

BRB Nos. 10-0708 BLA
and 11-0293 BLA

WILLODENE LINGENFELTER)	
(o/b/o and Widow of CORY)	
LINGENFELTER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 09/27/2011
FREEMAN UNITED COAL MINING)	
COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

John A. Washburn (Gould & Ratner LLP), Chicago, Illinois, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (05-BLA-5474 and 05-BLA-5475) of Administrative Law Judge Jeffrey Tureck denying benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

¹ Claimant is the surviving spouse of the deceased miner, who died on November 7, 2003. Director's Exhibit 23.

amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case, involving a miner's claim filed on September 4, 2002, and a survivor's claim filed on December 30, 2003, is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with twenty-two years of coal mine employment,² and found that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Additionally, the administrative law judge found that, because the evidence did not establish the existence of complicated pneumoconiosis, the miner was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits in the miner's claim.

In regard to the survivor's claim, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Further, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis, and he therefore found that claimant was not entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits in the survivor's claim.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding, in the miner's claim, that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Lingenfelter v. Freeman United Coal Mining Co.*, BRB Nos. 09-0280 BLA, 09-0488 BLA (Nov. 30, 2009) (unpub.). The Board, however, vacated the administrative law judge's findings, in the miner's claim and the survivor's claim, that neither the miner nor claimant was entitled to invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304. *Id.* Although the Board affirmed the administrative law judge's finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20

² The record reflects that the miner's coal mine employment was in Illinois. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

C.F.R. §718.304(b), the Board held that the administrative law judge failed to sufficiently discuss the x-ray evidence at Section 718.304(a), and the CT scan evidence at Section 718.304(c). *Id.* The Board also vacated the administrative law judge's finding, in the survivor's claim, that the evidence did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and remanded the case for further consideration of the miner's claim and the survivor's claim. *Id.*

On remand, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c), thereby precluding either the miner or claimant from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. The administrative law judge further found that the evidence did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.³

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

³ Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claims in this case, because they were filed before January 1, 2005.

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §18.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Complicated Pneumoconiosis

Claimant argues that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis, and therefore, erred in finding that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, and death due to pneumoconiosis, set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, and that the miner's death was due to pneumoconiosis, if the miner was suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). See 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 Section 718.304. The administrative law judge must first determine whether the 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 *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899 (7th Cir. 2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Claimant specifically argues that the administrative law judge erred in finding that Dr. Smith's positive interpretation of a May 22, 2001 x-ray did not establish the existence of complicated pneumoconiosis. Although Dr. Smith, a B Reader and Board-certified radiologist, interpreted the miner's May 22, 2001 x-ray as positive

for complicated pneumoconiosis, Claimant's Exhibit 5, Dr. Wheeler interpreted this x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 1. Dr. Wheeler, like Dr. Smith, is a dually-qualified B reader and Board-certified radiologist. *Id.*

On remand, the administrative law judge, in evaluating the relative weight of the x-ray evidence, accorded great weight to Dr. Wheeler's negative interpretation of the May 22, 2001 x-ray, based upon his status as a professor of radiology at Johns Hopkins University, and his service as a member of the American College of Radiology Task Force on Pneumoconiosis from 1987 to 1995. Decision and Order on Remand at 2. The administrative law judge acted within his discretion in according greater weight to Dr. Wheeler's negative interpretation, based upon his additional radiological qualifications. *See generally Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

The administrative law judge also considered interpretations of x-rays taken on May 22, 2001, November 2, 2001, December 5, 2001, and December 2, 2002, accurately noting that none of the these interpretations was positive for complicated pneumoconiosis. Decision and Order on Remand at 2-3; Director's Exhibits 11A, 13, 19. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Claimant also contends that the administrative law judge erred in finding that the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). We disagree. The record contains interpretations of CT scans taken on November 5, 2001, December 26, 2001, July 3, 2002, January 27, 2003, and September 26, 2003. Director's Exhibits 11A, 13. The administrative law judge accurately found that none of the physicians interpreting these CT scans diagnosed pneumoconiosis. Decision and Order on Remand at 3. We, therefore, affirm the administrative law judge's finding that the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).⁴ Consequently, we affirm the administrative law judge's findings that neither the miner nor claimant was entitled to invocation of the irrebuttable presumption set forth at 20

⁴ We decline to address claimant's contention that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). The Board previously rejected claimant's contentions of error, and affirmed the administrative law judge's finding pursuant to 20 C.F.R. §718.304(b). *Lingenfelter v. Freeman United Coal Mining Co.*, BRB Nos. 09-0280 BLA, 09-0488 BLA (Nov. 30, 2009) (unpub.). Claimant has not demonstrated any exception to the law of the case doctrine. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

C.F.R. §718.304. In light of this holding, we affirm the administrative law judge's denial of benefits in the miner's claim.

Death Due to Simple Pneumoconiosis

In regard to the survivor's claim, claimant argues that the administrative law judge erred in finding that the evidence did not establish that clinical pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Drs. Hnilica, Cohen, Askin, and Repsher addressed the cause of the miner's death. In her autopsy report, Dr. Hnilica listed the cause of death as coal workers' pneumoconiosis.⁵ Director's Exhibit 10A. During a deposition, Dr. Hnilica reiterated that the miner's death was caused by his coal workers' pneumoconiosis. Director's Exhibit 19A at 38-39. Dr. Cohen opined that the miner's "many years of coal mine dust exposure were significantly contributory to the development of his severe obstructive lung disease, with severe diffusion impairment, which caused him to be disabled and resulted in his purely respiratory death." Claimant's Exhibit 4.

Dr. Askin opined that the miner's death was due to "infectious bacterial pneumonia." Employer's Exhibit 4. Dr. Askin further opined that the miner's mild clinical pneumoconiosis did not have any significant effect on the miner's pulmonary function, and therefore, did not contribute to, or hasten, the miner's death. *Id.* Dr. Repsher agreed with Dr. Askin, opining that the miner's death was not caused, contributed to, or hastened, by his minimal coal workers' pneumoconiosis. Employer's Exhibit 3.

On remand, the administrative law judge clarified that, in evaluating the conflicting evidence regarding the cause of the miner's death, he attributed the greatest weight to Dr. Askin's opinion that the miner's clinical pneumoconiosis did not contribute to, or hasten, his death. Decision and Order on Remand at 3. The administrative law judge further explained that he accorded less weight to the opinions of Drs. Hnilica and Cohen, for the same reasons that he provided in addressing the conflicting evidence regarding the existence of complicated pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to clinical pneumoconiosis. We

⁵ The record also contains the miner's death certificate. Steven D. Hines, a coroner, completed the miner's death certificate, listing the miner's cause of death as coal workers' pneumoconiosis. Director's Exhibit 9A. Mr. Hines, however, testified that his opinion regarding the cause of the miner's death was based solely on Dr. Hnilica's autopsy report, not on his own independent findings. *Id.*

disagree. The administrative law judge permissibly credited Dr. Askin's opinion, that the miner's clinical pneumoconiosis did not contribute to his death, over Dr. Hnilica's contrary opinion, based upon Dr. Askin's superior credentials.⁶ See *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Moreover, the administrative law judge permissibly questioned the reliability of Dr. Cohen's opinion regarding the contribution of the miner's clinical pneumoconiosis to his death because it was based, in part, on Dr. Hnilica's discredited autopsy report. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 8-9. Dr. Repsher, the only other physician to address the cause of the miner's death, opined that the miner's minimal coal workers' pneumoconiosis did not cause, contribute to, or hasten his death. Employer's Exhibit 3. Because claimant does not raise any other contentions of error regarding the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), this finding is affirmed. We, therefore, affirm the administrative law judge's denial of benefits in the survivor's claim.

⁶ In his 2008 decision, the administrative law judge noted that, in addition to being Board-certified in Anatomic Pathology, Dr. Askin is a professor and the Director of Surgical Pathology at the Johns Hopkins Medical Institution. The administrative law judge further noted that Dr. Askin has been on medical school faculties continuously since 1973, the last twenty-seven years as a full professor, and has authored or co-authored over 150 peer-reviewed journal articles, as well as numerous books and book chapters, a large number of which concern pulmonary pathology. Decision and Order at 5. Although the administrative law judge recognized Dr. Hnilica's status as a "highly qualified pathologist," he questioned her familiarity with coal workers' pneumoconiosis, noting Dr. Hnilica's admission that, before this case, she had never diagnosed the disease. *Id.* at 4-5.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge