

BRB No. 11-0448 BLA

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| EILEEN MULLINS |) | |
| (Widow of GEORGE K. MULLINS) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| CANNELTON INDUSTRIES, |) | DATE ISSUED: 03/23/2012 |
| INCORPORATED |) | |
| |) | |
| and |) | |
| |) | |
| CANNELTON HOLDING COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan,
Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Parkersburg, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2009-BLA-5768) of Administrative Law Judge Richard A. Morgan rendered on a survivor's claim filed, on October 14, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge found that the miner had at least thirty-four years of coal mine employment. He also found that claimant was not entitled to the presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(3) and Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(3), (4). Adjudicating the claim pursuant to the regulations at 20 C.F.R. Part 718,³ the administrative law judge found that the existence of clinical, but not legal,

¹ Claimant is the widow of the miner, who died on April 29, 2008. Director's Exhibit 12. The miner's lifetime claim for benefits was denied on March 6, 1990, by Administrative Law Judge David A. Clarke, Jr., because the miner failed to establish the existence of pneumoconiosis, total disability, and disability causation. The denial was affirmed by the Board, as the existence of pneumoconiosis, an essential element of entitlement, was not established. *Mullins v. Cannelton Industries, Inc.*, BRB No. 90-1214 BLA (Mar. 18, 1993)(unpub.). No further action was taken on the miner's claim.

² Section 411(c)(3) of the Act provides an irrebuttable presumption that the miner's death was due to pneumoconiosis if the existence of complicated pneumoconiosis is established. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c).

Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if the miner had at least fifteen years of qualifying coal mine employment and the evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4).

³ In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR

pneumoconiosis, was established, and that the clinical pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.201, 718.202, 718.203(b). He found, however, that the miner's death was not caused by pneumoconiosis. 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding her entitled to the invocation of the presumptions pursuant to Section 411(c)(3) and Section 411(c)(4) of the Act, and in denying benefits.⁴ In response, employer contends that the administrative law judge's denial of benefits should be affirmed, as he properly found that the presumptions at Section 411(c)(3) and Section 411(c)(4) of the Act were not invoked. Employer also contends that the administrative law judge properly found that death due to pneumoconiosis was not established pursuant to Section 718.205(c). The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in this appeal.

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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) Complicated Pneumoconiosis

Claimant contends that the administrative law judge erred in finding that she was not entitled to invocation of the Section 411(c)(3) presumption because the physicians did not specifically diagnose the presence of "complicated pneumoconiosis" or "progressive massive fibrosis" in their opinions. Claimant contends that, "[i]n contrast to the

2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

⁴ The administrative law judge's findings that the miner had thirty-four years of coal mine employment and did not establish death causation pursuant to Section 718.205(c) are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 2; Claimant's Exhibit 4.

speculations of Drs. Oesterling and Bush[,] Dr. Jelic fully explained his contention that what was found on [the miner's] autopsy actually demonstrate[d] the presence of progressive massive fibrosis.” Claimant’s Brief at 6. Claimant further contends “that it was error to discount [Dr. Jelic’s] opinion simply because [he] did not choose to say that [the miner] suffered from ‘complicated pneumoconiosis.’” Claimant’s Brief at 6.

Pursuant to Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 of the regulations, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). Further, the United States Court of Appeals for the Fourth Circuit has held that the administrative law judge must perform an equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. Specifically, the court has held that “[b]ecause prong (A) sets out an entirely objective scientific standard” - *i.e.*, an opacity on an 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 Scarbro v. Eastern Assoc. Coal Corp.*, 220 F.3d 250, 22 BLR 2-93(4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Although the court indicated in *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006), that a diagnosis of massive lesions, standing alone, can satisfy 20 C.F.R. §718.304(b), it did not overrule its holdings in *Scarbro* and *Blankenship*, that “massive lesions” are those which, when x-rayed, would appear as opacities greater than one centimeter in diameter. *Perry*, 469 F.3d at 366, 23 BLR at 2-387.

In determining that the autopsy evidence did not establish complicated pneumoconiosis pursuant to Section 718.304(b),⁶ the administrative law judge found that “[t]he evidentiary record lacks the required equivalency determination establishing that the changes Dr. Jelic identified at autopsy would appear as opacities greater than one centimeter in diameter on a standard x-ray[,]” as required by *Scarbro*. Specifically, the administrative law judge noted that, while Dr. Jelic stated that he believed that there was

⁶ Claimant does not challenge the administrative law judge’s finding that “[t]here is no x-ray evidence of complicated pneumoconiosis” pursuant to 20 C.F.R. §718.304(a). Decision and Order at 22. That finding is, therefore, affirmed. *See Skrack*, 6 BLR at 1-711. Further, complicated pneumoconiosis cannot be established at 20 C.F.R. §718.304(c), as there is no evidence relevant to that subsection.

evidence of progressive massive fibrosis, and testified that there “could be” a correlation between the nodules seen on autopsy and those seen on a chest x-ray,” he testified that “it would depend on the quality of the picture and the x-rays.” Decision and Order at 20; Employer’s Exhibit 5 at 37. Turning to the other relevant evidence, the administrative law judge noted that Dr. Oesterling stated that, while “[four] millimeter lesions in the interstitium of the lung should be seen [by x-ray]; they were not.” Decision and Order at 20; Employer’s Exhibit 7 at 34-35. Considering the opinion of Dr. Bush, the administrative law judge stated that “Dr. Bush testified [that] he would not expect any significant radiographic changes based on the microscopic slides here.” Decision and Order at 20; Employer’s Exhibit 8 at 30. Finally, in discussing the opinion of Dr. Castle, the administrative law judge stated that “Dr. Castle said the x-ray readings did not reflect either clinical or complicated pneumoconiosis and that it would be ‘very unlikely’ for a complicated pneumoconiosis lesion to be overlooked or missed on a standard x-ray.” Decision and Order at 20; Employer’s Exhibit 9 at 15-16. Consequently, based on his review of the relevant evidence, the administrative law judge found that it did not contain the requisite x-ray equivalency determination to establish the existence of complicated pneumoconiosis, and that it did not contain sufficient information upon which he could make an equivalency determination. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 244, 22 BLR at 2-560-61. Further, we reject claimant’s contention that the administrative law judge erred in rejecting the medical opinions because they did not specifically state that the miner had “complicated pneumoconiosis” or “progressive massive fibrosis,” as the administrative law judge did not reject the opinions for this reason. Decision and Order at 20. Consequently, we affirm the administrative law judge’s finding that the relevant evidence failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b).

Section 411(c)(4)
Total Disability

Next, claimant asserts that the administrative law judge erred in accepting the speculations of “employer’s physicians that [the miner] had no pulmonary impairment during his lifetime[,]” to find that total disability was not established and that the Section 411(c)(4) presumption was not, therefore, invoked. Claimant’s Brief at 5. Claimant contends that the administrative law judge’s finding is “contradicted by the objective medical evidence, which fully supports Dr. Wantz’s conclusion concerning the extent and effects of [the miner’s] pulmonary condition[,]” and which establishes total disability. Claimant’s Brief at 6. We disagree. As the administrative law judge found, no pulmonary function studies or blood gas studies were submitted into the record. Decision and Order at 22. Further, the one paragraph letter by Dr. Wantz, who treated the miner before his death, does not state that the miner was totally disabled from a respiratory impairment, which precluded him from performing his usual coal mine employment, or otherwise discuss the miner’s physical limitations. Claimant’s Exhibit 1. Rather, in her

on paragraph letter, written subsequent to the miner's death, Dr. Wantz states that the miner "had several episodes of pneumonia," that the miner "finally succumbed to his medical problems,"⁷ that "[a]n autopsy showed complicated coal workers' pneumoconiosis/progressive massive fibrosis," and that, in her opinion, the miner "died from complications of the pneumoconiosis" and that "the pneumoconiosis contributed in large part to the [miner's death]." Claimant's Exhibit 1. The administrative law judge properly found that Dr. Wantz's letter contained insufficient information to constitute a reasoned opinion sufficient to establish total respiratory disability pursuant to Section 718.204(b). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986)(en banc); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(en banc), *aff'd on recon.* 9 BLR 1-104 (1986)(en banc). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Conclusion

We affirm the administrative law judge's findings that the evidence did not establish invocation of the presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(3) and Section 411(c)(4) of the Act. As claimant has made no other allegations of error, the administrative law judge's denial of benefits must be affirmed.

⁷ Dr. Wantz does not, however, in her one paragraph letter, identify the miner's medical problems. Claimant's Exhibit 1. Hospital treatment records from 2007 until the miner's death in 2008, listed, among other conditions, heart disease, dementia, diabetes, chronic renal failure, hypothyroidism, pneumoconiosis, and pneumonia. Employer's Exhibit 6.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge