

BRB No. 01-0507 BLA

MILDRED GOLLIE)
(Widow of JOE GOLLIE))

Claimant-Respondent)

v.)

ELKAY MINING COMPANY)

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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (97-BLA-

0891) of Administrative Law Judge Daniel L. Leland (the administrative law judge) awarding 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).¹ This case is before the Board for the second time. In *Gollie v. Elkay Mining Co.*, BRB No. 99-1217 BLA (Nov. 2, 2000)(unpub.), the Board vacated the administrative law judge's finding that claimant was entitled to invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000) and remanded the case for reconsideration of all the relevant evidence in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *BethEnergy Mines Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996)(administrative law judge must provide an adequate rationale for concluding, under the facts of the case, that the autopsy prosector's opportunity to conduct a gross examination, rather than merely review slides, renders his opinion superior to the reviewing pathologists' opinions), as well as the Fourth Circuit's decisions 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, BLR (4th Cir. 1999) and *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993)

¹The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the instant case, the Director, Office of Workers' Compensation Programs (the Director), asserts that the revised regulations will not affect the outcome of the case, and notes that the regulation at 20 C.F.R. §718.304 (2000) was not revised. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the Director regarding the impact of the challenged regulations.

relevant to claimant's burden at 20 C.F.R. §718.304 (2000). The Board further instructed the administrative law judge to determine the issue of the etiology of the miner's pneumoconiosis at 20 C.F.R. §718.203(b) (2000), if reached. On remand, the administrative law judge found that the evidence was sufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000). The administrative law judge also found that claimant established that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge's finding that the evidence is sufficient to entitle claimant to the benefit of the irrebuttable presumption provided at 20 C.F.R. §718.304 (2000) is so contrary to the record that it may be characterized as "bizarre." Employer argues that the administrative law judge's award of benefits is based on his irrational interpretation of the "equivalency determination" required by *Blankenship*. Employer argues that it was irrational for the administrative law judge to conclude that lesions which do not establish complicated pneumoconiosis on pathology would constitute complicated pneumoconiosis on x-ray where x-ray evidence is available and clearly does not show complicated pneumoconiosis in this case. Employer specifically argues that, contrary to the administrative law judge's finding, the testimony of Drs. Naeye and Kleinerman cannot be rationally interpreted as supportive of a finding of complicated pneumoconiosis because these physicians unequivocally opined that only simple pneumoconiosis was present and nothing in their speculations can support the administrative law judge's decision to award benefits. Employer thus argues that in awarding benefits, the administrative law judge substituted his opinion for that of the medical experts. Employer further argues that the administrative law judge ignored the best evidence (x-rays and pathology) and awarded benefits based on speculation of what might appear if the actual evidence did not exist. Employer seeks a reversal of the administrative law judge's finding that claimant is entitled to the benefit of the irrebuttable presumption provided at 20 C.F.R. §718.304 (2000) and, alternatively, seeks a remand of the case. Claimant responds, and seeks affirmance of the decision below. Claimant asserts that Drs. Naeye and Kleinerman testified that the lesions found on the miner's autopsy would be viewed as nodules of one centimeter or greater on x-ray, which meets the equivalency determination mandated by *Blankenship*. The Director, Office of Workers' Compensation Programs (the Director), responds, and agrees with employer's position that the administrative law judge's decision cannot stand. The Director does not, however, agree with employer's argument that the opinions of Drs. Naeye and Kleinerman necessarily foreclose a finding of complicated pneumoconiosis. The Director argues that rather, the administrative law judge's decision must be vacated because he mischaracterized the opinions of Drs. Naeye and Kleinerman and thus, did not weigh the evidence as mandated by *Scarbro*.

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 by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the administrative law judge’s determination that the pathological evidence is sufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000). Considering the relevant evidence, the administrative law judge accorded greatest weight to the opinions of Drs. Naeye and Kleinerman, reviewing pathologists, based on their expertise. He found that although Drs. Naeye and Kleinerman determined that the lesion seen on the miner’s autopsy did not represent complicated pneumoconiosis because it was less than two centimeters in diameter, such a finding does not foreclose invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000) under *Blankenship*. The administrative law judge further found that, under *Scarbro*, the physicians’ insistence that the miner did not have complicated pneumoconiosis did not preclude a finding of entitlement under 20 C.F.R. §718.304 (2000). In this regard, the administrative law judge stated, “Instead it must be determined if the lesion viewed on the slides would produce a 1cm opacity when viewed on x-ray.” Decision and Order on Remand at 4.

Conducting an equivalency determination, the administrative law judge noted Dr. Naeye’s testimony that the twelve millimeter nodule viewed on the slide of tissue taken on the miner’s autopsy would look like complicated pneumoconiosis on x-ray, *see* Employer’s Exhibit 9 at 20, and Dr. Kleinerman’s testimony that the 1.6 centimeter lesion viewed on a lung slide would be considered progressive massive fibrosis, *see* Employer’s Exhibit 10 at 68. Addressing this evidence, the administrative law judge found:

Although neither Dr. Naeye nor Dr. Kleinerman specifically found that the lesion would be greater than one centimeter in diameter when viewed by x-ray, both physicians expressed familiarity with the interpretation and classification of chest x-rays, and their testimony is sufficiently specific to indicate that the lesion would be greater than one centimeter on x-ray. None of the other pathologists commented on whether the (sic) any nodule of pneumoconiosis in the miner’s lung would appear as a large opacity on x-ray. Therefore, I conclude that the findings of Drs. Naeye and Kleinerman meet the equivalency standard set forth in *Blankenship* and that the presumption in [30 U.S.C.] §921(c)(3) has been invoked. The decedent is therefore irrebuttably presumed to have died due to pneumoconiosis.

Decision and Order on Remand at 4.

We find merit in employer's argument that the administrative law judge erred in resolving the issue of whether claimant established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000). The administrative law judge indicated that Dr. Naeye observed a twelve millimeter nodule on the autopsy slides. Decision and Order on Remand at 4. In fact, Dr. Naeye was describing a twelve millimeter nodule he found on a 1990 lobectomy. See Employer's Exhibit 9 at 13, 18-20. Further, while Dr. Naeye stated that this nodule would appear as complicated pneumoconiosis on x-ray, this statement alone is not sufficient to support a finding of invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000) under *Scarbro*. Pursuant to *Scarbro* and *Blankenship*, the administrative law judge was required to make an equivalency determination, namely whether this twelve millimeter nodule seen on the miner's 1990 lobectomy would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray.²

²Without specifically addressing Dr. Naeye's finding of a twelve millimeter nodule on the miner's 1990 lobectomy, the administrative law judge found:

The pathological evidence from the miner's claims also failed to show any massive lesions which the pathologists believed would appear as one centimeter opacities on x-ray.

Decision and Order on Remand at 4.

Further, while Dr. Naeye found a two centimeter lesion on autopsy, *see* Employer's Exhibits 1, 5, 9, 12, and testified that it would look like complicated pneumoconiosis on x-ray, *see* Employer's Exhibit 9 at 20, he testified that the lesion was "compromised of individual anthracotic micro and macronodules that became confluent, or joined together," and indicated a disease process different from features associated with complicated coal workers' pneumoconiosis, namely simple pneumoconiosis and cancer. Employer's Exhibit 9 at 19, 20². In its Decision and Order remanding the case, the Board noted that on initial consideration the administrative law judge held that Dr. Naeye's finding of a two centimeter lesion of coalesced anthracotic macronodules is sufficient to be termed a massive lesion under the Act, *see* Board's Decision and Order at 6-7. In reconsidering Dr. Naeye's opinion on remand, the administrative law judge did not make the requisite equivalency determination, namely whether this two centimeter coalesced lesion would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray, *see Scarbro, supra; Blankenship, supra*, although he was instructed to do so by the Board. *See* Board's Decision and Order at 7-8. On remand, the administrative law judge must determine whether this two centimeter lesion seen by Dr. Naeye on autopsy, comprised of coalesced anthracotic micronodules and macronodules, would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray. *See Scarbro, supra; Blankenship, supra*.

We agree with the Director's argument that Dr. Kleinerman's testimony, *see* Employer's Exhibit 10 at 68, referred to by the administrative law judge on remand, *see* Decision and Order on Remand at 4, does not appear to support a finding that the physician identified a specific lesion which would appear as at least one opacity greater than one centimeter when viewed on x-ray. We note that Dr. Kleinerman did not refer to a 1.6 centimeter lesion viewed on autopsy, as the administrative law judge found, *see* Decision and Order on Remand at 4. Rather, Dr. Kleinerman discussed a 1.5 centimeter nodule which he identified on a 1992 x-ray and had characterized as a tumor. Employer's Exhibit 10 at 67, 68. Further, although Dr. Kleinerman testified that this nodule would be considered progressive massive fibrosis using the International Labour Organization's one centimeter radiological standard, *Id.*, a diagnosis of "progressive massive fibrosis" is not a diagnosis upon which the administrative law judge could properly rely to make an equivalency determination at 20 C.F.R. §718.304 (2000). 20 C.F.R. §718.304(a) - (c) (2000); *cf.* 20

²Dr. Naeye was of the opinion that a lesion must be at least two centimeters in diameter as viewed on autopsy for a diagnosis of complicated pneumoconiosis on autopsy. Employer's Exhibit 9 at 18. The administrative law judge correctly noted that the United States Court of Appeals for the Fourth Circuit in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999) declined to impose such a rule. Decision and Order on Remand at 3.

C.F.R. §410.418(b).³ Thus, on remand, the administrative law judge must reconsider whether Dr. Kleinerman identified any lesion which would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray. *Scarbro, supra; Blankenship, supra.*

³Like Dr. Naeye, Dr. Kleinerman also opined that lesions must be two centimeters or larger on pathology to constitute complicated pneumoconiosis. Employer's Exhibit 13 at 1. See discussion, *supra* at n.2.

Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.304 (2000). On remand, the administrative law judge must reconsider all the relevant evidence and determine its sufficiency to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000).⁴

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴In light of our decision to vacate the administrative law judge's finding of invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000), we vacate the administrative law judge's finding that claimant established that the miner's pneumoconiosis arose out of his coal mine employment. This finding, which is unchallenged on appeal, is subject to reinstatement by the administrative law judge should he again find invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000).