

BRB No. 08-0559 BLA

M.W.)
(o/b/o and as Widow of C.W.))
)
Claimant-Respondent)
)
v.)
)
RUSSELL COAL COMPANY) DATE ISSUED: 04/16/2009
)
and)
)
AMERICAN RESOURCE INSURANCE)
COMPANY)
)
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 on Remand of Ralph A. Romano,
Administrative Law Judge, United States Department of Labor.

Anthony K. Finaldi and Ward Ballerstedt (Ferreri & Fogle PLLC),
Louisville, Kentucky, for employer/carrier.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James,
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: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2005-BLA-05639 and 2005-BLA-05640) of Administrative Law Judge Ralph A. Romano (the administrative law judge) awarding benefits on both a miner's claim and a survivor's 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 In its most recent Decision and Order in this case, the Board vacated the administrative law judge's prior decision awarding benefits and remanded the case for the administrative law judge to reconsider whether the evidence established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption that the miner's disability and death were due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Specifically, the Board held that the administrative law judge must determine whether the autopsy evidence established the existence of complicated pneumoconiosis at Section 718.304(b). The Board further instructed the administrative law judge that if he found that complicated pneumoconiosis was not established and that claimant was not, therefore, entitled to the irrebuttable presumption that the miner's disability and death were due to coal mine employment, he must consider whether claimant carried her burden of establishing that the miner's total disability and death were due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c) and 718.205(c). *Wright v. Russell Coal Co.*, BRB No. 06-0599 BLA (Apr. 27, 2007) (unpub.).

In finding the existence of complicated pneumoconiosis established by autopsy evidence at Section 718.304(b), on remand, the administrative law judge determined that the findings of Dr. Guerry-Force, the autopsy prosector, were more persuasive than the findings of the consulting pathologists. The administrative law judge found Dr. Guerry-Force's autopsy report to be entitled to the greatest weight because, as the autopsy prosector, she was able to see the "entire respiratory system as well as other body systems." Decision and Order on Remand at 4. Consequently, the administrative law judge found that Dr. Guerry-Force's autopsy report established the existence of complicated pneumoconiosis and that claimant was, therefore, entitled to the irrebuttable

¹ The miner filed a claim on August 14, 2000. That claim was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order issued on March 29, 2002, because the miner failed to establish that his totally disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(b)(2000). Subsequent to an appeal by the miner, the Board, on February 25, 2003, affirmed the denial of benefits. *Wright v. Russell Coal Co.*, BRB No. 02-0533 BLA (Feb. 25, 2003)(unpub.). On July 21, 2003, the miner died, and on December 12, 2003, claimant filed a survivor's claim. Director's Exhibit 61. As the survivor's claim was filed less than one year after the denial of the miner's claim, it was treated as a request for modification of the denial of the miner's claim, as well as a separate survivor's claim for benefits.

presumption that the miner's disability and death were due to pneumoconiosis. Accordingly, benefits were awarded on both the miner's claim and the survivor's claim.²

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.³ 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).

On appeal, employer argues only that the administrative law judge erred in finding claimant entitled to the irrebuttable presumption that the miner's disability and death were due to pneumoconiosis based on autopsy evidence of complicated pneumoconiosis at Section 718.304(b). Specifically, employer contends that the administrative law judge must consider the report of Dr. Goldstein, who found that the miner had a cardiac condition, and the reports of Drs. Caffrey and Naeye, who found, on review of the autopsy, that the lesions seen were the result of the miner's cancer. Additionally, employer contends that the administrative law judge erred in giving controlling weight to the disability causation opinions of Drs. Westerman and Brasfield, treating physicians, at Section 718.204(c), without considering whether their opinions were reasoned and documented at 20 C.F.R. §718.104(d)(5). Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge followed the Board's instructions and fully explained his reasons for according greatest weight to the report of Dr. Guerry-Force and, thereby, finding claimant entitled to the irrebuttable presumption at Section 718.304. The Director also contends, citing *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), that the administrative law judge's finding of complicated pneumoconiosis should be affirmed as employer did not challenge the administrative law judge's findings that the report of the autopsy prosector, Dr. Guerry-Force, established the presence of complicated pneumoconiosis and that her report was the most probative of record. Further, the Director contends that employer's arguments that the administrative law judge failed to consider whether the evidence independently established that the miner's disability and death were due to coal mine employment are meritless, as claimant is not required to establish those elements if she is entitled to the irrebuttable presumption.

² The administrative law judge also found that the evidence established that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge did not, however, consider whether the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the miner's coal mine employment was in Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

At the outset, we note, as the Director asserts, that the administrative law judge is not required to consider whether the evidence establishes that the miner's disability and death are due to pneumoconiosis if claimant establishes invocation of the irrebuttable presumption by establishing complicated pneumoconiosis at Section 718.304. Rather, invocation of the irrebuttable presumption at Section 718.304 relieves claimant of the burden of showing that the miner's disability and death were due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Accordingly, if the administrative law judge properly found the irrebuttable presumption invoked at Section 718.304, we need not consider employer's arguments at Section 718.204(c) and Section 718.205(c).

In this case, as the Director asserts, employer fails to argue with any specificity that the administrative law judge erred in finding complicated pneumoconiosis established at Section 718.304(b) based on the report of Dr. Guerry-Force, the autopsy prosector, which the administrative law judge found to be more persuasive. The Board is not permitted to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf*, 10 BLR at 1-120. The Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf*, 10 BLR at 1-120; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. Consequently, because employer has failed to point to any specific errors made by the administrative law judge in his analysis of the evidence at Section 718.304, *i.e.*, in according greater weight to the autopsy report of Dr. Guerry-Force because it was more persuasive than the opinions of Drs. Goldstein, Caffrey and Naeye, we have no basis on which to review the administrative law judge's decision, on remand, awarding benefits on both the miner's claim and the survivor's claim.⁴ It must, therefore be affirmed.

⁴ The administrative law judge found that claimant was entitled to the irrebuttable presumption that the miner's disability and death were due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, based on his finding of complicated pneumoconiosis. Consequently, we need not consider employer's argument that the administrative law judge erred in finding that claimant also established that the miner's disability was due to pneumoconiosis at 20 C.F.R. §718.204(c), or its argument that the administrative law judge failed to address evidence relevant to death causation at 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge