

BRB No. 10-0415 BLA

CHARLOTTE E. CURRY)	
(Widow of EARL R. CURRY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WYOMING POCAHONTAS LAND)	
COMPANY)	DATE ISSUED: 04/29/2011
)	
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 Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Erik A. Schramm (Hanlon, Estadt, McCormick & Schramm Co. LPA), St. Clarksville, Ohio, for employer.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5199) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim filed on October 27, 2006, 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).¹ Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that the miner worked for twenty-six years as an underground coal miner and that the miner had simple pneumoconiosis. The administrative law judge then accorded greatest weight to the autopsy evidence and found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that the miner's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) and that death causation was established at 20 C.F.R. §718.205(c), based upon invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to invoke the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Claimant urges the Board to reject employer's arguments and affirm the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a letter in response to employer's appeal indicating that the administrative law judge permissibly found the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and urges the Board to affirm the administrative law judge's decision awarding benefits.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,

¹ Earl R. Curry, the miner, died on February 24, 2006. Director's Exhibits 2, 8. Although claimant asserted in her application for survivor's benefits that other claims were filed, the record does not contain any evidence indicating that the miner filed a claim during his lifetime. Claimant's Exhibit 2.

² We affirm, as unchallenged on appeal, the administrative law judge's acceptance of the parties' stipulation to twenty-six years of underground coal mine employment and the existence of simple pneumoconiosis and the administrative law judge's determination that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To establish entitlement to survivor’s benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because this survivor’s claim was filed after January 1, 1982, claimant must establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner’s death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, invocation of the irrebuttable presumption set forth in 20 C.F.R. §718.304 or that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2). 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 Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Employer alleges that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption under 20 C.F.R. §718.304. Relevant to this survivor’s claim, Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the 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 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. 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. In determining whether a

³ The administrative law judge determined that employer – Wyoming Pocahontas Land Company (formerly known as Youghioghenny & Ohio Coal Company) – is the only entity for whom the miner performed coal mine work. Decision and Order at 2. The administrative law judge did not, however, make a specific finding as to where the miner engaged in coal mine employment. Because the miner’s Social Security Administration records reflect that employer’s business address is in Lexington, Kentucky, and employer’s assertion that this case arises within the jurisdiction of the United States Court of Appeals of the Sixth Circuit is uncontested, we will apply the law of the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Employer’s Brief at 15.

claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

The administrative law judge initially determined that claimant did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a), as none of the x-rays of record was read as positive for a large opacity classified as Category A, B, or C. Decision and Order at 11. The administrative law judge also found that the evidence relevant to 20 C.F.R. §718.304(c) was insufficient to establish the existence of complicated pneumoconiosis because “none of the computerized tomography (CT) scans were [sic] read to show progressive massive fibrosis (PMF).” *Id.*

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy report prepared by Dr. Doshi, the prosector, and the reports prepared by Drs. Oesterling, Rizkalla, Schaaf and Fino. Drs. Doshi, Oesterling and Rizkalla are pathologists, while Drs. Schaaf and Fino are pulmonologists. Director’s Exhibit 9; Claimant’s Exhibits 1, 3-5; Employer’s Exhibits 3, 5.

In Dr. Doshi’s report, dated March 28, 2006, he noted the presence of a large, necrotic tumor in the miner’s left lung on gross examination. Director’s Exhibit 9. Dr. Doshi further noted:

Away from the tumor, the upper lobe of the left lung shows moderate subpleural anthracotic pigmentation which sharply outlines the lobules . . . Multiple, small nodular densities which measure from 0.5 to 1.0 [centimeter] can be palpated throughout. They are all pigmented, dark, black and also fibrotic palpable surfaces There is associated emphysematous change and pulmonary fibrotic changes [T]he lungs [on the right side] show anthracotic changes similar to those described on the left side. Multiple coal macules and nodules are seen involving all the lobes and measuring from 0.5 to 1.0 [centimeters]. There is associated, severe pulmonary emphysema and pulmonary fibrotic changes.

Id. In his microscopic description, Dr. Doshi observed:

[T]he lungs bilaterally show multiple foci of anthracotic pigment deposition. These foci vary from small to medium to large in size. The largest foci are associated with fibrosis. In these areas, many black pigment[-]containing histiocytes are present with associated sclerosis and fibrosis. Examination under polarized light shows multiple refractile particles consistent with silica. These changes are present bilaterally and in all the lobes Sections of the hilar lymph nodes show extensive

anthracotic pigment deposition with fibrosis and calcification . . . seen in multiple lymph nodes. Examination under polarized light, again shows refractile silica particles.

Id. Dr. Doshi's final diagnoses included extensive metastatic small cell carcinoma, severe coronary atherosclerosis, and complicated coal workers' pneumoconiosis with pulmonary emphysematous changes and pulmonary fibrosis. *Id.*

Dr. Oesterling reviewed the autopsy slides and submitted a report dated July 3, 2007. Employer's Exhibit 3. Dr. Oesterling determined that three of the twenty-nine slides showed significant evidence of coal mine dust exposure. Dr. Oesterling viewed these three slides at 250% magnification and stated that "each of these areas on the pleural surface measure [sic] slightly over [one centimeter] in length, however, none extends for more than [nine millimeters] into the underlying lung parenchyma." *Id.* He observed that "the black pigment is suspended within a matrix of nucleated fibers" and identified these structures as micronodular coal workers' pneumoconiosis. *Id.* Dr. Oesterling concluded, "we are looking at a confluence of normal reactive pleural fibrosis encompassing micronodules of coal workers' pneumoconiosis. This does not represent the pathologic findings needed for a diagnosis of [PMF], the corresponding term to complicated pneumoconiosis, a clinical term. Thus despite his careful description I would be in disagreement with the prosector" *Id.*

Dr. Rizkalla submitted a report dated March 5, 2008, based upon his review of the autopsy slides. Claimant's Exhibit 1. Dr. Rizkalla stated that he observed anthrasilicotic pigment deposition in the lungs, with fibrosis, resulting in micronodules averaging five millimeters in size with some nodules measuring up to one centimeter. *Id.* Dr. Rizkalla diagnosed moderately severe pneumoconiosis. *Id.* In a supplemental report dated September 16, 2008, Dr. Rizkalla stated, "the measurement of [a one centimeter] nodule with anthrasilicotic pigment deposit seen in the slides that came from the autopsy in the background of multiple macronodules averaging [five millimeters] . . . would be characterized as [PMF]." Claimant's Exhibit 2. Dr. Rizkalla also indicated that the one centimeter nodule would be visualized as a one centimeter or larger opacity on x-ray. *Id.* Dr. Rizkalla was deposed on December 9, 2008 and reiterated his conclusions. Claimant's Exhibit 4 at 12, 17, 20, 22, 26. Dr. Rizkalla also testified that, based upon his review of Dr. Oesterling's photographs of the tissue slides at 250% magnification, he measured lesions greater than one centimeter in size. *Id.* at 19.

Dr. Oesterling submitted a second report, dated December 10, 2008, based upon his review of Dr. Rizkalla's reports. Employer's Exhibit 5. Dr. Oesterling challenged Dr. Rizkalla's diagnosis of PMF and stated that the nodules seen on autopsy may not have appeared on x-ray due to their location on the pleural surface of the miner's lungs. *Id.*

Dr. Schaaf reviewed the death certificate, the reports of Drs. Doshi, Oesterling and Rizkalla and the miner's treatment records and submitted a report dated October 28, 2008. Claimant's Exhibit 3. Dr. Schaaf determined that, based upon the pathology findings of nodules measuring one centimeter, the miner had complicated pneumoconiosis or PMF. *Id.* Dr. Schaaf further indicated that the nodules would appear as large opacities of complicated pneumoconiosis on x-ray. *Id.* Dr. Schaaf was deposed on February 4, 2009, and reiterated his opinion. Claimant's Exhibit 5 at 19. At his deposition, Dr. Schaaf also reviewed Dr. Oesterling's photographs of the tissue slides from the autopsy at 250% magnification and indicated that the pneumoconiotic nodules measured between eleven and twelve millimeters.⁴ *Id.* at 12-13, 42.

Dr. Fino submitted a report dated December 16, 2008, in which he reviewed the death certificate, treatment records, and the reports of Drs. Doshi, Oesterling, Rizkalla and Schaaf. Employer's Exhibit 4. Dr. Fino opined that there was insufficient evidence to justify a diagnosis of complicated pneumoconiosis and that he could not discern whether pneumoconiosis was a contributing cause of the miner's death. *Id.*

Upon weighing this evidence at 20 C.F.R. §718.304(b), the administrative law judge stated:

[B]ased on the observations of Drs. Oesterling, Rizkalla, and Schaaf of nodules larger than one centimeter and the uncontroverted testimony by Drs. Schaaf and Rizkalla that the radiographic demonstration of a nodule is consistent with that seen pathologically, the evidence establishes complicated pneumoconiosis under 20 C.F.R. §718.304(b).

Decision and Order at 13. The administrative law judge further determined that he could not credit Dr. Oesterling's opinion, that the location of the lesions in the pleura was inconsistent with a diagnosis of complicated pneumoconiosis or PMF, as it conflicted with the opinions of Drs. Rizkalla and Schaaf and was unsupported by the regulations and the case law. *Id.* The administrative law judge also stated, "Dr. Oesterling's diagnosis of reactive pleural fibrosis is accorded no weight on the grounds that it is speculative and equivocal and couched in generalities." *Id.* Upon weighing all of the evidence relevant to 20 C.F.R. §718.304 together, the administrative law judge concluded:

Though the x-rays and CT scans were negative for large opacities, more weight is given to the autopsy findings of [PMF] with nodules over [one centimeter]. Dr. Rizkalla testified that whether a nodule will be visualized on x-ray depends on the angle of an x-ray or the location of a nodule.

⁴ Because a centimeter is comprised of ten millimeters, measurements of eleven and twelve millimeters are equivalent to 1.1 and 1.2 centimeters, respectively.

Similarly, Dr. Oesterling explained why the nodules seen on the miner's autopsy may not have presented on x-ray In light of these explanations by Drs. Rizkalla and Oesterling, the most weight is given to the autopsy evidence. Accordingly, the weight of the evidence under [20 C.F.R.] §718.304 establishes complicated pneumoconiosis.

Id. at 14 (internal citations omitted).

Employer argues that, because the only autopsy evidence available to the administrative law judge was the opinion of Dr. Doshi, who did not find a nodule greater than one centimeter in diameter, the administrative law judge could not find complicated pneumoconiosis established at 20 C.F.R. §718.304(b). Employer also contends that the administrative law judge erred in holding that the autopsy evidence established the presence of “massive lesions,” when none of the physicians made such a diagnosis. Lastly, employer alleges that the administrative law judge erred in finding that the autopsy evidence was sufficient to establish the existence of lesions greater than one centimeter in diameter, even though the x-ray and CT scan evidence did not confirm their existence.

Employer's allegations of error are without merit. Contrary to employer's contention, the administrative law judge rationally treated the reports by Drs. Oesterling and Rizkalla, both of whom based their opinions upon the tissue slides prepared by Dr. Doshi, as autopsy evidence under 20 C.F.R. §718.304(b). *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*). In addition, the administrative law judge acted within his discretion in determining that the reports of Drs. Oesterling, Rizkalla and Schaaf were sufficient to establish the existence of complicated pneumoconiosis. In *Gray*, the United States Court of Appeals for the Sixth Circuit held that autopsy evidence can establish invocation of the irrebuttable presumption of death due to pneumoconiosis if this evidence shows massive lesions or if the nodules found on autopsy would appear as greater than one centimeter on x-ray. *Gray*, 176 F.3d at 389, 21 BLR at 2-628-29. Given the court's recognition of the latter method, employer is also incorrect in suggesting that a physician must use the term “massive lesions” to satisfy the terms of 20 C.F.R. §718.304(b). *Gray*, 176 F.3d at 389, 21 BLR at 2-628-29; *see also Pittsburgh & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 986, 24 BLR 2-72, 89 (11th Cir. 2007); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3, 1-5 (1991).

Consistent with the court's holding in *Gray*, the administrative law judge rationally determined, based upon the reports of Drs. Oesterling, Rizkalla and Schaaf, that the miner's lungs contained nodules that were greater than one centimeter in size. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002); Decision and Order at 13. The administrative law judge also acted within his

discretion in crediting the opinions of Drs. Rizkalla and Schaaf, that these nodules would appear as opacities greater than one centimeter in diameter on a chest x-ray. *Gray*, 176 F.3d at 389, 21 BLR at 2-628-29; *Gruller*, 16 BLR at 1-5; Decision and Order at 14. In rendering this finding, the administrative law judge rationally determined that Dr. Oesterling's opinion, that the nodules were not indicative of complicated pneumoconiosis or PMF because they were located on the pleural surfaces of the miner's lungs, was not credible, in light of the contrary opinions of Drs. Rizkalla and Schaaf and the medical literature cited by Dr. Rizkalla. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Gray*, 176 F.3d at 388, 21 BLR at 2-626; Decision and Order at 13. Furthermore, the administrative law judge acted within his discretion in according little weight to Dr. Oesterling's view that the nodules on the pleura were not pneumoconiotic in nature, as the pleural fibrosis was caused by irritants other than coal dust. The administrative law judge reasonably determined that, although Dr. Oesterling "explained that the pleural surface *typically* reacts to any irritant by producing a reactive fibrosis and that collection of pleural fluid as a result of a tumor and pulmonary congestion *can* elicit [a] fibrotic response, he failed to adequately explain why the fibrosis seen in *the miner's lung* was due to these potential other causes." Decision and Order at 14 (emphasis in original); *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Gray*, 176 F.3d at 388, 21 BLR at 2-626.

Finally, we reject employer's argument that, in light of the administrative law judge's finding that the x-ray and CT scan evidence did not show opacities greater than one centimeter in diameter, he could not credit physicians' opinions asserting that the nodules seen on autopsy would appear as large opacities on an x-ray. An administrative law judge may rationally conclude that the autopsy evidence triggered invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b), even if the x-ray and CT scan evidence of record does not show a lesion greater than one centimeter in size, as autopsy evidence can diminish the probative value of negative radiological evidence. *See Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). In the present case, therefore, the administrative law judge reasonably relied upon the opinions of Drs. Rizkalla and Schaaf, and Dr. Oesterling's statement that the proximity of the lesions to the chest wall could have made them difficult to see on x-ray, to find that the existence of complicated pneumoconiosis was established. *See Braenovich*, 22 BLR at 1-245; Decision and Order at 14. In light of the foregoing, we affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis under 20 C.F.R. §718.304(b).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.⁵

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁵ In light of our affirmance of the award of benefits in this survivor's claim, we hold that application of the recent amendments to the Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 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)).