BRB No. 10-0606 BLA

NELLA J. STANLEY (Widow of BILLY R. STANLEY)	)	
Claimant-Respondent	)	
v.	)	
SHIPYARD RIVER TERMINAL	)	DATE ISSUED: 07/22/2011
and	)	
AMERICAN ZURICH	)	
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 – Approval of Modification and Award of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Ashton S. Phillips (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Approval of Modification and Award of Survivor Benefits (2008-BLA-5111) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a survivor's claim filed 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 found that the miner had at least twenty-seven years of coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the autopsy evidence was sufficient to establish that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), and that claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, based solely on the autopsy evidence pursuant to 20 C.F.R. §718.304(b). Employer also contends that the administrative law judge erred in failing to weigh all of the contrary evidence before finding that claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Both claimant and the Director,

[1] Claimant is the widow of the miner, Billy R. Stanley, who died on September 15, 2003. Director's Exhibit 11. Claimant filed this claim for survivor's benefits on January 19, 2005. Director's Exhibit 2. In a Proposed Decision and Order issued on November 21, 2005, the district director found that benefits were precluded because the miner's death was caused by a traumatic injury or medical condition unrelated to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(4). Director's Exhibit 27. Claimant wrote a letter on July 28, 2006, challenging the denial of her claim, which was treated as a request for modification. Director's Exhibits 31, 32. In a Proposed Decision and Order issued on August 16, 2007, the district director found that, because the evidence established that the miner had complicated pneumoconiosis, a mistake in a determination of fact had occurred with regard to the prior denial and that claimant was entitled to benefits. Director's Exhibit 49. Employer requested a hearing and the case was assigned to the administrative law judge, who issued his Decision and Order – Approval of Modification and Award of Survivor Benefits on June 23, 2010, which is the subject of this appeal. Director's Exhibits 50, 51.

Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[3] 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

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[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of at least twenty-seven 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).

[3] 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 2.

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*).

In this case, the administrative law judge found that claimant was unable to establish complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a), as "[n]either of the two chest x-rays were [read as] positive for a large pulmonary opacity consistent with pneumoconiosis." Decision and Order at 9; *see* Director's Exhibits 34, 35, 45-47. Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy evidence, which consists of the autopsy report of Dr. Dennis, who is Board-certified in anatomic and clinical pathology. Decision and Order at 9; Director's Exhibit 13. In his report, Dr. Dennis noted that a gross examination of the miner's lungs revealed pigment deposits on the entire surface of the pleura, along with a variegated pattern of white, splotchy, nodular expressions. Director's Exhibit 13. Dr. Dennis then provided a microscopic description of various sections of the miner's lungs *Id*. He noted that one section revealed black pigment deposition with silica particles in the hilar nodes. *Id*. He observed that the black pigment deposition was "resplendent" throughout the lungs and that interstitial fibrosis was moderate to severe. *Id*. In addition, he specified that there was macular development greater than one and one-half centimeters in diameter. *Id*. Based on his observations, he opined that his examination of the miner's respiratory system revealed "anthracosilicosis, or coal workers' pneumoconiosis, moderate to severe, with progressive massive fibrosis," which was manifested by: 1) macular development greater than 1.5 [centimeters] to 2.0 [centimeters] in diameter, "compatible with progressive coal workers' pneumoconiosis, progressive massive fibrosis;" 2) cor pulmonale; 3) fibrosis; 3) pulmonary congestion and edema; 4) prominent endotheilial proliferation of pulmonary circulature; and 6) pulmonary embolus. *Id*. Dr. Dennis concluded that the miner had a respiratory death "with significant anthracosilicosis with fibrosis compatible with progressive coal workers' pneumoconiosis." *Id*.

The administrative law judge found that claimant "has proven the presence of massive lesions consistent with pneumoconiosis" under 20 C.F.R. §718.304(b). Decision and Order at 10. The administrative law judge determined that the negative x-ray evidence did not preclude a finding of complicated pneumoconiosis, based on the autopsy report at 20 C.F.R. §718.304(b), and that "Dr. Dennis'[s] specific pathology observation of progressive massive fibrosis is not contradicted by the absence of a significant pulmonary impairment." *Id*. at 11. The administrative law judge further found that "the other medical opinions in the record have diminished probative value and do not

outweigh Dr. Dennis'[s] documented, reasoned, and probative pathology finding of progressive massive fibrosis."[4] *Id*. at 16. Additionally, the administrative law judge found that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Id*. The administrative law judge, therefore, concluded that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[5] *Id*. at 16-17.

Employer contends that Dr. Dennis's autopsy findings are insufficient to establish the existence of complicated pneumoconiosis because "no evidence has been submitted which establishes that the macules described by Dr. Dennis would be the equivalent to opacities seen on x-ray with a diameter of 1.0 [centimeter] or greater or would be classified as [C]ategory A, B, or C under the ILO classification system." Employer's

[4] The administrative law judge discussed the medical opinions of Drs. Puram, Broudy, Dahhan and Castle. The administrative law judge noted that Dr. Puram treated the miner from October 1999 to December 2000, but did not evaluate the miner's pulmonary condition. Decision and Order at 12, 15. The administrative law judge found that Dr. Broudy's opinion, that the miner did not suffer from simple or complicated pneumoconiosis, was entitled to diminished probative weight in comparison to the autopsy evidence because Dr. Broudy relied on radiographic evidence that is "less detailed and specific than the direct examination of lung tissue during an autopsy." Decision and Order at 15. The administrative law judge also found that Dr. Broudy's opinion was based on his finding of no respiratory disability, but that the results of normal pulmonary function and arterial blood gas studies "do not negate a pathology finding of progressive massive fibrosis in autopsy lung samples." *Id*. The administrative law judge found that, while Dr. Dahhan reviewed the autopsy report and opined that the miner did not suffer from complicated pneumoconiosis, Dr. Dahhan failed to explain the basis for his opinion, or indicate whether he agreed or disagreed with Dr. Dennis' pathology findings of progressive massive fibrosis. *Id*. Finally, the administrative law judge determined that Dr. Castle's opinion, that the miner did not have complicated pneumoconiosis, was not sufficiently reasoned, failed to address the pathology findings of coal macules greater than one centimeter in diameter, and appeared to be based on his review of the x-ray evidence. *Id*. at 16.

[5] The administrative law judge properly found that while the miner died from a traumatic injury, survivor's benefits are not precluded in this case, as 20 C.F.R. §718.205(c)(4) "is not applicable if the survivor's entitlement is based on the irrebuttable presumption under [20 C.F.R.] § 718.304(b)." Decision and Order at 17, *citing Gray v. SLC Coal Co.*, 176 F.3d 382, 386-387, 21 BLR 2-615, 2-623-624 (6th Cir. 1999); *Sumner v. Blue Diamond Coal Co*. 12 BLR 1-74 (1988).

Brief in Support of Petition for Review at 3. Employer's argument is rejected as without merit. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which held, in *Gray*, that autopsy evidence can establish invocation of the irrebuttable presumption of death due to pneumoconiosis if this 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 389, 21 BLR at 2-628-29. Therefore, claimant has two methods by which she may establish the existence of complicated pneumoconiosis, based on the autopsy evidence. *Id*.

We also reject employer's assertion that the autopsy evidence is insufficient to satisfy claimant's burden of proof because Dr. Dennis did not specifically use the term "massive lesions." As the Director correctly notes, because "massive lesions" is simply shorthand for complicated pneumoconiosis, 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). *Pittsburgh & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986, 24 BLR 2-72, 89 (11th Cir. 2007); *see also 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)). In addition, the term progressive massive fibrosis is synonymous with complicated pneumoconiosis. *See* 65 Fed. Reg. 79,951 (Dec. 20, 2000); *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, because Dr. Dennis diagnosed coal workers' pneumoconiosis with "progressive massive fibrosis," we see no error in the administrative law judge's conclusion that the autopsy report supports a finding of massive lesions consistent with complicated pneumoconiosis at 20 C.F.R. §718.304(b). Director's Exhibit 13; *see Cornelius*, 508 F.3d at 986, 24 BLR at 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). Furthermore, the administrative law judge permissibly found that Dr. Dennis's opinion was credible and that "[i]n terms of probative value, based on his detailed observations and in-depth review of multiple lung tissue slides, Dr. Dennis presented a well documented autopsy."[6]

[6] Employer argues that the administrative law judge did not consider the fact that Dr. Dennis indicated that the miner died a respiratory death when the death certificate lists the cause of death as a self-inflicted gun shot wound. Employer's Brief in Support of Petition for Review at 3; Director's Exhibit 11. The administrative law judge, however, rationally determined that "Dr. Dennis' erroneous cause of death determination [did] not diminish his specific microscopic pathology finding" as to the existence of complicated pneumoconiosis in the miner's lungs. Decision and Order at 15; *see Gray*,

Decision and Order at 10; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). The administrative law judge observed that Dr. Dennis's diagnosis of progressive massive fibrosis was supported by his finding of "extensive anthracosilicosis, with moderate to severe fibrosis and macular development greater than [one and one-half to two centimeters] throughout the various lung tissue samples, as well as evidence of fibrous connective tissue proliferation." Decision and Order at 10. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R §718.304(b). *See Gray*, 176 F.3d at 389, 21 BLR at 2-628-29.

Additionally, contrary to employer's argument, the administrative law judge properly relied upon the positive autopsy findings for complicated pneumoconiosis over the contrary negative x-ray evidence, as x-rays are "a single plane, radiographic image of the chest, whereas Dr. Dennis's examination involved a gross examination of all aspects of the lungs[,] as well as [a] detailed microscopic study of the lung tissue." Decision and Order at 10. It is well-settled that autopsy evidence is the most reliable evidence of the existence and degree of pneumoconiosis. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Moreover, the Sixth Circuit has specifically held that "x-rays are generally recognized as the least accurate method of correctly diagnosing complicated pneumoconiosis." *Gray*, 176 F.3d at 390, 21 BLR at 2-629.

Employer generally asserts that the administrative law judge "failed to weigh the conflicting medical evidence, [and] merely ignored all contrary evidence in favor of Dr. Dennis'[s] opinion." Employer's Brief in Support of Petition for Review at 4-5. Employer, however, has not specifically identified any of the contrary evidence that it contends the administrative law judge failed to consider. Nor has employer identified any specific errors made by the administrative law judge in his analysis of the contrary medical opinions.[7] *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director,*

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176 F.3d at 389, 21 BLR at 2-628-29; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

[7] Employer merely notes that "none of the medical reports indicated the presence of complicated pneumoconiosis." Employer's Brief at 3.

OWCP, 6 BLR 1-107 (1983). Thus, because the administrative law judge properly considered all of the record evidence in finding that claimant satisfied her burden of proof, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis and is entitled to the irrebuttable presumption of death due to pneumoconiosis.[8] *See Gray*, 176 F.3d at 389, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-31.

[8] Because we affirm the administrative law judge's finding that claimant is entitled to benefits pursuant to 20 C.F.R. §718.304, it is not necessary to consider claimant's entitlement, based on recent amendments to the Act.

Accordingly, the administrative law judge's Decision and Order – Approval of Modification and Award of Survivor Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge