

BRB No. 12-0595 BLA

ROSAMOND PACSAI	)	
(Widow of JOSEPH PACSAI)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BARNES & TUCKER COMPANY	)	
	)	DATE ISSUED: 07/17/2013
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-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Rita Roppolo (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (10-BLA-5642) of Administrative Law Judge Michael P. Lesniak on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case

involves a survivor's claim filed on August 17, 2009.<sup>1</sup> Director's Exhibit 3.

The administrative law judge credited the miner with twenty-seven years of coal mine employment,<sup>2</sup> and found that the autopsy evidence established the existence of complicated pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.304(b), 718.203(b). The administrative law judge, therefore, found that claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.<sup>3</sup>

On appeal, employer contends that the administrative law judge erred in determining that the autopsy evidence was sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's allegations of error.<sup>4</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> Claimant is the widow of the miner, who died on October 29, 2008. Director's Exhibit 9.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 3, 8.

<sup>3</sup> The administrative law judge also accepted the parties' stipulation that the miner suffered from simple pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and found that it arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Decision and Order at 2, 17. However, having found that claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge did not determine whether claimant could establish entitlement by any other means. Decision and Order at 17.

<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-seven years of coal mine employment, and the existence of simple pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205(c); *Neeley 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). 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); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis and, therefore, erred in finding that claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis, set out at 20 C.F.R. §718.304. 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 the 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. In determining whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 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. *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc). Autopsy evidence can support a finding of complicated pneumoconiosis where a physician diagnoses massive lesions or where an evidentiary basis exists for the administrative law judge to make an equivalency determination between the autopsy findings and x-ray findings. See 20 C.F.R. §718.304(b); *Clites v. J & L Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

After finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered whether the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). The administrative law judge considered the autopsy reports of Drs. Rizkalla, Bush, and Tomashefski. Director's Exhibits 10, 23; Employer's Exhibit 2. Dr. Rizkalla, a Board-certified pathologist and the autopsy prosector, found "multiple parenchymal nodules . . . in the left upper lobe, the

largest measuring 1.5 x 1.0 cm, and right lower lobe, the largest measuring 1.5 x 1.5 cm.” Director’s Exhibit 10. Dr. Rizkalla’s final pathologic diagnoses included “Coal Workers’ Pneumoconiosis, Macronodular, Severe.” *Id.* In his subsequent deposition, Dr. Rizkalla clarified that while the 1.5 x 1.5 cm lesion was “hard and calcific,” and was not pneumoconiotic, the 1.5 x 1.0 cm lesion was consistent with complicated pneumoconiosis or progressive massive fibrosis. Claimant’s Exhibit 4 at 15, 32-33. Dr. Rizkalla further explained that if the 1.5 cm x 1.0 pathological lesion of pneumoconiosis was seen on x-ray, it would be at least 1.5 cm. *Id.* at 15-16. Dr. Tomashefski, a Board-certified pathologist, reviewed the miner’s autopsy slides and other medical evidence. Dr. Tomashefski opined that eight of the twenty-four slides of lung parenchyma contained pneumoconiotic nodules, and identified a 1.5 x 1.0 parenchymal nodule in the left upper lob, and a hard, calcific lesion, measuring 1.5 x 1.5 cm, in the right lower lobe, consistent with Dr. Rizkalla’s opinion. Employer’s Exhibit 3 at 3, 4. Dr. Bush, a Board-certified pathologist, reviewed the miner’s autopsy slides and other medical evidence. Dr. Bush identified pneumoconiotic lesions on several slides, the largest, on slide 19, measuring 1.0 cm in greatest dimension. Director’s Exhibit 23.

The administrative law judge found that while the description of the 1.5 x 1.5 cm nodule as “hard and calcific” by Drs. Rizkalla and Tomashefski suggested that it was not comprised of pneumoconiotic or anthracotic material, in contrast, the weight of the autopsy evidence supported the existence of a 1.5 x 1.0 cm nodule of pneumoconiosis. Decision and Order at 15. As this finding is both supported by substantial evidence, and unchallenged on appeal, it is affirmed. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Skrack*, 6 BLR at 1-711; Decision and Order at 9.

The administrative law judge next reviewed the autopsy and medical opinion evidence to determine whether the 1.5 x 1.0 cm pneumoconiotic nodule found on autopsy would appear as greater than one centimeter in diameter on x-ray, consistent with the approach adopted by the United States Court of Appeals for the Third Circuit. Decision and Order at 15, *citing Clites*, 663 F.2d at 14, 3 BLR at 2-86. The administrative law judge found that, in addition to Dr. Rizkalla’s statement that if the 1.5 cm pathological lesion of pneumoconiosis was seen on x-ray, it would be at least 1.5 cm, Drs. Schaff and Begley opined that the nodule identified by Dr. Rizkalla would appear on x-ray as an opacity greater than one centimeter in diameter.<sup>5</sup> Decision and Order at 15. While Dr.

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<sup>5</sup> Dr. Schaaf, a Board-certified pulmonologist and B reader, testified that to a reasonable degree of medical certainty, the 1.5 cm nodule of coal workers’ pneumoconiosis identified by Dr. Rizkalla on autopsy would appear on x-ray as an opacity greater than one centimeter. Claimant’s Exhibit 5 at 11, 14. Dr. Schaaf explained that there were many factors that could cause a lesion seen on autopsy to not

Fino opined that the 1.5 centimeter nodule would “not necessarily” appear as greater than one centimeter on x-ray, he conceded that “it could.” Employer’s Exhibit 14 at 31-33. Consequently, the administrative law judge concluded that the autopsy evidence supported a finding of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b). Decision and Order at 15.

The administrative law judge then considered the medical opinion and computerized tomography (CT) scan evidence pursuant to 20 C.F.R. §718.304(c). Decision and Order at 16. The administrative law judge noted accurately that Drs. Schaaf and Begley diagnosed complicated pneumoconiosis, based on the autopsy evidence. Decision and Order at 16. The administrative law judge noted further that Dr. Talbott did not address whether the miner suffered from complicated pneumoconiosis, and Dr. Fino diagnosed simple pneumoconiosis, but conceded that he did not know whether the 1.5 x 1.0 cm lesion of pneumoconiosis identified on autopsy fulfilled the legal definition of complicated pneumoconiosis. Decision and Order at 16. Further, the administrative law judge declined to consider the CT scan evidence, finding that employer submitted no evidence that CT scan evidence is medically acceptable and relevant to a determination of whether a miner suffers from complicated pneumoconiosis, as required by 20 C.F.R. §718.107(b). Decision and Order at 5 n.14; 8, n.20.

Upon weighing all of the evidence at 20 C.F.R. §718.304(a)-(c) together, the administrative law judge acknowledged that the x-rays were negative for large opacities, but accorded greater weight to the autopsy findings of at least one pneumoconiotic nodule measuring 1.5 cm in greatest diameter. Decision and Order at 16. In light of the opinions of Drs. Rizkalla, Schaaf and Begley that the lesion would appear greater than one centimeter on x-ray, and the physicians’ explanations for why a nodule seen on autopsy might not be seen on x-ray, the administrative law judge concluded that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 16.

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appear on an x-ray, including the one-dimensional nature of x-ray technology, tissue density, shadows, bones, or scars in the region of the nodule, the lack of sufficient air for contrast, and the actual density of the nodule itself. Claimant’s Exhibit 5 at 12 Dr. Begley, a Board-certified pulmonologist, also testified that to a reasonable degree of medical certainty, the 1.5 cm lesion identified by Dr. Rizkalla on autopsy would appear as the same size on x-ray. Claimant’s Exhibit 6 at 11. Dr. Begley also explained that limitations in x-ray technology could cause a lesion seen on autopsy to not appear on an x-ray. Claimant’s Exhibit 6 at 10.

Employer does not dispute the administrative law judge's finding that the autopsy evidence established the existence of pneumoconiotic nodules measuring up to 1.5 cm x 1.0 cm. Rather, employer contends that the administrative law judge erred in finding that the nodule seen on autopsy would appear on x-ray as an opacity greater than one centimeter in diameter, when the x-ray and CT scan evidence is negative for the presence of large opacities of complicated pneumoconiosis. Employer's Brief at 5-7. This contention lacks merit.

In regard to the CT scan evidence, 20 C.F.R. §718.107 provides, in pertinent part, that "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis . . . may be submitted in connection with a claim and shall be given appropriate consideration." 20 C.F.R. §718.107(a). The Board has consistently held that, pursuant to 20 C.F.R. §718.107(b), the administrative law judge must determine, on a case-by-case basis, whether the proponent of the "other medical evidence" has established that the test or procedure is "medically acceptable and relevant to entitlement." *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*). In this case, having found that employer did not show that CT scan evidence is medically acceptable and relevant to a determination of whether a miner suffers from complicated pneumoconiosis, the administrative law judge permissibly declined to consider the CT scan evidence. *See* 20 C.F.R. §718.107(b); *Webber*, 23 BLR at 1-133; Decision and Order at 5 n.14; 8, n.20.

Moreover, as autopsy evidence can diminish the probative value of negative radiological evidence, an administrative law judge may rationally conclude that the autopsy evidence triggered invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b), even if the x-ray evidence of record does not show an opacity greater than one centimeter in size, *See Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). In the present case, therefore, the administrative law judge reasonably relied upon the opinions of Drs. Rizkalla, Schaaf, and Begley, regarding the size that the nodules identified on autopsy would appear on an x-ray, together with the physicians' explanations as to why a nodule might fail to appear on an x-ray, to find that the existence of complicated pneumoconiosis was established. *See Braenovich*, 22 BLR at 1-245; Decision and Order at 14. In light of the foregoing, we affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis under 20 C.F.R. §718.304(b).

Because it is unchallenged on appeal, we also affirm the administrative law judge's finding that employer did not rebut the presumption that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R.

§718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983); Decision and Order at 17.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge