



BRB Nos. 16-0593 BLA
and 16-0594 BLA

NELTHA ELLEN CROAFF)
(o/b/o and Widow of ROBIN RANDAL)
CROAFF))

Claimant-Respondent)

v.)

CHISHOLM COAL COMPANY,)
INCORPORATED)

DATE ISSUED: 07/25/2017

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeals of the Decisions and Orders of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decisions and Orders (13-BLA-5616, 14-BLA-5941) of Administrative Law Judge Richard A. Morgan awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on June 12, 2012, and a survivor's claim filed on August 12, 2013.¹

In a Decision and Order dated July 19, 2016, the administrative law judge found that claimant² established the existence of complicated pneumoconiosis, and therefore invoked the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further 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). Accordingly, the administrative law judge awarded benefits in the miner's claim. In a separate Decision and Order dated July 19, 2016, the administrative law judge found that claimant was entitled to derivative survivor's benefits pursuant to Section 422(l) of the Act, based on the miner's award. 30 U.S.C. §932(l).

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.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, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Employer's appeal in the miner's claim was assigned BRB No. 16-0593 BLA, and its appeal in the survivor's claim was assigned BRB No. 16-0594 BLA. By Order dated October 17, 2016, the Board consolidated these appeals for purposes of decision only.

² Claimant is the surviving spouse of the deceased miner, who died on June 18, 2013. Director's Exhibit 9 (Survivor's Claim).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had at least twenty-one years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner’s death was due to pneumoconiosis if (A) an x-ray of the miner’s lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence regarding the presence or absence of simple and complicated pneumoconiosis, resolve any conflict, and make appropriate findings of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Employer contends that the administrative law judge erred in finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).⁵ Employer specifically argues that the administrative law judge erred in finding that the autopsy evidence established the existence of progressive massive fibrosis. A diagnosis of progressive massive fibrosis has been held to be equivalent to a diagnosis of “massive lesions” under 20 C.F.R. §718.304(b). *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976) (“Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors”); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006).

Summary of the Evidence

The record contains the autopsy reports of two Board-certified pathologists, Drs. Cinco and Caffrey. Although Dr. Cinco diagnosed the miner with progressive massive fibrosis, Dr. Caffrey opined that the miner did not suffer from the disease. Claimant’s Exhibit 1; Employer’s Exhibit 1.

Dr. Cinco performed the miner’s autopsy on June 20, 2013. Claimant’s Exhibit 1. In an autopsy report dated October 22, 2013, Dr. Cinco noted on gross examination that

⁵ The administrative law judge found that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order at 17.

the pleural surfaces of the miner's lungs had "a reddish-brown color with multiple black anthracotic pigments." *Id.* On microscopic examination, Dr. Cinco found that the miner's lung tissue revealed several areas of "massive fibrosis," measuring 0.9, 1.0, and 1.5 centimeters. *Id.* Dr. Cinco opined that the miner's lung tissue was "massively replaced by fibrous tissue," with one lesion measuring at least 2.0 centimeters in length. *Id.* Dr. Cinco specifically described "confluent areas of pulmonary fibrosis consistent with progressive massive fibrosis." *Id.* Dr. Cinco diagnosed coal workers' pneumoconiosis with "pulmonary coal macules, massive fibrosis, and emphysema." *Id.*

After reviewing the miner's autopsy slides and Dr. Cinco's autopsy report, Dr. Caffrey opined that the miner's slides showed changes of simple coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Caffrey, however, disagreed with Dr. Cinco's diagnosis of progressive massive fibrosis:

I am unable to make a diagnosis of progressive massive fibrosis (PMF) or complicated coal [w]orkers' fibrosis. The [miner] definitely shows areas of fibrosis and he shows anthracotic pigment and lesions consistent with the diagnosis I made. In my opinion there are no lesions of complicated coal workers' pneumoconiosis or PMF. I follow the definition of that disease entity as recorded in the Archives of Pathology and Laboratory Medicine, July 1979 in a special issue entitled "Pathology Standards for Coal Workers' Pneumoconiosis." . . . [Dr. Cinco] in my opinion does not grossly describe a lesion or lesions of pulmonary fibrosis (complicated CWP). He says and I quote: "***The pleural surfaces have partial soft fibrous adhesions and have a reddish-brown color with multiple black anthracotic pigments. There are no external nodules or mass lesions.***" Since there are no mass lesions by his gross description, and I do not see mass lesions in his microscopic description, in my opinion [the miner] does not have complicated CWP. I definitely believe that he has a pneumoconiosis.

Employer's Exhibit 1 at 4-5 (emphasis in original).

The Administrative Law Judge's Findings

The administrative law judge found that Dr. Cinco's diagnosis of progressive massive fibrosis was well-reasoned, noting that the doctor described the clinical findings and observations upon which he based his diagnosis.⁶ Decision and Order at 18. Conversely, the administrative law judge found that Dr. Caffrey's opinion was not well-

⁶ The administrative law judge found that Dr. Cinco provided "detailed descriptions of [his] microscopic findings." Decision and Order at 18.

reasoned because the doctor did not adequately explain the basis for his microscopic findings. *Id.* at 19. The administrative law judge therefore found that the autopsy evidence established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) and that the other evidence of record did not outweigh that finding. *Id.* at 21.

Discussion

Employer initially contends that Dr. Cinco's diagnosis does not support a finding of complicated pneumoconiosis. We disagree. Because of the lack of a prevailing standard in the medical community for diagnosing complicated pneumoconiosis on autopsy, the Department of Labor has not promulgated specific standards for diagnosing "massive lesions." See *Pittsburg & Midway Coal Co. [Cornelius]*, 508 F.3d 975, 986-87, 24 BLR 2-72, 2-92 (11th Cir. 2007). In this case, the administrative law judge permissibly found that Dr. Cinco's "descriptions of massive fibrosis and massive confluent fibrosis ranging from 0.9 to 2 centimeters" were adequate to support a diagnosis of progressive massive fibrosis, a term that has been held to be equivalent to "massive lesions." Decision and Order at 19; *Usery*, 428 U.S. at 7, 3 BLR at 2-38; *Perry*, 469 F.3d at 366, 23 BLR at 2-387.

We also reject employer's contention that the administrative law judge erred in his consideration of Dr. Caffrey's opinion. The administrative law judge found that Dr. Caffrey, in opining that there were no lesions of complicated pneumoconiosis or progressive massive fibrosis, relied on definitions of those terms published in a July 1979 issue of the Archives of Pathology and Laboratory Medicine, but did not explain those definitions. Decision and Order at 18-19; Employer's Exhibit 1 at 4-5. The administrative law judge also found that Dr. Caffrey failed to provide a detailed discussion of the miner's autopsy slides,⁷ or adequately explain why he found that the slides did not reveal progressive massive fibrosis. *Id.* The administrative law judge therefore permissibly found that Dr. Caffrey's opinion was not sufficiently reasoned.⁸

⁷ The administrative law judge found that Dr. Caffrey, in his description of the miner's autopsy slides "did not discuss the amount of fibrosis, sizes of most of the fibrosis, or whether he observed a two centimeter lesion or one centimeter and larger areas of fibrosis, which Dr. Cinco described as 'massive.'" Decision and Order at 18.

⁸ The administrative law judge found that Dr. Caffrey's inability to discern the date of the miner's autopsy from Dr. Cinco's report cast doubt on the carefulness of Dr. Caffrey's review of the autopsy materials. Decision and Order at 19. Employer challenges this basis for according less weight to the doctor's opinion. Employer's Brief at 9. However, because the administrative law judge provided a separate, valid basis for according less weight to Dr. Caffrey's opinion—that it was not sufficiently reasoned—any error he may have made in according less weight to Dr. Caffrey's opinion for this

See 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); Decision and Order at 19.

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Moreover, the administrative law judge acted within his discretion in according the greatest weight to the autopsy evidence as the most reliable evidence regarding the existence of complicated pneumoconiosis.⁹ *See Gray*, 176 F.3d at 387, 21 BLR at 2-626; *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order at 21. We therefore affirm the administrative law judge's determination that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Additionally, we affirm, as unchallenged, the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's award of benefits in the miner's claim.

reason, or any additional reasons, would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

⁹ The administrative law judge considered the medical opinions of Drs. Gaziano and Castle pursuant to 20 C.F.R. §718.304(c). Dr. Gaziano did not diagnose complicated pneumoconiosis. The administrative law judge, however, accorded little weight to Dr. Gaziano's opinion because the doctor examined the miner prior to his death and, therefore, did not have an opportunity to review the autopsy evidence. Decision and Order at 21; Director's Exhibit 12. Because this finding is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711. Dr. Castle reviewed the autopsy reports of Drs. Cinco and Caffrey, along with other medical evidence. Dr. Castle opined that the miner did not have any pathological evidence of complicated pneumoconiosis, based upon his acceptance of Dr. Caffrey's opinion. Employer's Exhibit 2 at 24-25. Because the administrative law judge found that Dr. Caffrey's opinion was entitled to less weight than that of Dr. Cinco, the administrative law judge permissibly accorded less weight to Dr. Castle's opinion regarding the existence of complicated pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 21.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(l): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Decision and Order at 3-4. Because none of these findings is challenged on appeal, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l). 30 U.S.C. §932(l); *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decisions and Orders awarding benefits in the miner's claim and the survivor's claim are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge