



BRB No. 19-0290 BLA

CHARLOTTE A. GREGORY)
(Widow of JOHN E. GREGORY))

Claimant-Respondent)

v.)

BARNES & TUCKER COMPANY)

Employer-Petitioner)

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

Party-in-Interest)

DATE ISSUED: 05/29/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long),
Ebensburg, Pennsylvania, for claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and
GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-06196) of Administrative Law Judge Drew A. Swank rendered on a survivor's claim filed on December 31, 2015,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge further found the miner's complicated pneumoconiosis arose out of his coal mine employment and therefore awarded benefits. 20 C.F.R. §718.203.

On appeal, employer argues the administrative law judge erred in finding the miner suffered from complicated pneumoconiosis and claimant invoked the irrebuttable presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 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).

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be 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. In determining whether claimant has invoked the irrebuttable

¹ Claimant is the widow of the miner, who died on January 9, 2014. Director's Exhibit 9.

² We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had seventeen and three-quarter years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 6; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

presumption, the administrative law judge must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge noted the parties did not designate x-ray evidence for consideration. Decision and Order at 11; *see* 20 C.F.R. §718.304(a). Dr. Qian conducted the miner's autopsy on January 9, 2014, and reported coal macules in excess of one centimeter.⁴ Decision and Order at 11-12; *see* Claimant's Exhibit 1. The administrative law judge found Dr. Qian's autopsy report supportive of a finding of complicated pneumoconiosis.⁵ Decision and Order at 12; *see* 20 C.F.R. §718.304(b).

In considering the other evidence of record, 20 C.F.R. §718.304(c), he noted that the miner's treatment records included diagnoses of pneumoconiosis and "various x-rays describe nodules measuring up to [one] centimeter in both lungs." Decision and Order at 12; *see* Director's Exhibit 11. He then weighed the opinions of Drs. Perper and Swedarsky.

Dr. Perper reviewed the miner's medical records and autopsy slides and opined he had complicated coal workers' pneumoconiosis. Claimant's Exhibit 2. He stated:

The microscopic examination of the autopsy lung slides by the current reviewer disclosed several nodular anthracotic silicotic nodules and nodular areas, some exceeding 1-1.5 [centimeters] with presence of silica and silicates on a background of interstitial fibroanthracosis and those findings are characteristic for complicated coal workers' pneumoconiosis

⁴ On microscopic examination, Dr. Qian wrote, in part:

Sections show collections of anthrasilicotic pigment laden macrophages in perivascular, peribronchiolar, subpleural, and periseptal locations. These collections involve up to 45 percent of the lung paranchyma forming macules measuring up to 1.2 [centimeters] and micronodules measuring up to 5.0 [millimeters]. The macules show giant cell granulomas and chronic inflammation.

Claimant's Exhibit 1.

⁵ Dr. Qian diagnosed severe simple coal workers' pneumoconiosis. Claimant's Exhibit 1.

(Progressive Massive Fibrosis) as nodular areas of such magnitude are equivalent to radiological opacities of the same size.

Id. at 26.

Dr. Swedarsky also reviewed the miner's medical records and autopsy slides. Employer's Exhibit 2. He opined the miner had simple coal workers' pneumoconiosis. *Id.* at 15, 26. In his description of the slides, however, he referenced that "nodules form 1.0 x 0.5 [centimeter] aggregate." *Id.* at 10. During his deposition on November 6, 2018, Dr. Swedarsky disagreed with Dr. Perper's diagnosis of progressive massive fibrosis. Employer's Exhibit 3 at 45-46. Although he acknowledged the miner had several pleural-based lesions that measured greater than one centimeter, he excluded a diagnosis of progressive massive fibrosis because the nodules were greater than one centimeter in only one dimension. *Id.* at 51-55.

The administrative law judge found the totality of the evidence established the miner had opacities in his lungs in excess of one centimeter in diameter related to coal workers' pneumoconiosis. Decision and Order at 14. He rejected Dr. Swedarsky's rationale that a lesion must exceed one centimeter in all dimensions to be considered complicated pneumoconiosis or progressive massive fibrosis. *Id.*, citing *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 259 (4th Cir. 2000). Thus, the administrative law judge found claimant established complicated pneumoconiosis and invoked the irrebuttable presumption. Decision and Order at 14.

Employer generally contends the administrative law judge erred in rejecting Dr. Swedarsky's opinion by citing case law from the United States Court of Appeals for the Fourth Circuit, whereas this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Employer's Brief at 7. Employer fails to explain, however, why the administrative law judge's rejection of Dr. Swedarsky's rationale for not diagnosing complicated pneumoconiosis is contrary to Third Circuit case law. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Employer also argues the administrative law judge erred in "taking Dr. Qian's and Dr. Swedarsky's measurements of the macules and/or nodules that they had observed on the microscopic slides and concluding that they were equivalent to a diagnosis of complicated coal workers' pneumoconiosis." Employer's Brief at 7. Since neither physician diagnosed massive lesions or "an equivalent description, such as progressive massive fibrosis," employer contends their opinions cannot support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Employer asserts that "[e]liminating Dr. Qian and Dr. Swedarsky and the medical records from the equation

materially undermines the [administrative law judge's] conclusion that the miner had complicated pneumoconiosis and renders his decision unsupported by substantial evidence.” *Id.* We disagree.

Contrary to employer's contention, an autopsy can support a finding of complicated pneumoconiosis where the physician diagnoses “massive lesions” *or* where an evidentiary basis exists for the administrative law judge to make an equivalency determination between autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304(b); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981); *Lohr v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984). The standard for establishing complicated pneumoconiosis by x-ray is whether the opacity is greater than one centimeter in diameter – Category A, B or C opacities.⁶ *See* 20 C.F.R. §718.304(a). The administrative law judge rationally found the opinions of Drs. Qian and Swedarksy supported a finding of complicated pneumoconiosis based on their respective measurements of the opacities they observed on the autopsy slides as exceeding one centimeter. *See Clites* 663 F.2d at 16; *see also Mancia v. Director, OWCP*, 130 F.3d 579, 589 (3d Cir. 1987).

Notwithstanding, even if we were to “eliminate” the miner's treatment records⁷ and the opinions of Drs. Qian and Swedarsky as employer suggests, substantial evidence supports the administrative law judge's finding of complicated pneumoconiosis based on Dr. Perper's review of the autopsy slides. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the “error to which [it] points could have made any difference”). Employer does not identify any error by the administrative law judge in crediting Dr. Perper's opinion that the miner's autopsy slides showed complicated pneumoconiosis/progressive massive fibrosis. *See* 20 C.F.R. §§802.211, 802.301; *Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant established complicated pneumoconiosis.⁸ 20 C.F.R.

⁶ The International Labour Organization (ILO) classification form used for the interpretation of x-rays defines Category A opacities as those “[h]aving a greatest diameter exceeding about 10 mm” *See* Form CM-933.

⁷ Employer contends the miner's treatment record x-rays cannot support a finding of complicated pneumoconiosis because there is no indication they were interpreted under the ILO classification system for identifying large opacities. Employer's Brief at 6.

⁸ Because we affirm the administrative law judge's finding of complicated pneumoconiosis, we need not consider employer's arguments that the administrative law

§718.304; *Melnick*, 16 BLR at 1-33. We further affirm, as unchallenged, the administrative law judge's finding the miner's complicated pneumoconiosis arose out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we affirm his finding claimant invoked the irrebuttable presumption the miner's death was due to pneumoconiosis. Decision and Order at 14, 16.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

judge erred in also finding claimant invoked the Section 411(c)(4) presumption. Employer's Brief at 8; Decision and Order at 10.