BRB No. 10-0530 BLA

LULA C. SARGENT (Widow of TENNIS A. SARGENT)	)	
Claimant- Petitioner	)	
v.	)	
ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY	)	DATE ISSUED: 05/23/2011
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 on Remand – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lula C. Sargent, Logan, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand - Denying Benefits (2007-BLA-5894) of Administrative Law Judge Michael P. Lesniak rendered on a survivor's claim[1] filed pursuant to the provisions of the Black

[1] Claimant is the widow of the miner, Tennis A. Sargent, who died on April 17, 2006. Director's Exhibit 1. Claimant was represented by counsel at the hearing, when

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 is before the Board for the second time. In its prior Decision and Order, the Board addressed employer's appeal of the administrative law judge's award of benefits. The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the miner had ten years of coal mine employment and that claimant established the existence of simple pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b). *L.C.S.* [*Sargent*] *v. Arch of West Virginia/Apogee Coal Co.*, BRB No. 08-0709 BLA, slip op. at 2 n.2. (July 29, 2008) (unpub.). However, the Board vacated the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304(b), as he did not determine whether there was evidence establishing that the lesions seen on autopsy would appear as large opacities on x-ray. *Id*. at 5, *citing Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). The Board further held that the administrative law judge erred in according greater weight to the opinion of Dr. Dennis, based on his status as the autopsy prosector. *Sargent*, BRB No. 08-0709 BLA, slip op. at 5. Lastly, the Board vacated the administrative law judge's findings, under 20 C.F.R. §718.304(c), that the medical opinions in which Drs. Crisalli and Zaldivar ruled out the presence of complicated pneumoconiosis were entitled to no weight. *Id*. at 8.

The Board, therefore, remanded the case to the administrative law judge with instructions that he reconsider the evidence relevant to 20 C.F.R. §718.304(b), (c).[2] *Sargent*, BRB No. 08-0709 BLA, slip op. at 6-7. The Board also instructed the administrative law judge on remand that, if he did not find claimant to be entitled to invocation of the irrebuttable presumption at 20 C.F.R. §718.304, he was required to determine whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (2). *Id*. at 8-9.

In the administrative law judge's Decision and Order on Remand, he found that claimant did not establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also determined

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this case was previously before the Board, and when the case was remanded to the administrative law judge.

[2] Proof of the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a) is not at issue in this case, as the record does not contain any x-ray evidence.

that claimant did not prove that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh Dr. Dennis's opinion pursuant to 20 C.F.R. §718.304(b). Claimant further argues that the administrative law judge should have stricken employer's evidence in light of allegations of misconduct by employer's counsel in other cases. Claimant also asserts that the administrative law judge erred in crediting the miner with less than fifteen years of qualifying coal mine employment and, therefore, erred in determining that the amendments to the Act do not apply in this case. Employer responds in support of the denial of benefits and asserts that the administrative law judge correctly found that Dr. Dennis's opinion was outweighed by the contrary opinions of record. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). In claims filed on or after January 1, 1982, death is considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the irrebuttable presumption at 20 C.F.R. §718.304 is available, based on a finding of complicated pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *Trumbo v. Reading Anthracite Co.*, 17

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner was employed in coal mining in West Virginia. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Evidentiary Issue

We reject claimant's assertion that employer's medical evidence should be stricken from the record, in light of "public allegations of manipulating, manufacturing and covering up evidence" by counsel for employer in an unrelated case. Claimant's Letter dated June 5, 2010. In order to justify a ruling excluding, or otherwise disregarding, the evidence that employer has submitted, claimant must establish that employer's counsel engaged in misconduct that actually tainted employer's evidence in this case. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Bowman v. Clinchfield Coal Co.*, 15 BLR 1-22 (1991). Because in this case claimant has submitted no proof of misconduct, there is no basis for remand to the administrative law judge for consideration of claimant's request to strike employer's evidence.

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, in determining whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*). Additionally, the United States Court of Appeals for the Fourth Circuit has held that, because prong (a) "sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, i.e., an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy, or other means, would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561.

The record evidence relevant to 20 C.F.R. §718.304 consists of the autopsy reports of Drs. Dennis, Caffrey and Bush and the medical opinions of Drs. Zaldivar and Crisalli. Dr. Dennis, who is Board-certified in Anatomic and Clinical Pathology, performed the autopsy. Director's Exhibit 10. In the section of his report detailing his final anatomic diagnoses, Dr. Dennis listed "simple coal workers' pneumoconiosis with progressive massive fibrosis present in focal areas with macular development greater than [two centimeters] associated with black pigment deposition, fibrosis, and silica particle impregnation in and about the pigmented clusters and scattered throughout the lung." *Id*. Dr. Dennis also diagnosed severe atherosclerotic cardiovascular disease with left ventricular hypertrophy, moderate to severe pulmonary congestion and edema, pulmonary hemorrhage, and recent myocardial infarction with thrombus in the miner's left main artery. Director's Exhibit 12.

Dr. Caffrey, who is Board-certified in Anatomic and Clinical Pathology, reviewed the miner's death certificate, the autopsy slides and the report of Dr. Dennis. Employer's Exhibit 1. Dr. Caffrey stated that the miner had simple coal workers' pneumoconiosis, occupying approximately five percent of the lung tissue, but "the sections of lung tissue definitely do not show evidence of complicated [coal workers' pneumoconiosis] as the pathologist described." *Id*. (emphasis in original).

Dr. Bush, who is Board-certified in Anatomic and Clinical Pathology, also reviewed the miner's death certificate, the autopsy slides and the report of Dr. Dennis. Employer's Exhibit 4. Dr. Bush indicated that the miner "had simple coal workers' pneumoconiosis and did not have any evidence of progressive massive fibrosis in the lungs" and that his "death resulted from dissection and rupture of an extensive aortic aneurysm resulting from atherosclerotic disease causing secondary ischemic changes in all vital organs." *Id*.

Dr. Zaldivar, a Board-certified pulmonologist, reviewed the autopsy reports of Drs. Dennis and Caffrey and submitted a report dated September 10, 2007. Employer's Exhibit 2. Dr. Zaldivar diagnosed simple coal workers' pneumoconiosis and cardiac disease. *Id*. Dr. Zaldivar stated that the miner's coal workers' pneumoconiosis did not play any role in, or hasten, his death. *Id*. Dr. Zaldivar indicated that the cause of the miner's death was either cardiac arrhythmia or a myocardial infarction, superimposed on chronic congestive heart failure due to a previous heart attack. *Id*. Dr. Zaldivar further noted that, if the miner had a ruptured aneurysm, it was the immediate cause of death. *Id*. At his subsequent deposition, Dr. Zaldivar reiterated his conclusions. Employer's Exhibit 5.

Dr. Crisalli, a Board-certified pulmonologist, reviewed the autopsy report and the miner's medical records and submitted a report dated September 24, 2007. Employer's Exhibit 3. Dr. Crisalli stated that the miner had simple coal workers' pneumoconiosis

and significant coronary disease. *Id*. Dr. Crisalli opined that coal dust exposure played no role in the miner's death, nor did it hasten the miner's death. *Id*. Dr. Crisalli identified the cause of the miner's death as an acute cardiovascular condition with marked pulmonary edema. *Id*. In a subsequent deposition, Dr. Crisalli stated that Dr. Dennis's description of lesions in the pleura was not consistent with a diagnosis of complicated pneumoconiosis, as complicated pneumoconiosis does not develop in the pleura. Employer's Exhibit 6. Dr. Crisalli concluded that the cause of the miner's death was a ruptured thoracic aortic aneurysm, which was a sudden acute event. *Id*.

The administrative law judge weighed the autopsy reports and medical opinions together and determined that claimant did not establish the existence of complicated pneumoconiosis. Decision and Order on Remand at 3. In support of his finding, the administrative law judge noted that Dr. Dennis was the only physician who concluded that the nodules found pathologically would be equivalent to a one centimeter opacity on a chest x-ray.[4] *Id*. The administrative law judge determined that Dr. Dennis's opinion was entitled to the "least amount of weight," as his definition of complicated pneumoconiosis conflicted with that adopted by the Department of Labor,[5] and because his view that a lesion on the pleura supported a diagnosis of complicated pneumoconiosis, was directly refuted by Drs. Zaldivar and Crisalli, who indicated that complicated pneumoconiosis does not form on the pleura. *Id*. at 3-4. The administrative law judge gave greater weight to the opinions of Drs. Bush, Caffrey, Zaldivar and Crisalli, "who all agree that the miner does not have complicated coal workers' pneumoconiosis, because the autopsy did not reveal a lesion of the appropriate size." *Id*. at 4. The administrative law judge concluded, therefore, that claimant did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(b), (c). *Id*.

We hereby affirm the administrative law judge's findings at 20 C.F.R. §718.304(b), (c), as they are rational, supported by substantial evidence and in accordance with applicable law. Contrary to claimant's contention, the administrative law judge was not required to give controlling weight to Dr. Dennis's opinion, based

[4] Dr. Caffrey found that the lung slides did not show any lesions of progressive massive fibrosis and that the lesion of coal workers' pneumoconiosis seen occupied only 5% of the lung tissue on the lung slides. Employer's Exhibit 1. Dr. Bush opined that the largest nodule of coal workers' pneumoconiosis seen was 0.7 centimeters and that less than 5% of the lung tissue was affected by coal workers' pneumoconiosis. Employer's Exhibit 4.

[5] The administrative law judge cited Dr. Dennis's statement that, "I try to stay away from size and try to concentrate on degree of involvement to make that [diagnosis] or fix in my mind that there is massive progressive fibrosis." Decision and Order on Remand at 3, *quoting* Employer's Exhibit 7 at 15.

upon his status as the autopsy prosector. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). In this case, the administrative law judge recognized that Dr. Dennis was the only doctor who performed a gross examination of the miner's lungs, but permissibly found that his diagnosis of complicated pneumoconiosis was outweighed by the better reasoned reports of Drs. Bush and Caffrey, as supported by the medical opinions of Drs. Zaldivar and Crisalli. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-262; *Urgolites*, 17 BLR at 1-23; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Lester*, 993 F.2d at 1145-46; 17 BLR at 2-117-118; *Melnick*, 16 BLR at 1-33-34; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order on Remand at 3-4. Thus, based on his review of all of the relevant evidence, the administrative law judge rationally found that claimant failed to establish the existence of complicated pneumoconiosis and was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.304.

Proof of Death Due to Pneumoconiosis

In accordance with the Board's remand instructions, the administrative law judge considered whether claimant established, by a preponderance of the evidence, that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge correctly noted that the death certificate listed acute carotid artery rupture due to hypertension related to atherosclerotic cardiovascular disease as the immediate cause of death, but did not list any other conditions as contributing to death. Decision and Order on Remand at 4; Director's Exhibit 9. The administrative law judge also correctly noted that, although Dr. Dennis indicated in his autopsy report that pneumoconiosis contributed to the miner's death, he contradicted this opinion at his deposition, testifying that he agreed that the miner died so quickly from the aortic rupture, resuscitation would not have been successful. Decision and Order on Remand at 4; Director's Exhibits 10, 12; Claimant's Exhibit 4; Employer's Exhibit 7 at 19. Further, the administrative law judge determined accurately that Drs. Bush, Caffrey, Zaldivar and Crisalli agreed that pneumoconiosis did not cause, or contribute to, the miner's death in any way. Employer's Exhibits 1, 3-6.

Based upon this accurate summary of the relevant evidence, the administrative law judge rationally concluded that, as none of the physicians conclusively attributed the miner's death to pneumoconiosis, claimant failed to meet her burden of establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Mays*, 176 F.3d at 757, 21 BLR at 2-592-2-593; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93; Decision and Order on Remand at 4. The administrative law judge's finding that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) is, therefore, affirmed.

Applicability of the Amendments to the Act

Subsequent to the issuance of the Board's prior Decision and Order, but prior to the issuance of the administrative law judge's Decision and Order on Remand, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005 and pending on or after March 23, 2010, the effective date of the amendments.[6] 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)). Relevant to this survivor's claim, the amended version of Section 411(c)(4), 30 U.S.C. §921(c)(4), provides that, if a miner had at least fifteen years of qualifying coal mine employment and the evidence establishes the presence of a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption of death due to pneumoconiosis.

By Order dated April 5, 2010, the administrative law judge stated that the amendments to the Act were potentially applicable in this case, as the claim was filed after January 1, 2005 and was pending on March 23, 2010. Accordingly, the administrative law judge provided the parties with the opportunity to address the impact on this case, if any, of Section 1556. Through counsel, claimant indicated that the rebuttable presumption of death due to pneumoconiosis was not available in this case, as claimant "did not establish [fifteen] years of coal mine employment."[7] Counsel's Letter dated April 19, 2010. Employer set forth the same conclusion. The Director declined to take a position as to the applicability of the amendments in this case.

In the administrative law judge's Decision and Order on Remand, he determined that "the [fifteen]-year presumption does not apply to this claim because [claimant] has

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[6] The miner filed claims for benefits in 1975 and 1989. Both were denied by the district director. Because the deceased miner in this case was not awarded benefits during his lifetime, claimant is not eligible for derivative benefits, based on amended Section 422(*l*). 30 U.S.C. §932(*l*), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*).

[7] In the administrative law judge's 2008 Decision and Order, he credited the miner with ten years of coal mine employment, based upon the district director's finding and statements from the miner's co-workers. 2008 Decision and Order at 2. The Board affirmed the administrative law judge's finding as unchallenged on appeal. *L.C.S.* [*Sargent*] *v. Arch of West Virginia/Apogee Coal Co.*, BRB No. 08-0709 BLA, slip op. at 2 n.2. (July 29, 2008) (unpub.). On remand, when the administrative law judge allowed the parties to file position statements regarding the applicability of the amended version of Section 411(c)(4), no allegations were made regarding the administrative law judge's prior finding as to the length of the miner's coal mine employment, nor was new evidence proffered regarding the miner's coal mine employment history.

not established that the miner worked in the coal mines for [fifteen] years" and cited claimant's counsel's letter in support of his finding. Decision and Order on Remand at 1. Claimant asserts that the administrative law judge's finding was in error, as he should have credited the miner with at least ten years of coal mine employment in the 1940s and the 1950s – periods during which earnings were not always reported to the Social Security Administration.

Claimant bears the burden of proof to establish the number of years that the miner actually worked in coal mine employment and must do so by proffering evidence that substantiates the length of coal mine employment that claimant has alleged. *See Lafferty v. Cannelton Industries*, 12 BLR 1-190 (1989); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (*en banc*); *Green v. Director, OWCP*, 7 BLR 1-276 (1984). In the present case, there is no evidence in the record to support claimant's assertion that "the miner worked for at least [ten] years during the 1940's and 1950's."[8] Claimant's Letter dated June 5, 2010. We affirm, therefore, the administrative law judge's finding that claimant is not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis, set forth in the amended version of Section 411(c)(4), as claimant did not establish that the miner had fifteen years of qualifying coal mine employment.

[8] Although claimant attempted to set forth evidence regarding the miner's coal mine employment history in her June 5, 2010 letter, and also requested that the Board consider additional medical opinions, the Board does not have the authority to either engage in the initial consideration of evidence or make findings of fact. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Such evidence, however, may form the basis of a request for modification of the denial of benefits pursuant to 20 C.F.R. §725.310.

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge 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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JUDITH S. BOGGS
Administrative Appeals Judge