers' pneumoconiosis, progressive massive fibrosis, he held that the evidence was insufficient to invoke the irrebuttable presumption at 20 C.F.R. §718.304, because he believed that the United States Court of Appeals for the Fourth Circuit requires medical evidence to prove that the massive lesion seen on autopsy in the form of a one-centimeter nodule, would appear on x-ray as an opacity greater than one centimeter. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). The majority holds that the administrative law judge correctly required medical evidence of an equivalency determination because the Fourth Circuit has not overruled that requirement, first set out in *Blankenship*. Yet the majority appears to recognize that language in *Perry v. Mynu*

Coals, Inc., 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006) suggests that the Fourth Circuit has retreated from the equivalency requirement. In *Perry*, the Fourth Circuit held that the administrative law judge erred in finding claimant failed to establish entitlement to the irrebuttable presumption at 20 C.F.R. §718.304(b) both because the autopsy prosector's testimony was sufficient to provide an equivalency determination and the prosector's description of massive lesions in both lungs provided a "statutory ground for application of the presumption."[8] *Id.* In other words, the Fourth Circuit found that the autopsy evidence in *Perry* provided two independent grounds to invoke the irrebuttable presumption. It is noteworthy that the *Perry* court praised the Director for recognizing that the prosector's testimony was sufficient to provide an equivalency determination and therefore, invocation of the presumption, but the court also criticized the Director for failing to argue that the prosector's diagnosis of:

> "Complicated coal worker type pneumoconiosis:
>
> Advanced anthracosis with marked Fibrosis of both upper lobes (progressive massive fibrosis)."

was sufficient to trigger the presumption under (b) of 20 C.F.R. §718.304. *Perry*, 469 F.3d at 365 n.4, 23 BLR at 2-385 n.4. Because *Perry* contained sufficient evidence to provide an equivalency determination, it was unnecessary for the court to overrule the equivalency determination requirement. Nevertheless, by recognizing that evidence of massive lesions provided "another" ground, a "statutory ground" for invocation of the presumption, the court signaled that evidence of an equivalency determination is not always necessary when autopsy or biopsy evidence is used to establish complicated pneumoconiosis at 20 C.F.R. §718.304(b). Because, according to *Perry*, the autopsy prosector's diagnosis of "PROGRESSIVE MASSIVE FIBROSIS, RIGHT MIDDLE AND LOWER LOBES, AND ONE COAL NODULE (1.0 CM), CONSISTENT WITH **COMPLICATED COAL WORKER'S [sic] PNEUMOCONIOSIS**," which the administrative law judge found was uncontradicted, is sufficient to establish the statutory ground for application of the presumption, I would hold that this evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Based upon the prosector's uncontradicted diagnosis of "coal worker's [sic] pneumoconiosis" I would reverse the administrative law judge's determination that claimant failed to prove that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(a).

[8] 30 U.S.C. §921(c)(3) provides in relevant part that the irrebuttable presumption attaches "If a miner . . . suffered from a chronic dust disease of the lung which . . . when diagnosed by biopsy or autopsy, yields massive lesions in the lung . . . ."

In his letter on appeal, the Director voiced his agreement with my interpretation of *Perry*. He stated, "In *Perry v. Mynu Coals, Inc.*, 460 F.3d 360 (4th Cir. 2006), . . . , the Fourth Circuit suggested that an equivalency determination may not always be required if it is clear that the physician diagnosed the condition contemplated in the statute." (Citation omitted). Director's August 5, 2009 letter at 2-3 n.3. The Director argues that even if an equivalency determination is not required, the prosector's report in the instant case is insufficient to support invocation of the statutory presumption because it is internally contradictory and therefore unreasoned. In support of this contention, the Director points to a statement in the doctor's microscopic descriptions: "There are changes of progressive massive fibrosis in right middle and lower lobes including at least one 1.0 cm coal nodule." Director's Exhibit 16 at 1. The Director asserts that this statement is contradicted by the doctor's statements in his gross description: "[N]o discrete palpable nodules are identified. . . . No mass lesions are identified." Director's Exhibit 16 at 2. Examination of these statements, however, reveals no contradiction. The doctor reported in his gross description that which is visible to the naked eye, and in his microscopic description, that which is visible only with the aid of the microscope.[9] It is not surprising that he was able to make findings with the assistance of the microscope which he was unable to make with the naked eye.

In sum, in light of *Perry*, 496 F.3d at 365, 23 BLR at 2-384-85, I believe the administrative law judge erred in requiring evidence of an equivalency determination despite the prosector's diagnosis of complicated coal workers' pneumoconiosis, progressive massive fibrosis, uncontradicted evidence which the administrative law judge credited; that was sufficient to establish complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304(b), 718.203(a). Accordingly, I would reverse the administrative law judge's Decision and Order denying benefits on this survivor's claim.

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REGINA C. McGRANERY
Administrative Appeals Judge

[9] Dorland's Illustrated Medical Dictionary (26th ed. 1981) defines "gross" as "coarse or large; visible to the naked eye, as gross pathology; macroscopic; taking no account of minutiae."

Dorland's defines "microscopic" as "of extremely small size; visible only by the aid of the microscope."