

BRB No. 01-0900 BLA

ESTER MAE AMERSON)		
(Widow of BILLIE JOE AMERSON))		
)		
Claimant-Respondent)		
)		
v.)		
)		
DRUMMOND COAL COMPANY,)	DATE	ISSUED:
)		
INCORPORATED)		
)		
Employer-Petitioner)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (00-BLA-1012) of Administrative Law Judge Gerald M. Tierney 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 The instant case involves a survivor's claim filed on October 13,

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

1999.² The administrative law judge found that the autopsy evidence is sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge also found that claimant is entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence is sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Section 718.304 provides that there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.³

C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The miner filed a claim on March 13, 1991. Director's Exhibit 33. The district director denied the claim on July 16, 1991. *Id.* There is no indication that the miner took any further action in regard to his 1991 claim.

³Section 718.304 has not been revised. Section 718.304 provides in relevant part:

There is an irrebuttable presumption that...a miner's death was due to pneumoconiosis...if such miner...suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray...yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original].

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Although the administrative law judge accurately noted that there was no x-ray evidence of record indicating an opacity greater than one centimeter in diameter, the administrative law judge acted within his discretion in finding that the autopsy evidence was the most reliable evidence as to the existence of complicated pneumoconiosis. Decision and Order at 5; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). The administrative law judge noted that while Dr. Parker, the autopsy prosector, diagnosed complicated pneumoconiosis, Dr. Caffrey, a reviewing pathologist, opined that the miner did not suffer from complicated pneumoconiosis. Decision and Order at 4; Director's Exhibits 4, 30; Claimant's Exhibit 1. The administrative law judge noted that the opinions of Drs. Hasson and Fino supported Dr. Caffrey's opinion that the miner did not suffer from complicated pneumoconiosis. Decision and Order at 5; Employer's Exhibits 1, 3. The administrative law judge, however, accorded the opinions of Drs. Hasson and Fino less weight because their opinions were based upon a review of the evidence; not upon a review of the miner's autopsy slides. *Id.*

In considering the autopsy evidence, the administrative law judge acted within his discretion in according greater weight to Dr. Parker's opinion because she "had the opportunity to grossly examine the miner's lungs." Decision and Order at 5. The administrative law judge found that Dr. Parker observed "massive lesions" during her gross examination of the miner's lungs, thereby providing her with an advantage over a reviewing pathologist.⁴ *See Terlip, supra; Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order at 5; Director's Exhibit 4; Claimant's Exhibit 1.

Employer argues that the administrative law judge erred in according greater weight to Dr. Parker's opinion. Employer contends that Dr. Parker's opinion is insufficient to support a finding of complicated pneumoconiosis because she did not include a finding of "massive

⁴Autopsy findings can support a finding of complicated pneumoconiosis where a physician diagnoses "massive lesions" or where an evidentiary basis exists for the administrative law judge to make an equivalency finding between autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Lohr v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984).

lesions of the lungs” in her autopsy report as required by Section 718.304(b).⁵ Employer contends that the nodules found by Dr. Parker were “in the lymph nodes and were visible upon gross examination of the chest cavity, prior to cutting into the lungs.” Employer’s Brief at 11.

Dr. Parker did not specifically identify the presence of “massive lesions” in her autopsy report. However, in her autopsy report, Dr. Parker stated that:

Gross examination of the lungs showed a moderate to marked amount of anthracotic type pigmentation, involving perihilar and peribronchial lymph nodes, the pulmonary parenchyma and pleural lymphatics. In addition, peribronchial lymph nodes and the central lung tissue were fibrotic and hard on palpation.

Director’s Exhibit 14.

Moreover, the administrative law judge accurately noted that Dr. Parker, during a subsequent March 8, 2001 deposition, clarified that she observed “massive lesions” in the miner’s lungs. Decision and Order at 5; Claimant’s Exhibit 1 at 11-13, 20, 21. Consequently, the administrative law judge properly found that Dr. Parker’s opinion supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

Employer also argues that Dr. Parker’s opinion should be accorded less weight because she had only been a Board-certified pathologist for two years at the time she conducted the miner’s autopsy. We disagree. The administrative law judge properly noted that Dr. Parker satisfied the requirements for Board-certification in Pathology. Decision and Order at 6; Director’s Exhibit 4. Thus, Drs. Parker and Caffrey are similarly qualified, each having satisfied the requirements for Board-certification in Clinical and Anatomic Pathology. *See* Director’s Exhibits 4, 30.

We also reject employer’s contention that Dr. Parker’s opinion is entitled to less weight because she “never reviewed [the miner’s] medical records, did not perform a full autopsy, and was unaware of his smoking history.” Employer’s Brief at 12. Dr. Parker’s finding of “massive lesions” in the miner’s lungs constitutes a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Such a finding is not dependent upon a review of medical records, a full autopsy or a knowledge of a miner’s smoking history.

Inasmuch as it is supported by substantial evidence, we affirm the administrative law

⁵The Board has strictly construed the medical criteria for establishing complicated pneumoconiosis by requiring that an autopsy report diagnose “massive lesions.” *Neeley, supra; Lohr, supra.*

judge's finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge