

BRB No. 07-0956 BLA

W.L.	)	
(Widow of J.L.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PATTON, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	DATE ISSUED: 08/25/2008
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5833) of Administrative Law Judge Adele Higgins Odegard rendered on 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). Claimant filed her survivor's claim on August 3, 2005, following the death of her husband (the miner) on April 24, 2005. Director's Exhibits 3, 11. In a decision dated July 25, 2007, the administrative law judge credited the miner with at least twenty-nine years of coal mine employment,<sup>1</sup> as stipulated by the parties, and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially noted that at the hearing, held on February 14, 2007, claimant objected to the admission of Dr. Crouch's report, proffered by employer as an autopsy rebuttal report, in response to claimant's affirmative autopsy report from Dr. Dennis.<sup>2</sup> Claimant asserted that because Dr. Crouch reviewed additional medical records, her opinion went beyond the scope of an autopsy rebuttal report. Hearing Transcript at 11-18. The administrative law judge disagreed with claimant, finding that although Dr. Crouch indicated that she had reviewed additional medical evidence, Dr. Crouch largely confined her discussion to the autopsy evidence, and her opinion was therefore properly admissible as an autopsy rebuttal report. Moreover, the administrative law judge stated that any comments by Dr. Crouch on matters beyond the scope of autopsy rebuttal would be disregarded.<sup>3</sup> Decision and Order at 5, 6 n.9. Turning to the merits of entitlement, the administrative law judge found the existence of simple pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as stipulated by the parties and supported by the evidence. The administrative law judge further found, however, that the evidence did not establish that the miner had complicated pneumoconiosis pursuant to 20

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<sup>1</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>2</sup> The applicable provision of the regulations authorized employer "to submit, in rebuttal of the case presented by the claimant, no more than one interpretation of each . . . autopsy . . . submitted by the claimant" in support of her affirmative case. 20 C.F.R. §725.414(a)(3)(ii).

<sup>3</sup> Addressing another objection by claimant, the administrative law judge admitted Dr. Oesterling's report and associated deposition testimony as one of employer's two medical reports permitted by 20 C.F.R. §725.414(a)(3)(i), (c). Decision and Order at 4. On appeal, claimant has not challenged this aspect of the administrative law judge's decision.

C.F.R. §718.304, or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting Dr. Crouch's report as autopsy rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). Claimant additionally challenges the administrative law judge's finding that the evidence was insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304 and death due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.<sup>4</sup>

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. 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).

Initially, we address claimant's evidentiary challenge to Dr. Crouch's report. Claimant asserts that the administrative law judge erred in admitting Dr. Crouch's report into the record as an autopsy rebuttal report, arguing that because Dr. Crouch reviewed "miscellaneous medical and occupational records" in addition to the autopsy report, autopsy slides, and death certificate, her conclusions went beyond the scope of an autopsy rebuttal report. Claimant's Brief at 5. Contrary to claimant's contention, the administrative law judge properly considered claimant's objection and acted within her discretion in finding that because Dr. Crouch confined her discussion to the autopsy slides and Dr. Dennis' autopsy report, Dr. Crouch's opinion constituted admissible autopsy rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(*en banc*); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); Decision and Order at 5, 6 n.9. As a review of Dr. Crouch's report supports the administrative law judge's conclusion, and as claimant has demonstrated no abuse of discretion by the administrative law judge, we hold that the administrative law judge's admission of Dr.

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<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's admission of Dr. Oesterling's report and deposition testimony pursuant to 20 C.F.R. §725.414(a)(3)(i), (c), and her findings of at least twenty-nine years of coal mine employment and that claimant established that the miner suffered from simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Crouch's report into the record as an autopsy rebuttal report was proper. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Claimant also challenges the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The regulations provide 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 a large opacity greater than one centimeter in diameter, that would be classified as Category A, B, or C; (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). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c); *see Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). The administrative law judge must, however, weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

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 any conflict, and make a finding of fact. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Melnick*, 16 BLR at 1-33.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), 718.304. Claimant’s Brief at 3-4. Specifically, claimant asserts that Dr. Dennis, the autopsy prosector, diagnosed “[a]ntracosisilicosis with progressive massive fibrosis with macular development greater than 1.5 to 2 cms in diameter resulting in fibrosis with nodular configuration.” Claimant’s Brief at 3-4; Director’s Exhibit 13. Claimant further contends that the administrative law judge failed to discuss whether claimant proved a diagnosis of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). We disagree.

Reviewing the evidence relevant to the existence of complicated pneumoconiosis, the administrative law judge found, correctly, that the record contains no x-ray interpretations of large opacities pursuant to 20 C.F.R. 718.304(a), and no medical opinions diagnosing the existence of the disease pursuant to 20 C.F.R. §718.304(c). Decision and Order at 12. Considering the autopsy evidence pursuant to 20 C.F.R. §718.304(b), the administrative law judge noted that there must be evidence of massive lesions or nodules in the lung that would equate to a large opacity, greater than one centimeter, if seen on chest x-ray for a diagnosis of complicated pneumoconiosis.<sup>5</sup> The administrative law judge found that while Dr. Dennis, who is Board-certified in Anatomic and Clinical Pathology, diagnosed “macular development greater than 1.5 to 2 cms in diameter” and “progressive massive fibrosis,” the record contained no evidence that these conditions would equate to an opacity of greater than one centimeter on x-ray. Decision and Order at 13. Moreover, the administrative law judge found that, by contrast, Dr. Oesterling, who is also Board-certified in Anatomic and Clinical Pathology, and Dr. Crouch, who is Board-certified in Anatomic Pathology, both opined that the autopsy slides revealed only very mild, simple coal workers’ pneumoconiosis. Decision and Order at 6, 8. Thus, because the record contained no x-ray evidence of large opacities, no evidence that any lesion described by Dr. Dennis would measure over one centimeter if seen on x-ray, and no other physician or pathologist diagnosed complicated pneumoconiosis, the administrative law judge acted within her discretion in finding that claimant failed to prove by a preponderance of the evidence that the miner had complicated pneumoconiosis. Decision and Order at 13-14; *see Blankenship*, 177 F.3d at

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<sup>5</sup> The Fourth Circuit has held that 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, requires that an equivalency determination be made. The statute requires, if diagnosis is by biopsy or autopsy, that a miner have “massive lesions,” which are lesions that would show on an x-ray as opacities greater than one centimeter. *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999); *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384-85 (4th Cir. 2006).

243, 22 BLR at 2-560-61; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003); *Braenovich v. Cannelton Industries*, 22 BLR 1-236, 1-239 (2003). Accordingly, the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304 is affirmed, as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.205(c), claimant asserts that the autopsy report of Dr. Dennis "does establish" that pneumoconiosis caused, contributed to, or hastened the miner's death. Claimant's Brief at 4. Claimant's argument is without merit. The administrative law judge properly found that the record reflects that the miner underwent gastric bypass surgery on April 22, 2005. Two days later, while he was still hospitalized, the miner developed difficulty breathing, failed to respond to treatment, and died. Decision and Order at 10; Director's Exhibit 15. The miner's death certificate, signed by Dr. Geller, who attended to the miner during his final hospitalization, indicated that the miner died on April 24, 2005 from cardio-pulmonary arrest, due to, or as a consequence of, coronary artery disease, morbid obesity, and diabetes mellitus. Decision and Order at 14; Director's Exhibit 11. Dr. Dennis conducted an autopsy on May 2, 2005, and in a report dated July 12, 2005, listed his final diagnoses as: (1) Anthracosilicosis with progressive massive fibrosis with macular development greater than 1.5 to 2 cms in diameter resulting in fibrosis with nodular configuration; (2) minimal emphysema; (3) pulmonary congestion focal; and (4) no evidence of tumor. Director's Exhibit 13.

Contrary to claimant's argument, the administrative law judge properly found that while the report of the autopsy by Dr. Dennis supported a finding of simple pneumoconiosis, it did not contain any discussion as to the cause of the miner's death. Decision and Order at 14; Director's Exhibit 13. The administrative law judge further found, correctly, that all of the physicians who offered opinions on the cause of the miner's death opined that pneumoconiosis did not cause, substantially contribute to, or hasten the miner's death.<sup>6</sup> Decision and Order at 14-15. Thus, the administrative law

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<sup>6</sup> Dr. Rosenberg opined that the miner had minimal coal workers' pneumoconiosis, that the miner died due to a coronary event in close proximity to having had gastric bypass surgery, and that the miner's death bore no relationship to coal mine dust exposure or coal workers' pneumoconiosis. Employer's Exhibit 12. Dr. Rosenberg further testified that pneumoconiosis did not cause, accelerate, or hasten the miner's death. Employer's Exhibit 17 at 23. Similarly, Dr. Oesterling diagnosed mild coal workers' pneumoconiosis, but opined that the miner died due to cardio-respiratory failure due to his post-operative status and ischemic heart disease secondary to coronary artery vascular disease complicated by obesity and diabetes. Employer's Exhibit 2. Dr. Oesterling further testified that coal workers' pneumoconiosis was "not a factor . . . in hastening, contributing or causing [the miner's] death." Employer's Exhibit 18 at 52. Finally, Dr. Crouch also diagnosed mild simple pneumoconiosis, and opined that

judge rationally concluded that claimant failed to meet her burden to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We, therefore, affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and affirm the denial of survivor's benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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“[o]ccupational dust exposure could not have caused, contributed to or otherwise hastened [the miner's] death, most likely as a complication of atherosclerotic cardiovascular disease.” Employer's Exhibit 6.