

BRB No. 09-0675 BLA

INES GRACHEN)	
(Widow of GEORGE GRACHEN))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SHANNOPIN MINING COMPANY)	
)	DATE ISSUED: 06/30/2010
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington D.C., for employer.

Ann Marie Scarpino (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 (07-BLA-5117) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed pursuant to the provisions of 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). This case involves a survivor's claim filed on November 10, 2005. After crediting the miner with forty-three years of coal mine employment,¹ the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant² to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.³ Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends, *inter alia*, 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. In a reply brief, employer reiterates its previous contentions.

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).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides that 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 in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other

¹ The record reflects that the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² Claimant is the surviving spouse of the deceased miner who died on December 23, 2004. Director's Exhibit 6.

³ Although the administrative law judge also found that the evidence established the existence of simple clinical pneumoconiosis and legal pneumoconiosis, Decision and Order at 17, 21, he did not address whether the evidence established that the miner's death was due to either simple clinical pneumoconiosis or legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

means the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 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. 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 the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

The administrative law judge initially 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 18. The administrative law judge also found that the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.*

Autopsy findings 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 finding between autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304(b); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981);⁴ *Lohr v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984).

In this case, three physicians, Drs. Omalu, Perper, and Oesterling, reviewed the miner’s autopsy slides.⁵ Dr. Omalu, the autopsy prosector, diagnosed complicated pneumoconiosis and progressive massive fibrosis. The administrative law judge,

⁴ In *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981), the United States Court of Appeals for the Third Circuit held that an administrative law judge not only has the authority, but has an obligation to make equivalency determinations between autopsy findings and x-ray findings when an evidentiary basis exists for doing so.

⁵ Drs. Renn and Komen also submitted medical reports. The administrative law judge found that neither Dr. Renn nor Dr. Komen diagnosed complicated pneumoconiosis or progressive massive fibrosis. Decision and Order at 19. However, because he found that Drs. Renn and Komen offered “little discussion or explanation regarding the presence or absence of complicated pneumoconiosis,” the administrative law judge accorded their opinions “little weight.” *Id.*

however, found that Dr. Omalu did not indicate which lung tissue slides exhibited areas of progressive massive fibrosis. Decision and Order at 20. The administrative law judge further noted that Dr. Omalu did not opine that any of the lesions that he identified would appear as greater than one centimeter on an x-ray. *Id.* Because he found that that the doctor's "explanations, reasoning, and documentation [were] insufficient to support his conclusions," the administrative law judge accorded Dr. Omalu's opinion "little weight." *Id.*

Based upon a review of the miner's autopsy slides, Dr. Perper diagnosed complicated pneumoconiosis. Claimant's Exhibit 3 at 31. Dr. Perper opined that nodules, greater than one centimeter in size, were contained in the miner's lung tissue. Dr. Perper explained that some of the nodules "were in [a] subpleural location, which is clearly in the lung tissue because it's covered in the lung and not being in the lymph nodes."⁶ Claimant's Exhibit 4 at 30. Dr. Perper also opined that "[p]athological lesions of 1.0 cm. or larger are equivalent to radiological lesions of the same size or larger." Claimant's Exhibit 3 at 32.

Based upon his review of the miner's autopsy slides, Dr. Oesterling opined that the miner did not have complicated pneumoconiosis. Employer's Exhibit 1 at 5. Dr. Oesterling disagreed with Dr. Perper's conclusions, stating that Dr. Perper's diagnosis of complicated pneumoconiosis was "based on tissue which is not in any way functioning lung tissue." *Id.* Dr. Oesterling explained that the miner's lymph nodes "had become totally sclerotic." Employer's Exhibit 9 at 42. While Dr. Oesterling acknowledged that the size alone of the miner's lymph nodes would probably qualify as complicated pneumoconiosis, he further explained that the lymph nodes are not involved in gaseous exchange, and, as such, "have no role in breathing." *Id.* at 43. Dr. Oesterling explained that the miner's lymph nodes were not impacting pulmonary function because they were not large enough to compress his airways. *Id.* at 43-44. Dr. Oesterling explained that the miner's coal dust inhalation had produced a typical change in the lymph nodes that act to filter coal dust out of the lymphatic fluids. *Id.* at 51. Dr. Oesterling opined that this is "not any form of coal workers' pneumoconiosis." *Id.*

Dr. Oesterling also questioned Dr. Perper's findings of lesions satisfying the definition of complicated pneumoconiosis. For example, Dr. Oesterling opined that the lesion that Dr. Perper identified as complicated pneumoconiosis in Figure 6 of his report, was not complicated pneumoconiosis, but rather multiple smaller lesions, "three to four millimeters in maximum diameter." Employer's Exhibit 9 at 48. Similarly, Dr.

⁶ Dr. Perper opined that the miner's lymph nodes were "[p]artly or largely replaced by coalescing silicotic nodules with coal dust and birefringent crystals." Claimant's Exhibit 4 at 26.

Oesterling opined that the lesion that Dr. Perper identified as complicated pneumoconiosis in Figure 15 was really only a micronodule of coal workers pneumoconiosis. *Id.* at 49-50.

In considering the conflicting opinions of Drs. Perper and Oesterling, the administrative law judge stated:

I give the most weight to the opinion of Dr. Perper who noted the presence of lesions of coal workers' pneumoconiosis measuring greater than 1 cm, and opined that such lesions would appear as greater than 1 cm on chest x-ray. His opinion is thoroughly explained, well reasoned and well documented; therefore, I find that the opinion of Dr. Perper establishes that the miner suffered from complicated pneumoconiosis. I find the contrary opinion of Dr. Oesterling insufficient to outweigh Dr. Perper's conclusions. Dr. Oesterling attempted to counter Dr. Perper's findings by stating that the observed pathological lesions measuring greater than 1 cm were either areas of micronodules of coal dust which had not yet coalesced, lesions located in the parietal pleura, or fibrotic lymph tissue rather than actual lung tissue. He opined that fibrosis located in lymph tissue or the parietal pleura did not constitute coal workers' pneumoconiosis.

The Benefits Review Board had held that "anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis." *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA (July 30, 2002) (unpub.). In addition, anthracotic pigment with associated fibrosis is the equivalent of anthracosis, which satisfies the definition of pneumoconiosis under §718.202(a). In light of the regulations and the Board's holding in *Taylor*, I find that Dr. Oesterling's conclusion that anthracotic pigment and associated fibrosis located in the lymph nodes was not coal workers' pneumoconiosis unpersuasive. While Dr. Oesterling acknowledged that the tissue he identified as lymph node tissue resembled complicated pneumoconiosis, I will not go so far as to conclude that Dr. Oesterling's finding constitutes a diagnosis of complicated pneumoconiosis; however, I give his opinion less weight.

Decision and Order at 19-20 (footnote omitted).

Employer contends that the administrative law judge erred in crediting Dr. Perper's opinion, that the autopsy evidence revealed the existence of complicated pneumoconiosis, over Dr. Oesterling's contrary opinion. We agree. The administrative law judge failed to provide a valid reason for crediting Dr. Perper's autopsy findings over the contrary findings of Dr. Oesterling. Although anthracosis found in lymph nodes may

be sufficient to establish the existence of pneumoconiosis in certain cases, Dr. Perper specifically stated that he based his diagnosis of complicated pneumoconiosis on lesions that he found in the miner's lung tissue, not his lymph nodes. Moreover, neither Dr. Perper nor Dr. Oesterling interpreted pathology slides of the miner's lymph nodes as revealing complicated pneumoconiosis.

The administrative law judge did not resolve the relevant conflict in the opinions of Drs. Perper and Oesterling; namely, Dr. Oesterling's opinion that the lesions that Dr. Perper identified as complicated pneumoconiosis were either not contained in the miner's lung tissue, or were collections of micronodules of coal workers' pneumoconiosis measuring less than one centimeter in diameter. Because the administrative law judge did not resolve the conflict in the physicians' opinions as to the presence or absence of complicated pneumoconiosis in the miner's lung tissue, we vacate his finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). On remand, the administrative law judge must reconsider the autopsy evidence, resolve the conflict in the physicians' opinions, and explain his credibility determinations in accordance with the mandates of the Administrative Procedure Act (the APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with employer that the administrative law judge, in weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.304, erred in finding that the autopsy evidence outweighed the conflicting x-ray and CT scan evidence. The administrative law judge found that:

Though I have found the x-ray and CT scan evidence does not establish the presence of complicated pneumoconiosis, in light of the variety of pulmonary problems experienced by the miner, including emphysema, lung cancer, pneumoconiosis and pneumonia which may have obscured the x-ray and CT scan findings, I find the most reliable evidence regarding the presence of complicated pneumoconiosis to be the pathology evidence obtained at autopsy.

Decision and Order at 20. However, as employer correctly notes, "[n]one of the experts testified that the x-rays or CT scans were unreliable because of the presence of other diseases." Employer's Brief at 21. Because it is not supported by substantial evidence, we vacate the administrative law judge's weighing of the conflicting evidence at 20 C.F.R. §718.304. On remand, the administrative law judge must reconsider all relevant evidence pursuant to 20 C.F.R. §718.304 and explain the basis for his findings in accordance with the APA. *See Wojtowicz* 12 BLR at 1-165. Further, if the administrative law judge, on remand, finds that the evidence establishes the existence of

complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, he must address whether it arose out of the miner's coal mine employment. 20 C.F.R. §718.203(b).

Impact of the Recent Amendments

By Order dated April 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), which amended the Act with respect to the entitlement criteria for certain claims. The parties have responded.

The Director contends that Section 1556 affects this case and that a remand is required if the award of benefits is not affirmed. The Director states that, because claimant filed her claim after January 1, 2005, and it was still pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.⁷ The Director requests that this case be remanded to the administrative law judge to consider whether claimant has established entitlement pursuant to the Section 411(c)(4) presumption. The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414. Claimant and employer agree that Section 1556 will affect this case if the award cannot be affirmed.

After review of the parties' responses, we are persuaded that Section 1556 affects this case. Relevant to this survivor's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes that a miner had at least fifteen years of qualifying coal mine employment, and that he had a totally disabling respiratory impairment, there is a rebuttable presumption that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed her survivor's claim after January 1, 2005, and the miner was credited with forty-three years of coal mine employment. The Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that was not previously relevant to this

⁷ Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the existence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

survivor's claim prior to the recent amendments. In addition, if the presumption is invoked, the burden of proof shifts to employer to establish rebuttal of the presumption.

Consequently, on remand, the administrative law judge must consider whether claimant is entitled to invocation of the presumption at Section 411(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and this 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

BETTY JEAN HALL
Administrative Appeals Judge