

BRB No. 08-0306 BLA

J.S.)	
(Widow of R.S.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PERFORMANCE COAL COMPANY)	DATE ISSUED: 11/20/2008
)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Tom White (Bickley & Jacobs), Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2007-BLA-5183) of Administrative Law Judge Linda S. Chapman (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). The administrative law judge credited the miner with thirty-two years of qualifying coal mine

¹ Claimant is the widow of the miner, who died on May 15, 2005. Claimant filed her survivor's claim for benefits on December 22, 2005. Director's Exhibits 1, 8.

employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence, as a whole, established simple pneumoconiosis at 20 C.F.R. §718.202(a) and that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), based on the length of the miner's coal mine employment. The administrative law judge further found, however, that the evidence failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge also found that claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, because the evidence of record did not establish complicated pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish complicated pneumoconiosis by autopsy evidence and, therefore, that claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304(b). Specifically, claimant contends that the administrative law judge improperly discounted Dr. Plata's autopsy report. In response, employer urges that the administrative law judge's decision denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.²

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'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).

² The administrative law judge's findings that death due to pneumoconiosis was not established at 20 C.F.R. §718.205(c)(1) and (2) are affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pneumoconiosis is a “substantially contributing cause” of death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *see also 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).³

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)(A); 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 Section 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 “[b]ecause prong (A) sets out an entirely objective scientific standard” for diagnosing complicated pneumoconiosis, that is, 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 under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Claimant asserts that the administrative law judge should have credited Dr. Plata’s autopsy report at Section 718.304(b) because, on deposition, Dr. Plata specifically stated that the scarring and macules with black pigment that he saw on autopsy would appear on x-ray as opacities of up to 2 cm in diameter. Claimant contends that Dr. Plata’s report should have been given controlling weight because he was the only doctor who actually examined the miner’s lungs and there is no evidence in the record showing that his opinion is unreliable. Claimant contends that the administrative law judge erred in

³ The law of the United States Court of Appeals for the Fourth Circuit applies because the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibits 2-4.

rejecting Dr. Plata's finding of complicated pneumoconiosis on gross examination because it was not supported by his findings on microscopic examination, as there is no requirement that a finding of complicated pneumoconiosis be made microscopically.

In considering the evidence on the issue of complicated pneumoconiosis, the administrative law judge found that neither of the two x-ray readings of record established complicated pneumoconiosis at Section 718.304(a).⁴ Turning to Section 718.304(b), the administrative law judge found that, although Dr. Plata found complicated pneumoconiosis on gross examination,⁵ he did not identify the lesions on microscopic examination of the size he described on his gross examination, or explain his failure to do so.⁶ The administrative law judge found that Drs. Naeye and Bush found no lesions of pneumoconiosis, on the autopsy slides, that were remotely close to 2 cm in size. Rather, the administrative law judge noted that Drs. Naeye and Bush found that the lesions present were, in greatest dimension, 0.1 cm and 0.2 cm. The administrative law judge credited the findings of Drs. Naeye and Bush, as well-reasoned and supported by the objective medical evidence. Regarding the report of Dr. Plata, the administrative law judge found it unreliable because Dr. Plata's findings on microscopic examination did not support his finding of complicated pneumoconiosis on gross examination, and his finding of complicated pneumoconiosis on gross examination was contradicted by the findings of Drs. Naeye and Bush, on review of the autopsy slides. The administrative law judge

⁴ The April 10, 2005 x-ray was read as negative for pneumoconiosis by Drs. Meyer and Wiot, Board-certified radiologists and B readers. *See* Decision and Order at 3; Employer's Exhibits 1, 2.

⁵ The administrative law judge noted that Dr. Plata diagnosed complicated pneumoconiosis on gross inspection of the lungs, based on a finding of "marked carbon deposits with areas of scarring and black pigmentation, which he called macules, measuring up to 2cm in greatest dimension." Decision and Order at 5, 17. The administrative law judge also noted that Dr. Plata observed extensive carbon deposits, scarring macules and carcinoma in the left lung, and non-small cell carcinoma in both lower lobes of the lungs, and testified that the "scarring macules of up to 2cm in diameter were scattered throughout both lungs, and that the [cancerous] tumor may have obscured the presence of these lesions on x-rays," but that if not for the cancerous tumor both lungs would reveal opacities of 1cm or more on x-ray. Decision and Order at 17; Director's Exhibit 10 at 7-10, 12-13.

⁶ On microscopic inspection of the lungs, the administrative law judge noted that Dr. Plata found massive pulmonary fibrosis, but that Dr. Plata did not otherwise describe the nature of the fibrosis, or the extent of the fibrosis on microscopic inspection. Decision and Order at 17, n. 8.

therefore found that complicated pneumoconiosis was not established at Section 718.304(b) based on autopsy evidence. Pursuant to Section 718.304(c), the administrative law judge found that the other evidence did not establish complicated pneumoconiosis because Dr. Castle found, on reviewing all of the miner's medical records, including the autopsy evidence, that the miner did not have complicated pneumoconiosis and the sole CT scan of record did not show evidence of complicated pneumoconiosis. Accordingly, the administrative law judge found that the evidence did not establish complicated pneumoconiosis at Section 718.304(c). In sum, on reviewing all of the evidence at Section 718.304(a)-(c), the administrative law judge concluded that it did not establish complicated pneumoconiosis and, therefore claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis.

Contrary to claimant's contention that Dr. Plata's opinion should have been given controlling weight because he was the only doctor who actually observed the miner's lungs, autopsy prosectors are not entitled to enhanced weight solely because they performed the autopsy. *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). Here, the administrative law judge recognized that Dr. Plata was the only doctor who had actually examined the miner's lungs, but nonetheless permissibly found his report outweighed by the better reasoned reports of Drs. Bush and Naeye, who reviewed the miner's autopsy slides, and by the opinion of Dr. Castle, who reviewed all of the miner's records, including the autopsy evidence. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-262; *Urgolites*, 17 BLR at 1-23.

Further, contrary to claimant's contention that the administrative law judge improperly disregarded Dr. Plata's diagnosis of complicated pneumoconiosis on gross examination of the lung because it was not supported by his microscopic findings, we discern no error in the administrative law judge's weighing of the autopsy evidence. The administrative law judge acknowledged that Dr. Plata diagnosed massive pulmonary fibrosis on microscopic examination but found that, overall, the microscopic evidence of record did not support the doctor's finding of complicated pneumoconiosis on gross examination because the doctor did not otherwise describe the nature and extent of the massive pulmonary fibrosis and did not otherwise confirm his finding of up to 2 cm macules on gross examination. Instead, the administrative law judge relied on the reports of Drs. Bush and Naeye, who found lesions of only 0.1 cm and 0.2 cm on microscopic review. The administrative law judge concluded that Drs. Bush and Naeye better described their microscopic observations than had Dr. Plata and further noted that their reports were better supported by the other evidence of record, *i.e.*, the CT scan and x-ray evidence that was negative for complicated pneumoconiosis, as well as the opinion of Dr. Castle, who did not find complicated pneumoconiosis based on a review of all of the evidence, including the autopsy evidence. *See 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, 1-155 (1989)(*en banc*). Thus, based on his review of all of the relevant evidence, the administrative law judge rationally found that complicated pneumoconiosis was not established at Section 718.304⁷ and that claimant was not therefore entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁷ Although the administrative law judge discussed only the autopsy evidence in her evaluation of complicated pneumoconiosis at 20 C.F.R. §718.304(b), she accurately summarized a biopsy report conducted by Dr. Naeye, in which the physician reviewed one glass slide of five small pieces of bronchial wall tissue. Dr. Naeye's review led him to conclude that the lung tissues provided had almost no black pigment and no tiny birefringent crystals that could have caused pulmonary fibrosis. Decision and Order at 10.