

BRB No. 01-0195 BLA

DOROTHY FULTZ )  
(Widow of CLARENCE FULTZ) )  
 )  
Respondent Claimant- )  
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 )  
v. ) DATE ISSUED:  
 )  
CLINCHFIELD COAL COMPANY )  
 )  
Employer- )  
Petitioner )  
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 )  
DIRECTOR, OFFICE OF )  
WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR ) DECISION AND ORDER

Respondent

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer<sup>1</sup> appeals the Decision and Order Granting Benefits (00-BLA-0004) of Administrative Law Judge Pamela Lakes Wood 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).<sup>2</sup> Pursuant to

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<sup>1</sup> Claimant is the widow of Clarence Fultz, the miner, who died on January 6, 1999. Director's Exhibit 9. The miner filed three applications for benefits during his lifetime, on February 12, 1981, January 22, 1982 and January 17, 1983, which were consolidated by the district director. Director's Exhibits 21-1, 21-2, 21-3, 21-40. Following a formal hearing, the miner's claims were denied by Administrative Law Judge Giles J. McCarthy in a Decision and Order issued March 29, 1991. Director's Exhibit 21-86. This denial was affirmed in part and vacated in part by the Board in a Decision and Order issued March 18, 1992. *Fultz v. Clinchfield Coal Co.*, BRB No. 91-1123 BLA (Mar. 18, 1992)(unpub.); Director's Exhibit 21-90. On remand, the case was reassigned to Administrative Law Judge Donald W. Mosser, who denied the claim in a Decision and Order on Remand issued on January 29, 1983. Director's Exhibit 21-93. This denial was affirmed by the Board in a Decision and Order issued on June 29, 1994. *Fultz v. Clinchfield Coal Co.*, BRB No. 93-1027 BLA (June 29, 1994)(unpub.); Director's Exhibit 21-101. No further action was taken on the miner's claims.

Claimant filed her survivor's claim on February 10, 1999. Director's Exhibit 1. The survivor's claim is the only claim before the Board.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order on August 3, 2001 requesting supplemental briefing in the instant

claimant's February 10, 1999 filing date, the administrative law judge adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge credited the miner with thirty years of coal mine employment, based on the parties' stipulation, and found that Clinchfield Coal Company was the properly named responsible operator. Addressing the merits of the survivor's claim, the administrative law judge found the evidence sufficient to establish the existence of simple pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). The administrative law judge further found that the medical evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). The administrative law judge, therefore, found that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as set forth at Section 718.304. Accordingly, the administrative law judge awarded benefits in this survivor's claim.

On appeal, employer challenges the administrative law judge's award of benefits, asserting that the administrative law judge erred in finding the medical evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000). Employer further contends that the administrative law judge erred in crediting the autopsy report of Dr. Brooks, arguing that the report fails to conform with the quality standards set forth at 20 C.F.R. §718.106 (2000). The Director, Office of Workers' Compensation Programs (the Director), concurs with employer that the case should be remanded to the administrative law judge for consideration of the Section 718.106 (2000) quality standards. Claimant has not submitted a response in this appeal.<sup>3</sup>

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case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). On August 10, 2001, the Board issued an Order rescinding its August 3, 2001 order.

<sup>3</sup> The parties do not challenge the administrative law judge's decision to credit the miner with thirty years of coal mine employment, her determination that employer was the properly named responsible operator, or her findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.304(a), (c) (2000). Therefore, these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the relevant evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Contrary to the contentions of employer and the Director, the quality standards set forth at Section 718.106 are not mandatory standards but rather are guidelines to be used by the administrative law judge in weighing the evidence and determining its relevancy. 20 C.F.R. §718.106; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Moreover, an administrative law judge is not limited to examining the four corners of the autopsy report, but may look to other supporting documents contained within the record to determine whether the report is sufficient under Section 718.106. *Dillon, supra* at 1-115, n.1.

Herein, the administrative law judge found that the autopsy report by Dr. Brooks, while containing a gross description of the miner's respiratory system as well as the final anatomic findings of complicated pneumoconiosis, did not contain a description of the microscopic findings.<sup>4</sup> Decision and Order at 9; Director's Exhibit 10. However, the administrative law judge found that Dr. Brooks, in her deposition testimony, indicated that a microscopic examination of the lungs was performed at the time of the autopsy and that she also reviewed the slides prior to stating her conclusion at deposition. Decision and Order at 9-10; Employer's Exhibit 21. Consequently, the administrative law judge as trier-of-fact reasonably considered Dr. Brooks's deposition testimony, in conjunction with her autopsy report, in determining the reliability and relevancy of the autopsy report. See *Dillon, supra*; see also *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985).

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<sup>4</sup> In her deposition testimony, Dr. Brooks stated that it was not the policy of the hospital or her pathology group to include the microscopic findings within the autopsy report. Employer's Exhibit 21 at p. 5-6.

Employer also contends that the administrative law judge erred in finding the medical evidence sufficient to establish the existence of complicated pneumoconiosis because the administrative law judge's findings are not supported by the medical evidence of record. We do not agree. The administrative law judge set forth the relevant evidence of record, including the medical reports of Dr. Brooks, the autopsy prosector, and Drs. Caffrey and Kleinerman, both of whom reviewed the autopsy report and autopsy slides, as well as other medical evidence of record. Decision and Order at 6-7, 9-13; Director's Exhibit 10; Employer's Exhibits 1, 2, 18, 21, 22. In weighing the medical evidence of record, the administrative law judge reasonably exercised her discretion in finding that the autopsy report and deposition testimony of Dr. Brooks, which stated that the miner was suffering from complicated pneumoconiosis or progressive massive fibrosis based on the gross and microscopic findings at autopsy, was tantamount to a finding of "massive lesions of the lungs" and, therefore, was sufficient to establish complicated pneumoconiosis pursuant to Section 718.304(b).<sup>5</sup> Decision and Order at 9-10; Director's Exhibit 10; Employer's Exhibit 21; 20 C.F.R. §718.304(b); see *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); see generally *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

In particular, the administrative law judge considered the findings of Dr. Brooks in conjunction with the findings of Drs. Caffrey and Kleinerman, both of whom diagnosed moderately severe simple pneumoconiosis and multiple lesions in the lungs, with Dr. Caffrey diagnosing lesions measuring 1.2 centimeters, but did not diagnose complicated pneumoconiosis. Decision and Order at 10-13;

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<sup>5</sup> Dr. Brooks stated that her diagnosis of complicated pneumoconiosis was based on the findings of "collagen bundles around silicotic nodules that obliterate the lung tissue" which the physician noted were very prominent in this case. Employer's Exhibit 21 at pp. 7-8. Dr. Brooks further stated that she does not ascribe specific measurements to her findings, but looks at the size and amount of lung tissue damaged. Employer's Exhibit 21 at pp. 8-10. Dr. Brooks also identified the extensive amount of fibrosis found in the gross and microscopic examinations of the miner's lung tissue as a definite indication of complicated pneumoconiosis. *Id.* Moreover, Dr. Brooks stated her disagreement with the 2 centimeter standard of diagnosing complicated pneumoconiosis, noting that it was an arbitrary standard, but further stating that the miner's lung tissue did contain 2 centimeter lesions that were too numerous to count. Employer's Exhibit 21 at pp. 18-19.

Employer's Exhibits 1, 2, 18, 22. The administrative law judge weighed this conflicting evidence and rationally found that the opinion of Dr. Brooks was sufficient to demonstrate "massive lesions of the lungs" as comprehended by the regulations. 20 C.F.R. §718.304(b); see *Gruller, supra*. Moreover, contrary to employer's contention, the administrative law judge considered the conflicting descriptions of the lesions found on autopsy and reasonably found that these lesions "would be expected on x-ray to yield one or more large opacities (*i.e.*, greater than 1 centimeter in diameter) which would be classified as Category A, B, or C under the classification requirements." Decision and Order at 13; see *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999). Since the administrative law judge has considered all of the relevant evidence, we affirm her finding that the autopsy evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b) as within a reasonable exercise of her discretion as trier-of-fact. See *Blankenship, supra*; *Gruller, supra*.

Furthermore, the administrative law judge weighed all of the relevant medical evidence pursuant to Section 718.304(a)-(c) and reasonably found that the autopsy evidence, as supported by the reports of Drs. Caffrey and Kleinerman, outweighs the x-ray report of simple pneumoconiosis by Dr. Fino and the other evidence of record and, therefore, is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Decision and Order at 13; see *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); see also *Blankenship, supra*. Consequently, in light of the affirmance of the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis and, therefore, has established invocation of the irrebuttable presumption set forth at Section 718.304, we affirm her finding that claimant has establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c). 20 C.F.R. §§718.205(c)(3), 718.304.

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

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge