

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0443 BLA

INA RATLIFF)
(Widow of BILLY RATLIFF))

Claimant-Respondent)

v.)

SHAMROCK PROCESSING COMPANY,)
INCORPORATED)

and)

DATE ISSUED: 09/09/2020

EMPLOYERS INSURANCE OF WAUSAU,)
c/o LIBERTY MUTUAL INSURANCE)
GROUP)

Employer/Carrier-)
Petitioners)

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

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams &
Reynolds), Norton, Virginia, for Claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
Employer/Carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-05441) on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on April 22, 2015.

The administrative law judge credited the Miner with thirty-one years of coal mine employment.¹ He found Claimant² established complicated pneumoconiosis and thus invoked the irrebuttable presumption 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 awarded benefits. 20 C.F.R. §718.203.

On appeal, Employer argues that the Section 411(c)(4) presumption is unconstitutional. Employer also contends the administrative law judge erred in finding the evidence established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to decline to entertain Employer's constitutional objection as inapplicable. In a reply brief, Employer reiterates its previous contentions.

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. 33 U.S.C. §921(b)(3), as incorporated

¹ The Benefits Review Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21.

² Claimant is the widow of the Miner, who died on March 7, 2009. Director's Exhibit 7.

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

Constitutional Challenge

Employer initially objects to the application of the Section 411(c)(4) presumption, contending that Section 1556 of the Patient Protection and Affordable Care Act, which revived this provision, “violates Article II of the United States Constitution.” *See* Pub. L. No. 111-148, §1556 (2010); Employer’s Brief at 2. However, the administrative law judge did not award benefits based on the Section 411(c)(4) presumption. Director’s Brief at 2. Thus, we decline to address Employer’s argument. *See* 20 C.F.R. §802.211(b).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner’s death is 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 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must weigh together the evidence at subsections (a), (b), and (c) before determining whether a claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

After finding the x-ray evidence did not establish complicated pneumoconiosis, 20 C.F.R. §718.304(a); Decision and Order at 26, the administrative law judge considered the autopsy reports of Drs. Picklesimer, Oesterling, and Perper.³ 20 C.F.R. §718.304(b).

Dr. Picklesimer conducted the Miner’s autopsy on March 8, 2009. Director’s Exhibit 8 at 1. He diagnosed complicated pneumoconiosis, noting “[m]arked pulmonary anthracosis with fibrosis.” *Id.*

³ The administrative law judge also considered a report of a lung biopsy performed on July 28, 2006, but found the report did not contain sufficient information to make a determination regarding the existence of pneumoconiosis, and thus accorded it no “probative weight.” 20 C.F.R. §718.304(b); Decision and Order at 26; Director’s Exhibit 9 at 117-18.

Dr. Oesterling reviewed the Miner's autopsy slides and the medical evidence. He opined the Miner did not have complicated pneumoconiosis, but instead had "significant bacterial overgrowth that resulted in early bronchopneumonia complicating marked passive congestion with extensive areas of intraalveolar hemorrhage." Director's Exhibit 12 at 6. He opined that the result of the passive congestion with the alveolar hemorrhage, and the resultant overgrowth of bacteria and pneumonia, was "significant reactive fibrosis within the lung tissue." *Id.* at 7.

Dr. Perper also reviewed the Miner's autopsy slides and the medical evidence including Dr. Oesterling's report. Dr. Perper found:

[The Miner] had clear and undeniable pathological evidence of complicated coal workers pneumoconiosis (progressive massive fibrosis) with a left lower lobe pneumoconiotic fibro-anthracotic mass exceeding [one centimeter] and equivalent to radiological masses of the same size, on the background of marked [d]ust related [d]iffuse [f]ibrosis . . . , the interstitial fibrosis/ fibro-anthracosis type of coal workers' pneumoconiosis.

Director's Exhibit 11 at 54.

In addressing the conflicting autopsy evidence, the administrative law judge accorded less weight to Dr. Picklesimer's opinion because he did not adequately explain the basis for his diagnosis of complicated pneumoconiosis. Decision and Order at 29. He noted that Dr. Picklesimer "did not articulate the size of opacities he observed or describe them as massive lesions." *Id.*

The administrative law judge next considered the remaining opinions of Drs. Oesterling and Perper, noting that he was "struck by the divergence of opinion regarding the evidence of dust deposition, black pigment, and anthracosis."⁴ Decision and Order at 30. The administrative law judge noted that if Dr. Oesterling was correct that there was a lack of black pigment or anthracosis in the Miner's lungs, his opinion would have "added validity." Decision and Order at 31. Conversely, if black pigment and anthracosis were present in the Miner's lungs as identified by Drs. Picklesimer and Perper, the administrative law judge noted that Dr. Oesterling's attribution of the fibrosis to bacteria would be called into question. *Id.* The administrative law judge therefore found it necessary to initially

⁴ The administrative law judge noted that while Dr. Oesterling found very little anthracotic pigmentation and attributed all of the Miner's fibrosis to other causes, Drs. Picklesimer and Perper each described significantly higher levels of pigmentation and fibro-anthracosis. Decision and Order at 30-31.

resolve the difference of opinion among the pathologists regarding the presence of black pigment and anthracosis in the Miner's lungs.

In addressing this issue, the administrative law judge noted that Drs. Picklesimer, Perper and Oesterling are all Board-certified pathologists. Decision and Order at 5, 7, 17. He found it significant that a majority of these pathologists, Drs. Picklesimer and Perper, opined that the Miner's lungs revealed anthracosis or fibro-anthracosis. *Id.* at 31. He also noted that one of these two pathologists, Dr. Picklesimer, was the prosector.⁵ *Id.* Relying on their opinions over Dr. Oesterling's, the administrative law judge found the autopsy evidence established anthracosis, *i.e.*, simple clinical pneumoconiosis. *Id.* at 31.

Employer contends that the administrative law judge erred in weighing the autopsy evidence, alleging he improperly "relied on the numerical superiority of [the] pathology opinions." Employer's Brief at 3. Employer asserts that the administrative law judge "must weigh the credentials of each physician and the degree to which each opinion is well-reasoned and documented." *Id.* Contrary to Employer's argument, the administrative law judge considered the physicians' credentials, the bases for their opinions, and their descriptions of what the autopsy slides reveal. See *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Because Employer raises no other specific challenge to the administrative law judge's weighing of the autopsy evidence, we affirm his finding that the autopsy evidence established simple pneumoconiosis.

The administrative law judge then found Dr. Oesterling's opinion that bacteria caused the Miner's fibrosis was premised in large part on his discredited view that the Miner's lungs did not reveal anthracosis. Decision and Order at 31. The administrative law judge therefore accorded greater weight to Dr. Perper's opinion that the mass in the left lower lobe represented a fibro-anthracotic mass exceeding one centimeter that was consistent with complicated pneumoconiosis.⁶ *Id.* at 31-32. Thus, he found the autopsy

⁵ The administrative law judge noted that Dr. Picklesimer performed the autopsy as part of the Miner's final hospitalization, and not for the purpose of litigation. Decision and Order at 31.

⁶ The administrative law judge also noted Dr. Perper observed that Dr. Oesterling described "minute birefringent intracellular encapsulated bacteria," but did not identify the type of bacteria that comprised the alleged infectious process. Decision and Order at 32 n.17; Director's Exhibit 11 at 40. The administrative law judge noted that Dr. Perper explained that birefringent micro-organisms are "exceedingly rare." *Id.*

evidence established complicated pneumoconiosis. 20 C.F.R. §718.304(b). Because Employer does not challenge this finding, other than its already rejected contention that the administrative law judge erred in finding the autopsy evidence revealed anthracosis, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge also considered the medical opinions of Drs. Perper, Rasmussen, Alam, Castle, and Rosenberg. He found Dr. Perper's opinion that the Miner had complicated pneumoconiosis was reasoned and documented, and based upon the most extensive record review, including a review of the autopsy slides. Decision and Order at 37. The administrative law judge accorded little weight to the contrary opinions of Drs. Rasmussen and Alam because they relied upon their examinations of the Miner in 2005 and 2008 and thus did not have access to the more recent and probative autopsy evidence. *Id.* at 34; Director's Exhibits 9, 10. Similarly, he accorded less weight to the contrary opinions of Drs. Castle and Rosenberg because they did not consider Dr. Perper's review of the autopsy slides, which the administrative law judge found to be the most probative evidence of record. *Id.* at 36; Director's Exhibits 13, 14. The administrative law judge therefore found the medical opinions established complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 37.

Employer notes that Dr. Perper premised his opinion largely upon his review of the autopsy slides. Employer's Brief at 3. Employer asserts that "for the same reasons that the [administrative law judge's] findings on the pathology evidence must be reversed, his findings on the medical opinion evidence must also be reversed." *Id.* As we have affirmed the administrative law judge's weighing of the autopsy evidence and Employer has raised no other challenges to his weighing of the medical opinions, we affirm his finding that Dr. Perper's opinion and the medical opinion evidence established complicated pneumoconiosis. 20 C.F.R. §718.304(c). We also affirm his finding that the evidence as a whole established complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 37-38. We therefore affirm the administrative law judge's finding that Claimant invoked the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §718.304.

We further affirm, as unchallenged on appeal, the administrative law judge's finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711 (1983); Decision and Order at 38.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge