BRB No. 05-0874 BLA

ROBERTA RITCHIE (Widow of BILLY M. RITCHIE)	)	
Claimant-Petitioner	)	
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 05/24/2006
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James M. Haviland (Pyles Haviland Turner & Smith, LLP), Charleston, West Virginia, for claimant.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Denying Benefits (04-BLA-0084) of Administrative Law Judge Janice K. Bullard (the administrative law judge) on 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). This case has previously been before the Board. In a decision dated May 6, 1998, Administrative Law Judge Richard A. Morgan initially noted that employer no longer controverted the issues of, *inter alia*, length of coal mine employment and the existence of occupationally related pneumoconiosis. Decision and Order at 2 n.3; Hearing Transcript at 7, 26. Judge Morgan credited the miner with at least thirty-seven years of coal mine employment. On the merits of the claim, he found that the evidence failed to establish that the miner had complicated pneumoconiosis and thus, was insufficient to

establish invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. Judge Morgan further found that the evidence was insufficient to meet claimant's burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c) pursuant to *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Accordingly, benefits were denied.

On appeal, the Board vacated Judge Morgan's findings that the evidence was insufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Specifically, the Board held that Judge Morgan failed to determine, as set forth in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), whether the pulmonary nodules or lesions measuring up to 1.5 centimeters found on autopsy constitute "massive lesions" sufficient to support a finding of complicated pneumoconiosis by autopsy evidence at Section 718.304(b); *i.e.* whether these nodules would equate, when x-rayed, to a showing of opacities greater than one centimeter in diameter, *see* 20 C.F.R. §718.304(a).[1] The Board, therefore, remanded the case for an "equivalency determination" to be made by an administrative law judge consistent with the decision in *Blankenship*. The Board further vacated Judge Morgan's finding that claimant did not establish death due to pneumoconiosis at Section 718.205(c), because this finding was tainted by his consideration of the evidence relevant to the issue of claimant's entitlement to the irrebuttable presumption of death due to pneumoconiosis provided at Section 718.304. *Ritchie v. Eastern Assoc. Coal Corp.*, BRB No. 98-1169 BLA (Jun. 1, 1999)(unpub.).

On remand, Judge Morgan issued an Order dated September 7, 1999, remanding this case to the district director for further medical development. Specifically, the district director was ordered to have at least two physicians, preferably with qualifications as a Board-certified radiologist and a Board-certified pathologist with radiologic qualifications, answer a series of questions pertaining to whether the pathologic evidence in this case of nodules measuring up to 1.5 centimeters was sufficient to provide a basis

[1] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, creates an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis if (A) an x-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter; (B) a biopsy or autopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). In *Blankenship*, the court stated that because prong (A) sets out an entirely objective scientific standard, *i.e.*, an opacity on x-ray greater than one centimeter, x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

for the diagnosis of complicated pneumoconiosis pursuant to Section 718.304. Director's Exhibit 47. The district director's ability to carry out the remand Order was impeded by the fact that the autopsy slides were lost and unavailable for review. Of the four physicians contacted by the district director, only Dr. Gaziano, who is a Board-certified internist and pulmonologist and a B reader, submitted a report.[2]

In a Decision and Order on remand dated June 23, 2005, the administrative law judge found that the medical evidence of record failed to establish that the miner had complicated pneumoconiosis and thus, was insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. The administrative law judge further found that the evidence was insufficient to meet claimant's burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c) pursuant to *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff*, 967 F.2d at 977, 16 BLR at 2-90. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge committed reversible error in determining that claimant was not entitled to the irrebuttable presumption of death due to pneumoconiosis provided at Section 718.304, and in finding that claimant failed to meet her burden to establish death due to pneumoconiosis at Section 718.205(c). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially asserts that in evaluating the medical opinion evidence relevant to Section 718.304, the administrative law judge erred in failing to accord determinative weight to Dr. Gaziano's opinion that a "lesion on chest x-ray is approximately 10% larger than its actual size if compared to a pathologic specimen," which, if credited, could support a finding of complicated pneumoconiosis, and thus, entitlement to benefits. Director's Exhibit 51; Claimant's Brief at 4. We disagree.

Reviewing the medical opinion evidence, the administrative law judge properly noted that of the forty readings of the sixteen x-ray films of record dating from May 10, 1974 to May 28, 1996, only Dr. Wheeler's reading of the October 17, 1994 film could

[2] Dr. Hansbarger, the autopsy prosector, and Drs. Sherman and Crouch, all declined to render opinions in response to the remand Order.

potentially support a finding of complicated pneumoconiosis. Decision and Order at 7. The administrative law judge properly noted, however, that while Dr. Wheeler opined that the x-ray revealed a one centimeter mass, the physician attributed this mass to a probable granuloma, and did not diagnose complicated pneumoconiosis. Employer's Exhibit 4; Decision and Order at 7. Rather, Dr. Wheeler specifically indicated that the x-ray did not show any large opacities.[3] Similarly, while Dr. Hansbarger, the autopsy prosector, found "pulmonary nodules measuring up to 1.5 cm in greatest dimension," he did not diagnose "massive lesions" or complicated pneumoconiosis, but, rather, stated that his autopsy findings supported a diagnosis of "very severe simple coal workers' pneumoconiosis." Director's Exhibit 11; Decision and Order at 7.

Turning to the pertinent inquiry of whether, despite Dr. Hansbarger's conclusion that the miner had only simple pneumoconiosis, the nodules or lesions seen by Dr. Hansbarger nonetheless constitute "massive lesions" sufficient to support a finding of complicated pneumoconiosis by autopsy evidence at Section 718.304(b); *i.e.* whether these nodules would equate, when x-rayed, to a showing of opacities greater than one centimeter in diameter, *see* 20 C.F.R. §718.304(a), the administrative law judge properly found that Dr. Gaziano was the only physician who offered an opinion on this issue.[4] Decision and Order at 3-4, 7. Reviewing Dr. Gaziano's responses to the questions posed by the district director, the administrative law judge noted that Dr. Gaziano stated that while he was not sure if the nodule seen at autopsy is the same nodule seen by Dr. Wheeler on the October 17, 1994 x-ray, he is of the opinion that a lesion on chest x-ray is

[3] The regulations plainly state that an x-ray reading must specifically diagnose "one or more large opacities (greater than 1 centimeter in diameter)…[which] would be classified in Category A, B, or C" in the ILO/U-C International classification of x-rays to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)(1); *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). The word "opacity" is a term of art used to classify abnormalities in the lung which appear consistent with pneumoconiosis. *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis* (Rev. ed. 1986) at 3, 4, 6.

[4] In addition to the death certificate signed by Dr. Sakkal, the autopsy protocol from Dr. Hansbarger, and the consultative reports from Dr. Gaziano, the record contains reports from Drs. Kleinerman, Naeye and Green, each a Board-certified pathologist who reviewed the medical records and autopsy slides. While Drs. Hansbarger, Gaziano, Kleinerman, Naeye and Green agreed that the miner suffered from pneumoconiosis, only Dr. Green diagnosed complicated pneumoconiosis, based on the autopsy finding of nodules measuring up to 1.5 centimeters. Director's Exhibit 32. Dr. Green did not address, however, whether the nodules seen on autopsy would appear as opacities greater then one centimeter when viewed on x-ray, as required by 20 C.F.R. §718.304(a).

approximately 10% larger than its actual size if compared to a pathologic specimen. Director's Exhibit 51; Decision and Order at 5, 7-8. Thus, Dr. Gaziano explained, a lesion measuring only .9 centimeters on autopsy, smaller than the lesions found by Dr. Hansbarger, would appear as a one centimeter lesion on x-ray. Director's Exhibit 51; Decision and Order at 5, 7. Dr. Gaziano concluded that he believed a uniform standard of one centimeter, for both x-ray lesions and histopathology, should be the standard for making a diagnosis of complicated pneumoconiosis. Director's Exhibit 51.

Contrary to claimant's argument, the administrative law judge permissibly concluded that, because the record contained a prior, 1996, opinion from Dr. Gaziano, in which he reviewed the file, including Dr. Hansbarger's autopsy report describing the 1.5 centimeter nodules, and had opined that the medical evidence did *not* support a diagnosis of complicated pneumoconiosis, this inconsistency mitigated against adopting Dr. Gaziano's "10% rule" and applying it to the facts of this case to find complicated pneumoconiosis established. *See Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984) (medical report may be found unreasoned where doctor fails to explain change in his conclusion); Director's Exhibits 12, 51; Decision and Order at 7-8. As the administrative law judge permissibly found that Dr. Gaziano's opinion is insufficient to establish that the 1.5 centimeter nodules seen on autopsy would appear as opacities greater then one centimeter when viewed on x-ray, as required by 20 C.F.R. §718.304(a), and as the administrative law judge further properly found that the record contains no other medical opinions which address this issue, we affirm the administrative law judge's finding that claimant failed to establish entitlement to the irrebuttable presumption of death due to pneumoconiosis provided at Section 718.304. *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *see Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003) (Gabauer, J., concurring); Decision and Order at 8.

Claimant next contends that in finding that claimant did not establish death due to pneumoconiosis at Section 718.205(c), the administrative law judge erred in failing to credit the opinion of Dr. Green, that the miner died as a result of complications of ischemic heart disease and that his death was hastened and contributed to by pre-existing lung diseases related to his coal mine employment, including pneumoconiosis, emphysema, and chronic bronchitis, over the contrary opinions of Drs. Kleinerman and Naeye. We disagree.

Reviewing the medical opinion evidence relevant to the cause of the miner's death, the administrative law judge properly noted that Dr. Green, a Board-certified pathologist, was the only physician to clearly opine that pneumoconiosis played any role

in the miner's death.[5] In a report dated December 19, 1997, Dr. Green stated that the immediate cause of the miner's death was ischemic heart disease, but that his death was contributed to and hastened by pneumoconiosis, both simple and complicated, chronic bronchitis and emphysema. Director's Exhibit 32. Dr. Green opined that pneumoconiosis, chronic bronchitis and emphysema, when severe, as in the miner's case, lead to strain of the right side of the heart, or cor pulmonale, which puts an additional mechanical load on the heart contributing to heart failure. Director's Exhibit 32. In addition, Dr. Green stated that complicated pneumoconiosis, chronic bronchitis and

[5] The administrative law judge properly found that the final hospital notes and death certificate did not support a finding that pneumoconiosis contributed to the miner's death. Decision and Order at 8. The administrative law judge noted that on May 23, 1996, the miner was admitted to St. Francis hospital complaining of chest pain, nausea and vomiting. He experienced a non-Q wave myocardial infarction, but then appeared to stabilize. However, he then "stopped breathing all of a sudden" and could not be resuscitated. The final diagnoses were: acute non-Q wave myocardial infarction; acute and chronic renal failure; acute GI bleeding; non-insulin dependent diabetes mellitus; hypertension; past cerebrovascular accident; leg fracture from mining accident in the past; and previous tobacco use. Director's Exhibit 31; Decision and Order at 8. Dr. Sakkal, the attending physician during the miner's hospitalization, indicated that the "initiating process" of the miner's death was respiratory, but did not implicate pneumoconiosis. Similarly, the death certificate, also completed by Dr. Sakkal, indicated that the immediate cause of death was respiratory arrest followed by cardiac arrest, due to "CAD" and "CHF" due to a possible "CVA." Other significant conditions were listed as "CRF" and "old CVA." Director's Exhibit 9; Decision and Order at 8. Dr. Hansbarger, the autopsy prosector, diagnosed very severe simple pneumoconiosis, but opined that the miner "died as an apparent result of renal failure and cardiovascular problems." Director's Exhibit 11. In addition, the administrative law judge permissibly found that as Dr. Gaziano indicated in a September 5, 1996 report that the miner's death was *not* due to pneumoconiosis, but also stated in the same report that pneumoconiosis was "likely contributory" to death, Dr. Gaziano's 1996 opinion was too equivocal to support a finding of death due to pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 21 BLR 2-587, 2-605 (4th Cir. 1999); *United States Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Director's Exhibit 12; Decision and Order at 9. In addition, the administrative law judge properly found that Dr. Gaziano's more recent, 2003 opinion generally discussed equivalency determinations and did not specifically address the cause of the miner's death. *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Director's Exhibit 51; Decision and Order at 9. Finally, both Dr. Kleinerman and Dr. Naeye specifically opined that pneumoconiosis did not contribute to the miner's death. Director's Exhibits 32, 39.

emphysema will also reduce the oxygen saturation of the blood, increasing the ischemia of the already compromised heart muscle. The increased mechanical load on the heart, the physician opined, combined with hypoxic ischemia, would contribute to cardiac death in someone with preexisting ischemic heart disease. Director's Exhibit 32. In a follow-up report dated January 26, 1998, Dr. Green stated that his review of the autopsy slides revealed hypertrophy and other changes of the pulmonary vessels, indicative of "pulmonary hypertension (cor pulmonale)," thus confirming his earlier conclusion that pneumoconiosis contributed to the miner's heart failure and death. Director's Exhibit 32. The administrative law judge permissibly concluded, however, that Dr. Green's diagnosis of cor pulmonale was outweighed by the opinions of Drs. Naeye and Kleinerman, who are equally qualified as Board-certified pathologists and who both opined that a definitive diagnosis of cor pulmonale could not be made without weighing and measuring the heart, which was not done in this case. *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); Director's Exhibit 39; Employer's Exhibit 5; Decision and Order at 9. The administrative law judge further permissibly found that Dr. Green's additional conclusion, that the notation of hypoxemia in the miner's last hospitalization records indicated that pneumoconiosis had contributed to his death, was effectively countered by the contrary opinion of Dr. Kleinerman, who stated that when a person is terminal, there can be changes in the heart that affect oxygenation, which would explain the hypoxemia observed during the miner's final hospitalization, and further opined that in this case there was no evidence that the miner's hypoxemia was due to any lung disease because an arterial blood gas drawn in December of 1994 showed entirely normal PO2 and O2 saturation. *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Director's Exhibit 39; Decision and Order at 10.

It is within the purview of the administrative law judge to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127, and the Board will not substitute its inferences for those of the administrative law judge, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As the administrative law judge's finding, that death due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.205(c), is supported by substantial evidence and contains no reversible error, it is hereby affirmed. We, therefore, further affirm the administrative law judge's denial of benefits on the survivor's claim pursuant to 20 C.F.R. §718.205(c), *see Sparks*, 213 F.3d at 186, 22 BLR at 2-251; *Shuff*, 967 F.2d at 977, 16 BLR at 2-90; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

Accordingly, the administrative law judge's Decision and Order Denying 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