

BRB No. 11-0752 BLA

IVA CABLE)
(Widow of ROBERT CABLE))
)
Claimant-Respondent)
)
v.) DATE ISSUED: 08/28/2012
)
KENTUCKY MAY COAL COMPANY)
)
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 on Second Remand of Administrative Law Judge Daniel F. Solomon, United States Department of Labor.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2006-BLA-5959) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed 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). This case involves a survivor's claim filed on March 14, 2002,¹ and is before the Board for the third time.²

¹ Because the survivor's claim was filed before January 1, 2005, this case is not affected by recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005.

When this case was most recently before the Board, pursuant to employer's appeal, the Board vacated the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis and was therefore entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Specifically, the Board held that the administrative law judge failed to resolve the conflicting autopsy and medical opinion evidence regarding whether massive lesions were present in the miner's left lung. *Cable v. Ky. May Coal Co.*, BRB No. 10-0247 BLA, slip op. at 8 (Dec. 17, 2010) (unpub.). The Board further held that the administrative law judge did not adequately explain the basis for his determination that lesions within a hilar lymph node in the miner's right lung constituted complicated pneumoconiosis. *Id.* at 8-9. Therefore, the Board remanded the case for the administrative law judge to reconsider the autopsy and medical opinion evidence concerning these issues, and to explain his findings. The Board further instructed the administrative law judge that if he determined that claimant was not entitled to the irrebuttable presumption set forth at 20 C.F.R. §718.304, he was to consider whether the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On remand, the administrative law judge credited the miner with at least twenty years of coal mine employment.³ After reconsidering the autopsy and medical opinion evidence, the administrative law judge found that claimant established that the miner had complicated pneumoconiosis arising out of his coal mine employment and, therefore, established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

² The procedural history of this case is detailed in the Board's last decision. *Cable v. Ky. May Coal Co.*, BRB No. 10-0247 BLA, slip op. at 2-3 (Dec. 17, 2010) (unpub.). We note that the merits of this case are before the Board for the second time. The Board's first decision vacated the administrative law judge's initial Decision and Order awarding benefits without addressing the administrative law judge's findings on the merits, as he failed to make necessary rulings on the admissibility of the evidence pursuant to 20 C.F.R. §725.414. *Cable*, slip op. at 2.

³ The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 3, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

On appeal, employer contends that the administrative law judge erred in finding that the autopsy and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer further asserts that the administrative law judge inappropriately relied upon a medical dictionary not contained in the record in reaching his decision. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.⁴

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205(c); *Neely v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields an opacity 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 reveal a result equivalent to (a) or (b). See 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. The administrative law judge must examine all the evidence on this issue, that is, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established the existence of simple pneumoconiosis, 20 C.F.R. §718.202(a), and that claimant is entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment. See 20 C.F.R. §718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

make a finding of fact. *See 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).

Employer argues that the administrative law judge erred in finding that the autopsy and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b),(c). On remand, the administrative law judge considered the autopsy reports of Drs. Dennis, Perper, and Caffrey, as well as the medical opinions of Drs. Fino and Rosenberg. Concerning the miner's left lung, Dr. Dennis, the autopsy prosector, diagnosed "macule formation associated with black pigment deposition," as well as "fibrosis of the visceropleura." Director's Exhibit 13 at 2. Dr. Dennis further noted the existence of "macule formation greater than 1.5 to 2 cms demonstrated in slide 1A [of the left lung]." *Id.* Dr. Dennis concluded that "progressive fibrosis was appreciated [with] some of the macules present . . . greater than 1.5 to 2 cms diameter." *Id.* at 3. In a subsequent report dated January 18, 2002, Dr. Dennis clarified that the miner suffered from "progressive massive fibrosis" shown on a slide of the left lung. Director's Exhibit 12. While Dr. Dennis detected "[b]lack pigment deposition and [a] fibrotic nodule of hilum of [the] right lung," with one slide showing "a dense nodule of fibrous connective tissue greater than 1.5 cms diameter which completely obliterates the hilar lymph node," he did not diagnose complicated pneumoconiosis based on his findings in the miner's right lung. Director's Exhibit 13 at 2.

In contrast to Dr. Dennis, Dr. Perper opined that lesions in the miner's right lung established complicated pneumoconiosis. Director's Exhibit 42 at 337-338, 365-367. Specifically, Dr. Perper opined that the slides of a hilar lymph node in the right lung exhibited:

extensive fibro-hyalino-anthracosilicotic tissue with anthraco-fibrotic strands invading the pulmonary parenchyma, and invasion by the fibro-anthracotic tissue of the wall of the bronchus which penetrates through the cartilage plates and replacing the bronchial wall and the lining mucosa. Such destructive and invasive process is clearly not just a silicotic lymph node but also an aggressive lesion of complicated coal workers' pneumoconiosis, 15 mm (1.5 cm) in size and is extending beyond the edges of the section.

The autopsy substantiated the presence of complicated coal workers' pneumoconiosis in the lungs of [the miner], at the autopsy, with a fibro-anthracotic hilar mass of more than 2.0 cm, on the background of interstitial fibro-anthraco-sis and moderately severe simple coal workers' pneumoconiosis.

Director's Exhibit 42 at 367, 368.

Dr. Caffrey also reviewed the miner's autopsy report, autopsy slides, and other medical evidence. In a report dated April 28, 2004, Dr. Caffrey questioned Dr. Dennis's autopsy findings:

The autopsy pathologist has made a diagnosis of severe anthracosilicosis, progressive fibrosis but those changes are definitely not identified on the autopsy slides I reviewed, so I completely disagree with Dr. Dennis' interpretation. There were no lesions 1.5 to 2.0 centimeters on the autopsy slides except within the hilar lymph node tissue and the lesion of complicated pneumoconiosis must be identified within the lung tissue per se, and not within the lymph node tissue.

Director's Exhibit 42 at 217.⁵

During an October 1, 2004 deposition, Dr. Caffrey explained that:

The disease of coal workers' pneumoconiosis is a disease, as the experts pointed out, within the lung tissue per se, not in the lymph nodes; not in the lymph nodes either at the gateway to the lungs or around the bronchus within the lung tissue. The disease of CWP must be within the alveoli themselves.

Director's Exhibit 42 at 137. Dr. Caffrey explained that lymph nodes are not necessary to the functioning of the lungs. *Id.* at 164.

Based upon their review of the medical evidence, Drs. Fino and Rosenberg each opined that the miner did not suffer from complicated pneumoconiosis. Director's Exhibit 42 at 257; Employer's Exhibits 1, 3. Dr. Fino concluded that there was no clinical evidence supporting a diagnosis of complicated pneumoconiosis, and opined that

⁵ Dr. Caffrey also disagreed with Dr. Perper's findings regarding the lesions in the hilar lymph node in the right lung:

Dr. Perper made the diagnosis of coal workers' pneumoconiosis with macronodules of complicating [sic] coal workers' pneumoconiosis invading the bronchial wall. I said I disagreed with that because in the sections labeled H and I, the lesions were present within the lymph node tissue, not within the lung tissue per se.

Director's Exhibit 42 at 142.

“a lymph node finding pathologically [cannot be used] to diagnose coal workers’ pneumoconiosis because coal workers’ pneumoconiosis is a disease of the lung tissue, not the lymph nodes surrounding the lungs.” Employer’s Exhibit 4 at 7; Director’s Exhibit 42 at 257. Dr. Rosenberg agreed, noting that “[a]ny lymph node involvement by silico-anthracotic tissue does not constitute the diagnosis of progressive massive fibrosis or PMF.” Director’s Exhibit 42 at 223.

The administrative law judge initially considered the evidence regarding whether there was a lesion of complicated pneumoconiosis in the miner’s left lung. After noting Dr. Dennis’s diagnosis of progressive massive fibrosis based on Slide 1A of the left lung, the administrative law judge considered Dr. Caffrey’s contrary opinion, that the left lung showed mild to moderate anthracotic pigment with focal emphysema and silica particles, but “definitely no evidence of complicated pneumoconiosis.”⁶ Director’s Exhibit 42-215. The administrative law judge found that Dr. Caffrey’s opinion substantiated Dr. Dennis’s diagnosis of progressive massive fibrosis, because Dr. Caffrey’s opinion “indicat[ed] that the pneumoconiosis was bilateral.” Decision and Order on Remand at 5. The administrative law judge further found that since Dr. Caffrey “note[d] the presence of silica in addition to the black pigment,” his opinion substantiated Dr. Dennis’s diagnosis of severe anthracosilicosis. *Id.*

Turning to the evidence regarding whether a lesion of complicated pneumoconiosis was present in the miner’s right lung, the administrative law judge found Dr. Perper’s opinion, that findings in the miner’s hilar lymph node constituted complicated pneumoconiosis, to be “more reasonable” than the contrary opinions of Drs. Caffrey, Fino, and Rosenberg. The administrative law judge found Dr. Perper’s diagnosis “more credible because there was, indeed, by all accounts, more pneumoconiosis inside the lung and the anthracosis was not limited to the lymph node.” *Id.* The administrative law judge noted further that Dr. Perper cited medical authorities regarding the definition of complicated coal workers’ pneumoconiosis, and offered photomicrographs to support his diagnosis. In contrast, the administrative law judge found Dr. Caffrey’s opinion, that a nodule “must be identified within the lung tissue per se” in order to constitute complicated pneumoconiosis, to be “not as rational as [c]laimant’s expert[s]’ opinions.” *Id.* The administrative law judge further discounted the opinions of Drs. Fino and Rosenberg as conclusory and “completely contrary to the Board’s prior holdings that nodules in the miner’s lymph nodes may constitute coal workers’ pneumoconiosis.” *Id.*

⁶ Dr. Caffrey diagnosed minimal simple coal workers’ pneumoconiosis. Director’s Exhibit 42-216.

Based on the foregoing findings, the administrative law judge determined “that the [m]iner had large macronodules, from 1-3 cm. on autopsy.” Decision and Order on Remand at 6. The administrative law judge therefore determined that claimant established complicated pneumoconiosis, and invoked the irrebuttable presumption of 20 C.F.R. §718.304.

Employer contends that the administrative law judge did not adequately explain his finding that the evidence established the existence of complicated pneumoconiosis in the miner’s left lung. We agree. As noted above, the administrative law judge found that Dr. Caffrey’s opinion, that there was minimal simple pneumoconiosis, and “definitely no evidence of complicated pneumoconiosis” in the miner’s left lung, substantiated Dr. Dennis’s diagnosis of progressive massive fibrosis. Specifically, the administrative law judge pointed to the anatomical findings that Dr. Caffrey identified in support of his diagnosis of simple pneumoconiosis, and stated further that Dr. Caffrey’s opinion indicated that “pneumoconiosis was bilateral.” The Board is unable to discern from these findings how the administrative law judge determined that Dr. Caffrey’s opinion supported that of Dr. Dennis. Therefore, the administrative law judge’s finding does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision be accompanied by a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with employer that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis in the hilar lymph node of the miner’s right lung. Previously, we instructed the administrative law judge that the issue of whether a disease process in the hilar lymph nodes constitutes pneumoconiosis is “a finding of fact to be made by the administrative law judge based on the evidence before him.” *Cable*, slip op. at 8-9, *quoting Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984). The administrative law judge, on remand, found that Dr. Perper’s conclusion, that the disease process in the miner’s hilar lymph node constituted complicated pneumoconiosis, was “more credible” than the opinions of Drs. Caffrey, Fino, and Rosenberg. The administrative law judge found Dr. Perper’s diagnosis “more credible because there was . . . more pneumoconiosis inside the lung and the anthracosis was not limited to the lymph node.” The record reflects that the physicians agreed there was anthracosis and simple pneumoconiosis in the miner’s lungs. However, the administrative law judge did not explain how this factor supported Dr. Perper’s opinion that there was complicated pneumoconiosis in the hilar lymph node. Further, as employer asserts, the administrative law judge did not explain how Dr. Perper’s citation to medical studies generally, for the definition of complicated pneumoconiosis, or his

inclusion of photomicrographs, related to whether the findings in the hilar lymph node constituted complicated pneumoconiosis. Employer's Brief at 15-16. As a result, the Board is unable to discern how the administrative law judge determined that the evidence before him established that the disease process in the hilar lymph node of the miner's right lung was complicated pneumoconiosis. 5 U.S.C. §557(c)(3)(A).

Because the administrative law judge did not adequately explain his findings, we must vacate his determination that the autopsy and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b),(c) and remand this case for further consideration.⁷ *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, when considering whether the autopsy or medical opinion evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b),(c), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If the administrative law judge, on remand, determines that the autopsy evidence does not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), he must consider whether the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁷ Employer argues that the administrative law judge erred in consulting a medical dictionary for the definition of a hilar lymph node. Employer's Brief at 12. A review of the administrative law judge's Decision and Order on Remand does not reveal that he relied on that definition in weighing the medical evidence. Therefore, we need not resolve the issue raised by employer. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed in part and vacated in part, and case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge