

BRB No. 02-0365 BLA

THELMA BRAENOVICH)
(Survivor of and o/b/o)
STOIN BRAENOVICH))

Claimant-Respondent)

v.)

CANNELTON INDUSTRIES,)
INCORPORATED/CYPRESS AMAX)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)

Party-in-Interest)

DATE ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin, James M. Talbert-Slagle and Jennifer L. Nelson (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Kathy L. Snyder and Douglas A. Smoot (Jackson & Kelly), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals

Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand - Awarding Benefits (98-BLA-1179) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) 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).¹

This case is before the Board for the second time. The Board first considered this case in *Braenovich v. Cannelton Industries Inc.*, BRB No. 00-0727 BLA (Apr. 24, 2001)(unpublished), wherein the Board remanded the case to the administrative law judge. The administrative law judge awarded benefits by Decision and Order on Remand dated January 18, 2002. Employer again appealed to the Board. By Order dated August 5, 2002, the Board granted employer's Motion for Oral Argument.² Oral Argument was held on

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The Board specified the following issues for the Oral Argument:

1. Whether the provisions of 20 C.F.R. §718.304(c) are applicable where there is evidence available under both 20 C.F.R. §718.304(a) and (b)?

October 16, 2002 in Richmond, Virginia.

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2. Assuming 20 C.F.R. §718.304(c) is applicable where there is evidence available under 20 C.F.R. §718.304(a) and (b), is the administrative law judge's finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c) in the instant case rational and supported by substantial evidence.

Board's Order dated August 5, 2002.

The pertinent background in this case is as follows: In its 2001 decision, the Board considered employer's appeal of the administrative law judge's Decision and Order dated March 15, 2000. In that decision, the administrative law judge found that claimant, the miner's widow, established a material change in conditions under 20 C.F.R. §725.309(d) (2000) based on employer's concession that the miner had simple pneumoconiosis.³ The administrative law judge also found that the irrebuttable presumption of total disability and death due to pneumoconiosis was invoked pursuant to 20 C.F.R. §718.304(c) (2000). Specifically, the administrative law judge determined that the x-ray evidence of record was insufficient to support a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(a) (2000). The administrative law judge further found that, although the biopsy and autopsy evidence did not contain any reference to massive lesions in the miner's lungs, the pathologists of record rendered findings which permitted the administrative law judge to make an equivalency determination in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999). The administrative law judge determined, based on the opinions of Drs. Green and Koenig, that the 1.5 centimeter lesion observed on autopsy would have produced an opacity of equivalent size, if viewed on a chest x-ray. The administrative law judge found, therefore, that the irrebuttable presumption of total disability and death due to pneumoconiosis was invoked under 20 C.F.R. §718.304(c) (2000). Accordingly, the administrative law judge awarded benefits. In a Supplemental Decision and Order, the administrative law judge granted claimant's counsel's request for attorney's fees, with the exception of \$58.95 in postal expenses.

³ The miner's October 10, 1979 application for benefits was denied on August 21, 1980 based on the miner's failure to establish any element of entitlement. Director's Exhibit 46. The miner's second claim, filed June 18, 1996, was denied on September 17, 1996 based on the miner's failure to establish a material change in conditions under 20 C.F.R. §725.309 (2000). Director's Exhibit 45. The miner died on December 6, 1996. Director's Exhibit 7. Claimant, the miner's surviving spouse, filed an application for survivor's benefits on February 19, 1997 and requested modification of the denial of the miner's claim under 20 C.F.R. §725.310 (2000). Director's Exhibits 1, 45.

On appeal, the Board noted the applicability of the United States Court of Appeals for the Fourth Circuit's decision in *Eastern Associated Coal Corp v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), holding that an administrative law judge must weigh together all evidence pertinent to the issue of complicated pneumoconiosis in determining whether the irrebuttable presumption of total disability and death due to pneumoconiosis provided at 20 C.F.R. §718.304 is invoked. Because the administrative law judge did not have the benefit of the Fourth Circuit's July 2000 *Scarbro* decision at the time he rendered his Decision and Order in March 2000, the Board vacated the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis under 20 C.F.R. §718.304(c). The Board thus remanded the case to the administrative law judge for reconsideration of the medical evidence relevant to this issue in accordance with *Scarbro*.

The Board next noted its disagreement with employer's argument that the administrative law judge should have determined whether the appropriate pathological standard for the diagnosis of complicated pneumoconiosis is one centimeter, as Dr. Green advocated, or two centimeters, as endorsed by Drs. Kleinerman and Naeye. The Board stated:

As the administrative law judge indicated, in *Blankenship*, the Fourth Circuit held that because the irrebuttable presumption found at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by Section 718.304, provides three different ways of diagnosing complicated pneumoconiosis, the administrative law judge must make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption, *i.e.*, if a "massive lesion" is found on biopsy, it would appear as an opacity greater than one centimeter in diameter on an x-ray.

Thus, the central question does not concern the size of the lesion viewed on biopsy or autopsy; it concerns the size of the lesion as it would appear on x-ray. Indeed, the court in *Blankenship* declined to adopt the two centimeter pathologic standard, noting that the Department of Labor could engage in a single fact-finding exercise to determine how large a lesion must be in order to appear on an x-ray as a greater than one centimeter opacity and thereafter promulgate a rule imposing this finding on all future cases. The Department of Labor has not undertaken this fact-finding mission. *See Blankenship, supra*; 65 Fed.Reg. 80,051 (2000) (to be codified at 20 C.F.R. §718.304). Thus, the administrative law judge did not err in declining to resolve the conflict between the pathologic standard advocated by Drs. Kleinerman and Naeye and

that endorsed by Drs. Green and Koenig.

Braenovich, slip op. at 4-5.

The Board next found no merit in employer's assertion that in rendering the equivalency determination, the administrative law judge relied solely upon Dr. Green's qualifications and did not fully address the contrary opinions of Drs. Kleinerman, Naeye, Fino, Hutchins, Castle and Zaldivar. The Board held that the administrative law judge had properly reviewed the relevant medical reports and had rationally determined that inasmuch as no physician of record disputed Dr. Green's assertion that "the 1.5 centimeter lesion [seen on autopsy] would appear on x-ray as an opacity larger than one centimeter in size," Dr. Green's opinion supported a finding that the miner had complicated pneumoconiosis. *Braenovich*, slip op. at 5.⁴ The Board added that the administrative law judge, in rendering this finding, noted correctly that Dr. Kleinerman acknowledged that the size of an opacity on an x-ray can correlate with the size of a lesion observed on autopsy. *Braenovich*, slip op. at 6. The Board further held that the administrative law judge rationally determined that Dr.

⁴ Dr. Green specifically explained his disagreement with pathological standards requiring a two centimeter lesion for a diagnosis of pulmonary massive fibrosis where radiological standards properly require a one centimeter in diameter lesion. He opined, "There are now good studies and the advent of CT scans which show that the size [of a nodule seen] on the x-ray is equivalent to the size in real life. Thus today there is no reason to have two differing standards, one based on radiology, the other on pathology." Claimant's Exhibit 1. Dr. Green further opined that there is a ten to fifteen percent shrinkage of tissue when it is cut and prepared for examination. Dr. Green added:

The lesion that I measured as 1.1 cm across was, in fact, only part of a larger lesion, presumably the 1.5 cm lesion documented by the pathologist at autopsy. Finally, with regard to the pathologic definition of [progressive massive fibrosis], it has always been my policy, now and when I was Head of Pathology at the National Institute for Occupational Safety and Health in Morgantown, West Virginia, to diagnose lesions measuring greater than 1 cm in diameter pathologically as progressive massive fibrosis. I did this to be in accord with the radiological definition. Hence it is my view that Mr. Braenovich had [progressive massive fibrosis] as defined either radiologically or pathologically.

Id.

Zaldivar did not rule out the possibility that opacity size and lesion size could coincide, but rather stated that there was no reliable study establishing this fact. *Braenovich*, slip op. at 5. The Board also upheld the administrative law judge's crediting of Dr. Green's opinion over Dr. Zaldivar's opinion, based on Dr. Green's experience regarding the subject of coal workers' pneumoconiosis. *Braenovich*, slip op. at 5-6. Based on the foregoing, the Board affirmed the administrative law judge's finding that Dr. Green's opinion, as corroborated by Dr. Koenig's report, supports a finding of invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304(c). The Board instructed the administrative law judge, on remand, to weigh all of the relevant evidence together in accordance with *Scarbro* in order to determine whether the irrebuttable presumption of total disability and death due to pneumoconiosis is invoked.

In a footnote regarding invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis at 20 C.F.R. §718.304, the Board stated:

Employer also asserts that the administrative law judge was not required to make an equivalency determination, as the record contains evidence which falls within the categories established by 20 C.F.R. §718.304(a) and (b). We reject this argument, as the United States Court of Appeals for the Fourth Circuit has not indicated that the holdings in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), and *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999), are limited to cases in which there is no x-ray, biopsy, or autopsy evidence.

Braenovich, slip op. at 5.

Lastly, the Board found merit in employer's arguments challenging the administrative law judge's attorney fee award and vacated the fee award because the administrative law judge's findings did not comport with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

In his Decision and Order on Remand which is the subject of the instant appeal, the administrative law judge awarded benefits and an attorney fee. Pursuant to the Board's instructions on the merits of the claims, the administrative law judge initially addressed the requirements of *Scarbro*. The administrative law judge found:

Though the preponderance of the chest x-ray evidence itself did not establish the existence of pneumoconiosis, [20 C.F.R.] §718.304(a) provided the benchmark upon which the equivalency determination was made - an opacity on a chest x-ray greater than the one centimeter. The chest x-ray evidence

represented the initially-best available type of evidence to determine the presence or the absence of pneumoconiosis. Then, autopsy evidence became available. Autopsy evidence has long been held as a more reliable indicator as to the presence or absence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). Though the autopsy evidence, on its face, did not diagnose massive lesions or the existence of complicated pneumoconiosis at [20 C.F.R.] §718.304(b), it provided the measurements to compare against the benchmark set in [20 C.F.R.] §718.304(a). I found that the preponderance of the evidence supported a conclusion that the 1.5 centimeter lesion observed on autopsy would have produced an opacity of equal size if viewed on a chest x-ray. In weighing the different types of evidence at [20 C.F.R.] §§718.304(a)-(c), the more probative autopsy evidence diminished the weight of the preponderance of the chest x-ray evidence. The autopsy evidence bore out the minority opinion of the chest x-ray evidence. It supported the interpretation of board-certified radiologist Dr. Patel. Thus, I relied on the autopsy evidence over the preponderance of the chest x-ray evidence. Inherent in reaching my ultimate determination that the [20 C.F.R.] §718.304 irrebuttable presumption was invoked, I used [20 C.F.R.] §718.304(c) as a mechanism by which [to] make the equivalency determination, to compare the measurements provided by the autopsy evidence at [20 C.F.R.] §718.304(b) to the benchmark set at [20 C.F.R.] §718.304(a). The physician opinion evidence, of course, provided the backdrop information to flesh out the issues and reach this determination. The Benefits Review Board affirmed my finding that Dr. Green's opinion, as corroborated by Dr. Koenig's report, supported a determination that the miner had complicated pneumoconiosis pursuant to [20 C.F.R.] §718.304(c).

Upon weighing all of the evidence relevant to the existence of complicated pneumoconiosis together, I find that the [20 C.F.R.] §718.304 irrebuttable presumption is invoked. I continue to find that the [20 C.F.R.] §718.203(b) presumption is not rebutted. I continue to find that Claimant is entitled to benefits in both claims.

Decision and Order on Remand at 2-3.

The administrative law judge also awarded an attorney fee to claimant's counsel. Pursuant to the Board's remand instructions, the administrative law judge provided an explanation for his finding that counsel's \$200 hourly rate was not excessive. The administrative law judge next addressed objections to the fee petition which he previously had failed to do. The administrative law judge ultimately disallowed a total of 15.75 hours from the 68 hours claimant's counsel requested. He indicated that this disallowance translated into a deduction of \$3,150.00 from the

\$17,682.02 previously awarded. The administrative law judge thus modified the attorney fee award to \$14,532.02. Decision and Order on Remand at 6.

On appeal, employer contends that the administrative law judge committed reversible error in determining that the evidence of record is sufficient to invoke the irrebuttable presumption of total disability and death due to pneumoconiosis under 20 C.F.R. §718.304. Employer also alleges error in the administrative law judge's award of attorney fees. Claimant and the Director, Office of Workers' Compensation Programs (the Director), seek affirmance of the decision below, arguing that the administrative law judge's decision is rational, in accordance with law and supported by substantial evidence.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Administrative Law Judge's Equivalency Determination

We first address employer's contention that it was irrational for the administrative law judge to find invocation established under 20 C.F.R. §718.304(c), based on his determination that the preponderance of the evidence supports the conclusion that the 1.5 centimeter lesion observed on autopsy would have produced an opacity of equivalent size if viewed on a chest x-ray, *see* Decision and Order on Remand at 2-3, since he also found that the x-ray evidence and the autopsy evidence did not establish the existence of an opacity of similar size under 20 C.F.R. §718.304(a) and (b). Employer argues that in this case, in contrast to *Blankenship*, multiple chest x-ray interpretations are available, which the administrative law judge determined do not show opacities of sufficient size to support a finding of complicated pneumoconiosis. Employer submits that the lesions found on autopsy would not have shown as opacities greater than one centimeter on x-ray. Employer argues, "If the lesions found on autopsy, theoretically, 'would have showed' as large opacities, the x-ray interpretations available 'would have' been positive for complicated pneumoconiosis." Employer's Brief at 8-9. Employer continues that the administrative law judge's determination that the autopsy evidence ultimately "bore out the minority opinion of the chest x-ray evidence" and supported the July 31, 1998 x-ray reading of Dr. Patel which was positive for complicated pneumoconiosis, *see* Decision and Order on Remand at 2-3, is irrational and cannot be reconciled with the administrative law judge's finding that Dr. Patel's positive reading was outweighed by the preponderance of the x-ray evidence.

In response, claimant contends that the administrative law judge properly found that

the 1.5 centimeter lesion observed on autopsy would have produced an opacity of equal size if viewed on a chest x-ray, based on his crediting of Dr. Green's opinion that the size of an opacity on an x-ray is equivalent to its size in real life. *See* Claimant's Exhibit 1. Claimant also notes Dr. Kleinerman's testimony that he agreed with Dr. Green that there is a one-to-one correlation between the size of an opacity on x-ray and on autopsy. *See* Director's Exhibit 8 at 49. Claimant further argues that the administrative law judge rationally relied on the autopsy evidence, over the preponderance of the x-ray evidence, to find invocation of the irrebuttable presumption. The Director contends that the administrative law judge's equivalency determination "is not nullified" because he previously concluded that the x-ray evidence, viewed in isolation, does not support invocation of the irrebuttable presumption. The Director continues:

Although the sequence in which the [administrative law judge] evaluated the evidence is confusing, his global interpretation of the evidence is entirely rational. It makes sense to conclude that the autopsy findings, and the opinion of Dr. Green, "bore out" Dr. Patel's finding of Category A pneumoconiosis on the July 1996 x-ray and that the well-qualified doctors who found that x-ray negative were simply wrong. "Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict." *Eastern Associated Coal Corp. [Scarbro]*, 220 F.3d at 256. The [administrative law judge's] assessment of the x-ray evidence is reasonable given that autopsy evidence is generally more probative than x-ray evidence regarding the presence and extent of pneumoconiosis. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-22 n.4 (1992).

Director's Brief at 9-10.

Employer's contention that the administrative law judge's equivalency determination is irrational lacks merit. Substantial evidence supports the administrative law judge's finding that the 1.5 centimeter lesion observed on autopsy, which he determined to be the more probative evidence, *see* Decision and Order on Remand at 2, would have produced an opacity of equivalent size if viewed on x-ray. This equivalency finding by the administrative law judge is not compromised by his additional findings that the x-ray evidence and the autopsy evidence are insufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Specifically, the administrative law judge's weighing of the evidence is consistent with the Fourth Circuit's statement in *Scarbro* that "[e]vidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict." *See Scarbro*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101. The administrative law judge's weighing of the evidence under 20 C.F.R. §718.304 is also consistent with the Fourth Circuit's mandate in *Blankenship* that the administrative law judge is bound to perform equivalency determinations to make certain that, regardless of which diagnostic technique is

used, the same underlying condition triggers the irrebuttable presumption. *See Blankenship*, 177 F.3d 240, 243. We, therefore, reject employer's assertion that the administrative law judge's equivalency determination is irrational.

Employer further asserts that the administrative law judge's consideration of the conflicting medical opinions of Drs. Kleinerman, Naeye, Hutchins, Fino, Morgan, Castle and Zaldivar, on the one hand, and the opinions of Drs. Green and Koenig, on the other hand, is inadequate. Specifically, employer argues that the administrative law judge "avoided the necessary analysis of whether the one-centimeter or the two-centimeter criteria [sic] is the appropriate minimum requirement for establishing complicated pneumoconiosis." Employer's Brief at 11. Employer argues that, notwithstanding the Fourth Circuit's refusal to adopt the two-centimeter pathologic standard in *Blankenship*, the issue must be addressed in this case as the administrative law judge failed to resolve the conflict between the pathologic standard for complicated pneumoconiosis advocated by Drs. Kleinerman and Naeye (two centimeters in diameter) and that endorsed by Drs. Green and Koenig (one centimeter in diameter.)

In response, claimant notes that the Board previously rejected employer's argument that the administrative law judge should have determined the appropriate pathological standard for a diagnosis of complicated pneumoconiosis. *See Braenovich*, slip op. at 4. Claimant and the Director note that the Fourth Circuit in *Blankenship* declined to impose the two centimeter pathologic standard on the Board. Claimant's Brief at 5, Director's Brief at 8.

The Board previously rejected employer's argument that the administrative law judge should have determined the appropriate pathological standard, noting that the Fourth Circuit in *Blankenship* had declined to impose the two centimeter pathologic standard on the Board. *See Braenovich*, slip op. at 4. The Board concluded, therefore, that the administrative law judge did not err in declining to resolve the conflict between the pathologic standard advocated by Drs. Kleinerman and Naeye and that endorsed by Drs. Green and Koenig. *Id.* at 5. Consequently, the issue of the appropriate pathological standard was not before the administrative law judge following the Board's remand of the case. In the instant appeal, employer advances no reason why the Board should revisit its holding that the administrative law judge did not err in declining to resolve the conflict between the pathologic standard advocated by Drs. Kleinerman and Naeye and that endorsed by Drs. Green and Koenig. Accordingly, the Board's holding constitutes the law of the case and will not be disturbed. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer further contends that the administrative law judge failed to specify a reason for his reliance on the opinion of Dr. Green, as supported by the opinion of Dr. Koenig, to find invocation of the interim presumption under 20 C.F.R. §718.304(c). Employer asserts

that the administrative law judge failed to determine whether the opinions of Drs. Green and Koenig are reasoned and documented, and to weigh those opinions against the contrary opinions of Drs. Kleinerman, Naeye, Hutchins, Zaldivar, Castle, Fino and Morgan.

In response, claimant contends that in *Braenovich*, the Board upheld the administrative law judge's reliance on Dr. Green's opinion, as supported by Dr. Koenig's opinion, in determining that claimant established invocation of the irrebuttable presumption under 20 C.F.R. §718.304(c), *see Braenovich*, slip op. at 6, and that the Board need not address the issue again as it was not part of the Board's remand order. Claimant argues, alternatively, that the administrative law judge's finding of invocation is fully explained, supported by substantial evidence, and in accordance with law. The Director contends that the administrative law judge's evidentiary findings are reasonable and supported by substantial evidence. The Director states:

Both Dr. Klapproth, the autopsy prosector, and Dr. Green found lesions larger than one centimeter in the miner's lung tissue. Only Dr. Naeye stated that the miner's autopsy did not reveal a lesion greater than one centimeter in diameter, finding instead a conglomeration of nodules, the largest of which measured .9 centimeters. (DX 32). The [administrative law judge] accurately found, however, that Dr. Naeye's opinion did not disprove the existence of a nodule larger than one centimeter in the miner's lungs. The [administrative law judge] noted that Cannelton's expert Dr. Kleinerman acknowledged that a tissue sample shrinks by about 10-15% when prepared for a slide and that the lesion viewed by Dr. Naeye had been at least one centimeter in size prior to preparation (EX 8 at 50). Consequently, the [administrative law judge] concluded that Dr. Naeye's finding was not an accurate assessment of the true size of the miner's lung nodules. Thus, the [administrative law judge] permissibly found that the miner had a lesion measuring greater than one centimeter in diameter based on the findings of Dr. Klapproth and Dr. Green.

Director's Brief at 7-8.

We reject employer's contention. The Board previously addressed employer's arguments challenging the administrative law judge's weighing of the relevant evidence. The Board specifically found that employer's contention, that the administrative law judge relied solely upon Dr. Green's professional qualifications and did not fully address the contrary opinions of Drs. Kleinerman, Naeye, Fino, Hutchins, Castle and Zaldivar, lacked merit. *See Braenovich*, slip op. at 5. Ultimately, the Board determined that the administrative law judge rationally accorded determinative weight to Dr. Green's opinion, as corroborated by Dr. Koenig's opinion. *Id.* at 6. The administrative law judge on remand noted the Board's affirmance of the administrative law judge's finding that Dr. Green's opinion, as

corroborated by Dr. Koenig's opinion, supported a determination that claimant established invocation of the irrebuttable presumption at 20 C.F.R. §718.304(c). Decision and Order on Remand at 3. Following the Board's instructions, the administrative law judge then made findings pursuant to *Scarbro*, determining that the irrebuttable presumption at 20 C.F.R. §718.304 was invoked. The administrative law judge concluded, therefore, that he "continue[d] to find that claimant is entitled to benefits in both claims."⁵ *Id.* We thus reject employer's assertion that the administrative law judge erred in according determinative weight to the medical opinion of Dr. Green, as corroborated by Dr. Koenig's opinion.

Invocation of the Irrebuttable Presumption at 20 C.F.R. §718.304

We next address employer's contention that where, as in the instant case, the administrative law judge finds that the x-ray evidence and autopsy (or biopsy) evidence is insufficient to establish invocation of the irrebuttable presumption under 20 C.F.R. §718.304(a) and (b) respectively, invocation cannot be established under 20 C.F.R. §718.304(c). In this regard, employer argues that the regulation at 20 C.F.R. §718.304(c) is limited to certain types of medical evidence, including CT or PET scan evidence or "other medical diagnostic techniques which may become available to us in the future in order to diagnose pneumoconiosis." Oral Argument Transcript at 10. Employer asserts that complicated pneumoconiosis or massive lesions cannot be diagnosed by physical examination alone and thus, a physician's opinion, without the appropriate underlying diagnostic testing, is insufficient to establish invocation under 20 C.F.R. §718.304(c). *Id.* at 9-11, 28, 33, 37-38, 43-44. Employer, therefore, contends that the administrative law judge's finding of invocation under 20 C.F.R. §718.304(c) in the instant case cannot stand because he

⁵ Employer argues that the administrative law judge did not weigh the relevant evidence together, but instead considered the evidence at 20 C.F.R. §718.304(a), (b) and (c) separately. By analogy, employer cites to an administrative law judge's duty to consider all relevant evidence at 20 C.F.R. §718.202 under *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and all relevant evidence at 20 C.F.R. §718.204 under *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Claimant and the Director, Office of Workers' Compensation Programs (the Director), contend that the administrative law judge properly considered all relevant evidence under 20 C.F.R. §718.304 and fully explained his findings. We agree with claimant and the Director. The record refutes employer's argument. The administrative law judge specifically weighed all relevant evidence together in determining on remand that the irrebuttable presumption at 20 C.F.R. §718.304 is invoked, *see* Decision and Order on Remand at 1-3. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 242-243 (4th Cir. 1999).

relied on medical opinion evidence. Employer further contends that Dr. Green's medical opinion, relied upon by the administrative law judge to find invocation of the irrebuttable presumption, should have been considered under 20 C.F.R. §718.304(b), as it was based primarily on Dr. Green's analysis of the autopsy evidence.

In response, claimant argues that the administrative law judge properly found that invocation was established under 20 C.F.R. §718.304(c), and disagrees with employer's argument that the administrative law judge should have considered Dr. Green's opinion under 20 C.F.R. §718.304(b). The Director contends that the administrative law judge's evaluation of the evidence and resulting finding of invocation of the irrebuttable presumption under 20 C.F.R. §718.304(c) is consistent with the Act and controlling precedent interpreting the regulation at 20 C.F.R. §718.304. The Director further contends that while "a medical report relying on autopsy or biopsy findings would [] properly be considered under subcategory 'B,'" it is "irrelevant" whether the administrative law judge should have considered the medical opinion evidence under 20 C.F.R. §718.304(b) or under 20 C.F.R. §718.304(c) because the administrative law judge must ultimately consider all the relevant evidence of record. Oral Argument Transcript at 26-27, 42.

We find no error in the administrative law judge's finding on remand that claimant established invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis under 20 C.F.R. §718.304. The Board previously held that the administrative law judge properly relied on Dr. Green's undisputed opinion and on Dr. Koenig's corroborating opinion to find invocation of the irrebuttable presumption. *Braenovich*, slip op. at 6. We are not persuaded by employer's argument that the administrative law judge committed reversible error in finding invocation under 20 C.F.R. §718.304(c) instead of under 20 C.F.R. §718.304(b). Employer's argument is of no consequence as substantial evidence in the record supports the administrative law judge's determination on remand that claimant established invocation of the irrebuttable presumption at 20 C.F.R. §718.304 pursuant to *Scarbro* and *Blankenship*.⁶ See generally *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁶ We hold, moreover, that the administrative law judge's findings on remand are consistent with the decision of the United States Court of Appeals for the Fourth Circuit in *Blankenship*, wherein the court instructed the administrative law judge on remand to make an equivalency determination based on the biopsy evidence. See *Blankenship*, 177 F.3d at 244.

Based on the foregoing, we affirm the administrative law judge's finding of invocation of the irrebuttable presumption at 20 C.F.R. §718.304 and of claimant's entitlement to benefits.

Administrative Law Judge's Modified Attorney Fee Award

Employer also challenges the administrative law judge's award of a modified attorney fee on remand and argues that it is arbitrary, capricious and not in accordance with law. In response, claimant urges the Board to affirm the administrative law judge's attorney fee award, and argues that employer has raised no error of law or abuse of discretion to support vacating or reversing any portion of the administrative law judge's modified attorney fee award on remand. The Director did not respond on this issue.

The Board previously held that the administrative law judge did not comply with the requirements of the APA in rendering his findings regarding the reasonableness of the hourly rate requested (\$200) and the necessity of the services performed. The Board agreed with employer's contention that the administrative law judge "erred in failing to address all of its specific objections to the fee petition and in ordering employer to compensate counsel for the performance of clerical or paraprofessional activities that should have been billed at an hourly rate or not at all." *Braenovich*, slip op. at 6. The Board thus vacated the administrative law judge's determination that the \$200 hourly rate requested by counsel is reasonable. The Board rejected, however, employer's assertion that the administrative law judge was required to compare the hourly rate requested to the typical hourly rate charged in the geographic area in which counsel practices, when determining the appropriate hourly rate. The Board noted that the administrative law judge may consider this factor, but is not required to do so. *Id.* at 7. The Board further held that employer was correct in alleging that the administrative law judge did not address employer's objections to the five hours counsel spent preparing for Dr. Zaldivar's deposition and the 23.25 hours counsel spent drafting claimant's Closing Argument. The Board also held that the administrative law judge erred in finding that the clerical services identified in the fee petition were compensable because they were performed by attorneys. The Board noted that traditional clerical duties, whether performed by clerical employees or counsel, are not properly compensable services for which separate billing is permissible, but rather, the performance of such duties must be included as part of overhead in setting the hourly rate. Thus, the Board vacated the administrative law judge's findings and instructed the administrative law judge to reconsider the fee petition on remand, if he again determined that claimant and the miner are entitled to benefits. *Id.* at 7-8.

On remand, the administrative law judge explained, by reference to the factors set forth at 20 C.F.R. §725.366(b), the reasons why he upheld the requested hourly rate of \$200, notwithstanding employer's argument that it was not reasonable. Decision and Order on

Remand at 3. The administrative law judge also determined that the five hours of compensation requested by counsel in preparation for Dr. Zaldivar's deposition was not excessive as the entry actually covered more than that preparation. Specifically, the administrative law judge found that the five hours included compensation for related research, a phone call to "NIOSH requesting ALFORD protocol," review of certain medical opinions, a general review of the file, and the drafting of questions. Decision and Order on Remand at 3-4. The administrative law judge further upheld compensation for the twenty-three and one-quarter hours counsel spent drafting her closing argument, determining that counsel accounted fully for the time spent. The administrative law judge did find excessive, however, counsel's charge of seven hours for "drafting sections [of Argument] on Dr. Hutchins, coalescence, negative x-rays, and modification." Decision and Order on Remand at 4. The administrative law judge determined that, based on the subject matter, an allowance of two hours would be reasonable.

The administrative law judge next disallowed compensation for the three and one-quarter hours claimant's counsel charged for co-counsel, finding that counsel did not establish the necessity of associating with co-counsel. The administrative law judge also deducted the following charges for clerical work: one-half hour for copying and serving closing argument; one-quarter hour for the October 3, 1997 mailing of the retainer; one and one-half hours for the February 20, 1998 indexing of the Director's exhibits; one-quarter hour for the April 7, 1997 mailing of interrogatory responses; one-quarter hour for the April 14, 1999 fax to Dr. Koenig; one-half hour and one-quarter hour charged for the serving of claimant's exhibits on April 26, 1999 and April 29, 1999, respectively, and the one-half hour on May 18, 1999 for labeling and indexing exhibits in preparation for the hearing. Based on the reasonableness of the work performed, considered against the time charged, the administrative law judge's reduced the total of seven and one-half hours charged on April 16, 1998 and April 20, 1998 by three and one-half hours, finding four hours to be a more reasonable request. In sum, the administrative law judge disallowed a total of fifteen and three-quarters hours from the sixty-eight hours for which claimant's counsel initially requested compensation. He indicated that this disallowance translates to a \$3,150 deduction from the \$17,682.02 fee initially awarded. The administrative law judge thus modified the fee award to \$14,532.02.

Employer contends that while the administrative law judge properly deducted fifteen and three-quarters hours from the sixty-eight hours claimed by counsel, the administrative law judge "did not go far enough." Employer's Brief at 16. Employer asserts that the administrative law judge failed to review or comment on a number of entries in the fee petition. Employer offers, as an example, the four and one-half hours counsel claimed on March 26, 1999 and April 7, 1999 for work with claimant to draft responses to interrogatories and to mail them. Employer argues that four and one-half hours is excessive for such work. Moreover, employer asserts that Ms. Natkin did not sign the letter of April 7, 1999, but that it

was signed by Allison Driver, a student caseworker, and by Brian Murchison, as the supervising attorney. Employer also asserts that Brian Murchison's professional credentials are not of record. Employer thus argues that counsel billed for someone else's work and employer submits that because the record does not show how much of the four and one-half hours claimed is for work actually performed by Ms. Natkin, the administrative law judge should have disallowed the four and one-half hours. Employer also contends that the administrative law judge's reasoning for allowing time billed on December 9, 1998, February 22, 1999, March 25, 1999 and March 31, 1999 for counsel's letters to Drs. Green and Koenig, was irrational, arbitrary and capricious.

In response, claimant contends that employer improperly raises new objections to the fee petition, including (1) its objection to the amount of time counsel spent working with claimant to respond to employer's interrogatories and requests for production of documents; (2) its assertion that another attorney signed the April 7, 1999 "transmissal letter" after Ms. Natkin reviewed the evidence and prepared the interrogatories, and (3) its assertion that the credentials of "Professor Murchison (whose time was not billed) were not included in the fee petition." Claimant's Response Brief at 11. Since employer failed to raise these objections below, claimant asserts that it is barred from raising them now in this second appeal to the Board.

All objections to the fee petition must be raised prior to the fee award. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). We, therefore, decline to address employer's objections to the fee petition as the record reveals that they were not specifically raised before the administrative law judge. See Employer's Objection to Attorney Fee Petition dated April 11, 2000.

Employer next contends that, despite the Board's remand instruction, the administrative law judge did not explain adequately why he awarded claimant's counsel a \$200 hourly rate. Employer submits that the \$200 hourly rate awarded exceeds both the usual and reasonable hourly rates and constitutes an abuse of the administrative law judge's discretion. Employer also asserts that counsel did not offer any evidence of the customary rates charged by attorneys in counsel's community and that the administrative law judge made no findings in this regard. In response, claimant contends that the administrative law judge's finding that counsel's requested hourly rate was appropriate is in accordance with the regulation at 20 C.F.R. §725.366(b), supported by the evidence, and is not erroneous. Claimant contends that employer's assertion that the requested hourly rate is significantly higher than the usual hourly rate awarded to attorneys in federal black lung cases, is unsupported by any evidence. Claimant further notes that the Board explicitly rejected employer's assertion that the administrative law judge *was required* to compare the hourly rate requested by counsel to the typical hourly rate charged in the geographic area in which counsel practices, when determining the appropriate hourly rate. *Braenovich*, slip op. at 7.

Claimant argues that the Board should thus decline to entertain employer's assertion. Claimant further submits that the hourly rate requested by counsel in this case is appropriate and reasonable in light of the valuable service counsel renders to miners and their widows at the Legal Practice Clinic. Thus, claimant seeks affirmance of the modified fee awarded by the administrative law judge on remand.

Employer's contentions lack merit. The administrative law judge on remand fully explained, by reference to the factors set forth at 20 C.F.R. §725.366(b), the reasons why he upheld the requested hourly rate of \$200 in the face of employer's objection. Specifically, the record shows that the administrative law judge considered the "high quality" of counsel's representation in this case, which led to the successful prosecution of these claims. In addition, the administrative law judge considered counsel's professional credentials and experience, including work as a law professor and at a legal clinic, and the complex medical and legal issues presented in this case, requiring claimant to establish "complicated pneumoconiosis" and requiring "research of recent case law involving the concept of an equivalency determination." Decision and Order on Remand at 3. Further, the Board previously rejected employer's assertion that the administrative law judge *was required* to compare the hourly rate requested by counsel to the typical hourly rate charged in the geographic area in which counsel practices when determining the appropriate hourly rate. *Braenovich*, slip op. at 7. We, therefore, reject employer's assertion that the administrative law judge did not adequately explain his reasons for determining that the requested hourly rate was reasonable and appropriate in this case.⁷

Based on the foregoing, we affirm the administrative law judge's modified attorney fee award on remand of \$14,532.02. We thus affirm the administrative law judge's disallowance of fifteen and three-quarters hours from the sixty-eight hours claimed by counsel and his subtraction of \$3,150.00 from the original \$17,682.02 fee award.

⁷ Employer contends that this case has reached "administrative gridlock" which may necessitate reassignment to a different administrative law judge. Employer's contention is rendered moot by our decision to affirm the decision below.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY
Administrative Appeals Judge

GABAUER, Administrative Appeals Judge, concurring:

I concur in the majority's decision to affirm the administrative law judge's award of benefits and to affirm the administrative law judge's modified attorney fee award. I disagree, however, with the majority's position that the administrative law judge did not err by finding invocation of the irrebuttable presumption established under 20 C.F.R. §718.304(c) instead of under 20 C.F.R. §718.304(b). The medical evidence relied upon by the administrative law judge to find invocation of the irrebuttable presumption at 20 C.F.R. §718.304 in this case, namely the medical opinion of Dr. Green, as corroborated by Dr. Koenig's opinion, establishes that the 1.5 centimeter lesion observed on the miner's autopsy would have produced an opacity of equivalent size if viewed on x-ray. Because this medical evidence involves the interpretation of the autopsy findings, invocation is properly established under 20 C.F.R. §718.304(b) and not under 20 C.F.R. §718.304(c), as the administrative law judge found. See 20 C.F.R. §718.304(b).

Nonetheless, I agree that the administrative law judge properly found invocation of the irrebuttable presumption at 20 C.F.R. §718.304 established in this case. The administrative law judge properly found that substantial autopsy evidence supports such a finding. See Claimant's Exhibits 1, 4. He properly considered all the relevant evidence of record in a manner consistent with the mandates of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999), and *Island Creek Coal Co. v. Compton*,

211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Specifically, the administrative law judge resolved the conflicting x-ray evidence, properly finding that the weight of the x-ray evidence is negative for the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a). The administrative law judge then determined that the weight of the “more probative autopsy evidence” diminished the weight of the x-ray evidence. Decision and Order on Remand at 2. The administrative law judge concluded, “Upon weighing all of the evidence relevant to the existence of complicated pneumoconiosis together, I find that the [20 C.F.R.] §718.304 irrebuttable presumption is invoked.” *Id.* at 3. Based on the foregoing, I agree with my colleagues that the administrative law judge’s ultimate finding of invocation of the irrebuttable presumption at 20 C.F.R. §718.304 in this case was proper.

PETER A. GABAUER, Jr.
Administrative Appeals Judge