

BRB No. 10-0609 BLA

VINETTA FRANCISCO)	
(Widow of ALVIN L. FRANCISCO))	
)	
Claimant-Respondent)	
)	
v.)	
)	
KENTLAND ELKHORN COAL)	
CORPORATION)	
)	
Employer-Petitioner)	DATE ISSUED: 06/28/2011
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

Barry H. Joyner (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 on Remand (05-BLA-5790) of Administrative Law Judge Joseph E. Kane rendered on a survivor's 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).¹ This case is before the Board for the second time. In his initial decision, after crediting the miner with forty-one years of coal mine employment, the administrative law judge found that the autopsy and medical opinion evidence established the existence of both simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), (c). The administrative law judge further found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Thus, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3), through invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, the Board vacated the administrative law judge's evidentiary findings under 20 C.F.R. §725.414, and his finding of entitlement under 20 C.F.R. §§718.304, 718.205(c), and remanded the case for further consideration. The Board instructed the administrative law judge, on remand, to reconsider the admissibility of Dr. Perper's deposition testimony, and to determine whether the portions of Dr. Caffrey's February 2, 2004 and October 7, 2004 reports that referred to Dr. Dennis's autopsy findings were admissible as rebuttal autopsy evidence. On the merits, the Board held that the administrative law judge mischaracterized Dr. Caffrey's review of the autopsy slides, and thus failed to provide a valid reason for crediting Dr. Dennis's conclusions over those of Dr. Caffrey. The Board therefore instructed the administrative law judge, on remand, to first afford claimant and employer the opportunity to redesignate their evidence in accordance with *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2006)(*en banc*), and then to reconsider whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On remand, the administrative law judge found that the weight of the evidence established the existence of complicated pneumoconiosis, and that the irrebuttable

¹ The miner filed six claims during his lifetime, all of which were denied. Director's Exhibits 1-5. The miner's sixth and final claim, filed on January 20, 2001, was denied by the district director on February 4, 2002 for failure to establish any element of entitlement. There is no indication that the miner took any further action with regard to the 2001 claim prior to his death on December 22, 2001. Claimant, the miner's widow, filed her survivor's claim on January 30, 2002. Because the miner was not eligible to receive benefits at the time of his death, and because the survivor's claim was filed before January 1, 2005, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case.

presumption set forth at 20 C.F.R. §718.304 was applicable. Thus, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and was entitled to survivor's benefits.

In the present appeal, employer challenges the administrative law judge's finding of complicated pneumoconiosis at Section 718.304, and, by extension, his finding of death due to pneumoconiosis at Section 718.205(c). Employer asserts that the administrative law judge erroneously: (1) accorded greater weight to the autopsy report of Dr. Dennis "for no reason other than he performed the actual autopsy," Employer's Brief at 13; (2) credited the autopsy evidence over the x-ray evidence; and (3) failed to weigh Dr. Dahhan's opinion, that the miner did not have complicated pneumoconiosis, in violation 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). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal unless specifically requested by the Board to do so. Employer has filed a reply brief reiterating its contentions.²

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.³ 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).

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(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 and would be classified in 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. A determination of whether complicated pneumoconiosis has been demonstrated is a finding of fact, and the administrative law judge must consider and weigh all relevant evidence. *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*).

² The parties do not challenge the administrative law judge's resolution of the procedural issues, or raise any further procedural objections on appeal.

³ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Consistent with the Board's instructions, the administrative law judge reconsidered the relevant pathological opinions of Drs. Dennis and Perper, that the miner had complicated pneumoconiosis, and the contrary opinion of Dr. Caffrey, that the miner had only simple pneumoconiosis, and determined that all of the opinions were well-reasoned and well-documented.⁴ Decision and Order on Remand at 11-12; Director's Exhibits 18, 39; Claimant's Exhibit 1. The administrative law judge permissibly assigned greater weight to the opinion of Dr. Dennis, as bolstered by the opinion of Dr. Perper, because Dr. Dennis performed the autopsy and saw the miner's entire respiratory system as well as the autopsy slides. Decision and Order at 11; *see Urgolites v. BethEnergy Mines*, 17 BLR 1-20 (1992). Since Dr. Dennis identified nodules on both gross examination and microscopic examination that exceeded one centimeter in diameter, substantial evidence supports the

⁴ Dr. Dennis, the autopsy prosector, reported a gross description of right lung "marked by pigmented areas that vary from 1 to 1.5 cms diameter," and "black pigment nodules measuring 0.5 to 1 cm diameter;" and left lung "sections in the hilar portion [that] show distended alveolar spaces filled with black pigment ranging from 0.5 to 1.5 cms in diameter," and a "large prominent hilar node ...1.5 cms in diameter." He reported microscopic descriptions of fibrous connective tissue greater than 1 cm.; fibrous connective tissue proliferation greater than 1.4 cms with fibrosis and chronic inflammation; and a "large prominent nodule of fibrous connective tissue proliferation, dense collagenous fibers subtended by this macular structure....2 cms." His final diagnoses included: "anthracosilicotic plaques and macules composed of dense fibrous connective tissue greater than 1.1 to 1.5 cms diameter" and "emphysema with anthracosilicotic pigment deposition and anthracosilicosis, black lung disease with progressive fibrosis. (Macules greater than 1.5 cms diameter)." Decision and Order on Remand at 8-9; Director's Exhibit 18.

Dr. Perper reviewed materials, including Dr. Dennis's autopsy report and the autopsy slides, and reported microscopic findings of macronodules that exceeded one centimeter. He diagnosed complicated coal workers' pneumoconiosis, and testified that the macronodules he observed on examination of the tissue slides would appear as greater than one centimeter on an x-ray. Decision and Order on Remand at 5-6, 11-12; Claimant's Exhibit 1.

Dr. Caffrey reviewed the autopsy slides and the findings of the autopsy prosector, Dr. Dennis, and opined that the pathology evidence did not demonstrate complicated pneumoconiosis because there were no lesions greater than one centimeter. Decision and Order on Remand at 3-4, 12; Director's Exhibit 39.

administrative law judge's determination to accord additional weight to his opinion as prosector. See *Urgolites*, 17 BLR at 1-23; *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); see generally *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). Further, because Dr. Perper's microscopic findings corroborated those of Dr. Dennis, the administrative law judge rationally found that the opinions of Drs. Dennis and Perper outweighed the contrary opinion of Dr. Caffrey and established the existence of complicated pneumoconiosis at Section 718.304(b). Decision and Order on Remand at 6.

We reject employer's argument that the administrative law judge, in weighing all relevant evidence together at Section 718.304(a)-(c), erred in crediting the autopsy evidence over the x-ray evidence. It is well-settled that autopsy evidence is the most reliable evidence of the existence and degree of pneumoconiosis, see *Melnick*, 16 BLR at 1-33; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985), and the United States Court of Appeals for the Sixth Circuit has acknowledged 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. We also reject employer's assertion that the administrative law judge erred by failing to consider the medical opinion of Dr. Dahhan. In his initial decision, the administrative law judge determined that Dr. Dahhan reviewed the autopsy report of Dr. Dennis, the report of Dr. Caffrey, and the death certificate, and concluded, without explanation, that the pathology findings did not reveal evidence of complicated pneumoconiosis.⁵ Decision and Order at 11; Director's Exhibit 39. The administrative law judge properly assigned Dr. Dahhan's medical opinion less weight because the physician failed to explain how he reached this conclusion, and never discussed whether the prosector's findings of macronodules and anthracosilicotic changes with progressive fibrosis constituted complicated pneumoconiosis.⁶ Decision and Order at 11; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). On remand, the administrative law judge rationally determined that the autopsy evidence was the most probative and reliable evidence on the issue of complicated pneumoconiosis, and permissibly found that the weight of the autopsy evidence was sufficient to invoke the irrebuttable presumption

⁵ Dr. Dahhan initially reported on October 17, 2001, that his examination and testing of the miner revealed no evidence of pneumoconiosis or a respiratory impairment. Director's Exhibit 39. After review of the reports of Drs. Dennis and Caffrey, however, Dr. Dahhan opined that the miner had simple pneumoconiosis, but did not suffer from complicated pneumoconiosis, based upon the pathology findings. *Id.*

⁶ The record reflects that Dr. Dahhan is Board-certified in internal medicine and pulmonary medicine, but is not a pathologist. See Director's Exhibits 18, 39 at 77, 109, 262, 284-285, 288-298. When asked to define a macronodule, he replied: "[A] pathologist would be better describing it than I am." Director's Exhibit 39 at 295.

of death due to pneumoconiosis pursuant to Section 718.304. Decision and Order on Remand at 12-13; *see Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33.

The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings pursuant to Sections 718.304, 718.205(c), and affirm the award of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge