

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0383 BLA

MARY CALTAGARONE)
(Widow of WILLIAM M. CALTAGARONE))

Claimant-Petitioner)

v.)

KNISELEY COAL COMPANY,)
INCORPORATED)

DATE ISSUED: 09/20/2019

and)

AMERICAN MINING 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 Denying Request for Modification of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Request for Modification (2017-BLA-05999) of Administrative Law Judge Drew A. Swank rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act) (2012). This case involves a request for modification of the denial of a miner's claim filed on April 22, 2013.²

In his initial decision, the administrative law judge credited the miner with 30.74 years of coal mine employment, based on the parties' stipulation. He also found claimant established simple coal workers' pneumoconiosis based on the autopsy evidence but did not establish complicated pneumoconiosis or total disability and, thus, was not entitled to benefits.

Claimant requested modification, asserting the administrative law judge erred in weighing the autopsy evidence of complicated pneumoconiosis. The administrative law judge determined claimant's request for modification would render justice under the Act, but concluded claimant failed to establish a mistake in a determination of fact in the prior denial of benefits. Accordingly, the administrative law judge denied claimant's request for modification.

On appeal, claimant contends the administrative law judge did not properly weigh the autopsy reports in concluding she did not establish the existence of complicated pneumoconiosis. Employer/carrier (employer) urges the Board to affirm the denial of claimant's modification request. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

¹ Claimant is the widow of the miner, who died on January 15, 2014. Director's Exhibit 33. She is pursuing the claim on behalf of his estate. *Id.*

² The administrative law judge issued a Decision and Order Denying Benefits on September 29, 2015 (2014-BLA-05501). Director's Exhibit 28. On June 22, 2016, claimant timely requested modification and the district director issued a proposed Decision and Order denying claimant's request on March 31, 2017. Director's Exhibits 29, 37. Claimant requested a hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 38, 40.

evidence and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a miner’s claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact.⁴ 20 C.F.R. §725.310(a). When a request for modification is filed, the administrative law judge must reconsider the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large 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 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. The administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc). Autopsy evidence 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. J & L Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981).

In evaluating the autopsy evidence, the administrative law judge considered the opinions of Drs. Qian, Perper, and Oesterling. Decision and Order at 4-9; Director’s Exhibits 25-26, 31, 36. Dr. Qian, the autopsy prosector, did not identify any lesions or nodules greater than one centimeter due to coal workers’ pneumoconiosis or describe any massive lesions in the lungs. Decision and Order at 8; Director’s Exhibit 26. Drs. Perper and Oesterling concur that the autopsy slides show a pneumoconiotic lesion measuring 1.1 cm in length, but not diameter, but disagree as to whether this lesion is simple or

³ Because the miner’s last coal mine employment was in Pennsylvania, we 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 (1980) (en banc); Director’s Exhibits 5-6.

⁴ The administrative law judge noted because the miner is deceased, claimant cannot establish modification based on a change in condition. Decision and Order at 2.

complicated pneumoconiosis. Decision and Order at 8; Director's Exhibits 25, 31. Dr. Perper opined the lesion was consistent with complicated pneumoconiosis and would appear on x-ray as a lesion greater than one centimeter. Director's Exhibit 31. Dr. Oesterling opined the lesion represented simple pneumoconiosis, testifying there was "an area that comes close to being large enough [in] one dimension to say this is complicated coal workers' pneumoconiosis, but in looking at that histologically, two-thirds of that lesion are normal reactive fibrotic process and are unrelated to the dust that has produced a small micronodule on the one pole." Director's Exhibit 25 (Oesterling Deposition at 15).

The administrative law judge then noted the x-ray evidence was negative for pneumoconiosis and the only computed tomography (CT) scan did not identify any findings of coal workers' pneumoconiosis or any large masses. Decision and Order at 8-9. Further, he observed none of the medical opinions or treatment records documented a condition that would produce massive lesions in the miner's lungs.⁵ *Id.* at 9. Thus, the administrative law judge concluded that Dr. Perper's opinion "standing alone" was not sufficient to establish complicated pneumoconiosis.⁶ Decision and Order at 9.

We agree with claimant that the administrative law judge's evaluation of the evidence cannot be affirmed. While the administrative law judge noted the disagreement between Drs. Perper and Oesterling as to the whether the 1.1 cm lesion they observed on autopsy is complicated pneumoconiosis, he did not address the credibility of their opinions or otherwise resolve this conflict.⁷ *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354, 21 BLR 2-83, 2-87 (3d Cir. 1997). Further, he did not explain why the negative x-rays, CT scan, treatment records, and medical reports are more credible than the autopsy evidence identifying the presence of a 1.1 cm lesion and serve to undermine Dr. Perper's

⁵ The administrative law judge noted Dr. Go, who reviewed the record and authored a medical report that claimant submitted with his initial case, also diagnosed complicated pneumoconiosis "based on Dr. Perper's microscopic findings." Decision and Order at 9; Director's Exhibit 26. The administrative law judge did not state what weight he accorded Dr. Go or otherwise address his opinion.

⁶ Claimant does not challenge the administrative law judge's findings at 20 C.F.R. §718.304(a), (c). Therefore, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

⁷ In his initial Decision and Order Denying Benefits, the administrative law judge purported to find Dr. Oesterling's opinion on complicated pneumoconiosis more "convincing" than Dr. Perper's, but he did not explain this finding. Decision and Order Denying Benefits at 11.

opinion.⁸ See *Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-626 (6th Cir. 1999) (administrative law judge may reasonably accorded the greatest weight to autopsy evidence as the most reliable evidence regarding the existence of complicated pneumoconiosis); *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985) (autopsy evidence generally is the most reliable evidence for determining the existence of pneumoconiosis); *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-691 (1985).

By failing to resolve the differences in the physicians' opinions on the etiology of the 1.1 cm lesion or explain his weighing of the evidence, the administrative law judge did not 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 v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 8-9. Consequently, we must vacate the administrative law judge's finding claimant did not establish complicated pneumoconiosis. Thus, we also vacate his denial of claimant's request for modification.

On remand, the administrative law judge must resolve the conflict between Drs. Perper and Oesterling as to whether the 1.1 cm lesion they observed is complicated pneumoconiosis and determine whether the autopsy evidence, as a whole, establishes

⁸ Imaging evidence goes primarily to the existence of a lesion, which is not in dispute. Moreover, Dr. Go explained the absence of x-ray evidence is not dispositive, stating:

[Claimant] had clear autopsy evidence of complicated coal workers' pneumoconiosis. The consulting pathologist Dr. Perper identified a pneumoconiotic lesion measuring greater than 1 cm in diameter. A lesion of similar size was not reported on chest x-rays performed during [claimant's] life. However, chest x-rays are neither sensitive nor specific in the identification of pathologically proven progressive massive fibrosis. Vallyathan et al. found in a series of miners that 22% of cases of autopsy-proven progressive massive fibrosis did not have corresponding large opacities on chest x-ray prior to death. The absence of a documented finding of large opacities consistent with complicated pneumoconiosis on chest CT in [claimant's] case may occur for multiple reasons, including obscuration by other pathology and the orientation of the nodule relative to the imaging plane.

complicated pneumoconiosis. *See* 20 C.F.R. §718.304(b). When weighing the evidence, the administrative law judge should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge should also consider claimant’s argument that Dr. Oesterling’s opinion is based in part on a diagnostic criterion that is contrary to the regulations.⁹ Claimant’s Brief at 4; Director’s Exhibit 25 at 30.

Next, the administrative law judge must reconsider all of the relevant evidence, including Dr. Go’s opinion, and determine whether claimant has established the existence of complicated pneumoconiosis. 20 C.F.R. §718.304; *see Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34. In accordance with the APA, the administrative law judge must explain the bases for his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. If the administrative law judge determines that the evidence does not establish complicated pneumoconiosis, he may reinstate his denial of claimant’s request for modification. If he determines claimant has established complicated pneumoconiosis, however, claimant is entitled to an award of benefits. 20 C.F.R. §718.304

⁹ Dr. Oesterling espoused the belief that a pleural lesion must be 1 cm in all directions in order to qualify as complicated pneumoconiosis. Director’s Exhibit 25 (Dr. Oesterling’s Deposition) at 18, 30. As the Department of Labor has declined to adopt a specific numerical criterion for the pathological diagnosis of complicated pneumoconiosis, Dr. Oesterling’s diagnostic medical criteria are not controlling under the regulations. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-103-04; *see also The Pittsburg & Midway Coal Mining Co. [Cornelius]*, 508 F.3d 975, 984, 24 BLR 2-72, 2-88 (11th Cir. 2007) (observing that neither the Act nor the regulations defines the term “massive lesions”). Notably, the ILO classification form used for the interpretation of x-rays defines Category A opacities as those “[h]aving a *greatest* diameter exceeding about 10 mm” *See* Form CM-933 (emphasis added).

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification 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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge