BRB No. 05-0374 BLA

DIXIE E. HELTON (Widow of HURSHEL HELTON) Claimant-Respondent v. P & R COAL, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/05/2006 DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor's Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (04-BLA-5106) of Administrative Law Judge Mollie W. Neal on a survivor's claim[1] 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). Adjudicating the claim pursuant to 20 C.F.R.

[1] Claimant, Dixie E. Helton, is the widow of the miner, Hurshel Helton, who died on March 15, 2001. Director's Exhibit 13. Claimant filed her application for survivor's benefits on August 6, 2001. Director's Exhibit 3.

Part 718, the administrative law judge credited employer's stipulations that the miner worked in qualifying coal mine employment for 35.39 years and that the miner suffered from simple coal workers' pneumoconiosis based on the autopsy evidence. Next, the administrative law judge found that the miner suffered from complicated pneumoconiosis based upon the probative autopsy and medical opinion evidence of record. Accordingly, the administrative law judge found that claimant established invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, because the evidence affirmatively established the existence of complicated pneumoconiosis.[2] Benefits were, therefore, awarded in the survivor's claim, commencing as of March 2001, the month in which the miner died.

On appeal, employer argues that the administrative law judge erred in finding that the miner suffered from complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. Employer contends that the administrative law judge erroneously failed to consider the x-ray evidence of record pursuant to Section 718.304(a), that she improperly evaluated the autopsy and medical opinion evidence pursuant to Section 718.304(b) and (c), and that she impermissibly accorded greater weight to the opinion of Dr. Perper over the contrary opinions of Drs. Crouch and Caffrey when she found the evidence sufficient to establish the presence of complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[2] In addition, the administrative law judge found that because the miner had worked in qualifying coal mine employment for more than thirty-five years, claimant was entitled to invocation of the rebuttable presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). Decision and Order at 9.

[3] We affirm the administrative law judge's findings with respect to the length of coal mine employment and the existence of simple coal workers' pneumoconiosis inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2.

In determining whether a miner is suffering or suffered from a chronic dust disease of the lung commonly known as complicated pneumoconiosis at Section 718.304, the administrative law judge must first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b) and (c), prior to finding the existence of complicated pneumoconiosis established. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). Evidence under one prong of Section 718.304 can diminish the probative value of evidence under another prong if the two kinds of evidence conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), *citing Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, 22 BLR 2-554, 2-561-562 (4th Cir. 1999). Therefore, the administrative law judge must, in every case, consider and evaluate all relevant evidence. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically held that the administrative law judge is bound to perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562. Hence, the administrative law judge must determine whether "the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

In challenging the administrative law judge's determination under Section 718.304, *i.e.*, that claimant established invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis based on a finding of complicated pneumoconiosis, employer argues that the administrative law judge erred in failing to consider the numerous chest x-ray interpretations contained in the record and, therefore, erred in failing to render a determination as to whether the x-ray evidence was sufficient to demonstrate that the miner suffered from complicated pneumoconiosis under Section 718.304(a). Employer argues that it is incumbent upon the administrative law judge to consider all relevant medical evidence and, because the x-ray evidence of record is not only relevant, but also demonstrative of an absence of complicated pneumoconiosis, the administrative law judge erred in failing to discuss and analyze this evidence. Employer avers further that it was not entitled to submit x-ray interpretations as a part of its rebuttal evidence under the regulatory evidentiary limitations set forth in Section 725.414(a) because claimant declined to submit any x-ray interpretations in support of her affirmative case, but nevertheless, the record contains two exhibits that qualify as x-ray interpretations in support of employer's affirmative case. Employer's arguments lack merit.

During the formal hearing on February 24, 2004, the administrative law judge applied Section 725.414(a) to this survivor's claim and admitted Director's Exhibits 1-55, Employer's Exhibits 1-2, and Claimant's Exhibit 1 into the record, but excluded Employer's Exhibits 3-7, exhibits which served as employer's anticipated rebuttal evidence of chest x-rays potentially proffered by claimant, because claimant "did not designate any of the chest x-ray interpretations submitted in the earlier living miner's claims[4] in support of [her] affirmative case." Decision and Order at 2; *see* Hearing Transcript at 5-22. Next, the administrative law judge summarized the medical evidence submitted in the survivor's claim and, after listing the contested issues that required resolution, namely, whether the miner suffered from pneumoconiosis and whether his death was due to pneumoconiosis, determined that the need to address the issue of the existence of simple pneumoconiosis under Section 718.202(a)(1) was obviated by employer's stipulation that the miner suffered from simple coal workers' pneumoconiosis and the absence of x-ray evidence filed by the parties.

This is a survivor's claim filed under the recently amended regulations, which provide that a claimant must designate any and all evidence upon which she relies to support her affirmative case, including exhibits that may be associated with a prior living miner's claim. Hence, the administrative law judge was not compelled to discuss or address the x-ray evidence because claimant did not designate any of the x-ray evidence from the living miner's claims as evidence in support of her affirmative case. *See* 20 C.F.R. §725.414. We, therefore, reject employer's contention that the administrative law judge erred in failing to consider the x-ray evidence and in failing to render a specific determination pursuant to Section 718.304(a).

Relevant to Section 718.304(b), employer contends that the administrative law judge erred in her evaluation and consideration of the pathological reports of Drs. Perper, Crouch, and Caffrey with respect to the autopsy evidence. Specifically, employer argues that the administrative law judge mischaracterized Dr. Perper's opinion by finding that Dr. Perper observed a mass measuring 2.0 centimeters because Dr. Perper neither indicated that he made this observation nor included such a finding in his microscopic diagnosis. Stating that Dr. Perper's report containing thirty-one pages is the longest physician's report of record, employer argues that Dr. Perper's actual review of the miner's autopsy was limited to only

[4] Hurshel Helton, the miner, filed his first application for benefits on September 2, 1994 which was finally denied in a Decision and Order by Administrative Law Judge Vivian Schreter-Murray on September 5, 1996 and affirmed by the Board on September 11, 1997. *Helton v. P & R Coal Co.*, BRB No. 96-1772 BLA (Sep. 11, 1997) (unpub.); Director's Exhibit 1. The miner filed a duplicate claim for benefits on December 14, 1999 and, pursuant to the district director's decision awarding benefits on May 15, 2000, employer through its insurance carrier agreed to pay benefits on August 1, 2000. Director's Exhibit 2.

one page and that his sole reference to the autopsy slides -- that the lung sections in slide numbers 9 and 21 "were virtually replaced by the pneumoconiotic process" -- is an insufficient conclusion to constitute a description of complicated pneumoconiosis. In addition, employer argues that the administrative law judge erred in concluding that Dr. Perper's board-certification in anatomical, surgical, and forensic pathology demonstrated superiority to the pathological expertise of Drs. Crouch and Caffrey because there is no legal authority for the proposition that board-certification in surgical and/or forensic pathology bestows superior expertise upon a pathologist.

A review of Dr. Perper's report reveals, under the section marked "**Microscopic diagnoses of the current reviewer**," Dr. Perper diagnosed "complicated coal workers' pneumoconiosis with macules, micronodules and macronodules measuring up to more than 2.0 [centimeters], on the background of moderate to severe simple coal workers' pneumoconiosis." Claimant's Exhibit 1 [emphasis in original]. Contrary to employer's argument, therefore, the administrative law judge correctly found that Dr. Perper diagnosed complicated coal workers' pneumoconiosis with macules and macronodules measuring 2.0 centimeters under the *microscopic diagnoses* section of his report. Decision and Order at 8; Claimant's Exhibit 1. Further, the administrative law judge, within a rational exercise of her discretion, determined that the opinion of Dr. Perper, who reviewed the autopsy report and slides, the miner's medical records, and supporting medical studies, was more persuasive because unlike Drs. Crouch and Caffrey who opined that the miner did not suffer from complicated pneumoconiosis, Dr. Perper provided the most detailed and descriptive observations and measurements of the massive lesions on the miner's lung tissue, *i.e.*, his observations of a macronodule measuring 1.2 centimeters in diameter, a fibro-anthracotic mass measuring 2.0 centimeters on the background of interstitial fibro-anthracosis, and moderate to severe simple coal workers' pneumoconiosis with macules, micronodules, and macronodules exceeding 1.0 centimeter. The administrative law judge, therefore, rationally found that because Dr. Perper's opinion was thorough and contained detailed findings compared to the less detailed opinions of Drs. Crouch and Caffrey, Dr. Perper's opinion was entitled to determinative weight. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9. Similarly, we reject employer's argument that the administrative law judge erred in finding that Dr. Perper was the "most qualified pathologist of record" inasmuch as Dr. Perper's board-certification in anatomical, surgical, and forensic pathology demonstrates greater pathological expertise than that of Dr. Caffrey, who is board-certified in anatomical and clinical pathology, and of Dr. Crouch, who is board-certified in anatomical pathology only. *See Hicks*, 138 F.3d at 537, 21 BLR at 2-341 (physician with board-certifications in pulmonary disease medicine and internal medicine possessed superior expertise than physician with board-certification in

internal medicine only). Accordingly, contrary to employer's argument, the administrative law judge did not err in finding Dr. Perper's opinion demonstrating that the lesions in the miner's lungs were attributable to complicated pneumoconiosis more compelling than the contrary opinions of Drs. Crouch and Caffrey and, as such, was entitled to dispositive weight. *See Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-310-311 (2003); *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring).

Employer contends that, notwithstanding the administrative law judge's citation to the standard articulated by the Fourth Circuit in *Scarbro*, requiring that an equivalency determination be rendered to determine whether lesions observed by a pathologist on autopsy would equate to a 1.0 centimeter opacity on chest x-ray, the administrative law judge erroneously relied on Dr. Perper's opinion to support her equivalency determination. Employer avers that Dr. Perper's analysis is general in nature and lacks an explanation or direct evidence supporting his conclusion that the masses he observed on autopsy were the equivalent of a 1.0 centimeter finding by a radiologist on x-ray. Citing *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), employer asserts that even though the Fourth Circuit has declined to impose a requirement that massive lesions observed on autopsy evidence must measure two centimeters to constitute a diagnosis of complicated pneumoconiosis, the court has noted that nodules are generally larger on autopsy examination than they appear on a chest x-ray.

In the instant case, the administrative law judge properly concluded that Dr. Perper's findings constituted the presence of complicated pneumoconiosis because Dr. Perper specifically delineated and explained why the lesions seen on the miner's autopsy would be expected to yield one or more opacities greater than one centimeter when viewed on x-ray, and contrary to employer's argument, provided several corroborating medical studies supportive of his conclusions. In according probative weight to Dr. Perper's opinion, the administrative law judge relied on Dr. Perper's evaluation of various studies, including a 1979 NIOSH study that validated the choice of selecting a nodular size of 1.0 centimeter as the minimal size for diagnosing complicated coal workers' pneumoconiosis on autopsy and concluded that a 2.0 centimeter size was arbitrary. Decision and Order at 8, *citing* Claimant's Exhibit 1 at 20-22. Similarly, the administrative law judge was further persuaded by Dr. Perper's review of a 1996 study of autopsied coal miners which found that radiologists failed to identify or to accurately estimate the severity of pneumoconiosis in coal miners' lungs, including cases of complicated pneumoconiosis. The administrative law judge permissibly found that Dr. Perper's reliance on this study bolstered his conclusion that the autopsy findings were "exceedingly clear as to the presence of complicated coal workers' pneumoconiosis" because a number of radiologists in the instant case did not diagnose coal workers' pneumoconiosis but reported the presence of a 1.0 centimeter pulmonary nodule and attributed it to tuberculosis or to a non-specific granuloma, neither of which were found

upon both the gross and microscopic examination of the lungs at autopsy. Decision and Order at 7, 9; Claimant's Exhibit 1 at 20.

Section 718.304(a) "sets out an entirely objective scientific standard, *i.e.*, an opacity on an x-ray greater than one centimeter," which serves as "the benchmark to which evidence under the other [subsections] is compared," thus, contrary to employer's argument, the administrative law judge did not err in holding that the evidence of record, and particularly, the opinion of Dr. Perper, was sufficient to determine that the miner suffered from an underlying condition that would have produced an opacity greater than one centimeter when viewed on x-ray, or a massive lesion when viewed on autopsy. *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562; *see* 20 C.F.R. §718.304(a)-(c); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117 (4th Cir. 1993); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) (Board is not empowered to reweigh evidence nor substitute its inferences for those of administrative law judge); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Decision and Order at 7-9.

Based on the foregoing, therefore, we hold that the administrative law judge conducted a full and comparative weighing of all relevant evidence; she reasonably determined that the evidence was sufficient to invoke the irrebuttable presumption at Section 718.304 and fully explained how the opinion of Dr. Perper and the evidence of record supported her ultimate conclusion that the miner suffered from complicated pneumoconiosis. *See Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-149; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984). Accordingly, we affirm the administrative law judge's finding that because the evidence of record was sufficient to establish that the miner suffered from complicated pneumoconiosis pursuant to Section 718.304, claimant affirmatively established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. *See* 20 C.F.R. §718.304.

Accordingly, the Decision and Order Awarding Survivor's Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge