

BRB No. 94-2666 BLA

GINA RICHARDSON)	
(Widow of ROY RICHARDSON))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
MABEN ENERGY CORPORATION)	
)	
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 of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Jack E. McVey, Midway, West Virginia, for claimant.

W.F. Richmond, Jr. (Abrams, Byron, Henderson & Richmond), Beckley, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (93-BLA-0460) of Administrative

¹ Claimant is Gina Richardson, widow of the miner, Roy Richardson, who died on December 23, 1991. Director's Exhibit 19. Claimant filed her survivor's claim on February 20, 1992. Director's Exhibit 1. The miner's claim, filed on March 17, 1988, is not before the Board. Director's Exhibit 45.

Law Judge John C. Holmes denying benefits on a claim 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 thirty-five years of coal mine employment, found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a), and determined that the evidence was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred by failing to invoke the Section 411(c)(3) presumption of death due to pneumoconiosis, 30 U.S.C. § 921(c)(3), as implemented at 20 C.F.R. §718.304. Claimant's Brief at 1-3. Employer urges affirmance. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the evidence establishes the existence of complicated pneumoconiosis and that, therefore, the administrative law judge should have invoked the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. Claimant's Brief at 1-3. Section 718.304 provides in part that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which "when diagnosed by biopsy or autopsy, yields massive lesions in the lung." 20 C.F.R. §718.304(b).³

² We affirm as unchallenged on appeal the administrative law judge's findings regarding the length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a) and 718.205(c). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Sections 718.304(a) and (c), which provide for the diagnosis of complicated pneumoconiosis by x-ray or by other means yielding results equivalent to x-ray,

In their autopsy report, Drs. Chang and Lee diagnosed coal workers' pneumoconiosis and described "many macular and blackish nodules ranging from 3 mm. to 12 mm. . . . macronodular lesions measur[ing] from 7 mm. to 1.2 mm." (sic) that "appear[ed] to have central hyalinization from silicosis." Director's Exhibit 26 at 6, 8. They opined that pneumoconiosis was not a major contributing factor to the miner's death, but noted their finding of "several macronodular lesions from exposure to coal dust." Director's Exhibit 26 at 1-2. Drs. Naeye and Hansbarger reviewed the autopsy report and slides and diagnosed simple pneumoconiosis. Director's Exhibits 27, 39.

Pursuant to Section 718.304, the administrative law judge must weigh all the relevant evidence on the question of whether complicated pneumoconiosis is present. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). If the record contains any evidence of complicated pneumoconiosis, the administrative law judge must specifically address this evidence and explain his weighing of it. *Shultz v. Borgman Coal Co.*, 1 BLR 1-233 (1977).

biopsy, or autopsy diagnosis, are inapplicable because the record contains no x-ray evidence of complicated pneumoconiosis or any evidentiary basis for an equivalency finding. See *Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985)(physician must state that nodules revealed on autopsy would be greater than 1 cm. in diameter if seen on x-ray to support equivalency finding).

In this case, the autopsy prosecutors' report is legally sufficient, if credited, to establish the existence of complicated pneumoconiosis. See *Gruller v. BethEnergy Mines Inc.*, 16 BLR 1-3 (1991). Because the administrative law judge failed to consider the question of complicated pneumoconiosis or weigh the autopsy report against the conflicting evidence, see *Lester, supra*; *Melnick, supra*; *Shultz, supra*, we remand this case for him to do so.⁴ The administrative law judge is instructed that if on remand he invokes the irrebuttable presumption, he must then render findings pursuant to 20 C.F.R. §718.203(b). See *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988).

Claimant also asserts that Dr. Naeye's finding of cor pulmonale, Director's Exhibit 27, and Dr. Aburahma's notation of congestive heart failure, Director's Exhibit 42, support invocation of the irrebuttable presumption. Claimant's Brief at 2. We reject this contention because these findings are not evidence of complicated pneumoconiosis. Compare 20 C.F.R. §718.204(c)(3) with 20 C.F.R. §718.304.

⁴ We note the discrepancy in the autopsy report concerning the measurement of the nodules seen on autopsy--12 mm. versus 1.2 mm.--and instruct the administrative law judge to resolve this inconsistency on remand. See *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge

_____REGINA C.
McGRANERY
Administrative Appeals Judge