BRB No. 04-0947 BLA

PATRICIA BRITTEN (Widow of THEODORE BRITTEN) Claimant-Petitioner v. FLORENCE MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/23/2005 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Julie Ann Roland (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Claimant, the miner's widow, appeals the Decision and Order - Denying Benefits (03-BLA-5677) of Administrative Law Judge Daniel L. Leland rendered 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). The administrative law judge credited the miner with twenty-eight years and ten months of coal mine employment. Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence is insufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge further found that the evidence is insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, benefits were denied.

On appeal, claimant contends that the autopsy evidence shows massive lesions in the lungs and establishes invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b). Claimant urges the Board to vacate the administrative law judge's findings at 20 C.F.R. §718.304 and to remand the case for the administrative law judge to reconsider the record evidence thereunder. Employer responds, urging affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the opinions of Drs. Oesterling and Naeye are sufficient to establish invocation at 20 C.F.R. §718.304. The Director also argues that if the Board upholds the administrative law judge's crediting of Dr. Naeye's opinion over Dr. Goldblatt's autopsy report, then it may affirm the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 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).

As this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neely v. Director, OWCP*, 11 BLR 1-85 (1988). This case involves claimant's challenge to the administrative law judge's determination that claimant is not entitled to the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304.[2] *See* 20 C.F.R. §718.205(c)(3).

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[1]The miner died on February 12, 2001. Director's Exhibit 3. Claimant filed her survivor's claim for benefits on May 22, 2001. Director's Exhibit 3. The district director denied benefits in a Proposed Decision and Order issued on December 13, 2002. Director's Exhibit 29. A formal hearing was held on May 4, 2004.

[2]The administrative law judge's findings at 20 C.F.R. §§718.304(a), (c) and 718.205(c)(1), (c)(2) are affirmed as unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if the miner is suffering from or suffered from a chronic dust disease of the lung. 30 U.S.C. §921(c)(3). A chronic dust disease of the lung may be established by any one of three methods enumerated in the statutory provision and in the regulation at 20 C.F.R. §718.304: (1) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter), and would be classified as category A, B, or C under any one of three classification systems; (2) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (3) when diagnosed by means other than the previous two methods, would be a condition which could reasonably be expected to yield the same results. *See* 20 C.F.R. §718.304(a)-(c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption provided 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 the conflicts, and make a finding of fact. 20 C.F.R. §718.304; s*ee Melnick v. Consolidation Coal Corp.*, 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). Autopsy findings can support a finding of complicated pneumoconiosis where a physician diagnoses "massive lesions" or where an evidentiary basis exists for the administrative law judge to make an equivalency determination between the autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304(b); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981); *Neeley*, 11 BLR at 1-85; *Lohr v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984).

In the instant case, the administrative law judge found, at 20 C.F.R. §718.304:

> There are no x-ray interpretations in the record indicating large opacities and therefore [20 C.F.R.] §718.304(a) is inapplicable. In his autopsy report Dr. Goldblatt determined that there were confluent areas of fibrosis in the decedent's lungs that were 2 cm in size, a finding in which Dr. Rizkalla apparently concurred. However, Dr. Oesterling concluded that the lesions of pneumoconiosis in the miner's lungs were no more than 6 mm in diameter and Dr. Naeye found no evidence of massive lesions of pneumoconiosis. It is immaterial which pathologist's report should be credited as Dr. Goldblatt's finding of a 2 cm area of fibrosis is insufficient to invoke the [20 C.F.R.] §718.304 presumption at subsection (b) because he failed to make an equivalency determination that the nodules would be viewed as at least a one cm opacity on chest x-ray. *See Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14 (3d Cir. 1981); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985). Dr. Goldblatt not only failed to make the required

> equivalency determination, he admitted that complicated pneumoconiosis does not necessarily show up on x-ray. As there are no other diagnostic tests in the record (such as CT scans) subsection (c) is not applicable. The evidence does not invoke the [20 C.F.R.] §718.304 presumption.

Decision and Order at 5-6. Claimant contends that the administrative law judge committed reversible error by not determining whether Dr. Goldblatt's autopsy findings show "massive lesions in the lung," sufficient to invoke the irrebuttable presumption pursuant to 20 C.F.R. §718.304(b).[3] Claimant's Brief at 7. Claimant asserts that Dr. Goldblatt's findings of a two centimeter area of fibrosis on autopsy, as well as his other pathological findings, show "massive lesions in the lung," sufficient to invoke the irrebuttable presumption pursuant to 20 C.F.R. §718.304(b). Claimant adds, "Hence, the equivalency determination is not applicable."[4] Claimant's Brief at 3-4. Claimant submits

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[3]Dr. Goldblatt, the autopsy prosecutor, in the gross examination of the lungs, noted, "numerous black macules and nodules involving 60% of the pulmonary parenchyma with foci of fibrous consolidation up to 2 cm in the right upper lobe." Director's Exhibit 12. In the microscopic examination, Dr. Goldblatt observed, "Numerous anthracotic macules and nodules, up to 1.3 cm, are scattered throughout the pulmonary parenchyma in perivascular, peribronchial, and intraseptal locations involving 70% of the pulmonary parenchyma. There are multifocal areas of confluent fibrosis up to 2 cm, around anthracotic macules and nodules." *Id.*

[4]In conducting an equivalency determination, an administrative law judge determines whether nodules found in the lung upon autopsy or biopsy would correspond in size to large opacities viewed on x-ray film. 30 U.S.C. §921(c)(3)(C). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held in *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981), that an administrative law judge must make equivalency determinations under Section 411(c)(3) of the Act where the record contains a proper evidentiary basis for doing so. The administrative law judge in *Clites* found that the nodules described in a pathologist's autopsy report were "massive lesions in the lung" at 20 C.F.R. §718.304(b) even though those words did not appear in the report. In reaching this conclusion, the administrative law judge credited the pathologist's deposition testimony that, had the nodules seen on autopsy been x-rayed while the miner was alive, they would have shown opacities measuring between one and one and one-half centimeters. *Clites*, 663 F.2d at 16, 3 BLR at 2-89-90. In reinstating the administrative law judge's award of benefits, the Third Circuit rejected the Board's ruling that administrative law judges lack medical competence to make an equivalency determination between nodules found on autopsy and opacities on x-ray. *Clites*, 663 F.2d at 16, 3 BLR at 2-91. In the instant case, the administrative law judge erred in finding that, pursuant to *Clites* and *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), it was the duty of the

that there is no conclusive standard to determine what size a lesion must be to be considered "massive," but asserts that Dr. Goldblatt's finding of two centimeter lesions due to coal dust should be determinative because Dr. Goldblatt was the "only pathologist to view the lesion grossly." Claimant's Brief at 4. Claimant further relies on Dr. Goldblatt's deposition testimony identifying the diagnostic standards he uses. Dr. Goldblatt testified that, pursuant to the "Pathology Standards for Coal Workers' Pneumoconiosis from Archives of Pathology, Laboratory Medicine," nodules of two-centimeters are required for a diagnosis of complicated progressive massive fibrosis due to coal dust exposure, which findings he made on autopsy. Claimant's Exhibit 1 at 23. Dr. Goldblatt also testified that, pursuant to "the Atlas of Non Tumor Pathology from the Air Force Institute of Pathology, entitled Non Neoplastic Disorders of the Lower Respiratory Tract," "when nodules form conglomerates greater than one centimeter in diameter the designation of progressive massive fibrosis is appropriate from a pathologic standpoint;" he testified that his findings of two centimeter lesions due to coal dust exposure are thus consistent with a diagnosis of complicated progressive massive fibrosis by pathology. *Id.* at 16-17, 24. Claimant further relies on the administrative law judge's finding that Dr. Rizkalla "apparently concurred" with Dr. Goldblatt's finding of two centimeter lesions in the lung tissue.[5] Decision and Order at 5. Claimant concludes that if the opinions of Drs. Goldblatt and Rizkalla are credible, then he has established "massive lesions in the lung" and there is no reason for an "equivalency determination that such nodules would be viewed as at least a [one centimeter] opacity on chest x-ray." Claimant's Brief at 4.

Employer responds, arguing that the administrative law judge properly determined that claimant is not entitled to the irrebuttable presumption provided at 20 C.F.R. §718.304. The Director, in response, asserts that the administrative law judge erred in analyzing "Dr. Goldblatt's diagnosis of complicated pneumoconiosis." Director's Brief

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physician, as opposed to the administrative law judge, to make the required equivalency determination. *See* Decision and Order at 5-6.

[5]Dr. Rizkalla opined, in his consulting report dated August 26, 2002, that the miner's exposure to coal dust "affected his lungs severely with coal worker[s'] pneumoconiosis, interstitial fibrosis, centrilobular emphysema and progressive massive fibrosis." Claimant's Exhibit 6. Dr. Rizkalla disagreed with Dr. Oesterling's diagnosis of "micronodular" coal workers' pneumoconiosis. Dr. Rizkalla found that the largest nodule seen in the lung tissue slides measures "1.3 cm in greatest dimension" and that "since there are nodules exceeding 1.0 cm in greatest dimension," the miner's condition is properly characterized "as progressive massive fibrosis if the guidelines of the **Pathology Standards for Coal Workers' Pneumoconiosis,** *Arch Pathol Lab Med*, Vol 103, 7/6/79 is followed." (emphasis in original) *Id.*

at 1. The Director further argues that while the administrative law judge correctly determined that "Dr. Goldblatt did not discuss whether his diagnosis would equate to at least one centimeter by X-ray (sufficient to invoke under subsection (c)(3)(A), Drs. Oesterling and Naeye arguably did…"[6] *Id.* Further, the Director refers to the administrative law judge's finding, at 20 C.F.R. §718.205(c), that Dr. Naeye's opinion outweighs Dr. Goldblatt's opinion that pneumoconiosis was a substantial contributing cause of the miner's death. The Director concludes, "Consequently, should the Board affirm the [administrative law judge's] crediting of Dr. Naeye over Dr. Goldblatt, the Board need not address the equivalency issue." Director's Brief at 2.

It is the duty of the administrative law judge to make factual findings and credibility determinations regarding the medical evidence. *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). While the administrative law judge cited to *Clites*, he failed to determine whether the autopsy evidence is sufficient to establish invocation at 20 C.F.R. §718.304(b), as *Clites* requires him to do. *Clites*, 663 F.2d at 16, 3 BLR at 2-91; *see* Decision and Order at 6. Claimant's argument that "the equivalency determination is not applicable" because the autopsy evidence shows "massive lesions in the lung" sufficient to invoke the irrebuttable presumption of death due to pneumoconiosis under 20 C.F.R. §718.304(b), misconstrues the regulatory scheme.

[6]Dr. Oesterling testified that the largest nodule he found in the lung tissue slides measured "six millimeters in diameter," and that nodules seen on autopsy would appear as a same sized opacity when viewed on x-ray. Employer's Exhibit 10 at 28-30. Dr. Oesterling explained that "if we have tissue that is dense enough to form a nodule, it will show on x-ray and will show comparably to what it looks like in tissue." *Id.* at 29. Dr. Naeye testified that a two-centimeter lesion is "the appropriate size for the diagnosis of complicated [coal workers' pneumoconiosis]" and explained that "a lesion that size will be smaller on x-ray." Employer's Exhibit 12 at 18-19. Dr. Naeye testified that he does not dispute Dr. Goldblatt's gross description on autopsy of two-centimeter areas of fibrosis, but does dispute Dr. Goldblatt's opinion relating these findings to the miner's exposure to coal mine dust. Employer's Exhibit 12 at 28. Dr. Naeye opined that the two-centimeter areas of fibrosis identified by Dr. Goldblatt are not those indicative of complicated coal workers' pneumoconiosis, and attributed fibrotic areas seen in the lung tissues to the miner's "bouts of cardiac failure which led to episodes of pulmonary congestion, local edema and perhaps small areas of pneumonia that organized." Employer's Exhibit 9. We note that neither Dr. Oesterling's report nor Dr. Naeye's report is sufficient to establish at 20 C.F.R. §718.304(a) "one or more large opacities (greater than 1 centimeter in diameter) and would be classified by Category A, B, or C" in any one of three classification systems for radiological evidence, which are due to the miner's exposure to coal mine dust.

Pursuant to *Clites*, the administrative law judge must determine whether the autopsy findings would show opacities on x-ray of a size sufficient to establish invocation under 20 C.F.R. §718.304(a), *in order to* determine whether the autopsy evidence is sufficient to show "massive lesions in the lung" sufficient to invoke the presumption under 20 C.F.R. §718.304(b). *Clites,* 663 F.2d at 16, 3 BLR at 2-89-90; *see Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship,* 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

Furthermore, to the extent that employer and the Director rely on the administrative law judge's weighing of the autopsy evidence and resulting findings at 20 C.F.R. §718.205(c), their reliance is misplaced. At 20 C.F.R. §718.205(c), the administrative law judge considered the evidence relevant to whether claimant met her burden to establish death due to pneumoconiosis; he did not consider the evidence relevant to whether the claimant established "massive lesions in the lung," sufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304(b). *See* Decision and Order at 4-5.

Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.304. The record contains evidence which, if fully credited, may be sufficient to support a finding of invocation at 20 C.F.R. §718.304(b), specifically the opinions of Drs. Goldblatt and Rizkalla.[7] We, therefore, remand the case for the administrative law judge to consider the relevant evidence at 20 C.F.R. §718.304(b) pursuant to *Clites.* On remand, the administrative law judge must consider any finding of invocation under 20 C.F.R. §718.304(b), together with his findings at 20 C.F.R. §718.304(a) and (c). 20 C.F.R. §718.304; *Melnick,* 16 BLR at 1-34.

[7]Claimant contends that Dr. Goldblatt's opinion should be "determinative" since he was the only pathologist to view the lung tissue grossly. Dr. Goldblatt's opinion, however, is not entitled to greater weight based on his status as the autopsy prosector, unless there is a medical basis for such preference. *See generally Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order - Denying 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