

U.S. Department of Labor

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



BRB No. 16-0646 BLA

MARY LOUISE P. KAMELISKI )  
(Widow of CHARLES E. KAMELISKI) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 QUEMAHONING COLLERIES )  
 )  
 and )  
 ) DATE ISSUED: 09/20/2017  
 ROCKWOOD CASUALTY INSURANCE )  
 COMPANY )  
 )  
 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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Edensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE,  
Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05884) of Administrative Law Judge Drew A. Swank, awarding benefits on a survivor's claim<sup>1</sup> filed on November 30, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge initially denied the claim in a Decision and Order issued on March 25, 2013. Although he credited the miner with 23.42 years of underground coal mine employment<sup>2</sup> and found that the miner suffered from simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, he determined that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

Claimant appealed to the Board, but later withdrew her appeal in order to pursue modification. *Kameliski v. Quemahoning Collieries*, BRB No. 13-0325 BLA (July 2, 2013) (Order) (unpub.). On June 30, 2014, the district director granted claimant's request for modification of the denial of benefits. At employer's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing.

On modification, the administrative law judge found that the autopsy evidence established that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). The administrative law judge therefore found that claimant invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Pursuant to 20 C.F.R. §725.310, the administrative law judge therefore found a mistake in a determination of fact in his prior decision denying benefits. He further found that employer stipulated that the miner's

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on January 31, 2010. Director's Exhibit 7. The miner did not file a claim for benefits during his life. Director's Exhibit 2.

<sup>2</sup> The miner's last coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Employer further argues that the administrative law judge erred in finding that it stipulated that the miner's complicated pneumoconiosis arose out of his coal mine employment. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.<sup>3</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, 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).

In order to establish a basis for modification in a survivor's claim, where the denial of benefits related to the miner's condition and death, claimant must demonstrate that there was a mistake in a determination of fact in the prior decision. *See* 20 C.F.R. §725.310; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has the authority to consider all the evidence for any mistake in a determination of fact, including the ultimate fact of entitlement. *See Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-63 (3d Cir. 1995).

### **Complicated Pneumoconiosis**

Benefits are payable on survivors' claims when the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). 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's death was due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities 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

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner worked in underground coal mines for 23.42 years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.<sup>4</sup>

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy report of Dr. Heggere, as well as the opinions of Drs. Perper, Swedarsky, and Bush.<sup>5</sup> Dr. Heggere, the prosector, diagnosed simple coal workers' pneumoconiosis involving ten percent of the miner's lung tissue. Director's Exhibit 37. Dr. Perper, who reviewed the miner's autopsy slides and other medical evidence, opined that the miner suffered from complicated pneumoconiosis, identifying fibro-anthracotic masses measuring greater than one centimeter on lung tissue slides 14, 15, 17, 27, and 30. Director's Exhibit 52. He also noted a pneumoconiotic mass exceeding one centimeter on slide 20.<sup>6</sup> *Id.* Drs. Swedarsky and Bush, both of whom reviewed the miner's autopsy slides and other medical evidence, opined that the miner had simple pneumoconiosis but not complicated pneumoconiosis. Director's Exhibits 36, 40; Employer's Exhibits 1-4.

Although the administrative law judge found Dr. Heggere's opinion to be unclear and entitled to reduced weight, he found the pathological descriptions provided by Drs. Swedarsky and Bush of "mild or moderate" pneumoconiosis to be better documented and reasoned than Dr. Perper's diagnosis of severe fibroanthracosis, and found the opinions of Drs. Swedarsky and Bush consistent with Dr. Heggere's finding that anthracotic

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<sup>4</sup> The administrative law judge did not specify whether he was finding complicated pneumoconiosis under subsection (b) or subsection (c). Subsection (c) requires a showing of equivalence, which would bring into play the greater than one centimeter *in diameter* requirement of subsection (a) (emphasis added). This case arises in the Third Circuit, which does not require a showing of equivalence for determinations under subsection (b).

<sup>5</sup> The administrative law judge correctly noted that no chest x-ray evidence was submitted for consideration pursuant to 20 C.F.R. §718.304(a). Decision and Order at 10. Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the miner's treatment records and found that CT scans in the records reflected areas of pulmonary fibrosis, but did not "affirmatively state the size or etiology of the opacities." Decision and Order at 15. Consequently, the administrative law judge determined that claimant did not establish the existence of complicated pneumoconiosis by "means other than chest X-rays or pathological findings," pursuant to 20 C.F.R. §718.304(c). *Id.*

<sup>6</sup> Dr. Perper also diagnosed diffuse interstitial fibrosis-type pneumoconiosis, and legal pneumoconiosis based on the presence of emphysema and pulmonary cancer. Director's Exhibits 52 at 47; 53.

pigment involved up to ten percent of the miner's lung tissue. Decision and Order at 14-15.

However, the administrative law judge determined that Dr. Perper relied upon the correct legal standard to diagnose complicated pneumoconiosis, and therefore credited his opinion over the contrary opinions of Drs. Swedarsky and Bush. Decision and Order at 14-15. The administrative law judge concluded that Dr. Perper accurately described the legal standard for identifying complicated pneumoconiosis, which the administrative law judge understood to define a "large opacity" as an opacity whose longest dimension is more than 10 millimeters, or one centimeter. Decision and Order at 15; Director's Exhibit 52 at 44. The administrative law judge also determined that Dr. Perper "thoroughly" explained why a one-centimeter mass seen on autopsy would appear at least as large on a chest x-ray. Decision and Order at 15; Director's Exhibit 52 at 45. Conversely, the administrative law judge concluded that Drs. Swedarsky and Bush relied upon an erroneous legal standard for complicated pneumoconiosis, requiring lesions or nodules at autopsy to be greater than one centimeter in all dimensions, when they determined that the large lesions they observed were not complicated pneumoconiosis. Decision and Order at 14-15; Director's Exhibits 36, 40; Employer's Exhibits 1-4.

We agree with employer that the administrative law judge did not adequately resolve the conflicts in the physicians' opinions as to the nature or etiology of the masses in the miner's lungs. Employer's Brief at 15. In fact, he did not recognize the conflict. After crediting Dr. Perper's opinion that the nodules he saw that were greater than one centimeter constituted complicated pneumoconiosis, the administrative law judge mischaracterized the opinions of Drs. Swedarsky and Bush as additional evidence supporting a finding of complicated pneumoconiosis. Decision and Order at 14-15. The administrative law judge determined that Drs. Swedarsky and Bush both "acknowledge finding a lesion of coal workers' pneumoconiosis measuring at least a centimeter in one direction," and thus concluded that each had also observed complicated pneumoconiosis, notwithstanding their use of what the administrative law judge believed to be an erroneous legal standard. *Id.* at 15.

The record reflects, however, that Drs. Swedarsky and Bush believed the lesions they observed that were larger than one centimeter did not have the characteristics of complicated pneumoconiosis.<sup>7</sup> Employer's Exhibit 3 at 16-20, 65-72; 4. Neither reported observing a lesion of clinical pneumoconiosis over one centimeter in even one

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<sup>7</sup> Drs. Swedarsky and Bush set forth their full opinions at great length, in multiple reports and depositions. We note certain portions of their opinions here to illustrate their disagreement with Dr. Perper.

dimension; instead, both disagreed with Dr. Perper about the nature of the large lesions that Dr. Perper identified as complicated pneumoconiosis. Dr. Swedarsky opined that the miner suffered from mild simple pneumoconiosis with associated lesions one to two millimeters in size. Director's Exhibit 40. He testified that the mass seen on Slide 17 is a one-centimeter aggregate of nodules, representing a lymph node or an area of granulomas due to the miner's staph pneumonia, and that Slide 20 showed plaque-like linear lesions measuring one centimeter in length. Employer's Exhibit 3 at 17-18, 65, 71-72. Dr. Swedarsky also opined that while slide 14 showed a possible early coal nodule, such nodules are usually less than one centimeter in diameter. Director's Exhibit 40. Similarly, Dr. Bush concluded that the miner suffered from mild to moderate simple pneumoconiosis, with the associated lesions measuring up to a half-centimeter in diameter. Director's Exhibit 36. Dr. Bush opined that the 1.37-centimeter mass described by Dr. Perper on Slide 20 was, in fact, a scar of unclear origin that did not significantly affect the parenchyma and was not heavily pigmented, contrary to the criteria for progressive massive fibrosis.<sup>8</sup> Employer's Exhibit 4.

By failing to resolve the differences in the physicians' opinion on the existence and etiology of any massive lesions, the administrative law judge failed to comply with the requirements of the Administrative Procedure Act (APA), which requires that every adjudicatory decision 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165. Because complicated pneumoconiosis, when diagnosed by autopsy evidence, is the result of "a chronic dust disease of the lung" which "yields massive lesions in the lung," 20 C.F.R. §718.304(b), we cannot say the administrative law judge's error was harmless. This is particularly so given the administrative law judge's determination that the pathological descriptions offered by Drs. Swedarsky and Bush are better reasoned and documented than those of Dr. Perper.

We therefore vacate the administrative law judge's determination that the autopsy evidence establishes complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), and remand this case for further consideration.<sup>9</sup> *See Wojtowicz*, 12 BLR at 1-165; *Tackett v.*

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<sup>8</sup> According to Dr. Bush, who cited a journal called ARCHIVES OF PATHOLOGY AND LABORATORY MEDICINE, lesions that meet the criteria for progressive massive fibrosis are "solid, heavily pigmented, rubbery to hard[,] and frequently cross and obliterate lobar and lesser fissures." Employer's Exhibit 4 at 1 (not paginated).

<sup>9</sup> In addition, we note that the administrative law judge erred in discounting Dr. Heggere's autopsy report. The administrative law judge found Dr. Heggere's opinion that the miner had simple pneumoconiosis "unclear," because he could not determine

*Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Decision and Order at 15. Consequently, we also vacate the administrative law judge's determination that claimant established a mistake of fact in the prior denial of benefits.

On remand, the administrative law judge must reconsider the autopsy evidence, determine whether it supports a finding of "massive lesions" resulting from "a chronic dust disease of the lung," pursuant to 20 C.F.R. §718.304(b), and explain his findings and credibility determinations. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283, 24 BLR 2-269, 2-280-81 (4th Cir. 2010); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

### **Causation of Pneumoconiosis**

In the interest of judicial economy, we address and reject, on the basis of harmless error, employer's argument that the administrative law judge erred in determining that employer's prior stipulation that the miner's simple pneumoconiosis arose out of coal mine employment extended to the miner's complicated pneumoconiosis.<sup>10</sup> Employer's Brief at 16-18. Because the miner had 23.42 years of coal mine employment, the administrative law judge properly found that claimant invoked the rebuttable presumption at 20 C.F.R. §718.203(b) that the miner's pneumoconiosis arose out of coal mine employment. Decision and Order at 16. Employer does not argue that it could rebut the presumption, nor does it point to evidence that it believes could do so. Therefore, any error by the administrative law judge regarding the effect of employer's earlier stipulation regarding simple pneumoconiosis would be harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, if the administrative law judge finds on

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whether Dr. Heggere's diagnosis of coal macules measuring up to one-half of a centimeter "refers to the diameter or a maximal dimension." Decision and Order at 15. Given Dr. Heggere's conclusion that the miner had simple but not complicated pneumoconiosis, the administrative law judge failed to explain what was unclear about Dr. Heggere's diagnosis of macules that size, and failed to resolve the conflict between Dr. Heggere's opinion and his finding of complicated pneumoconiosis. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

<sup>10</sup> The administrative law judge determined that at the hearing when this case came before him the first time, employer withdrew controversion of whether the miner's pneumoconiosis arose out of his coal mine employment. Decision and Order at 16; Director's Exhibit 37 at 6.

remand that the evidence establishes the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), then claimant will have established that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

Accordingly, the administrative law judge's Decision and Order 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.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge