BRB No. 10-0247 BLA

IVA CABLE (Widow of ROBERT CABLE)	)	
Claimant-Respondent	)	
	)	DATE ISSUED: 12/17/2010
v.	)	
KENTUCKY MAY COAL COMPANY	)	
Employer-Petitioner	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (06-BLA-5959) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of 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 March 14, 2002, and is before the Board for the second time.

In the initial decision, the administrative law judge, after crediting the miner with at least twenty years of coal mine employment,[1] found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant[2] to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Alternatively, the administrative law judge found that the autopsy evidence and the medical opinion evidence established the existence of simple pneumoconiosis. 20 C.F.R. §718.202(a)(2), (4). The administrative law judge further 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). Finally, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in not making necessary findings regarding the admissibility of the medical evidence. *I.C.* [*Cable*] *v. Kentucky May Coal Co.*, BRB No. 08-0128 BLA (Oct. 6, 2008) (unpub.). The Board, therefore, vacated the administrative law judge's Decision and Order, and remanded the case to the administrative law judge to determine whether the submitted evidence complied with the evidentiary limitations set forth at 20 C.F.R. §725.414.[3] *Id.*

[1] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 5, 6. 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 (1989) (*en banc*).

[2] Claimant is the surviving spouse of the deceased miner who died on December 3, 2001. Director's Exhibits 8, 9.

[3] The Board instructed the administrative law judge to reevaluate whether the medical evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R §718.304. *I.C.* [*Cable*] *v. Kentucky May Coal Co.*, BRB No. 08-0128 BLA (Oct. 6, 2008) (unpub.). In the event that the administrative law judge found that claimant was not entitled to the Section 718.304 presumption, the Board instructed the administrative law judge to determine whether the medical evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.*

On remand, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the presumption that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in admitting Dr. Perper's report into the record. Employer also contends that the administrative law judge erred in finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board hold that the administrative law judge properly admitted Dr. Perper's report into evidence. In a reply brief, employer contends that the administrative law judge erred in not considering whether Dr. Perper improperly considered evidence outside of the record.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Admissibility of Dr. Perper's Report

Employer contends that the administrative law judge erred in admitting Dr. Perper's May 16, 2004 report into the record. In an Interim Order dated November 3, 2009, the administrative law judge properly admitted Dr. Perper's report as one of claimant's two affirmative medical reports pursuant to 20 C.F.R. §725.414(a)(2)(i).[5] *See*

[4] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to his claim because it was filed before January 1, 2005.

[5] In the Interim Order, the administrative law judge also found that Dr. Perper's report was admissible pursuant to 20 C.F.R. §725.414(a)(3)(i), a provision that addresses the limits on employer's affirmative evidence. Because employer did not offer Dr. Perper's report, it is not admissible under 20 C.F.R. §725.414(a)(3)(i). However, because the administrative law judge properly admitted Dr. Perper's report as one of claimant's

Keener v. Peerless Eagle Coal Co., 23 BLR 1-229, 1-239 (2006) (*en banc*). In his Decision and Order on Remand, the administrative law judge also properly found that Dr. Perper's report was admissible as claimant's autopsy rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). *Keener*, 23 BLR at 1-240.

Employer, however, contends that the administrative law judge erred in admitting Dr. Perper's report because the doctor relied on 1988 hospital records that are not a part of the record. The Director notes that there is no evidence that Dr. Perper's opinions, regarding the existence of pneumoconiosis or the cause of the miner's death, were based on those hospital records. Director's Brief at 3. Moreover, Dr. Perper's reliance on evidence not in the record goes to the weight to which his opinion is entitled, not on the admissibility of his report.[6] *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). We, therefore, hold that the administrative law judge properly admitted Dr. Perper's report in the record.

Complicated Pneumoconiosis

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis. Under Section 411(c)(3) of the Act, 30 U.S.C. §923(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

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two affirmative medical reports, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] The evidentiary limitations provide that records of a miner's hospitalization for a respiratory or pulmonary disease are admissible. 20 C.F.R. §725.414(a)(4). However, Dr. Perper's reliance on even inadmissible evidence would not preclude consideration of his report. An administrative law judge should not automatically exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Harris*, 23 BLR at 1-108. Rather, he may redact the objectionable content; ask the physician to submit a new report; or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (*en banc*).

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 does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding 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*).

Claimant contends that the administrative law judge erred in finding that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).[7] The record contains the medical opinions of three pathologists, Drs. Dennis, Perper, and Caffrey, and two pulmonologists, Drs. Fino and Rosenberg.

Summary of the Evidence

Dr. Dennis performed the miner's autopsy on December 4, 2001. In an autopsy report dated January 3, 2002, Dr. Dennis identified, on microscopic examination of sections of the miner's left lung (slide 1A), a macule that exceeded 1.5 centimeters in diameter. Director's Exhibit 11. Dr. Dennis also interpreted a section of the miner's right lung (slide 1F) as showing, *inter alia*, a part of a macule on the surface of the lung that measured at least one centimeter in diameter. *Id.* Upon review of another slide (slide 1H), Dr. Dennis found a dense nodule of fibrous connective tissue greater than 1.5 centimeters in diameter, which "completely obliterated the hilar lymph node." *Id.*

Dr. Dennis diagnosed, *inter alia*, (1) pulmonary congestion with macule formation associated with black pigment deposition and fibrosis of the visceropleura and macule formation greater than 1.5 to 2 cms. (demonstrated in slide 1A), and (2) black pigment deposition and fibrotic nodule of hilum of right lung. Director's Exhibit 11. In a letter dated January 18, 2001, Dr. Dennis reiterated that the miner "had progressive massive fibrosis of the lung with intense documentation of macule formation, black pigment deposition and fibrosis of the visceropleura and macule formation greater than 1.5 to 2 cms. demonstrated in slides 1A." *Id*.

[7] The administrative law judge found that neither claimant nor employer submitted x-ray evidence in connection with the survivor's claim. Decision and Order at 12.

Dr. Perper reviewed the miner's autopsy report, autopsy slides, and other medical evidence. In a report dated May 16, 2004, Dr. Perper opined that:

> The gross and microscopic examination of the lung section showed evidence of hilar macronodules exceeding 1 cm and approaching 2 cm, that invaded both the full thickness of the bronchial wall as well as the adjacent pulmonary parenchyma.
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> ***
>
> The autopsy substantiated the presence of complicated coal workers' pneumoconiosis in the lungs of [the miner], at the autopsy, with a fibro-anthracotic hilar mass of more than 2.0 cm, on the background of interstitial fibro-anthracosis and moderately severe simple coal workers' pneumoconiosis.

Director's Exhibit 42 at 367, 368.[8]

Dr. Caffrey also reviewed the miner's autopsy report, autopsy slides, and other medical evidence. In a report dated April 28, 2004, Dr. Caffrey questioned Dr. Dennis' autopsy findings:

> The autopsy pathologist has made a diagnosis of severe anthracosilicosis, progressive fibrosis but those changes are definitely not identified on the autopsy slides I reviewed, so I completely disagree with Dr. Dennis' interpretation. There were no lesions 1.5 to 2.0 centimeters on the autopsy slides except within the hilar lymph node tissue and the lesion of

[8] During a May 21, 2007 deposition, Dr. Perper explained that the fibroanthracotic tissue was not confined to the miner's lymph node:

> The invasive nature of the process in this case, which was not limited to the lymph node but was invading the bronchial wall, and some of my slides show very clear how the fibroanthracotic tissue basically erupted, broke through the bronchial wall, it's an indication of the more malignant nature of the process, in addition to the fact there were lesions of fibroanthracosis of a size exceeding 1.5 centimeter, and according to the pathologist reaching two centimeters.

Claimant's Exhibit 2 at 10.

> complicated pneumoconiosis must be identified within the lung tissue per se, and not within the lymph node tissue.

Director's Exhibit 42 at 217.[9]

During an October 1, 2004 deposition, Dr. Caffrey explained that:

> The disease of coal workers' pneumoconiosis is a disease, as the experts pointed out, within the lung tissue per se, not in the lymph nodes; not in the lymph nodes either at the gateway to the lungs or around the bronchus within the lung tissue. The disease of CWP must be within the alveoli themselves.

Director's Exhibit 42 at 137. Dr. Caffrey explained that lymph nodes are not necessary to the functioning of the lungs. *Id.* at 164.

Based upon their review of the medical evidence, Drs. Fino and Rosenberg each opined that the miner did not suffer from complicated pneumoconiosis. Director's Exhibit 42 at 257; Employer's Exhibits 1, 3. Dr. Fino explained that "you cannot use a lymph node finding pathologically to diagnose coal workers' pneumoconiosis because coal workers' pneumoconiosis is a disease of the lung tissue, not the lymph nodes surrounding the lungs." Employer's Exhibit 4 at 7. Dr. Rosenberg agreed, noting that "[a]ny lymph node involvement by silico-anthracotic tissue does not constitute the diagnosis of progressive massive fibrosis or PMF." *Id.*

[9] Dr. Caffrey also disagreed with Dr. Perper's findings:

> Dr. Perper made the diagnosis of coal workers' pneumoconiosis with macronodules of complicating [sic] coal workers' pneumoconiosis invading the bronchial wall. I said I disagreed with that because in the sections labeled H and I, the lesions were present within the lymph node tissue, not within the lung tissue per se.

Director's Exhibit 42 at 142.

The Administrative Law Judge's Finding

Relying on the Board's unpublished decision in *Taylor v. Director, OWCP*, BRB No. 010-0837 BLA (July 30, 2002) (unpub.),[10] the administrative law judge determined that Dr. Caffrey's opinion, that nodules in the miner's lymph nodes did not constitute a diagnosis of complicated pneumoconiosis, was contrary to law. Decision and Order on Remand at 2. The administrative law judge also accorded less weight to the opinions of Drs. Fino and Rosenberg because they are not pathologists. *Id.* at 3. The administrative law judge found that the autopsy evidence established that the miner "had large macronodules, from 1-3 cm." *Id.* Consequently, the administrative law judge found that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *Id.*

Discussion

Employer contends that the administrative law judge committed numerous errors in his consideration of the autopsy evidence. Employer initially argues that the administrative law judge failed to adequately explain how Dr. Dennis' opinion supported a finding of complicated pneumoconiosis in the miner's lymph nodes. We agree. Director's Exhibit 11. Dr. Dennis indicated that his identification of progressive massive fibrosis of the lung with "macule formation greater than 1.5 to 2 centimeters" was based on his review of slide 1A, a slide showing sections of the miner's left lung. Director's Exhibit 11. Thus, Dr. Dennis' diagnosis of massive fibrosis was based upon his examination of the miner's *left* lung tissue, not his examination of the miner's *right* hilar lymph node. Moreover, Dr. Caffrey disagreed with Dr. Dennis' findings regarding the presence of large macules in the left lung tissue. Dr. Caffrey found that that there "were no lesions 1.5 to 2.0 centimeters on the autopsy slides except within the hilar lymph node tissue." Director's Exhibit 42 at 217. The administrative law judge did not address this conflicting evidence regarding the existence of large opacities in the miner's left lung tissue.

Instead, the administrative law judge focused upon whether the findings regarding the miner's right hilar lymph node supported a finding of complicated pneumoconiosis. We agree with employer that the administrative law judge improperly interpreted the Board's *Taylor* decision as authority for the proposition that a diagnosis of anthracosis in lymph node tissue conclusively establishes the existence of pneumoconiosis. Although a diagnosis of anthracosis of the hilar lymph nodes may constitute a diagnosis of

[10] In *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA, slip op. at 5 (July 30, 2002) (unpub.), the Board noted that "anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis."

pneumoconiosis, the Board has held that whether a disease process in the hilar lymph nodes constitutes pneumoconiosis is "is a finding of fact to be made by the administrative law judge *based on the evidence before him*." *Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984) (emphasis added); *see also Lykins v. Director, OWCP*, 819 F.2d 146, 10 BLR 2-129 (6th Cir. 1987). In this case, the administrative law judge did not explain how Dr. Dennis' opinion, regarding the miner's right hilar lymph node, supported a finding of complicated pneumoconiosis. Moreover, the administrative law judge did not address the reasons that Dr. Caffrey provided for his determination that the 1.5 to 2.0 centimeter lesions within the miner's hilar lymph node did not constitute complicated pneumoconiosis (*i.e.*, that the lesions were not within the lung tissue itself and the fact that the lymph nodes are not necessary to the functioning of the lungs).[11] The administrative law judge also erred in according less weight to the opinions of Drs. Fino and Rosenberg, solely because they are not pathologists. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191, 22 BLR 2-251, 2-260-61 (4th Cir. 2000).

Because the administrative law judge did not properly resolve the conflict between the opinions of Drs. Dennis, Perper, Caffrey, Fino, and Rosenberg; did not accurately characterize the evidence or applicable precedent; and did not adequately explain his findings, we vacate his determination that the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), and remand the case for further consideration. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, when considering whether the autopsy evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.304(b), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

On remand, should the administrative law judge determine that the physicians' findings, regarding the lesions associated with the miner's right hilar lymph node, do not support a finding of complicated pneumoconiosis, he must consider whether the additional findings of Drs. Dennis and Perper, when weighed against the contrary evidence, establish the existence of "massive lesions" in the lung. On remand, if the

[11] Citing a medical dictionary, the administrative law judge found that Dr. Caffrey's conclusions were "inaccurate based on the accepted definition of a hilar lymph node." Decision and Order on Remand at 2. The administrative law judge, however, failed to explain the basis for his determination that Dr. Caffrey based his opinion, regarding the absence of complicated pneumoconiosis, on an inaccurate understanding of the nature and function of a hilar lymph node.

administrative law judge determines that claimant is not entitled to the irrebuttable presumption set forth at 20 C.F.R. §718.304, he must consider whether the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[12] *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[12] Employer requests that the case be remanded for reassignment to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).