

BRB No. 11-0175 BLA

MINNIE JANE TOOTHMAN)	
(Widow of MELVIN ROSS TOOTHMAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 11/30/2011
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Carl E. Hostler (Prim Law Firm, PLLC), Hurricane, West Virginia, for claimant.

Amy J. Holley (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 (09-BLA-5298) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of

¹ Claimant is the surviving spouse of the miner, who died on May 9, 2007. Director's Exhibit 14.

the Black 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 involves a survivor's claim filed on February 26, 2008. Because the evidence did not establish the existence of complicated pneumoconiosis, the administrative law judge initially found that claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Next, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of qualifying coal mine employment, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.² 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.³ 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that the miner worked for more than fifteen years in surface mining employment,⁴ where he was

² Section 1556 of Public Law No. 111-148 also reinstated Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. However, claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Unmarked Exhibit.

³ In an April 2, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements. Claimant, employer and the Director, Office of Workers' Compensation Programs, submitted position statements. By Order dated August 17, 2010, the administrative law judge reopened the record to allow the parties to submit additional evidence to respond to the change in law. None of the parties submitted any additional evidence.

⁴ The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibit 4; Hearing Transcript at 16-17. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

exposed to coal dust in conditions substantially similar to those of an underground coal mine. The administrative law judge, however, found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis.

The administrative law judge next found that the x-ray and autopsy evidence established the existence of clinical pneumoconiosis⁵ pursuant to 20 C.F.R. §718.202(a)(1), (2). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, however, found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the miner did not suffer from complicated pneumoconiosis. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁶

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁵ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁶ Because claimant does not challenge the administrative law judge's finding that the evidence did not establish the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9. In light of our affirmance of this finding, we also affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

Complicated Pneumoconiosis

Claimant initially argues that the administrative law judge erred in finding that the miner did not have complicated pneumoconiosis and, therefore, erred in finding that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis set out at 20 C.F.R. §718.304.⁷ Claimant specifically contends that the administrative law judge erred in finding that the autopsy evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

In considering whether the autopsy evidence established the existence of complicated pneumoconiosis, the administrative law judge considered the opinions of Drs. Franyutti, Oesterling, Tomashefski, Castle, and Kahn. While Dr. Franyutti, the autopsy prosector, diagnosed complicated pneumoconiosis, Director's Exhibits 15, 24, two reviewing pathologists, Drs. Oesterling and Tomashefski, opined that the miner did not suffer from the disease. Director's Exhibit 25; Employer's Exhibit 1. Another reviewing pathologist, Dr. Kahn, diagnosed simple, but not complicated, pneumoconiosis. Claimant's Exhibit 1. Additionally, Dr. Castle reviewed the medical evidence of record, and opined that the miner did not suffer from complicated pneumoconiosis. Employer's Exhibit 3.

⁷ 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 the miner suffered from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

In his consideration of the conflicting evidence, the administrative law judge accorded less weight to Dr. Franyutti's opinion because he found that it was not well-reasoned. Decision and Order at 8. The administrative law judge accorded greater weight to the opinions of Drs. Oesterling, Tomashefski, and Castle, based upon the physicians' superior qualifications. *Id.* Consequently, the administrative law judge found that the autopsy evidence did not establish the existence of complicated pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in not according greater weight to Dr. Franyutti's opinion, based upon his status as the autopsy prosector. We disagree. An administrative law judge need not accord greater weight to the opinion of 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, 1-23 (1992). In this case, Dr. Franyutti characterized the lesion that he identified as complicated pneumoconiosis, as consisting of pneumoconiosis, a tumor, and adhesions from radiation therapy. Director's Exhibit 24 at 24-25. The administrative law judge found that Dr. Franyutti failed to "indicate how he [was] able to account for [the] additional processes while measuring the lesion and degree of the pneumoconiosis." Decision and Order at 8. Substantial evidence supports this finding. The administrative law judge, therefore, permissibly determined that Dr. Franyutti's opinion was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The administrative law judge also permissibly credited the opinions of Drs. Oesterling, Tomashefski, and Castle, that the miner did not suffer from complicated pneumoconiosis,⁸ over Dr. Franyutti's contrary opinion, based upon the latter physicians' superior qualifications.⁹ *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling*

⁸ Drs. Oesterling, Tomashefski, and Castle explained that Dr. Franyutti incorrectly diagnosed complicated pneumoconiosis. Decision and Order at 8. Dr. Oesterling indicated that the area identified as complicated pneumoconiosis by Dr. Franyutti was fibrosis "purely due to tumor and chronic inflammation." Director's Exhibit 25. Dr. Tomashefski similarly opined that the large nodular scar reported in the miner's right middle lobe "does not have the features of progressive massive fibrosis." Employer's Exhibit 1. Dr. Castle opined that the miner did not suffer from complicated pneumoconiosis, and stated that Dr. Franyutti did not provide adequate reasoning for his diagnosis. Employer's Exhibit 6 at 11.

⁹ Drs. Oesterling and Tomashefski, are Board-certified in Anatomic and Clinical Pathology. Director's Exhibit 25; Employer's Exhibit 2. Dr. Castle is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 4. Dr. Franyutti is not Board-certified in any specialty. Director's Exhibit 24 at 35.

Smokeless Coal Co. v. Akers, 131 F.3d 438, 441, 21 BLR 2-269, 275-76 (4th Cir. 1997); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 8. The administrative law judge further noted that Dr. Kahn, a physician selected by claimant to review the miner's autopsy slides, did not diagnose complicated pneumoconiosis.¹⁰ Decision and Order at 8. Because substantial evidence supports the administrative law judge's finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis, this finding is affirmed. We, therefore, affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Death Due to Pneumoconiosis

Claimant next argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The relevant medical evidence includes the miner's death certificate, and the medical opinions of five physicians. The miner's death certificate indicates that his death was due to "black lung." Director's Exhibit 14. Dr. Franyutti opined that the miner's death was due to coal workers' pneumoconiosis, adenocarcinoma of the right lung, and bronchopneumonia. Director's Exhibit 15. Dr. Kahn opined that the miner suffered from lung cancer, emphysema, bronchopneumonia, and coal workers' pneumoconiosis. Claimant's Exhibit 1. Dr. Kahn stated that, because the effect of these diseases was addictive and synergistic, coal workers' pneumoconiosis significantly contributed to the miner's death. *Id.*

Drs. Oesterling, Tomashefski, and Castle agreed that the miner died of adenocarcinoma of the lung complicated by bronchopneumonia. Employer's Exhibits 3, 5 at 21, 7 at 30. However, Drs. Oesterling and Castle opined that the miner's coal workers' pneumoconiosis was too mild to have contributed to, hastened, or caused the miner's death. Director's Exhibit 25; Employer's Exhibit 6 at 20-21. Because Dr. Tomashefski did not diagnose coal workers' pneumoconiosis, he opined that the disease was not a factor in the miner's death. Employer's Exhibits 1, 5 at 21.

In evaluating the evidence relevant to the cause of the miner's death, the administrative law judge accorded little weight to the miner's death certificate because he found that it was not sufficiently reasoned. Decision and Order at 10. The administrative law judge further found that the opinions of Drs. Franyutti and Kahn, that the miner's death was due to pneumoconiosis, were not sufficiently reasoned. *Id.* The administrative law judge found that the contrary opinions of Drs. Oesterling, Tomashefski, and Castle

¹⁰ Dr. Kahn is Board-certified in Anatomic and Clinical Pathology. Claimant's Exhibit 2.

were more persuasive. *Id.* at 11. Consequently, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in finding that the opinions of Drs. Franyutti and Kahn did not establish that the miner's death was due to pneumoconiosis.¹¹ Claimant's contention lacks merit. The administrative law judge found that neither Dr. Franyutti nor Dr. Kahn adequately explained how the miner's pneumoconiosis contributed to his death. The administrative law judge noted that Dr. Franyutti, when asked why he believed that the miner's pneumoconiosis contributed to his death, stated only that: "Why, because it was there. I could see that." Decision and Order at 10, quoting Director's Exhibit 24 at 28. The administrative law judge similarly found that Dr. Kahn failed to adequately explain the basis for his opinion, that the miner's lung diseases, including pneumoconiosis, were "synergistic" in causing the miner's death. Decision and Order at 10. Because the administrative law judge has the discretion as the trier-of-fact to render credibility determinations, and substantial evidence supports his findings with respect to Drs. Franyutti and Kahn, we affirm his determination that their opinions, regarding the cause of the miner's death, were not sufficiently reasoned. See *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-46. Because claimant does not allege any additional errors, the administrative law judge's finding, that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), is affirmed.

¹¹ Because claimant does not challenge the administrative law judge's finding that the miner's death certificate is not sufficiently reasoned, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

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