BRB Nos. 09-0477 BLA
and 09-0606 BLA

Estate of MAXINE HAGERMAN (Widow of and o/b/o IRA E. HAGERMAN) Claimant-Respondent v. CONSOLIDATION COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/04/2010 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (07-BLA-5708 and 07-BLA-5709) of Administrative Law Judge Larry W. Price (the administrative law judge) rendered on 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] The miner's claim, which was filed on December 29, 1981, is before the Board for the fifth time, and its complete procedural history is contained in the Board's prior decision, affirming the denial of benefits on modification. *See Hagerman v. Consolidation Coal Co.*, BRB Nos. 05-0248 BLA and 05-0248 BLA-A (Dec. 20, 2005) (unpub.).

On February 28, 2006, the miner died, and the miner's widow was substituted as claimant on his behalf. On July 19, 2006, claimant requested modification of the denial of benefits in the miner's claim pursuant to 20 C.F.R. §725.310 (2000),[2] and submitted medical evidence in support of her request. Director's Exhibit 243. On July 28, 2006, claimant filed a survivor's claim. Both claims were subsequently assigned to the administrative law judge, who issued a Decision and Order dated February 25, 2009. The administrative law judge credited the miner with at least thirty-five years of coal mine employment,[3] and found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b), thus entitling claimant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. The administrative law judge found that the evidence established a mistake in a determination of fact in the miner's claim, pursuant to 20 C.F.R. §725.310 (2000), and he awarded benefits in the miner's claim. The administrative law judge further found that the evidence established the existence of complicated pneumoconiosis in the survivor's claim, and thus established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3), through invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

[1] The 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 20 C.F.R. Parts 718, 722, 725, and 726 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[2] Although 20 C.F.R. §725.310 has been revised, those revisions apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c).

[3] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 2. 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*).

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis in both claims pursuant to 20 C.F.R. §718.304, and, therefore, erred in awarding benefits on both the miner's and survivor's claims. Specifically, employer asserts that the administrative law judge applied an improper standard in his evaluation of the x-ray, autopsy, computerized tomography (CT) scan, and medical opinion evidence, and further failed to consider all relevant evidence. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.

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).

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 total disability, or 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 that would yield results equivalent to (A) or (B).[4] 30 U.S.C.

[4] Section 718.304 provides in relevant part:

There is an irrebuttable presumption that a miner is totally disabled or died due to pneumoconiosis . . . if such miner is suffering . . . 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.

§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. 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. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *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*).

Turning first to the miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

The administrative law judge noted that in the prior decision, Administrative Law Judge Edward Terhune Miller denied benefits based on a finding that there was a mistake of fact in the prior award of benefits by Administrative Law Judge Linda A. Chapman. Specifically, Judge Miller found that Dr. Alexander's x-ray and CT scan interpretations, upon which Judge Chapman relied to award benefits, were conflicting and inconsistent as to the exact measurements and location of the Category A, large opacities Dr. Alexander identified.[5] Thus, Judge Miller concluded that the finding of complicated

---

20 C.F.R. §718.304.

[5] Judge Miller noted that Dr. Alexander, a Board-certified radiologist and B reader, read a May 8, 1998 chest x-ray as showing a Category A, large opacity of complicated pneumoconiosis, measuring 14 x 8 millimeters, in the left upper lung zone. Judge Miller further noted that Dr. Alexander read a February 28, 2000 x-ray as showing a Category A, large opacity of complicated pneumoconiosis, measuring 11 millimeters in diameter, in the right upper zone. Finally, Judge Miller noted that Dr. Alexander read an August 23, 1998 computerized tomography (CT) scan as showing large opacities, measuring greater than ten millimeters, in both upper lobes, consistent with complicated pneumoconiosis. Judge Miller found that, not only did the measurements differ, with the larger measurements related to the earlier film, but the locations conflicted, with the earlier x-ray reading identifying a single opacity in the left upper zone, the later x-ray reading identifying a single opacity in the right upper zone, and the CT scan reading identifying opacities in both upper zones.

pneumoconiosis, based on Dr. Alexander's interpretations of the miner's May 8, 1998 and February 28, 2000, x-rays, and the CT scan of June 10, 1998, constituted a mistake in a determination of fact. Therefore, Judge Miller vacated the finding of total disability due to pneumoconiosis made by Judge Chapman, and vacated the award of benefits in the miner's claim.

Relevant to claimant's most recent request for modification in the miner's claim, the administrative law judge initially found that the newly submitted autopsy evidence established a mistake of fact in Judge Miller's decision denying benefits. Specifically, the administrative law judge noted that Dr. Oesterling, who is Board-certified in Anatomic and Clinical Pathology and Nuclear Medicine, reviewed the autopsy prosector's report and examined the autopsy tissue slides, on behalf of employer. In his deposition, Dr. Oesterling testified that the lesion contained in slide N, from the right upper lobe, was the same lesion identified on the February 28, 2000 x-ray as an eleven millimeter, or 1.1 centimeter, large opacity. The administrative law judge found that Dr. Oesterling's testimony supported Dr. Alexander's reading of the February 28, 2000 x-ray, which identified a Category A, large opacity measuring 11 millimeters in the miner's right upper lobe. The administrative law judge also found that Dr Oesterling's acknowledgment, that several closely proximate lesions seen in slide V, from the left upper lobe, could show up on x-ray as a single mass measuring more than one centimeter, lent support to Dr. Alexander's classification of a Category A, large opacity on the May 8, 1998 x-ray. Finally, the administrative law judge found that Dr. Oesterling's acknowledgment of the presence of lesions in both the right and left upper lobes, supported Dr. Alexander's CT scan reading identifying large opacities, greater than 10 millimeters, in both upper lobes. Thus, the administrative law judge concluded that the "additional information provided by the autopsy evidence permits reconciliation of the inconsistency noted by Judge Miller and restores credibility to Dr. Alexander's findings," thus establishing a mistake of fact in Judge Miller's decision. Decision and Order at 6. As the administrative law judge's finding, that Dr. Alexander's credible x-ray and CT scan readings establish a mistake of fact, is supported by substantial evidence and is unchallenged on appeal, it is hereby affirmed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Having found Dr. Alexander's x-ray readings to be credible, the administrative law judge evaluated the remaining x-ray evidence pursuant to 20 C.F.R. §718.304(a). The administrative law judge initially noted, correctly, that no additional x-ray evidence was submitted by the parties on modification, and that, therefore, the record contained the same x-ray readings previously considered by Judge Chapman. The administrative law judge incorporated, by reference, Judge Chapman's prior weighing of the x-ray evidence,

stating that "[w]ith the credibility of Dr. Alexander's readings restored, I concur with Judge Chapman's analysis." Decision and Order at 6. The administrative law judge thus concluded, as did Judge Chapman, that the preponderance of the chest x-ray evidence establishes the existence of a Category A, large opacity meeting the criteria of 20 C.F.R. §718.304(a). The record reflects that Judge Chapman considered all of the relevant x-rays, and that the Board previously affirmed Judge Chapman's determination to credit the readings by Dr. Alexander over the contrary x-ray evidence to find complicated pneumoconiosis established. *Hagerman v. Consolidation Coal Co.*, BRB No. 01-0454 BLA, slip op. at 6 (Feb. 6, 2002)(unpub.). Thus, there is no merit to employer's contention that, having found Dr. Alexander's x-ray readings to be credible, the administrative law judge simply relied on Dr. Alexander's x-ray readings to find complicated pneumoconiosis established pursuant to 20 C.F.R. §718.304(a), without considering the multiple readings finding either no evidence of coal workers' pneumoconiosis or only simple coal workers' pneumoconiosis. Employer's Brief at 9-11. As employer raises no additional challenge to the administrative law judge's weighing of the x-ray evidence, we affirm the administrative law judge's conclusion that the x-ray evidence supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Relevant to 20 C.F.R. 718.304(b), the administrative law judge noted that the record contains the autopsy report by Dr. Ferguson, the autopsy prosector. Based on his gross examination of the body and his microscopic examination of 27 tissue slides, Dr. Ferguson diagnosed complicated coal workers' pneumoconiosis. Dr. Ferguson explained that his diagnosis was based on "the presence of at least two foci of coal dust nodule formation that measure greater than 1 cm. in maximal dimension."[6] Decision and Order at 7; Director's Exhibit 8.

The administrative law judge also considered the contrary opinions of Dr. Oesterling and Dr. Bush, who, like Dr. Oesterling, is Board-certified in Anatomic and Clinical Pathology. Drs. Oesterling and Bush reviewed the autopsy report and tissue slides and concluded that the miner did not suffer from complicated pneumoconiosis. Decision and Order at 7-8; Employer's Exhibits 1, 3, 13. Dr. Oesterling disagreed with Dr. Ferguson's conclusion that slide V showed a lesion measuring greater than one

[6] Dr. Ferguson described the presence of bilateral fibro-anthracotic macule and nodule formation in the upper lobes. He stated that most of these ranged between 0.4 and 0.8 centimeters, with the largest nodule measuring 2.0 x 1.5 centimeters. Dr. Ferguson also noted the presence of moderate diffuse paraseptal anthracosis, and an area of atelectasis within the right lower lobe measuring 4.5 x 2.0 centimeters, and stated that the mediastinal and hilar lymph nodes were markedly anthracotic. Director's Exhibit 8 at 3.

centimeter, stating that reactive pleural fibrosis suggested "a confluence of some nodular areas" when the nodules were actually not coalescent. Employer's Exhibits 1 at 3, 12 at 42-3. Dr. Oesterling agreed with Dr. Ferguson, however, that slide N showed a macronodule of coal workers' pneumoconiosis in the right upper lobe, measuring 1 to1.5 centimeters in its greatest dimension, in an area of lung adjacent to the pleura which is uninvolved with gas exchange. Employer's Exhibit 12 at 27, 38. Dr. Oesterling also stated that this macronodule, which may have been as large as 1.5 centimeters, was probably the same lesion identified by a Board-certified radiologist and B reader in the 2000 x-ray as measuring 11 millimeters.[7] Employer's Exhibit 12 at 38-39. Unlike Dr. Ferguson, however, Dr. Oesterling concluded that the presence of this 1 to 1.5 centimeter nodule of coal workers' pneumoconiosis did not support a diagnosis of complicated pneumoconiosis, because it extended less than half a centimeter into the substance of the lung, and was an isolated nodular lesion, not coalescing micronodules. Employer's Exhibit 12 at 27. Dr. Oesterling explained that "[t]o qualify for what we, as pathologists, would term as progressive massive fibrosis we have to see a very significant micronodular disease and begin to see those micronodules coalescing into an aggregate mass of two [centimeters] in diameter or greater." Employer's Exhibit 12 at 27. Dr. Oesterling further stated that, in order to diagnose progressive massive fibrosis, the lesion must be at least two centimeters in diameter in every dimension, not just in a single dimension. Employer's Exhibit 12 at 30. Thus, Dr. Oesterling concluded that the miner had moderate micronodular coal workers' pneumoconiosis, but not complicated coal workers' pneumoconiosis. Employer's Exhibits 1 at 7, 12 at 27-30.

Dr. Bush similarly disagreed with Dr. Ferguson's conclusion that slide V showed a lesion of coal workers' pneumoconiosis measuring greater than one centimeter, opining that, while the left upper lobe showed a prominent cluster of closely placed nodules, they were not fused into a single large lesion, with the largest one measuring .9 cm x .7 cm. Employer's Exhibits 3 at 2, 14 at 31. Dr. Bush also agreed with Drs. Ferguson and Oesterling, however, that slide N showed a significant pleural based lesion of coal workers' pneumoconiosis in the right upper lobe, measuring over 1.2 centimeters long and .6 centimeters wide. Employer's Exhibit 14 at 30-31. Dr. Bush agreed with Dr. Oesterling that this macronodule was the same lesion that appeared on the February 28, 2000 x-ray as a right upper lobe large opacity measuring 11 millimeters in diameter. Employer's Exhibit 14 at 43.

Dr. Bush further concurred with Dr. Oesterling's conclusion that the pathology evidence did not support a diagnosis of complicated pneumoconiosis or progressive

[7] As noted above, Dr. Alexander read an x-ray dated February 28, 2000 as showing a "[C]ategory A large opacity 11 [millimeters] in diameter . . . present in the right upper zone, indicating complicated pneumoconiosis." Claimant's Exhibit 1.

massive fibrosis, because of the inadequate width of the lesions. Dr. Bush stated that the pathology standards favor identifying a two-centimeter lesion as the minimum size that would justify a diagnosis of progressive massive fibrosis, but he acknowledged that a one-centimeter lesion is now often accepted as the minimum standard for making the diagnosis pathologically. Employer's Exhibit 14 at 27. Dr. Bush explained, however, that this standard implies a three-dimensional lesion that measures one centimeter or more in every dimension. Employer's Exhibit 14 at 32. Thus, Dr. Bush concluded that, while the pathology evidence revealed the presence of lesions of coal workers' pneumoconiosis measuring up to 1.2 x .6 centimeters, "there was no lesion that I could even use the minimum and what I consider somewhat inadequate standard of one centimeter lesion to justify a diagnosis of progressive massive fibrosis or complicated coal workers' disease." Employer's Exhibit 14 at 31-32.

Contrary to employer's argument, in weighing the opinions of Drs. Oesterling and Bush against the contrary opinion of Dr. Ferguson pursuant to 20 C.F.R. §718.304(b), the administrative law judge specifically considered the view of Drs. Oesterling and Bush, that the lesions seen on autopsy did not meet the pathological criteria for diagnosing complicated pneumoconiosis used in the medical community. Employer's Brief at 11-12. The administrative law judge noted, however, that Drs. Oesterling and Bush acknowledged that there is a disagreement in the medical community as to what measurement suffices for a pathological diagnosis of complicated pneumoconiosis. Decision and Order at 7 n.7. The administrative law judge further noted, correctly, that the Department of Labor has declined to adopt a specific numerical criterion for the pathological diagnosis of complicated pneumoconiosis, and that Dr. Oesterling's and Dr. Bush's diagnostic medical criteria are not controlling under the regulations. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-103-04; Decision and Order at 7 n.7, 10. Thus, the administrative law judge permissibly concluded that the fact that Drs. Oesterling and Bush did not agree with the diagnostic criteria used by Dr. Ferguson did not necessarily undermine the credibility of Dr. Ferguson's conclusion that complicated pneumoconiosis was present. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-103; Decision and Order at 7 n.7. We, therefore, reject employer's contention that the administrative law judge erred in evaluating the autopsy evidence pursuant to 20 C.F.R. §718.304(b). Employer's Brief at 11-12.

Relevant to 20 C.F.R. §718.304(c), the administrative law judge initially considered the CT scan evidence. The administrative law judge incorporated, by reference, Judge Chapman's prior weighing of the CT scans, stating that he concurred "with Judge Chapman's analysis of the CT chest scan evidence which credited Dr. Alexander's CT chest scan reading over the other physicians' readings and found that Dr. Alexander's CT chest scan reading supported his chest x-ray interpretations of

complicated pneumoconiosis."[8] Decision and Order at 7. The record reflects that Judge Chapman considered each of the relevant CT scans, and that the Board previously affirmed Judge Chapman's determination to credit the CT readings by Dr. Alexander over the contrary CT readings of record to find complicated pneumoconiosis established. *Hagerman*, BRB No. 01-0454 BLA, slip op. at 7. Thus, we reject employer's assertion that the administrative law judge failed to consider all of the CT scan evidence of record, in considering the evidence pursuant to 20 C.F.R. §718.304(c). Employer's Brief at 10. We, therefore, affirm the administrative law judge's conclusion, in the instant case, that Dr. Alexander's CT scan reading supports his x-ray interpretations of complicated pneumoconiosis.

Turning to the medical opinion evidence, the administrative law judge noted that, on modification, employer submitted deposition testimony from Drs. Castle, Hippensteel, and Repsher, in which they considered their prior objective findings, together with the recent autopsy and pathology evidence, and concluded that the miner did not have complicated pneumoconiosis. Decision and Order at 9; Employer's Exhibits 8, 10, 13. Specifically, the administrative law judge noted Dr. Castle's opinion that coal workers' pneumoconiosis does not cause pleural involvement, and his statement that the x-ray he reviewed did not contain a lesion approaching one centimeter. Decision and Order at 8; Employer's Exhibit 13 at 9-10. The administrative law judge also noted, correctly, that Dr. Castle emphasized that Drs. Bush and Oesterling agreed that Dr. Ferguson's autopsy findings did not support a diagnosis of complicated pneumoconiosis, and further emphasized that pathology is a more definitive tool for diagnosis than radiology. Decision and Order at 8; Employer's Exhibit 13 at 8-9, 11.

The administrative law judge also summarized Dr. Hippensteel's opinion, in which the physician noted that the x-ray he reviewed did not contain a lesion approaching one centimeter, and stated that lesions in the pleura do not constitute complicated pneumoconiosis. Decision and Order at 8-9; Employer's Exhibit 8 at 10, 13. Dr. Hippensteel further noted that neither Dr. Bush nor Dr. Oesterling reported findings sufficient to diagnose complicated pneumoconiosis as described in the medical literature, and agreed that pathology is a more reliable than chest x-rays for diagnosing either simple or complicated pneumoconiosis. Decision and Order at 8-9; Employer's Exhibit 8 at 10-12, 15. The administrative law judge further noted that, based on the x-ray evidence, the autopsy findings, and the fact that the miner had minimal or no impairment in function on objective testing, Dr. Hippensteel concluded that the miner had simple, but not complicated pneumoconiosis. Decision and Order at 9; Employer's Exhibit 8 at 14-15.

[8] Dr. Alexander read an August 23, 1998 CT scan as showing abnormalities consistent with complicated coal workers' pneumoconiosis. Claimant's Exhibit 1.

The administrative law judge also discussed Dr. Repsher's opinion, that the miner did not have complicated pneumoconiosis, noting that it was based on the chest x-ray readings by the B readers whom Dr. Repsher considered reliable, the preliminary autopsy diagnosis noting the presence of only simple coal workers' pneumoconiosis,[9] and the pathology reports of Drs. Oesterling and Bush. Decision and Order at 9; Employer's Exhibit 10 at 12. The administrative law judge noted that Dr. Repsher considered Dr. Alexander to be an unreliable B reader, asserting that Dr. Alexander grossly over-reads x-rays and probably over-reads CT scans. Decision and Order at 9; Employer's Exhibit 10 at 21-22, 28. The administrative law judge also noted Dr. Repsher's agreement with Drs. Castle and Hippensteel, that lesions in the lung pleura are not diagnostic of coal workers' pneumoconiosis, and that pathology evidence is potentially more reliable than radiographic evidence for diagnosing the disease. Decision and Order at 9; Employer's Exhibit 10 at 26, 27.

Finally, the administrative law judge noted that new medical opinion evidence submitted by claimant in support of modification included treatment notes listing impressions of shortness of breath and chronic obstructive pulmonary disease, and the miner's death certificate, signed by Dr. Prince. Decision and Order at 9. Dr. Prince listed simple coal workers' pneumoconiosis as a significant condition contributing to the miner's death. Dr. Prince also completed a death summary, diagnosing coal workers' pneumoconiosis, by history and pathology evidence. Decision and Order at 9; Director's Exhibit 7.

After reiterating that he found that the x-ray evidence supported invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered the x-ray evidence together with the autopsy, CT scan, and medical opinion evidence, under the standard set forth in *Scarbro.* The administrative law judge accorded greatest weight to the x-ray readings by Dr. Alexander, as supported by Dr. Alexander's CT scan readings, and concluded that claimant established the existence of complicated pneumoconiosis. Decision and Order at 10. The administrative law judge explained his conclusion as follows:

> I do not find either the autopsy evidence or the physician opinions to diminish the probative value of the chest x-ray evidence. First, the fact that

[9] The administrative law judge noted that some of employer's physicians suggested that the preliminary autopsy diagnosis and final autopsy diagnosis were completed by two different physicians. Decision and Order at 7 n.7, Director's Exhibit 8. The administrative law judge found, correctly, that review of the document revealed that Dr. Ferguson electronically signed both the preliminary and final autopsy diagnoses. Decision and Order at 7 n.7; Director's Exhibit 8.

> it is autopsy evidence, which has been held in other circumstances to be the most reliable evidence as to the presence [or] absence of pneumoconiosis, is not controlling here. Nor is the terminology and criteria of the medical community controlling here. Complicated pneumoconiosis in the *legal sense* is established by the application of *congressional*[*ly*] *defined criteria*; and, as the Fourth Circuit Court noted in *Scarbro, supra*, the most objective measure of the condition described in §718.304 is obtained through x-ray. The autopsy evidence does not affirmatively show that the lesions reported on chest x-ray are not there or that they are not lesions of coal workers' pneumoconiosis. There is no regulatory language specifically excluding lesions in the pleural area. There is no language in the regulation relating to impairment. There is no suggestion that there was some technical problem with the equipment used. Dr. Repsher's assertion that Dr. Alexander is an unreliable reader is based upon his personal opinion; Dr. Repsher did not read the chest x-rays or CT scan interpreted by Dr. Alexander in this case. Finally, I place little weight on the fact that simple coal workers' pneumoconiosis appears on the death certificate. The autopsy findings were not reported at the time Dr. Price completed the death certificate.

Decision and Order at 9-10.

Employer asserts that the administrative law judge failed to incorporate his summary of the medical opinion evidence into his final analysis. Employer's Brief at 12. We disagree. As set forth above, in concluding that claimant established the existence of complicated pneumoconiosis, the administrative law judge fully considered the opinions of Drs. Castle, Hippensteel, and Repsher, that autopsy evidence is the most reliable method of establishing the presence or absence of disease, that lesions located in the pleura cannot constitute complicated pneumoconiosis, and that the miner's level of impairment did not support such a diagnosis. Decision and Order at 10. We, therefore, reject employer's assertion that the administrative law judge failed to include the physicians' opinions in his analysis of the relevant medical evidence.

There is also no merit to employer's assertion that, having concluded that the x-ray evidence met the requirements for invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a), the administrative law judge improperly shifted the burden of proof to employer to establish that the opacities are not present or are due to a process other than coal workers' pneumoconiosis, by failing to consider "whether a preponderance of all available evidence, including the conflicting chest x-ray readings, CT scan readings, pathology evidence, and medical opinions established the existence of large opacities consistent with complicated coal workers' pneumoconiosis." Employer's Brief at 14.

In weighing the evidence together, the administrative law judge noted, correctly, that all of the pathologists and physicians agree that the lesions found on autopsy are lesions of coal workers' pneumoconiosis, and that at least one of these lesions measured 1 to 1.5 centimeters in greatest dimension. The administrative law judge properly recognized that the test for determining the existence of complicated pneumoconiosis is not whether a lesion revealed on autopsy measures two centimeters, or measures greater than one centimeter in every dimension, or is located inside or outside of the pleura, or whether it causes a pulmonary impairment. *See Scarbro*, 220 F.3d at 257-58, 22 BLR at 2-104. Rather, the United States Court of Appeals for the Fourth Circuit has held that, because radiographic evidence of one or more large opacities categorized as size A, B, or C represents the most objective measure of the condition, it sets the benchmark by which other methods for proving complicated pneumoconiosis are measured. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-104; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999). Thus, the test of whether a lesion of pneumoconiosis can be classified as complicated pneumoconiosis is whether that lesion would, if x-rayed, show as an opacity greater than one centimeter in diameter. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-104; *Blankenship*, 177 F.3d at 243, 22 BLR 2-561; *see also Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). As set forth above, we have affirmed both the administrative law judge's crediting of Dr. Alexander's reading of the February 28, 2000 x-ray as showing a Category A opacity of complicated pneumoconiosis, and the administrative law judge's finding that the probative x-ray evidence, weighed as a whole, meets the criteria for invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a). In addition, as the administrative law judge properly found, Drs. Oesterling and Bush both opined that the 1 to 1.5 centimeter lesion of coal workers' pneumoconiosis they observed on the autopsy slides would appear on x-ray as an opacity greater than one centimeter, and, in fact, was the very lesion of pneumoconiosis seen by Dr. Alexander as a large opacity on the February 28, 2000 x-ray, and credited by the administrative law judge. We, therefore, affirm the administrative law judge's finding of invocation, in the miner's claim, of the irrebuttable presumption of total disability due to pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a), weighed in conjunction with the autopsy evidence at 20 C.F.R. §718.304(b), as it is supported by substantial evidence and is in accordance with law. In addition, we affirm, as unchallenged, the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). *Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order at 10.

We also affirm the administrative law judge's finding of invocation of the irrebuttable presumption of death due to pneumoconiosis in the survivor's claim. The administrative law judge noted, correctly, that the survivor's claim, filed in 2006, is subject to the evidentiary limitations set forth at 20 C.F.R. §725.414. Relevant to 20 C.F.R. §718.304(a), the record in the survivor's claim contains four readings of three x-

rays. Decision and Order at 11. As in the miner's claim, Dr. Alexander, a Board-certified radiologist and B reader, read the May 8, 1998 and February 28, 2000 x-rays as showing Category A, large opacities of complicated pneumoconiosis. Decision and Order at 11; Claimant's Exhibits 1, 2. By contrast, Dr. Fino, a B reader, read the May 8, 1998 x-ray as showing no large opacities. Decision and Order at 11; Employer's Exhibit 5. Finally, Dr. Castle, a B reader, read an April 24, 2000 x-ray as showing no large opacities. Decision and Order at 11; Employer's Exhibit 10. The administrative law judge permissibly accorded greater weight to Dr. Alexander's readings, based on his superior qualifications, to conclude that the preponderance of the readings by the most highly qualified readers met the criteria for establishing complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*), *vacated on other grounds, Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 11. As employer raises no specific arguments with respect to the x-ray evidence in the survivor's claim, and as the administrative law judge's findings are supported by substantial evidence, we affirm the administrative law judge's determination pursuant to 20 C.F.R. §718.304(a). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

Relevant to 20 C.F.R. §718.304(b), (c), the administrative law judge noted, correctly, that the parties submitted no new evidence beyond that which was considered in the miner's claim, and concluded:

> My analysis of the evidence in the survivor's claim is the same as it was in the miner's claim. For the reasons discussed in the miner's claim, I conclude that the autopsy evidence, the physician opinion evidence, and the other relevant evidence submitted in the survivor's claim do not serve to diminish the probative value of the chest x-ray evidence. Dr. Alexander's CT chest scan supports his chest x-ray readings.
>
> Weighing together the evidence of subsections (a), (b), and (c) . . . I find that the miner suffered from a chronic dust disease of the lung invoking the §718.304 presumption of death due to pneumoconiosis. I rely on the weight of the x-ray evidence at subsection (a) and find that the evidence at subsections (b) and (c) and the other evidence relevant to the issue do not suffice to diminish the probative effect of the x-ray evidence.

Decision and Order at 11-12. Finally, the administrative law judge found that claimant established that the miner's complicated pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b). Decision and Order at 12.

Again, employer has raised no arguments relevant to the pathology, CT scan, or medical opinion evidence in the survivor's claim, beyond those already addressed by the Board in the above discussion of the miner's claim. Thus, as we have affirmed the administrative law judge's analysis, in the miner's claim, of the autopsy, medical opinion, CT scan, and other evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.304(b), (c), we also affirm the administrative law judge's analysis of the evidence in the survivor's claim. Consequently, we affirm the administrative law judge's finding that claimant established that the miner died due to pneumoconiosis arising out of coal mine employment, through invocation of the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304.

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

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge