

BRB No. 05-0837 BLA

HELEN L. GALL)	
(Widow of JULIUS GALL))	
)	
Claimant-Respondent)	
)	DATE ISSUED: 05/12/2006
v.)	
)	
BETHENERGY MINES, INCORPORATED)	
)	
Employer-Petitioner)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 – Awarding Benefits (2004-BLA-5346) of Administrative Law Judge Daniel L. Leland D&O with respect to a survivor’s claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The administrative law judge accepted employer’s stipulation to twenty-six years of coal mine employment and considered the claim, filed on July 18, 2002, under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was sufficient to establish that pneumoconiosis was a contributing cause of the miner’s death pursuant to 20 C.F.R. §718.205(c)(2). The administrative law judge also found that claimant was entitled to the irrebuttable presumption, set forth in 20 C.F.R. §718.304, that the miner’s death was due to pneumoconiosis. Benefits were awarded accordingly.

Employer argues on appeal that the administrative law judge did not properly weigh the medical opinion evidence in this case. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has responded with respect to employer’s argument concerning the invocation of the irrebuttable presumption and urges the Board to reject it.

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

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, 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 that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1; 718.202; 718.203; 718.205(c); 718.304. Pneumoconiosis is a substantially contributing cause of the miner’s death if it hastened the miner’s death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001,13 BLR 2-100 (3d Cir. 1989); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).²

¹ Claimant is Helen Gall, the surviving spouse of Julius Gall, the deceased miner. Mr. Gall died on April 12, 2002. Director’s Exhibit 10.

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner’s last year of coal mine employment occurred in

With respect to invocation of the irrebuttable presumption of death due to pneumoconiosis referenced in Sections 718.205(c)(3) and 718.304, the administrative law judge found that Drs. Perper and Mittal observed lesions that would appear as one centimeter lesions on an x-ray. Decision and Order at 7; Director's Exhibit 14; Claimant's Exhibits 1, 4. He determined that Dr. Bush's description of a lesion that was one centimeter "in dimension" but only one half of a centimeter wide did not contradict the opinions of Drs. Perper and Mittal. *Id.*; Employer's Exhibit 5 at 22. The administrative law judge declined to credit the findings of Drs. Castle and Fino, that the miner had only mild or moderate simple pneumoconiosis, because their negative x-ray and CT scan interpretations were contradicted by the autopsy evidence. *Id.*; Director's Exhibit 17; Employer's Exhibits 2-4. The administrative law judge concluded that "the pathological evidence as a whole substantiates the presence of 1 cm nodular lesions in decedent's lungs." *Id.*, citing *Clites v. J & L Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981). The administrative law judge further found, therefore, that the irrebuttable presumption of death due to pneumoconiosis was invoked.

Employer argues that because Drs. Perper and Mittal did not observe lesions *greater than* one centimeter in diameter, they did not diagnose complicated pneumoconiosis as defined in Section 718.304(a). Employer also maintains that the administrative law judge erred in relying upon the United States Court of Appeals for the Third Circuit's decision in *Clites*, as the facts before the administrative law judge did not correspond to the facts in that case. The Director maintains that the Board should reject employer's argument, as Dr. Perper stated in his initial report and at his deposition that he found lesions greater than one centimeter and that those lesions would be the same size if viewed on an x-ray. Claimant concurs with the Director.

Upon review of the administrative law judge's Decision and Order, the relevant evidence, and the arguments raised by the parties, we hold that the administrative law judge rationally determined that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. Contrary to employer's argument, the administrative law judge did not err in relying upon the Third Circuit's decision in *Clites* when analyzing the medical evidence. In *Clites*, the Third Circuit held that an administrative law judge, as fact-finder, can make equivalency determinations in order to ascertain whether complicated pneumoconiosis has been established by means other than an x-ray if his findings are supported by medical evidence in the record. Employer suggests that the court's holding only applies when the record does not contain x-ray

Pennsylvania. Director's Exhibits 1, 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence. There is, however, no support for this position in the text of the court's decision. Thus, the administrative law judge did not err in considering whether the lesions observed by Drs. Perper and Mittal were equivalent in size to the objective measure of an opacity on x-ray measuring greater than one centimeter in diameter that is set forth in Section 718.304(a).

Moreover, as the Director contends, the administrative law judge's finding that the opinions of Drs. Perper and Mittal establish the presence of complicated pneumoconiosis under the terms of Section 718.304 is rational and supported by substantial evidence. The administrative law judge acted within his discretion as fact-finder in according little weight to the negative x-ray and CT scan readings referenced by Drs. Fino and Castle, as autopsy evidence is more probative of the existence of pneumoconiosis, whether simple or complicated. Decision and Order at 7; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). In addition, contrary to employer's argument, Dr. Perper stated unequivocally that he observed nodules greater than one centimeter in diameter when reviewing the autopsy evidence. Director's Exhibit 14; Claimant's Exhibit 1 at 14. In addition, although Dr. Mittal did not state that the lesions were more than one centimeter in diameter, he concurred with Dr. Perper's diagnosis of complicated pneumoconiosis. Claimant's Exhibit 4. We affirm, therefore, the administrative law judge's finding that claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304 and the award of survivor's benefits under Part 718. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).³

³ In light of our affirmance of the administrative law judge's findings under 20 C.F.R. §718.304, we decline to address employer's allegations of error regarding the administrative law judge's weighing of the evidence under 20 C.F.R. §718.205(c)(2), as error, if any, in the administrative law judge's analysis would be harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge