

BRB No. 11-0368 BLA

BONNIE S. YOUNG)	
(Widow of JAMES E. YOUNG))	
)	
Claimant-Respondent)	
)	
v.)	
)	
V & M COAL COMPANY)	DATE ISSUED: 02/29/2012
)	
and)	
)	
A.T. MASSEY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5069) of Administrative Law Judge Alice M. Craft, rendered on a survivor's claim filed on December 6, 2005, pursuant to 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 The administrative law judge accepted the parties' stipulation that the miner had nineteen years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that the autopsy evidence established that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) and, thus, found that claimant invoked the irrebuttable presumption at 20 C.F.R. §718.304, that the miner died due to pneumoconiosis. Accordingly, the administrative law judge awarded survivor's benefits.²

On appeal, employer contends that the administrative law judge erred in concluding that the miner had complicated pneumoconiosis, based on the autopsy prosector's finding of progressive massive fibrosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, asserting that the administrative law judge applied an improper standard in determining what constitutes complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), insofar as she discounted the opinions of Drs. Roggli and Caffrey for relying on the "medical" definition of progressive massive fibrosis to dispute the autopsy prosector's report. The Director, therefore, urges the Board to vacate the award of benefits and remand the case for further consideration of the evidence.³

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 Claimant is the widow of the miner, James E. Young, who died on November 28, 2005. Director's Exhibits 2, 9. Although the miner filed a claim for benefits during his lifetime, on March 20, 1985, his claim was denied by reason of abandonment and his case was administratively closed. Administrative Law Judge Exhibit 1.

² The administrative law judge did not consider the applicability of the recent amendments to the Act, given her award of benefits pursuant to 20 C.F.R. §718.304.

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of nineteen years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 if the evidence establishes that pneumoconiosis caused the miner’s death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, that the miner’s death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. See 20 C.F.R. §718.205(c)(1)-(3). 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).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, 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 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. 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).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge noted that there were eight readings of six chest x-rays dated between 1985 and 2005. Decision and Order at 29; see Administrative Law Judge’s Exhibit 1; Director’s Exhibits 14, 15;

⁴ Because the record indicates that the miner’s last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 3.

Claimant's Exhibit 2. She found that an x-ray dated April 30, 1985 had two positive readings for simple pneumoconiosis and no negative readings, while another x-ray dated June 26, 1985, had two negative readings but no positive readings for simple pneumoconiosis. Decision and Order at 28. The administrative law judge also determined that the remaining x-rays dated June 26, 2002, June 29, 2002, June 30, 2002 and September 23, 2005, showed emphysema and fibrosis, but were not interpreted for the presence or absence of either simple or complicated pneumoconiosis. *Id.* The administrative law judge concluded that the x-ray evidence was inconclusive and determined that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.* at 29.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy evidence, which is summarized as follows. Dr. Dennis performed the autopsy of the miner on November 29, 2005. Director's Exhibit 11. Under "Gross Description," he reported that the right lung showed confluent areas of black pigment deposition with fibrous connective tissue deposition and macular development, with the largest macule measuring "greater than 5 [centimeters] in diameter." *Id.* He also reported that the left lung was "markedly distorted by the presence of macular development" also measuring greater than five centimeters. *Id.* He further stated that there was a section of a large hilar node measuring 1.5 centimeters in diameter.

Under "Microscopic Description," Dr. Dennis reported black pigment deposition extending down into the parenchyma of the lung, with macular development "greater than 1.5 to 2 and some cases 3 [centimeters] in diameter" and a "moderate to severe" degree of fibrosis." Director's Exhibit 11. He concluded that "these features are compatible with macular development greater than 1.5 [centimeters]" with subtended fibrosis, emphysematous changes, and also coal workers' pneumoconiosis. *Id.* He stated that there are features suggestive of progressive massive fibrosis, "based on extent and size of macules and degree of fibrosis present." *Id.* The final pathological findings were listed as: 1) progressive massive fibrosis, coal workers' pneumoconiosis with "macular development greater than three centimeters in diameter with intensive pigment deposition, silica particle impregnation, and emphysematous changes;" 2) "degrees of fibrosis scattered throughout the pulmonary parenchyma with apical expressions of panlobular and cystic emphysematous changes, moderate to severe;" and 3) cor pulmonale. *Id.*

Dr. DeLara prepared a report dated September 13, 2007, based on his review of twenty-one autopsy slides. Claimant's Exhibit 3. He indicated that there was "panlobular emphysema throughout the entire lung" and "dense fibrous tissue proliferation with anthracotic pigments forming nodules and macules ranging in size from 0.3 to 1.5 [centimeters] in diameter." *Id.* He further stated that the features were "consistent with progressive massive fibrosis." *Id.*

Dr. Roggli prepared a report on August 4, 2006, based on his review of twenty-three autopsy slides and Dr. Dennis's autopsy findings. Employer's Exhibit 1. Dr. Roggli indicated that there were changes consistent with simple coal workers' pneumoconiosis with a few subpleural silicotic nodules and scattered coal dust macules. *Id.* Dr. Roggli opined that there was no histologic evidence of progressive massive fibrosis. *Id.* He concluded that the miner had simple pneumoconiosis, left ventricular hypertrophy and hypertensive cardiac disease. *Id.* Additionally, in a deposition conducted on October 24, 2006, Dr. Roggli disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis because Dr. Dennis described seeing a "macule" or "macules," as opposed to a nodule or macronodules. Employer's Exhibit 3. Dr. Roggli indicated that a macule is an area of pigmentation that can be seen but is not felt, and is not fibrotic. *Id.*

Dr. Caffrey reviewed, *inter alia*, twenty-three autopsy slides, a copy of the miner's death certificate and a copy of Dr. Dennis's autopsy report. Dr. Caffrey prepared a report on June 21, 2006, wherein he opined that there are no lesions on the autopsy slides that "fit the microscopic characteristic of progressive massive fibrosis." Employer's Exhibit 2. With regard to the right lung, Dr. Caffrey found moderate to severe emphysema with foci of interstitial fibrosis and honeycomb changes. *Id.* He identified two macules that measured 3 to 4 millimeters. *Id.* With regard to the right lung, he examined eight slides and found diffuse emphysema with honeycombing and noted "at most, one lesion of simple coal workers' pneumoconiosis per slide." *Id.* He also reviewed two slides pertaining to lymph nodes that contained a mild amount of anthracotic pigment but only one nodule, which measured as 1.3 centimeters. *Id.* Dr. Caffrey disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis, stating that "there are no lesions on the autopsy slides that fit the microscopic characteristic of a lesion of progressive massive fibrosis," other than the one lesion seen in the lymph node, which "did show characteristic changes of a lesion of complicated coal workers' pneumoconiosis." *Id.* According to Dr. Caffrey, a diagnosis of complicated pneumoconiosis is not warranted in this case, as the condition requires "a lesion which is present in the lung tissue not just lymph node tissue." *Id.*

Dr. Caffrey was deposed on April 7, 2007, and testified that Dr. Dennis's diagnosis of progressive massive fibrosis was not based on accepted medical standards. Dr. Caffrey noted that Dr. Dennis relied on the fact that, on gross examination, there was macule development in more than fifty percent of the lungs, and "the definition of progressive massive fibrosis is not how much lung involvement there is; it's a specific type of lesion." Employer's Exhibit 7. He defined a coal macule as a "spot" of coal dust accumulation, which is distinct from a micronodule or macronodule of coal workers' pneumoconiosis. *Id.* He opined that a macular area may or may not reveal lesions of pneumoconiosis on microscopic examination. *Id.* Dr. Caffrey reiterated that he did not

see any lesions or macules of pneumoconiosis greater than one centimeter, based on his microscopic review of the autopsy slides.⁵ *Id.*

In weighing the conflicting autopsy evidence, the administrative law judge found the opinions of Drs. Dennis and DeLara, that the miner had progressive massive fibrosis, to be reasoned and documented. Decision and Order at 25. The administrative law judge found that, while Drs. Roggli and Caffrey assert that, by its medical definition, a “macule” is no more than a finding of anthracotic pigmentation and is not a nodule of complicated pneumoconiosis, they failed to explain why the “macules” described by Dr. Dennis, measuring up to three centimeters, do not satisfy the statutory definition of complicated coal workers’ pneumoconiosis. *Id.* at 26. The administrative law judge observed that the Act does not utilize a purely “medical” definition of complicated pneumoconiosis, but creates a “legal” definition of complicated pneumoconiosis that encompasses more than just the medical description utilized by employer’s experts. *Id.* She further noted that Dr. Caffrey admitted in his deposition that he did not know what Dr. Dennis meant when he used the term “macules,” and had only assumed that Dr. Dennis was referring to macules in the medical sense of the word. *Id.* The administrative law judge found that “such an assumption is further proof that Dr. Caffrey failed to consider whether Dr. Dennis’s observations *satisfied the legal requirements for complicated pneumoconiosis.*” *Id.* at 27 (emphasis added). Thus, the administrative law judge found that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). *Id.*

With regard to 20 C.F.R. §718.304(c), the administrative law judge rejected Dr. Ghio’s opinion, that the miner did not have complicated pneumoconiosis, because he relied, in part, on the autopsy reports of Drs. Roggli and Caffrey, contrary to the administrative law judge’s finding that those reports were entitled to less weight than the reports of Drs. Dennis and DeLara. Decision and Order at 30. In weighing all of the probative evidence, the administrative law judge found that the autopsy reports of Drs. Dennis and DeLara established that the miner had complicated pneumoconiosis, and that the negative x-ray evidence did not detract from her finding of complicated pneumoconiosis. *Id.* The administrative law judge therefore found that claimant established the existence of complicated pneumoconiosis and invoked the irrebuttable presumption that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* at 30-31.

⁵ Dr. Caffrey was deposed again on November 8, 2007, and conceded that he did not actually know what Dr. Dennis meant when he used the term “macule” but had to assume it referred to anthracotic pigmentation. Employer’s Exhibit 7. Dr. Caffrey also refuted Dr. DeLara’s diagnosis of progressive massive fibrosis, stating again that he did not see any microscopic findings of nodules and fibrosis consistent with complicated pneumoconiosis in the slides he reviewed. *Id.*

Employer contends that Dr. Dennis's autopsy findings do not meet the statutory definition of complicated pneumoconiosis because he did not advise whether the miner had any findings on autopsy that would appear as opacities larger than one centimeter on x-ray and he did not use the term "massive lesions" in his report. Employer's arguments are rejected as without merit.

Because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, claimant may establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) if the autopsy evidence shows massive lesions *or, in the alternative*, if the nodules found on autopsy would appear as greater than one centimeter on x-ray. *Gray*, 176 F.3d at 387, 21 BLR at 624. An autopsy report need not contain the specific words "massive" or "lesions" in order to satisfy the requirements at 20 C.F.R. §718.304(b). *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 986, 24 BLR 2-72, 89 (11th Cir. 2007); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365 n.4, 23 BLR 2-374, 2-385 n.4 (4th Cir. 2006) (autopsy report diagnosing "[c]oal worker type pneumoconiosis, complicated type, with progressive massive fibrosis" sufficient to invoke the presumption pursuant to 20 C.F.R. §718.304(b)). As the administrative law judge correctly noted, the term "progressive massive fibrosis" is generally considered to be equivalent to the term complicated pneumoconiosis and when there is a diagnosis of progressive massive fibrosis, it equates to a diagnosis of massive lesions resulting from pneumoconiosis. Decision and Order at 25, 28; *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1359, 20 BLR 2-227, 2-228 (4th Cir. 1996) (noting that complicated pneumoconiosis is known "by its more dauntingly descriptive name, 'progressive massive fibrosis.'"). In this case, the administrative law judge correctly determined that findings of progressive massive fibrosis by Drs. Dennis and DeLara are supportive of a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b). *See Cornelius*, 508 F.3d at 986, 24 BLR at 2-89; *Perry*, 469 F.3d at 365 n.4, 23 BLR at 2-385 n.4; *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3, 1-5 (1991); Decision and Order at 27-28.

Employer also argues that the administrative law judge improperly rejected the opinions of Drs. Roggli and Caffrey, that the miner did not have progressive massive fibrosis, on the grounds that they focused on the medical definition of complicated pneumoconiosis and did not address the statutory definition of the disease. Employer asserts that these physicians have explained why the miner did not have complicated pneumoconiosis, under either a medical or legal definition, and that the administrative law judge has failed to properly resolve the conflict in the medical opinions as to the size of the macules observed by Dr. Dennis or whether his autopsy finding of progressive massive fibrosis is credible.

The Director agrees with employer and states:

Complicated pneumoconiosis may be established if “*the miner’s autopsy or biopsy results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards*” . . . [it] follows [therefore] that a physician may rely on the medical understanding of complicated pneumoconiosis when diagnosing the disease or when evaluating another physician’s diagnosis of the disease. In other words, because the legal definition for determining what constitutes complicated pneumoconiosis essentially incorporates the accepted medical definition, a physician should not be faulted for relying on an accepted medical definition in addressing the existence of complicated pneumoconiosis.

Director’s Brief at 2, *quoting Cornelius*, 508 F.3d at 986, 24 BLR at 2-89 (emphasis added). The Director also notes that, in referencing a “statutory” definition of complicated pneumoconiosis, which may be in conflict with any medical definition, the administrative law judge appears to rely on the “equivalency test”, whereby autopsy evidence may establish legal complicated pneumoconiosis if it shows the existence of a pneumoconiotic lesion that would appear as an opacity greater than one centimeter on x-ray. *Id.* The Director asserts, however, that the equivalency test is not at issue in this case since the question is solely whether the autopsy evidence establishes massive lesions. *Id.* We agree with the arguments of employer and the Director, in part.⁶

Although the administrative law judge found that employer’s experts did not address the “legal” definition of complicated pneumoconiosis, she did not identify the legal standard to which she refers. In this case, the issue is whether the autopsy evidence establishes progressive massive fibrosis or “massive lesions” pursuant to 20 C.F.R. §718.304(b). To the extent that Drs. Roggli and Caffrey specifically state that the miner does not have progressive massive fibrosis, they have addressed the presence or absence of complicated pneumoconiosis under the legal standard. Thus, we are unable to affirm the administrative law judge’s decision to accord less weight to the opinions of Drs. Roggli and Caffrey, as she has failed to provide a proper rationale for her credibility determinations. Furthermore, because the administrative law judge has failed to resolve the conflict in the evidence regarding the existence of massive lesions on autopsy, and she has not properly explained why she chose to credit the diagnoses of progressive

⁶ The legal definition of pneumoconiosis does not always incorporate the accepted medical definition of complicated pneumoconiosis. *See Double B Mining v. Blankenship*, 177 F.3d 240, 244, 22 BLR 2-554, 2-562 (4th Cir. 1999) (declining “to impose the two-centimeter rule,” because the Act “does not mandate use of the medical definition of complicated pneumoconiosis.”); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

massive fibrosis by Drs. Dennis and De Lara, over the contrary opinions of Drs. Roggli and Caffrey, her Decision and Order fails to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.304, and remand this case for further consideration.

On remand, when considering the autopsy evidence, 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 opinions. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge must weigh all of the evidence and reconsider whether claimant satisfied her burden of proof to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption that the miner's death was due to complicated pneumoconiosis at 20 C.F.R. §718.304.⁷ *See Cornelius*, 508 F.3d at 986, 24 BLR at 2-89; *Gray*, 176 F.3d at 389, 21 BLR at 2-628-29. If not, the administrative law judge must also consider whether claimant has established entitlement to benefits under 20 C.F.R. §718.205(c) or pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In rendering all of her findings on remand, the administrative law judge must explain her rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

⁷ The administrative law judge erred in stating that claimant “can establish the presence of complicated pneumoconiosis by any one of the methods set forth in the regulations.” Decision and Order at 30. The administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis, prior to finding that claimant satisfied her burden of proof. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-625 (6th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge