

BRB No. 13-0045 BLA

SHERRY LYNN ADAMS	)	
(Widow of DENNY RAY ADAMS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	DATE ISSUED: 09/25/2013
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	
	)	
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 Awarding Survivor's Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Survivor's Benefits (2010-BLA-5496) of Administrative Law Judge Stephen M. Reilly rendered on

a survivor's claim filed on September 18, 2009,<sup>1</sup> pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge found that the miner had twenty-three years of underground coal mine employment. The administrative law judge found that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis<sup>2</sup> at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, because the evidence established the existence of complicated pneumoconiosis arising out of the miner's coal mine employment.<sup>3</sup> Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Specifically, employer contends that the administrative law judge erred in crediting the opinion of Dr. Dennis,<sup>4</sup> the autopsy prosector, without considering the fact that Dr. Dennis's medical license had been suspended.<sup>5</sup> Employer contends that the Board should

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<sup>1</sup> Claimant is the widow of the miner, who died on October 16, 2008. Director's Exhibit 12. The record is devoid of evidence that the miner was receiving federal black lung benefits at the time of his death.

<sup>2</sup> Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers or 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 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; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1990).

<sup>3</sup> The administrative law judge also found that the evidence established that the miner had clinical, but not legal, pneumoconiosis and that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203.

<sup>4</sup> Dr. Dennis set forth a diagnosis of complicated pneumoconiosis in his October 17, 2008 autopsy report, stating in the "Final Anatomical Diagnosis" the presence of "Pulmonary congestion moderate to severe with progressive massive fibrosis, anthracosilicosis with progressive massive fibrosis, macular development 0.5 – 0.7 cms and macules 0.1 - 0.9 cms. One macule is 2 cms diameter." Director's Exhibit 13.

<sup>5</sup> In association with its Petition for Review and brief, employer submitted the Emergency Order of Suspension of the medical license of Dr. James A. Dennis, which

take judicial notice of the suspension of Dr. Dennis's medical license and reverse the administrative law judge's award of benefits. In the alternative, employer contends that the Board should remand the case for the administrative law judge to consider the effect of the suspension of Dr. Dennis's medical license on the credibility of his opinion.<sup>6</sup> In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. Additionally, claimant urges the Board to reject employer's contention regarding the suspension of Dr. Dennis's medical license. Claimant contends that, because the opinion of Dr. Dennis is based on the autopsy he performed on the miner in 2008, well before the 2012 suspension of his medical license, the suspension has no bearing on the credibility of his opinion. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal. Employer, in its reply brief, reiterates its arguments concerning the credibility of Dr. Dennis's opinion, the administrative law judge's consideration of Dr. Dennis's opinion, and his weighing of the relevant medical opinion evidence.<sup>7</sup>

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,

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was issued by the Kentucky Board of Medical Licensure on August 17, 2012. Subsequently, in association with its reply brief, employer submitted the Agreed Order of Surrender of the medical license of Dr. James A. Dennis to practice medicine within the Commonwealth of Kentucky, which was filed by the Kentucky Board of Medical Licensure on January 17, 2013.

<sup>6</sup> Employer maintains that the Agreed Order of Surrender, and the Complaint upon which it was based, contain information establishing that Dr. Dennis "engaged in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public." Employer's Reply Brief at 2. Employer further argues that this evidence is "valid impeachment evidence as to Dr. Dennis's character and credibility." *Id.*

<sup>7</sup> In addition to the opinion of Dr. Dennis, the autopsy prosector, the autopsy evidence consists of the opinions of Drs. Oesterling and Jarboe. Dr. Oesterling, on reviewing the slides prepared by Dr. Dennis, opined, *inter alia*, that "[t]his case lacked the necessary coalescence of nodules within the subpleural tissue for ... a diagnosis [of progressive massive fibrosis]." Director's Exhibit 19. Dr. Jarboe opined, *inter alia*, after reviewing the miner's medical records, including Dr. Dennis's autopsy report, that the miner did not have progressive massive fibrosis. Employer's Exhibit 3.

and in accordance with applicable law.<sup>8</sup> 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).

Because the evidence regarding the suspension of Dr. Dennis’s medical license could, if admitted, affect the administrative law judge’s weighing of the autopsy evidence pursuant to Section 718.304,<sup>9</sup> we vacate the administrative law judge’s Decision and Order Awarding Survivor’s Benefits and remand the case to the administrative law judge to consider whether the evidence regarding the suspension of Dr. Dennis’s medical license should be admitted into the record. *See* 20 C.F.R. §§725.455(c), 802.404(a), 802.405(a); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999)(en banc); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-46, 1-48 (1989)(en banc). If the administrative law judge admits the evidence regarding Dr. Dennis’s suspension, he must determine whether it alters the weight to which Dr. Dennis’s opinion of complicated pneumoconiosis is entitled, and the weight accorded to the other relevant medical opinion evidence on the issue. If the administrative law judge finds that Dr. Dennis’s opinion is entitled to diminished weight, the administrative law judge must reconsider his findings as to whether claimant has established the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304.

If the administrative law judge concludes that claimant cannot prove that the miner had complicated pneumoconiosis, he must determine whether claimant can establish entitlement to benefits by considering whether she is entitled to invocation of the rebuttable presumption of death due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),<sup>10</sup> or whether she has established entitlement pursuant to 20 C.F.R. Part 718.<sup>11</sup>

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<sup>8</sup> Because the miner’s last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director’s Exhibits 4, 5.

<sup>9</sup> In finding the existence of complicated pneumoconiosis established, the administrative law judge accorded greater weight to the opinion of Dr. Dennis, who was the autopsy prosector, than to the contrary opinions of Drs. Oesterling and Jarboe. Decision and Order at 9-10.

<sup>10</sup> Amended Section 411(c)(4) provides a rebuttable presumption that the miner’s death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground coal mine employment or employment in conditions substantially similar to

Accordingly, the administrative law judge's Decision and Order Awarding Survivor's Benefits is vacated, 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

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those in an underground mine. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

<sup>11</sup> In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).