

**PART X**  
**SURVIVORS' CLAIMS**

**E. SECTION 411(c)(3)**

Section 411(c)(3) of the Act, 30 U.S.C. §411(c)(3), provides an *irrebuttable* presumption that a miner who is suffering or has suffered from complicated pneumoconiosis is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that he was totally disabled due to pneumoconiosis at the time of his death. 20 C.F.R. §§410.418, 410.458, 718.304. In a survivor's claim where claimant has established the presumption under Section 411(c)(3) of the Act, s/he must still establish, by direct proof or presumption, that the miner's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§410.416, 718.203; see Parts VI.D., VII.C., VIII.A. and X.C. of the Desk Book.

The Board has strictly construed the medical criteria for establishing complicated pneumoconiosis by requiring that an autopsy report diagnose "massive lesions"; an autopsy that merely diagnoses large opacities (*i.e.*, nodules greater than one centimeter) is insufficient to invoke the Section 411(c)(3) presumption. See **Lohr v. Rochester & Pittsburgh Coal Co.**, 6 BLR 1-1264 (1984). In **Clites v. Jones & Laughlin Steel Corp.**, 2 BLR 1-1019 (1980), the administrative law judge found Section 411(c)(3) invocation established based on a physician's statement that he equated nodules he found during an autopsy to one centimeter opacities revealed by x-rays. The Board held that this equivalency determination was improper because an administrative law judge lacks medical expertise to make such a determination. The Third Circuit reversed the Board, holding that the administrative law judge properly found complicated pneumoconiosis established based on the physician's statement. **Clites v. Jones & Laughlin Steel Corp.**, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

The Board has not expressly adopted or disapproved the Third Circuit's holding in **Clites**. It has, however, narrowly construed it by requiring that any equivalency determination be based on *medical evidence* that equates the autopsy findings to the requisite x-ray diagnoses, *e.g.*, a *physician* must state that nodules revealed in autopsy would be greater than one centimeter *on an x-ray*. The administrative law judge may not make such a determination without such supporting medical evidence. See **Smith v. Island Creek Coal Co.**, 7 BLR 1-734 (1985); **Lohr**, *supra*.

For further discussion and additional digests on the Section 411(c)(3) presumption, see Part VIII.B. of the Desk Book.

## CASE LISTINGS

[autopsy revealing nodules "up to one centimeter" insufficient to establish complicated pneumoconiosis, especially where autopsy does not indicate any progressive massive fibrosis or massive lesions in lung] **Gaudio v. United States Steel Corp.**, 1 BLR 1-949 (1978).

[adjudicator's finding of Section 411(c)(3) invocation reversed based on one x-ray of complicated pneumoconiosis where more recent x-rays negative and pathology report showed only simple pneumoconiosis] **Travis v. Peabody Coal Co.**, 1 BLR 1-314 (1977).

[adjudicator properly found autopsy reports more credible than x-ray reports for purpose of determining presence or absence of complicated pneumoconiosis]. **King v. United States Steel Corp.**, 1 BLR 1-671 (1978).

[Third Circuit rejected Board's conclusion that adjudicator lacks competence to make equivalency determination between autopsy and x-ray findings; diagnosis by biopsy or autopsy of massive lesions of lung may satisfy Section 411(c)(3)(B) even if specific words "massive lesions" do not appear in diagnosis] **Clites v. Jones & Laughlin Steel Corp.**, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

[autopsy diagnosis of maculas larger than one centimeter will not invoke Section 411(c)(3) presumption as it did not diagnosis of "massive lesions;" **Clites** distinguished] **Lohr v. Rochester & Pittsburgh Coal Co.**, 6 BLR 1-1264 (1984).

[Board omitted decision whether to apply Third Circuit's holding in **Clites v. Jones & Laughlin Steel Corp.**, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981), in other circuits; any equivalency determination between autopsy and x-ray findings must be based on *medical evidence* equating autopsy findings to requisite x-ray diagnoses, *e.g.*, *physician* must state that nodules revealed in autopsy would be greater than one centimeter *on an x-ray* - adjudicator may not make such determination without this supporting medical evidence] **Smith v. Island Creek Coal Co.**, 7 BLR 1-734 (1985).

[adjudicator properly credited medical report of physicians who performed autopsy and diagnosed complicated pneumoconiosis over that of physician who reinterpreted autopsy based on slides to find Section 411(c)(3) invocation] **Simila v. Bethlehem Mines Corp.**, 7 BLR 1-535 (1984), *vacated on other grounds sub nom. Bethlehem Mines Corp. v. Director, OWCP*, 766 F.2d 128, 8 BLR 2-4 (3d Cir. 1985).

[adjudicator erred in concluding miner suffered reduced ability to work where existence of pneumoconiosis, symptoms of dyspnea and morning cough did not indicate that

respiratory difficulties affected job performance inasmuch as usual coal mine work was non-exertional and miner had worked until his death] **Bizzarri v. Consolidation Coal Co.**, 7 BLR 1-343 (1984), *rev'd on other grounds*, 775 F.2d 751, 8 BLR 2-65 (6th Cir. 1985).

## DIGESTS

The Board rejected employer's argument that the quality standards contained in Section 410.428(b) apply to determinations of complicated pneumoconiosis under Section 410.418, stating that they apply only to x-rays that diagnose simple pneumoconiosis. **Swartz v. United States Steel Corp.**, 8 BLR 1-481 (1986).

The Board has strictly construed the medical criteria for establishing complicated pneumoconiosis by requiring that an autopsy report diagnose "massive lesions." Thus, autopsy findings of "adhesions noted between the lungs and chest wall" and "scarring of the lung parenchyma" provide an insufficient basis for a finding of complicated pneumoconiosis. **Neeley v. Director, OWCP**, 11 BLR 1-85 (1988).

Section 718.205(c)(4) does not preclude an award of benefits to a surviving widow where the miner's death was caused by a traumatic injury, if the deceased miner has access to the irrebuttable presumption of death due to pneumoconiosis found in Section 718.304. The irrebuttable presumption of death due to pneumoconiosis found in Section 718.304 is controlling despite the fact that the death of a miner is caused by traumatic injury. **Sumner v. Blue Diamond Coal Corp.**, 12 BLR 1-74 (1988).

The Sixth Circuit rejected employer's argument that the adjudicator erred in relying on a doctor's x-ray finding of "Category A large opacity" under Section 410.418 because he also noted "tuberculosis" and "honeycomb lung," holding that the administrative law judge could reasonably conclude that the Category A opacities were caused by complicated pneumoconiosis. **Wolf Creek Collieries v. Robinson**, 872 F.2d 1264, 12 BLR 2-259 (6th Cir. 1989).

The Board held that an x-ray finding of "1.0 centimeter lesion" was inadequate to establish complicated pneumoconiosis under 20 C.F.R. §718.304, which implements Section 411(c)(3) of the Act, as that statutory provision requires x-ray evidence of one or more large opacities *greater than* one centimeter. **Handy v. Director, OWCP**, 16 BLR 1-73 (1990).

In determining the existence of complicated pneumoconiosis, the administrative law judge acted within his discretion in assigning greater weight to the opinion of the autopsy prosector, and less weight to the opinions of pathologists who reviewed

histological slides. **Gruller v. Bethenergy Mines, Inc.**, 16 BLR 1-3 (1991).

The administrative law judge properly found invocation of the irrebuttable presumption established pursuant to Section 718.304(b) where the autopsy prosector diagnosed complicated pneumoconiosis and described the lungs as revealing "both macular and nodular pneumoconiosis. These lesions are large, firm and black. They vary in size up to 1.0 cm. in diameter ...." **Gruller v. Bethenergy Mines, Inc.**, 16 BLR 1-3 (1991).

The Board affirmed the administrative law judge's finding of invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis under 20 C.F.R. §718.304. The Board held that substantial evidence, namely the opinion of Dr. Green as corroborated by the opinion of Dr. Koenig, 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, would have produced an opacity of equivalent size if viewed on x-ray. The Board further held that this equivalency finding by the administrative law judge is not compromised by his additional findings at 20 C.F.R. §718.304(a) and (b). The Board held that the administrative law judge's weighing of the evidence is consistent with the statement 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) 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, and is also consistent with the Fourth Circuit's mandate in **Double B Mining, Inc. v. Blankenship**, 177 F.3d 240 (4th Cir. 1999) 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. The Board thus affirmed the administrative law judge's award of benefits in the instant case. **Braenovich v. Cannelton Industries, Inc./Cypress Amax**, BLR , BRB No. 02-0365 BLA (Feb. 12, 2003)(Gabauer, J., concurring).

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