



BRB No. 17-0416 BLA

MINNIE JOYCE BIRMAN)
(Widow of GEORGE BIRMAN))
)
Claimant-Respondent)

v.)

LONE MOUNTAIN PROCESSING,)
INCORPORATED)
c/o ARCH COAL CITY PLACE ONE)

and)

ARCH COAL INCORPORATED)
)
Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 05/18/2018

DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05428) of Administrative Law Judge Adele Higgins Odegard awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on September 3, 2013.

After crediting the miner with thirty-five years of coal mine employment,¹ the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and that claimant² thus invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that claimant established that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.³

¹ The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² Claimant is the widow of the miner, who died on July 20, 2013. Director's Exhibit 11.

³ Seven months after filing its brief in support of the petition for review, and four months after the briefing schedule closed, employer moved to hold this case in abeyance pending a decision from the United States Supreme Court in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018). In its motion, employer argues for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 2-4.

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).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(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 that would be classified as 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. The introduction of legally sufficient evidence of complicated pneumoconiosis, however, does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must examine all the evidence on this issue, i.e., evidence regarding the presence or absence of simple and complicated pneumoconiosis, resolve any conflict, and make appropriate findings of fact. *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).

Employer argues that the administrative law judge erred in finding that the autopsy evidence established the existence of "massive lesions" in the lung.⁴ A diagnosis of

Because the Supreme Court will address in *Lucia* whether Securities and Exchange Commission administrative law judges are "inferior officers" within the meaning of the Appointments Clause, employer requests that this case be held in abeyance until the Court resolves the issue. *Id.* Claimant opposes employer's motion. We generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). While we retain the discretion in exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not attempted to show why this case so qualifies. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. Therefore, employer's motion to hold this case in abeyance is denied.

⁴ The administrative law judge found that the x-ray evidence did not establish the existence of complicated pneumoconiosis because the most recent x-ray, taken two years before the miner's death, provided little insight into the miner's condition at the time of his death. Decision and Order at 6. We affirm this determination as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

progressive massive fibrosis has been held to be equivalent to a diagnosis of “massive lesions” under 20 C.F.R. §718.304(b). See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976) (“Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors”); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006). The United States Court of Appeals for the Sixth Circuit has held that autopsy evidence can establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) if it shows massive lesions or, alternatively, if a physician opines that there are lesions on autopsy that, if seen on an x-ray, would appear as greater than one centimeter in diameter. *Gray*, 176 F.3d at 387, 21 BLR at 2-624.

The administrative law judge considered the autopsy reports of three Board-certified pathologists, Drs. Adelson, Abraham, and Oesterling. Dr. Adelson diagnosed simple coal workers’ pneumoconiosis based on a gross and microscopic examination of the miner’s right lung, removed after his death. Director’s Exhibit 12. Dr. Adelson commented that the largest dimension of the coal nodules was one centimeter. *Id.* He further commented that there was “no confluence of nodules or individual nodules greater than or equal to two centimeters.” *Id.*

Dr. Abraham opined that the autopsy slides showed “severe macular and some nodular coal workers’ pneumoconiosis,” and diagnosed progressive massive fibrosis based upon his review:

I note in [Dr. Adelson’s] surgical pathology report that “no nodules greater than or equal to 2.0 [centimeters] are seen.” I am not sure the significance of this “2 [centimeter]” mention, since the threshold for a diagnosis of complicated CWP [coal workers’ pneumoconiosis] (PMF) [progressive massive fibrosis] is 1.0 [centimeter], not 2.0 [centimeters]. As so well explained in the document from Dr. G. Wagner,⁵ it is likely that a lesion seen in a pathology sample of lung will appear even larger in a chest x-ray image.

⁵ Dr. Abraham attached to his report a copy of a January 9, 2002 letter prepared by Dr. Wagner, the Director of the Division of Respiratory Disease Studies at the National Institute for Occupational Safety and Health. In the letter, Dr. Wagner discussed “the relationship between the size of a PMF (progressive massive fibrosis) lesion seen on x-ray when compared with what is likely to be found at autopsy.” Claimant’s Exhibit 3. After explaining how an x-ray is produced, Dr. Wagner concluded that “[t]he dimensions of a lesion as seen on the film will be slightly greater than the dimensions of the lesion in the body.” *Id.*

Thus, these pathology materials support the finding of a lesion which would appear large enough to call PMF.

Claimant's Exhibit 3 (footnote added).

Dr. Oesterling also reviewed the autopsy slides. In his initial report, Dr. Oesterling noted that the largest lesions associated with coal mine dust exposure were found on the first two slides:

In the first slide there is an area that measures 9 x 5 [millimeters] that can be seen in the upper left pole of this tissue section. In [the second slide] there are two sections of tissue, the one on the left . . . shows an ovoid mass which measures 7 [millimeters] in greatest dimension and on the right fragment we see a mass measuring 1 x .6 [centimeters]. These are sufficient for a diagnosis of macronodular coal workers' pneumoconiosis, however, they are not sufficient for a diagnosis of complicated coal workers' disease utilizing the classic definition.

. . . I would like to address the . . . letter prepared by Dr. Gregory B. Wagner who was explaining the variation in size of lesions on x-ray versus those in tissue. Clearly he has described the cone which is typical of x-rays since they are obtained from a single source and projected onto a much larger source. Therefore lesions placed near the front of the chest, anteriorly, will appear larger on x-rays than they actually are. By contrast, lesions in the back of the lung will appear smaller than the actual size of the lesions. Therefore without knowing exactly where these lesions were, it is not feasible to specify that they be 1 [centimeter] on x-ray. This, therefore, invalidates Dr. Jerrold L. Abraham Much of his reasoning is based on Dr. Wagner's report concerning the size of the lesions. I would comment on his report since he states the dimension of lesions required for a diagnosis of complicated coal[]workers' pneumoconiosis as being 1 [centimeter] on x-ray. He then goes on to equate this to progressive massive fibrosis which requires a 2 [centimeter] mass of confluent micronodules. Neither of these were [sic] present in this case.

Employer's Exhibit 1.⁶

⁶ In a subsequent report, Dr. Oesterling opined that the largest lesion on the slides was "1 [centimeter] in maximum dimension by only 7 [millimeters] in width or thickness."

The administrative law judge addressed the conflicting evidence regarding whether the miner suffered from progressive massive fibrosis. She accorded less weight to Dr. Oesterling's opinion that the miner did not have progressive massive fibrosis because she found that the doctor applied a two-centimeter standard that is not set forth in the regulations. Decision and Order at 9, 11. The administrative law judge found that Dr. Adelson similarly relied upon an unrecognized definition of complicated pneumoconiosis. *Id.* at 9. In contrast, the administrative law judge credited Dr. Abraham's opinion because he supported his diagnosis of progressive massive fibrosis by identifying confluent nodules, with the largest lesion measuring up to one centimeter. *Id.* at 7, 10. The administrative law judge therefore found that the autopsy evidence established massive lesions and established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).⁷ *Id.* at 12.

We reject employer's contention that the administrative law judge erred in her consideration of the opinions of Drs. Oesterling and Adelson. The administrative law judge permissibly assigned less weight to Dr. Oesterling's opinion for diagnosing progressive massive fibrosis on a standard that is not recognized by the regulations. See *Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 986, 24 BLR 2-72, 2-92 (11th Cir. 2007); see also 65 Fed. Reg. 79,920, 79,936 (Dec. 20, 2000) (declining to adopt diagnostic criteria requiring a lesion of 2.0 [centimeters] for a diagnosis of complicated pneumoconiosis in 20 C.F.R. §718.106 because "the record does not substantiate the existence of a consensus among physicians for making diagnoses using these criteria . . ."). Similarly, the administrative law judge permissibly discredited Dr. Adelson's autopsy report because the doctor also "seemed to rely" on an unrecognized definition of complicated pneumoconiosis as a two centimeter coal lesion. *Id.*; Decision and Order at 9.

We also reject employer's contention that the administrative law judge erred in finding Dr. Abraham's opinion legally sufficient to establish the existence of complicated pneumoconiosis. Employer asserts that Dr. Abraham's opinion does not support a finding

Employer's Exhibit 2. Dr. Oesterling asserted that such a lesion was not "a centimeter in diameter." *Id.*

⁷ The administrative law judge also credited Dr. Abraham's opinion that at least one of the nodules found on autopsy would appear as greater than one centimeter on x-ray, over Dr. Oesterling's contrary opinion. Decision and Order at 10-12. Thus, the administrative law judge alternatively found that the autopsy evidence established complicated pneumoconiosis because it showed a lesion that, if seen on an x-ray, would appear to be greater than one centimeter in diameter. *Id.* at 12.

of complicated pneumoconiosis because he failed to specifically diagnose “massive lesions.” Employer’s Brief at 12. The administrative law judge correctly noted that the term “progressive massive fibrosis” is considered to be equivalent to the term “complicated pneumoconiosis”; a diagnosis of progressive massive fibrosis is a diagnosis of massive lesions resulting from pneumoconiosis. *See Perry*, 469 F.3d at 366, 23 BLR at 2-387; *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1359, 20 BLR 2-227, 2-228 (4th Cir. 1996) (complicated pneumoconiosis is known “by its more dauntingly descriptive name, ‘progressive massive fibrosis.’”); Decision and Order at 9. Therefore, the administrative law judge properly found that the diagnosis of progressive massive fibrosis by Dr. Abraham is supportive of a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b).⁸

We thus affirm the administrative law judge’s finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) as supported by substantial evidence.⁹ Moreover, the administrative law judge

⁸ The administrative law judge found that Dr. Abraham’s opinion that a one centimeter lesion could support a diagnosis of progressive massive fibrosis was supported by the opinion of Dr. Green, a Board-certified pathologist. Decision and Order at 9 n.9. The administrative law judge considered Dr. Green’s opinion pursuant to 20 C.F.R. §718.304(c). Dr. Green reviewed the autopsy reports of Drs. Adelson, Abraham, and Oesterling, along with other medical evidence. Dr. Green opined that the miner’s autopsy finding of a pneumoconiotic lesion measuring one centimeter in diameter fulfilled “the pathologic criteria for progressive massive fibrosis as defined in the regulations of the National Coal Workers’ Autopsy Program.” Claimant’s Exhibit 4 at 3. Dr. Green explained that the one-centimeter standard for the diagnosis of progressive massive fibrosis was appropriate in view of “the large body of epidemiologic evidence that shows that 1 [centimeter] lesions tend to progress and contribute to increased morbidity and mortality of coal miners.” *Id.* at 4. The administrative law judge permissibly found that Dr. Green’s diagnosis of complicated pneumoconiosis corresponded to the autopsy evidence, and was well reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 14.

⁹ The administrative law judge’s alternative finding that the autopsy evidence also showed a lesion that, if seen on an x-ray, would appear to be greater than one centimeter in diameter, is also affirmed. The administrative law judge accurately noted that all three Board-certified pathologists, Drs. Adelson, Abraham, and Oesterling, opined that the autopsy evidence revealed a pulmonary nodule with a dimension of at least one centimeter. Decision and Order at 9. The administrative law judge permissibly credited Dr. Abraham’s opinion that this one centimeter nodule would appear greater than one centimeter on an x-ray because it was supported by Dr. Wagner’s opinion. *See Director, OWCP v. Rowe*, 710

reasonably accorded the greatest weight to the autopsy evidence as the most reliable evidence regarding the existence of complicated pneumoconiosis. *See Gray*, 176 F.3d at 387, 21 BLR at 2-626; *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order at 15. We therefore affirm the administrative law judge's overall determination that claimant invoked the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Additionally, we affirm, as unchallenged on appeal, the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the award of benefits.

F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 10. The administrative law judge accurately noted that “Dr. Oesterling did not critique Dr. Wagner’s calculations, which show that a lesion – regardless of its location [in the lung] – could never appear as a ‘smaller lesion’ on [x]-ray.” Decision and Order at 10-11. Thus, the administrative provided a valid alternative basis for his finding that the autopsy evidence established the existence of complicated pneumoconiosis, the existence of a nodule that, if seen on an x-ray, would appear as greater than one centimeter in diameter. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-624 (6th Cir. 1999).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge