BRB No. 05-0455 BLA

DELORES L. ASHMORE (o/b/o and as Widow of MERRILL D. LAMBRIGHT)	)	
Claimant	)	
v.	)	
BRIDGER COAL COMPANY	)	DATE ISSUED: 03/16/2006
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Living Miner's and Survivor's Benefits of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Living Miner's and Survivor's Benefits (04-BLA-0093 and 04-BLA-05960) of Associate Chief Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on claims 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] The administrative law judge found that claimant established that the miner had a coal mine employment history of twenty years, which employer had conceded, and that while the chest x-ray evidence failed to establish the existence of simple pneumoconiosis, the autopsy and medical opinion evidence did establish the existence of simple pneumoconiosis. The administrative law judge further found, after reviewing all the relevant evidence, that the CT scan of August 23, 2000 showing a large node measuring 2.8 centimeters in greatest diameter as supported by Dr. Dobersen's findings on autopsy of a 2.5 inch lesion of anthracotic scarring, established the existence of complicated pneumoconiosis. Decision and Order at 19. Based on this finding, the administrative law judge concluded that claimant was entitled to the irrebuttable presumption of total disability and death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. The administrative law judge further concluded that based on the length of coal mine employment, claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits on the miner's claim from March 1998, the date the miner filed his claim through December 2001, the month preceding the miner's death, and on the survivor's claim from January 2002, the month of the miner's death.

On appeal, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established and thereby erred in finding claimant entitled to the irrebutable presumption of disability and death due to pneumoconiosis. Employer also contends that the administrative law judge erred in failing to make findings as to whether the evidence established total disability due to pneumoconiosis and death due to pneumoconiosis, and the administrative law judge erred in determining the correct onset date of benefits on the miner's claim. Employer concludes by requesting that the administrative law judge's Decision and Order awarding benefits based on a finding of complicated pneumoconiosis be reversed, or, in the alternative, that the case be remanded for reconsideration of all the relevant evidence and

[1] Claimant, Delores L. Ashmore, is the widow of the miner, Merrill D. Lambright, who died on January 31, 2002. The instant appeal encompasses both the miner's claim filed on March 19, 1998 and the survivor's claim filed on March 19, 2002. Claimant was not represented by counsel when this case was before the administrative law judge. Claimant was, however, made aware of her right to counsel without cost, *see* Notice of Hearing (April 7, 2004); Director's Exhibit 81, and was given the opportunity to present evidence on her own behalf, and to rebut evidence proffered by employer, *see* Hearing Transcript at 7. Accordingly, the safeguards enunciated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1988) for a claimant proceeding without counsel were satisfied.

a proper determination on the onset date, if reached. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, (the Director) takes no position on whether the administrative law judge's finding of complicated pneumoconiosis was correct, but contends that if the Board does not affirm that finding, it must remand the case for the administrative law judge to determine whether the miner was totally disabled and whether his death was due to pneumoconiosis as the administrative law judge did not make findings on these issues. Regarding the onset date of entitlement, the Director urges that, should the Board affirm the finding of entitlement, the Board should affirm the administrative law judge's onset date determination of March 1988 on the miner's claim.[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 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).

Employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established because the administrative law judge failed to explain which subsection of Section 718.304 the evidence satisfied, *i.e.*, whether the existence of complicated pneumoconiosis was established by (a) chest x-ray, classified as Category A, B, or C, (b) biopsy or autopsy evidence showing "massive lesions," or (c) when diagnosed by other means and an equivalency determination can be made from the medical evidence. Employer contends that the evidence fails to carry claimant's burden under any of the methods provided because none of the doctors who interpreted the x-ray evidence found a Category A, B, or C opacity, and the autopsy, CT scan, and medical opinion evidence failed to state whether the node seen on CT scan and the lesion seen on autopsy would be equivalent to a greater than one centimeter opacity seen on x-ray. In further support of its argument, employer contends that the administrative law judge erred in relying on Dr. Dobersen's autopsy findings because Dr. Dobersen never found "massive lesions" and that it was not clear from Dr. Dobersen's report what standard he relied on to find the existence of complicated pneumoconiosis. Employer also contends that the administrative law judge erred in stating that Dr. Dobersen found a 2.5 inch lesion when, in fact, Dr. Dobersen stated only that he found areas of "anthracotic scarring." Likewise, employer further contends that Dr. Doberson's statement that he saw "features" of complicated coal worker's pneumoconiosis on microscopic

[2] Because no challenge has been made to the administrative law judge's finding that the existence of simple pneumoconiosis was established, or that pneumoconiosis was due to coal mine employment, 20 C.F.R. §§718.202(a)(2), (4); 718.203(b), those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

examinations is insufficient to establish the existence of complicated pneumoconiosis because the doctor does not explain the "features" to which he is referring. In addition, employer contends that the administrative law judge erred in crediting Dr. Dobersen's opinion because Dr. Dobersen had an understanding of the concepts of simple and complicated pneumoconiosis. Likewise, employer contends that the administrative law judge erred in according greater weight to Dr. Dobersen's opinion based on Dr. Dobersen's superior qualifications when the administrative law judge did not explain how Dr. Dobersen's qualifications, *i.e.*, qualifications in clinical, anatomical, or forensic pathology were superior to the qualifications of Drs. Tomashefski and Crouch, who were professors of pathology, as well as consultants in pulmonology, had written extensively on pulmonary diseases, and whose opinions were supported by Dr. Tuteur, who was also a highly qualified pulmonologist. Employer's Brief at 41-43. Moreover, employer asserts that the administrative law judge erred in suggesting that the CT scan evidence supported Dr. Dobersen's autopsy findings when, in fact, there was no evidence that any node seen on CT scan constituted complicated pneumoconiosis as defined by the statute and regulations. Employer contends that the administrative law judge's finding that the node seen on CT scan was complicated pneumoconiosis is particularly incredible as all of the physicians who interpreted the CT scans excluded a diagnosis of even simple pneumoconiosis and all the other evidence of record, including the x-ray evidence and medical opinions, weighed against a finding of complicated pneumoconiosis.

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, creates an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis if (A) an x-ray of the miner's lungs show at least one opacity greater than one centimeter in diameter; (B) a biopsy or autopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). In *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit stated that although the clauses in (A), (B), and (C), provide three different ways to establish the existence of complicated pneumoconiosis and thereby invoke the irrebuttable presumption, these clauses were intended to describe a single, objective condition. Thus, the court stated that, in applying the standard set forth in each prong, equivalency determinations must be performed to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. The court further stated that because prong (A) sets out an entirely objective scientific standard, *i.e.*, an opacity on x-ray greater than one centimeter, x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999). In addition, in determining whether complicated pneumoconiosis has been established, the administrative law judge must, in every case, review the evidence under each prong and must also look at all of the relevant evidence

presented. *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *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).

In this case, the administrative law judge found that a 2.8 centimeter node seen on CT scan was supported by a 2.5 inch lesion of anthracotic scarring as seen on autopsy, and established the existence of complicated pneumoconiosis. The administrative law judge did not determine that the medical evidence established that the node seen on CT scan, or the lesion seen on autopsy, would be seen on x-ray as an opacity greater than one centimeter, and there is no evidence in the record which would support such a determination. *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003) (Gabauer, J., concurring). Accordingly, the administrative law judge's finding of complicated pneumoconiosis and the award of benefits, based thereon, are vacated, and the case is remanded for the administrative law judge to determine whether the evidence establishes total disability due to pneumoconiosis in the miner's claim and death due to pneumoconiosis in the survivor's claim. 20 C.F.R. §§718.204(b), (c), 718.205(c).

Employer next contends that the administrative law judge erred in awarding benefits from March 1998 on the miner's claim, the month in which the miner filed his claim, because a miner cannot be awarded benefits while he is working, absent a finding of complicated pneumoconiosis and the miner worked until June 1998 and the earliest evidence of complicated pneumoconiosis did not come until after the miner's death on January 31, 2002, *i.e.*, autopsy evidence. Employer further argues that it was error for the administrative law judge to rely upon the opinion of Dr. Guichteau as supporting a March 1998 onset date without first weighing it against other medical evidence. Additionally, employer contends that as the award of benefits on the miner's claim resulted from a request for modification the administrative law judge must determine whether the award on the miner's claim was based on a mistake in a determination of fact or a change in conditions. Employer contends that because it appears that the award was based on a finding of a changed condition, benefits would not be payable on the miner's claim until the date of the change in conditions was established, and if the evidence does not establish when the change in conditions occurred, benefits would be payable from the month during which claimant requested modification.

In considering the onset date, the administrative law judge found that it was undisputed among the pathologists that the miner suffered from simple coal workers' pneumoconiosis at the time of his death and that the issue for resolution was the date upon which the miner became totally disabled due to the disease. The administrative law judge found that the first diagnosis of total disability due to pneumoconiosis was by Dr. Guicheteau in a June 1998 medical opinion. Director's Exhibit 11. The administrative law judge further found that blood gas studies conducted from October 1998 through July

2001 consistently yielded qualifying values.[3] The administrative law judge concluded, therefore, that these studies in conjunction with Dr. Guichteau's medical report supported a finding that the miner became totally disabled due to coal workers' pneumoconiosis at some point prior to the doctor's June 1998 opinion. Thus, the administrative law judge determined that since the exact date that claimant became totally disabled due to pneumoconiosis could not be established benefits should commence from the date the miner filed his claim in March 1998. Decision and Order at 19-20; 20 C.F.R. §725.503; *see Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985).

Because we are remanding this case for a finding of whether the evidence establishes total disability due to pneumoconiosis, we must also vacate the administrative law judge's onset date finding in the miner's claim and direct the administrative law judge to reconsider that issue, as well. We note, however, that should the administrative law judge find total disability due to pneumoconiosis established based on consideration of all relevant evidence, 20 C.F.R. §718.204(b)(c), and the administrative law judge again finds that Dr. Guicheteau's June 1998 medical opinion was the first evidence finding claimant totally disabled due to pneumoconiosis, then the administrative law judge would properly award benefits on the miner's claim from March 1998, the month in which the miner filed his claim. 20 C.F.R. §725.503; *see Merashoff*, 8 BLR at 1-109. Benefits may not, however, be awarded for any periods during which the miner worked.

[3] The administrative law judge stated that although a blood gas study taken in April, 1999 was not qualifying, that study was taken when the miner was on a ventilator, and was not therefore "indicative of the miner's true lung function." Decision and Order at 20.

Accordingly, the administrative law judge's Decision and Order-Awarding Living Miner's and Survivor's Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge