U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0291 BLA

JUANITA V. ROBERTS (Widow of ADAM E. ROBERTS) Claimant-Respondent v. TRI-STAR CONSTRUCTION, INCORPORATED and WEST VIRGINIA COAL INSURANCE COMMISSION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/29/2015 DECISION and ORDER

Appeal of the Decision and Order on Remand of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order on Remand (2008-BLA-05124) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) awarding benefits on a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge found that the miner had 31 years of coal mine employment and simple pneumoconiosis arising out of coal mine employment, based on the parties' stipulation. Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), thereby establishing entitlement to the irrebuttable presumption of death 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 of the regulations. Accordingly, the administrative law judge awarded survivor's benefits, commencing as of October 2006, the month in which the miner died.

In response to employer's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding, and her findings that the miner had simple pneumoconiosis arising out of coal mine employment. *Roberts v. Tri-Star Construction Co.*, BRB No. 11-0358 BLA, slip op. at 2 n.2 (Feb. 24, 2012) (unpub.). However, the Board held that the administrative law judge's exclusion of the depositions of Drs. Oesterling and Rosenberg from consideration on the record constituted an abuse of discretion that may have materially affected her evaluation of the opinions that are contained in the doctors' reports. *Roberts*, BRB No. 11-0358 BLA, slip op. at 4. The Board therefore vacated the administrative law judge's award of benefits and remanded the case for reconsideration of the admissibility of the depositions of Drs. Oesterling and Rosenberg. The Board instructed the administrative law judge, on remand, to determine whether claimant actually received adequate notice of the depositions and/or whether the notice issue was waived. *Id*. The Board also instructed the administrative law judge to reassess the evidence that was relevant to the issue of complicated pneumoconiosis at 20 C.F.R. §718.304. *Id*. Further, the Board instructed the administrative law judge to determine whether claimant was entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305 (2014) of the regulations, if she determined that the evidence was insufficient to establish the presence of complicated pneumoconiosis. *Id*. The Board additionally instructed the administrative law judge to determine whether employer successfully rebutted the presumption, if reached. *Id*.

[1] Claimant is the widow of the miner. The miner died on October 28, 2006. Director's Exhibit 8. Claimant filed her survivor's claim in February 2007. Director's Exhibit 2.

On remand, the administrative law judge considered the depositions of Drs. Oesterling and Rosenberg, based on her assumption that claimant's counsel's failure to lodge objections to these depositions constituted a waiver of claimant's right to object to employer's use of them. The administrative law judge found that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), thereby establishing invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.[2] Accordingly, the administrative law judge again awarded survivor's benefits, commencing October 2006, the month in which the miner died.

On appeal, employer contends that the administrative law judge erred in refusing to follow the Board's remand instructions to render determinations with regard to whether claimant received adequate notice of the depositions of Drs. Oesterling and Rosenberg, and with regard to whether claimant waived such notice. Employer also challenges the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Specifically, employer challenges the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Claimant responds, urging affirmance of the administrative law judge's award of survivor's benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to employer's appeal.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal

[2] Because the administrative law judge found that claimant invoked the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, she found that it was not necessary for her to address whether claimant was entitled to the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305 (2014) of the regulations.

[3] The record indicates that the miner was employed in the coal mining industry in West Virginia. Director's Exhibit 3. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Pursuant to Section 411(c)(3), there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered 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); 20 C.F.R. §718.304(a)-(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge must perform an equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. Specifically, the court has held that '"[b]ecause prong (A) sets out an entirely objective scientific standard'" - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what, under prong (B), is a "massive lesion" and what, under prong (C), is an equivalent diagnostic result reached by other means. *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Further, the court has recognized that a diagnosis of massive lesions, standing alone, can satisfy the "statutory ground" for invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b). *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006).

Initially, we will address employer's contention that the administrative law judge erred in refusing to follow the Board's remand instructions to render determinations with regard to whether claimant received adequate notice of the depositions of Drs. Oesterling and Rosenberg, or with regard to whether claimant waived such notice. Employer asserts that the administrative law judge erred by failing to render specific evidentiary determinations with regard to the depositions of Drs. Oesterling and Rosenberg. Employer maintains that the administrative law judge's failure to admit the depositions of Drs. Oesterling and Rosenberg into the record constitutes reversible error because "it is unclear whether these depositions would be considered as in evidence if a party files for modification." Employer's Brief at 9.

In addressing the evidentiary record with respect to the depositions of Drs. Oesterling and Rosenberg, the administrative law judge noted that "the record is silent as to whether the [c]laimant, who at the time of those depositions was not represented by counsel, ever received deposition notices." Decision and Order on Remand at 3. The administrative law judge therefore stated that she was unable to determine whether claimant waived her right to challenge employer's use of the depositions of Drs.

Oesterling and Rosenberg by failing to attend them or by lodging objections to them. The administrative law judge further stated, "[b]ecause it is not clear from the record whether [c]laimant's counsel knew whether the [c]laimant had received adequate notice of the depositions, I will not presume that [c]laimant's counsel knowingly waived any defect in the depositions." *Id*. at 4 n.5. Nevertheless, the administrative law judge found that it was not necessary for her to make a specific finding with respect to whether claimant's counsel's failure to object to the depositions of Drs. Oesterling and Rosenberg constituted a waiver of claimant's right to challenge employer's use of these depositions. Based on her assumption that claimant's counsel's actions constituted a waiver of claimant's right to object to employer's use of the depositions of Drs. Oesterling and Rosenberg, the administrative law judge considered these depositions on the merits at 20 C.F.R. §718.304(b). Because employer has not established that it was prejudiced by the administrative law judge's decision, *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009), we reject employer's contention that the Board must remand the case to the administrative law judge to render specific evidentiary determinations with regard to the depositions of Drs. Oesterling and Rosenberg.

Next, we address employer's contention that the administrative law judge erred in finding that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3). Specifically, employer challenges the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at Section 718.304(b). The administrative law judge considered the autopsy reports of Drs. Racadag, Kahn, Oesterling, Naeye and Rosenberg.[4] Dr. Racadag diagnosed progressive massive fibrosis and complicated nodular coal workers' pneumoconiosis. Director's Exhibit 9. Similarly, Dr. Kahn diagnosed progressive massive fibrosis. Claimant's Exhibit 4. By contrast, Dr. Oesterling disagreed with Dr. Racadag's opinion that "the areas of change demonstrated due to coalmine dust exposure truly represent[ed] progressive massive fibrosis since they are a result of confluent processes and not limited to the effects of coalmine dust." Director's Exhibits 10, 12. During the September 18, 2008 deposition, Dr. Oesterling testified that "reactive changes due to the passive congestion and the superimposed infection within that area of passive congestion…have become confluent with the coal dust and it magnified the gross appearance of those lesions." Employer's Exhibit 11 (Dr. Oesterling's Depo. at 16). Dr. Oesterling further testified that "the maximum dimension

[4] In considering the autopsy evidence at 20 C.F.R. §718.304(b), the administrative law judge stated, "I will give the most weight on this issue to the pathologists, and lesser weight to the opinion of Dr. Rosenberg, a non-pathologist." Decision and Order on Remand at 7. Drs. Racadag, Kahn, Oesterling and Naeye are Board-certified in anatomic and clinical pathology. Dr. Rosenberg is Board-certified in internal medicine and pulmonary disease.

of this is 1.5 [centimeters]" and "I don't think that qualifies for progressive massive fibrosis." *Id*. Dr. Naeye diagnosed mild to moderate severe simple coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Rosenberg also opined that the miner had simple coal workers' pneumoconiosis without progressive massive fibrosis. Director's Exhibit 13; Employer's Exhibits 8, 10 (Dr. Rosenberg's Depo. at 11).

The administrative law judge discounted the opinions of Drs. Rosenberg and Naeye because she found that they were not well-reasoned. The administrative law judge also found that Dr. Oesterling relied on a definition of complicated pneumoconiosis/progressive massive fibrosis that is inconsistent with the regulatory definition of this disease. In addition, the administrative law judge found that Dr. Oesterling's description of the masses in the miner's lungs "is not necessarily inconsistent with the definition of complicated pneumoconiosis at [Section] 718.304(b)." Decision and Order on Remand at 8. Conversely, the administrative law judge found that "Dr. Racadag's and Dr. Kahn's descriptions of the masses in the [m]iner's lungs met the regulatory definition of complicated pneumoconiosis under [Section] 718.304(b), because they identified multiple large masses 2 [centimeters] in size or larger…." *Id*. at 9. The administrative law judge also found that "a pneumoconiotic lesion of the size that Dr. Kahn has identified would likely be equivalent to an opacity of 1 [centimeter] or more on an X-ray." *Id*. at 10. Because the administrative law judge found that Dr. Racadag's opinion was well-reasoned and his perspective as the autopsy prosector provided him with an advantage over the other pathologists, she gave significant weight to Dr. Racadag's opinion. The administrative law judge therefore found that Dr. Racadag's opinion outweighed Dr. Oesterling's contrary opinion. Further, the administrative law judge gave "some weight" to Dr. Kahn's opinion "because [Dr. Kahn] identified pneumoconiotic lesions of up to 2.6 [centimeters] in size."[5] *Id*. Hence, the administrative law judge found that claimant established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

Employer asserts that the administrative law judge erred in finding that the opinions of Drs. Racadag and Kahn were sufficient to establish the presence of complicated pneumoconiosis. Specifically, employer argues that an equivalency determination is necessary to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Contrary to employer's assertion, the administrative law judge's finding that the autopsy reports of Drs. Racadag and Kahn were sufficient to establish the presence of complicated pneumoconiosis at Section 718.304(b) is consistent with *Perry*. Although the Fourth Circuit has not overruled its holding, in either *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, or *Blankenship*, 177 F.3d at 243, 22 BLR at 560-61, that the

[5] The administrative law judge also noted that "Dr. Kahn observed the 'whorled pattern' which, he stated, is characteristic of progressive massive fibrosis." Decision and Order on Remand at 10.

"massive lesions" described at 20 C.F.R. §718.304(b) are those which, when x-rayed, would show as opacities greater than one centimeter, the court has recognized that evidence of massive lesions provided "another" ground, i.e., a "statutory ground," for invocation of the irrebuttable presumption. *Perry*, 469 F.3d at 365, 23 BLR at 2-384. Hence, the court provided two independent grounds to invoke the irrebuttable presumption at Section 718.304(b). In this case, the administrative law judge permissibly determined that Dr. Racadag's diagnosis of progressive massive fibrosis based on the doctor's description that the two masses in the upper lobes of the miner's lungs measured 2 x 1.5 x 1 centimeters in size was sufficient to establish "massive lesions" at 20 C.F.R. §718.304(b).[6] *Id*. Further, the administrative law judge permissibly determined that Dr. Kahn's diagnosis of progressive massive fibrosis with lesions measuring up to 2.6 centimeters in size was sufficient to establish "massive lesions" at 20 C.F.R. §718.304(b). *Id*. We, therefore, reject employer's assertion that the administrative law judge erred in finding that the autopsy reports of Drs. Racadag and Kahn were sufficient to establish the presence of complicated pneumoconiosis.[7]

Employer also asserts that the administrative law judge selectively analyzed the evidence by applying a greater level of scrutiny to the opinions of Drs. Oesterling, Naeye and Rosenberg than she applied to the opinions of Drs. Racadag and Kahn. We disagree. The administrative law judge permissibly found that Dr. Racadag's perspective as the autopsy prosector provided him with an advantage over Drs. Oesterling and Naeye, the reviewing pathologists, and Dr. Rosenberg, a pulmonologist, in determining the size of the lesions on gross examination.[8] *See Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-

[6] A diagnosis of progressive massive fibrosis has been held to be equivalent to a diagnosis of "massive lesions" under 20 C.F.R. §718.304(b). *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). The Department of Labor has also stated that the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis." 65 Fed. Reg. 79,951 (Dec. 20, 2000).

[7] Employer also asserts that the administrative law judge erred in crediting Dr. Kahn's opinion because she offered no reasoning or evidence in support of her equivalency determination. In light of the Board's holding that the administrative law judge permissibly determined that Dr. Kahn's diagnosis of progressive massive fibrosis with lesions measuring up to 2.6 centimeters in size was sufficient to establish "massive lesions" at 20 C.F.R. §718.304(b), *see Perry*, 469 F.3d at 365, 23 BLR at 2-384, we need not address employer's assertion, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[8] The administrative law judge determined that Dr. Racadag's description of the

23 (1992); *Gruller v. BethEnergy Mines, Inc.*, 16 BLR 1-3 (1991). Further, as discussed, *supra*, the administrative law judge permissibly credited Dr. Kahn's opinion because Dr. Kahn diagnosed progressive massive fibrosis based on pneumoconiotic lesions measuring up to 2.6 centimeters in size. *Perry*, 469 F.3d at 365, 23 BLR at 2-384. In addition, the administrative law judge permissibly found that Dr. Oesterling relied on a definition of complicated pneumoconiosis/progressive massive fibrosis that is inconsistent with the regulatory definition of this disease.[9] *See* 20 C.F.R. §718.304(b); *Perry*, 469 F.3d at 365, 23 BLR at 2-384. Further, the administrative law judge permissibly found that the

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subpleural black masses in the miner's lungs as 2 x 1.5 x 1 centimeters in size "constitute[d] reliable evidence of at least two masses of that size in the [m]iner's upper lobes." Decision and Order on Remand at 8. The administrative law judge therefore reaffirmed her prior finding that Dr. Racadag's opinion was well-reasoned and entitled to significant weight "for the reasons set forth previously." *Id*. at 10. In her prior decision, the administrative law judge noted that, based "solely" on their professional qualifications, each of the autopsy reports of the pathologists should be accorded the same weight, given that each of the pathologists was Board-certified in pathology. Nevertheless, the administrative law judge determined that "Dr. Racadag, as the autopsy prosector, was the only pathologist to have direct observations of the [m]iner's tissues, and his report includes a description of his observations, labeled: 'Respiratory System.'" Decision and Order at 11. The administrative law judge also noted that "[t]here is no evidence rebutting Dr. Racadag's description." *Id*. Additionally, in considering Dr. Oesterling's basis for finding that the miner did not have progressive massive fibrosis, the administrative law judge determined that Dr. Oesterling's statement that "the lower lobes of the [m]iner's lungs were 'by and large uninvolved with coal dust, by the way[,]'…is contradicted by Dr. Racadag's description, which indicates pneumoconiotic nodules of up to 1 [centimeter] in the middle and lower lobes…." Decision and Order on Remand at 9-10.

[9] As the administrative law judge found, "[Dr. Oesterling] stated that the definition of progressive massive fibrosis in the Archives of Clinical Pathology stated that in order to constitute progressive massive fibrosis a mass must be at least 2 [centimeters] in diameter." Decision and Order on Remand at 8. The administrative law judge also noted that the regulatory definition of complicated pneumoconiosis at Section 718.304 "does not require any specific size of mass, but only requires that it be 'massive.'" *Id*. at 9 (footnote omitted). The administrative law judge therefore determined that, "in order to address whether the [m]iner's condition met the regulatory requirements for complicated pneumoconiosis/progressive massive fibrosis, Dr. Oesterling should not have relied on the definition in the Archives of Clinical Pathology, but instead should have addressed the regulatory definition." *Id*. (footnote omitted).

opinions of Drs. Naeye and Rosenberg are not well-reasoned.[10] *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, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(en banc). Thus, we reject employer's assertion that the administrative law judge selectively analyzed the evidence by applying a greater level of scrutiny to the opinions of Drs. Oesterling, Naeye and Rosenberg than she applied to the opinions of Drs. Racadag and Kahn.

Employer additionally asserts that the administrative law judge erred in finding that "masses of complicated coal workers' pneumoconiosis do not need to be pneumoconiotic in origin." Employer's Brief at 15. The administrative law judge found that Dr. Racadag's microscopic description of the masses in the upper lobes of the lungs established that they were pneumoconiotic in origin. The administrative law judge also noted that "Dr. Oesterling…disagreed that these masses were entirely pneumoconiotic in origin, and he stated that a portion of these lesions were comprised of a reactive response to hemosiderin and not to coal dust pigment." Decision and Order on Remand at 8. Noting that "[t]he regulatory definition of clinical pneumoconiosis [at Section 718.201(a)(1)] relates to 'fibrotic reaction of the lung tissue' to particulate deposition," the administrative law judge determined that "the regulation does not demand as fine a distinction as Dr. Oesterling has insisted upon: all that is required is that there are 'massive lesions.'" *Id*. at 9. However, both the pertinent statute and regulation provide

[10] In reaffirming her prior finding that Dr. Naeye's opinion was not well-reasoned, the administrative law judge determined that "Dr. Naeye's opinion, that 'rare tiny birefringent crystals' indicated that a lesion was not occupational in origin" did not follow from the regulatory definition of pneumoconiosis. Decision and Order on Remand at 10. In her prior decision, the administrative law judge noted that Section 718.201(a)(1) "does not have any limitation on the amount of fibrotic reaction in lung tissue." Decision and Order at 14. The administrative law judge also determined that "Dr. Naeye's conclusion that pneumoconiosis did not occupy more than 3% of the [m]iner's lung tissue is based on the autopsy slides, which may not have captured all the pneumoconiotic tissue the autopsy prosector observed." Decision and Order on Remand at 10. In her prior decision, the administrative law judge found that Dr. Naeye's conclusion "presumes, without explanation, that the black pigment in autopsy slides reflects the entire extent of the pneumoconiotic tissues in the [m]iner's lungs." Decision and Order at 14 n.23. Further, the administrative law judge determined Dr. Rosenberg's conclusion that the miner's pneumoconiosis was mild was based on the doctor's presumption that the miner's coal workers' pneumoconiosis "involved only 3% of lung tissue." Decision and Order on Remand at 8. The administrative law judge also determined that "Dr. Rosenberg's opinion regarding whether the [m]iner had complicated pneumoconiosis is flawed because it is not based on X-rays that used the ILO categorizations for pneumoconiosis." *Id*.

that 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 that yields massive lesions in the lung when diagnosed by biopsy or autopsy. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(b). The Board has held, in an unpublished case, that an administrative law judge erred in finding that lesions identified on autopsy need not be comprised solely of anthracotic or pneumoconiotic material to establish invocation of the irrebuttable presumption at Section 718.304. *M.G.* [*Gollie*] *v. Elkay Mining Co.*, BRB No. 07-0375 BLA, slip op. at 7 (Jan. 31, 2008)(unpub.).[11] In this regard, the administrative law judge also failed to adequately consider whether the evidence established a chronic dust disease of the lung qualifying for the irrebuttable presumption under 20 C.F.R. §718.304. The Director has previously argued, and the Board has agreed, that a "chronic dust disease of the lung must produce, by a natural process, large x-ray opacities or lesions in order to invoke the irrebuttable presumption" at 20 C.F.R. §718.304. *Id*. We agree with the Director's logic, as adopted by the Board, and thus find here that the administrative law judge erred. Thus, we vacate the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) and remand the case to the administrative law judge for further consideration of whether the miner's lesions qualify as a chronic dust disease of the lung under the requirements of 20 C.F.R. §718.304.

Furthermore, we vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). If reached, on remand the administrative law judge must also consider whether the miner's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). We disagree with our dissenting colleague's view that because the administrative law judge provided valid reasons for discounting Dr. Oesterling's conclusions in certain respects at Section 718.304(b), it is unnecessary to remand the case. As discussed, *supra*, the reasons provided by the administrative law judge for discounting Dr. Oesterling's opinion at Section 718.304(b) relate only to the size of the lesions, and not to the nature or cause of the lesions; she permissibly found that Dr. Racadag, the autopsy prosector, had an advantage over Dr. Oesterling, a pathologist, in determining the size of the lesions on gross examination. *See Urgolites*, 17 BLR at 1-23; *Gruller*, 16 BLR at 1-5. Additionally, the administrative law judge gave less weight to

[11] In *M.G.* [*Gollie*] *v. Elkay Mining Co.*, BRB No. 07-0375 BLA, slip op. at 6-7 (Jan. 31, 2008)(unpub.), the Board accepted the interpretation of the Director, Office of Workers' Compensation Programs, that a lesion that was a coincidental fusion of simple pneumoconiosis and some other non-pneumoconiotic material does not establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304, as it was not produced by a chronic dust disease.

the opinion of Dr. Oesterling at Section 718.304(b) because Dr. Oesterling erroneously relied on the definition of progressive massive fibrosis in the Archives of Clinical Pathology, stating that a mass must be at least 2 centimeters in diameter in order to constitute the disease. *See* 20 C.F.R. §718.304(b); *Perry*, 469 F.3d at 365, 23 BLR at 2-384. However, the administrative law judge did not provide reasons that compel discounting Dr. Oesterling's opinion with respect to the composition of the lesions at Section 718.304(b) or the cause of the lesions at Section 718.203. Employer correctly asserts that "[the administrative law judge's] holding essentially eliminates the causation element required by [the Act] and the regulations." Employer's Brief at 18. Citing *Mitchell*, employer notes that the Fourth Circuit emphasized that the causation element is not subsumed in a finding of complicated pneumoconiosis at Section 718.304. Rather, causation must still be proved. Consequently, the administrative law judge must address whether the miner's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, prior to finding that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3). *Mitchell*, 479 F.3d at 337, 24 BLR at 2-28. Although the Section 718.203(b) presumption that pneumoconiosis arose out of coal mine employment applies in this case, as the administrative law judge properly credited the miner with more than 10 years of coal mine employment, the record contains medical evidence that could rebut this presumption. *See* 20 C.F.R. §718.203(b). For example, Dr. Oesterling opined that other disease processes were involved in the large masses in the miner's lungs. Director's Exhibits 10, 12; Employer's Exhibit 11 (Dr. Oesterling's Depo. at 16). On review of a pathology slide, Dr. Oesterling opined that "the entire structure cannot be attributed to coal dust deposition and micronodular change since there is a superimposed inflammatory and hemorrhagic process also present." Director's Exhibit 10. Thus, the administrative law judge, as trier-of-fact, must weigh the conflicting medical evidence at Section 718.304(b) and Section 718.203(b), if reached. *Mitchell*, 479 F.3d at 337, 24 BLR at 2-28; *M.G.* [*Gollie*], BRB No. 07-0375 BLA, slip op. at 7.

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 for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination that the administrative law judge's decision awarding survivor's benefits must be vacated a second time for reconsideration of the autopsy evidence obtained nearly nine years ago. The majority insists that the administrative law judge's award of benefits must be vacated because the administrative law judge held that the Black Lung Benefits Act, 30 U.S.C. §921(c)(3), and the regulations, 20 C.F.R. §718.304(b), do not require that a lesion in excess of two centimeters in diameter, which is produced by complicated pneumoconiosis, be composed purely of anthracotic or pneumoconiotic material to invoke the irrebuttable presumption of Section 411(c)(3). The majority holds that this was error and for that reason the case must be remanded to determine both whether claimant established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 and whether claimant established that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Because the majority has exceeded its authority by determining to apply its own definition of "massive lesions," unsupported by law or medical science, I must respectfully dissent.

The majority has usurped the authority Congress gave the Secretary of Labor to prescribe standards for determining whether a miner is totally disabled due to pneumoconiosis and whether the miner's death was due to pneumoconiosis. 30 U.S.C. §921(b). As the United States Court of Appeals for the District of Columbia Circuit declared in *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869, 23 BLR 2-124,

2-172 (D.C. Cir. 2002), the Black Lung Benefits Act authorizes the Secretary to supplement statutory terms. Today the Board majority has claimed for itself the authority to redefine "massive lesions," which is both a statutory and regulatory term.

The United States Court of Appeals for the Eleventh Circuit observed in *The Pittsburgh & Midway Coal Mining Co.* [*Cornelius*], 508 F.3d 975, 984, 24 BLR 2-72, 2-88 (11th Cir. 2007), that neither the Act nor the regulations defines the term "massive lesions." To determine legislative intent, the court turned to case law interpreting the Black Lung Benefits Act and to the regulatory history of the black lung regulations. *Id*. The court concluded: "All of these sources lend support to the Director's position that Congress intended the term "massive lesions to refer to the medical condition known as complicated pneumoconiosis." *Id*. The Eleventh Circuit noted that, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976), the United States Supreme Court had summarized a report of the Surgeon General on coal workers' pneumoconiosis, including a statement on complicated pneumoconiosis: that "Complicated pneumoconiosis … involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection) …. 428 U.S. at 7. This language was also quoted by the United States Court of Appeals for the Tenth Circuit when it issued its definitive decision on "massive lesions." *Bridger Coal Co. v. Director, OWCP* [*Ashmore*], 669 F.3d 1183, 1186, 25 BLR 2-89, 2-95 (10th Cir. 2012).

The majority does not acknowledge that the Supreme Court recognized that massive lesions involve a reaction to dust and other factors, which may include tuberculosis and other infections. The majority's insistence that only purely anthracotic or pneumoconiotic material compose massive lesions is based entirely on the statement of Dr. Oesterling, a reviewing pathologist, that he could not diagnose progressive massive fibrosis because the lesions "are a result of confluent processes and not limited to the effects of coal mine dust." Director's Exhibit 10 at [6] (unpaginated).[12] The doctor cited

[12] Dr. Oesterling diagnosed the miner with a severe form of micronodular coal workers' pneumoconiosis. Employer's Exhibit 11 at 11. The doctor described the miner's masses as showing about half micronodular coal workers' pneumoconiosis and half fibrotic tissue resulting from abundant hemosiderin (a protein resulting from disorders in iron metabolism and the breakdown of red blood cells, according to the Random House Dictionary, 2015), with red blood cells, pigment and bone spicules present. Employer's Exhibit 11 at 14-15. The doctor stated that "these two processes have become one process…. They've fused into one area of firmer tissue than the tissue surrounding that…." Employer's Exhibit 11 at 16.

Dr. Oesterling's identification of the miner's disorder as a separate disease process should be considered in light of an article on "Coal Worker's Pneumoconiosis" in Emedicine.Medscape.com, *see* http://emedicine.medscape.com/article/297887-overview

no medical authority for his definition, although he had cited the 1979 Archives of Clinical Pathology as authority for the size requirements he had stated. Employer's Exhibit 11 at 9. The ILO has set forth a pathological description of progressive massive fibrosis in "Coal Workers' Lung Disease" of The Encyclopedia of Occupational Health and Safety, published by the International Labor Organization (Geneva 2011):

> PMF lesions may be unilateral or bilateral, and are most often found in the upper or middle lobes of the lung. The lesions are formed of collagen, reticulin, coal mine dust and dust-laden macrophages, while the centre may contain a black liquid which cavitates on occasion. U.S. pathology standards require the lesions to be 2 cm in size or larger to be identified as PMF entities in surgical or autopsy specimens.

Thus, the ILO description of "massive lesions" includes material which is not purely anthracotic or pneumoconiotic and the description acknowledges a pathology standard for size but not for composition. Further understanding of massive lesions is provided by N.L. Lapp in his article, "A Lawyer's Medical Guide to Black Lung Litigation," which courts frequently cite.[13] Lapp described pathological findings of complicated pneumoconiosis:

> The pathological lesions of complicated [coal workers' pneumoconiosis] … consist of large collections of ill-defined black tissue which are rubbery in texture and often adhered to the chest wall. The lesions may demonstrate cavity formation in their center. Viewed microscopically, the lesions … appear to be composed of a capsule of thick scar tissue surrounding a formless black mass. Traces of obliterated arteries, veins and bronchioles that were incorporated into and destroyed by the process may occasionally be seen with the formless masses."

(updated March 27, 2014), which cites a 2009 study suggesting that iron is the active agent in coal responsible for coal workers' pneumoconiosis and progressive massive fibrosis. McCunney RJ, Morfield P, Payne S. "What component of coal causes coal workers' pneumoconiosis?" *J Occup Environ Med.* Apr 2009; 51(4): 462-71. [Medline]. If that is correct, the presence of abundant hemosiderin from a disordered iron metabolism would be related both to the miner's coal mine employment and to the development of progressive massive fibrosis, even though it is a different disease process. This demonstrates how flawed the majority's decision is in insisting on a definition of massive lesions as lesions composed solely of anthracotic and pneumoconiotic material.

[13] The article was most recently cited in *Marfork Coal Co. v. Weis*, 251 Fed. Appx. 229 n.15 (4th Cir. 2007).

83 W.Va. Law Rev. 721, 734-35 (1981) (footnotes omitted). Thus, it appears that progressive massive fibrosis progresses by destroying and incorporating whatever is in its path; it may be other infections, as the Supreme Court observed, or it may be obliterated arteries, as Lapp stated. Dr. Oesterling's description of the miner's lesions demonstrates that they were massive lesions produced by complicated pneumoconiosis, progressive massive fibrosis. The doctor testified that the processes present in the lesion "have become one process" and that "They've fused into one area of firmer tissue than the tissue surrounding that…." Employer's Exhibit 11 at 16. The majority's insistence that the lesion be comprised exclusively of anthracotic or pneumoconiotic material derives from a lack of understanding of the disease process. For that reason, and because the majority's standard is not derived from a consensus in the medical community, the majority's holding in this case will effectively foreclose claimants from invoking the irrebuttable presumption with evidence of massive lesions, until such time as the Board's decision can be reviewed by the United States Court of Appeals for the Fourth Circuit, assuming claimant is able to continue to litigate so long.

The majority's holding is without any support in caselaw except for an unpublished Board decision, *M.G.* [*Gollie*] *v. Elkay Mining Co.*, BRB No. 07-0375 BLA, slip op. at 6-7 (Jan. 31, 2008)(unpub.). The majority indicates that the Director agreed with the Board's holding in *M.G.* A careful reading of the Board's opinion belies that claim. According to the Board, the administrative law judge in *M.G.* determined that the miner had a chronic disease of the lung, simple pneumoconiosis, and that because some simple pneumoconiosis was manifested in a lesion of two centimeters in diameter, claimant had established massive lesions pursuant to 20 C.F.R. §718.304.[14] The administrative law judge considered that as long as the lesion was comprised in part of pneumoconiosis, and was of sufficient size, the regulatory criteria were satisfied. Accordingly, he awarded benefits. On appeal, both employer and the Director argued that the administrative law judge had erred in finding complicated pneumoconiosis established at Section 718.304(b). Employer argued that the regulation requires that the lesions be comprised solely of anthracotic or pneumoconiotic material. The Board did not state that the Director joined in that argument. Instead, the Board stated:

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[14] 20 C.F.R. §718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which: (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung....

> The Director argues that a chronic dust disease of the lung must produce, by a natural process, large x-ray opacities or lesions to invoke the irrebuttable presumption at 20 C.F.R. §718.304. The Director maintains that a lesion that was a coincidental fusion of simple pneumoconiosis and some other non-pneumoconiotic material does not establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304, because it was not produced by a chronic dust disease. The Director therefore requests a remand of the case for the administrative law judge to reconsider the issue of complicated pneumoconiosis.

M.G. [*Gollie*], BRB No. 07-0375 BLA, slip op. at 6-7. The Director's argument is a common sense interpretation of the regulation: unless the large x-ray opacity or massive lesion is the product of complicated pneumoconiosis or progressive massive fibrosis, it cannot invoke the irrebuttable presumption. It is also consistent with the Director's argument to the Eleventh Circuit, that a massive lesion must be complicated pneumoconiosis. The administrative law judge in *M.G.*, unlike the administrative law judge in the instant case, never made a determination of whether the evidence established the medical condition of complicated pneumoconiosis, progressive massive fibrosis.

In contrast to the administrative law judge in *M.G.*, the administrative law judge in the instant case properly began her analysis by determining that claimant established that the miner had progressive massive fibrosis, after crediting the opinions of Dr. Racadag, the autopsy prosector, and Dr. Kahn, a reviewing pathologist. Moreover, the majority opinion affirms the administrative law judge's determination that those opinions were sufficient to establish the presence of complicated pneumoconiosis. The administrative law judge found that the doctors' descriptions of the progressive massive fibrosis established the existence of clinical pneumoconiosis, as defined in Section 718.201(a)(1), and that this clinical pneumoconiosis, a "chronic dust disease of the lung," yielded massive lesions pursuant to Section 718.304(b). The administrative law judge stated:

> Notably, both Dr. Racadag and Dr. Kahn identified emphysematous changes in association with the masses; nevertheless, both conclude that the masses constituted progressive massive fibrosis. Director's Exhibit 9; Claimant's Exhibit 4. The regulatory definition of clinical pneumoconiosis relates to "fibrotic reaction of the lung tissue": to particulate deposition. *See* §718.201(a)(1). I have considered whether the masses constitute progressive massive fibrosis/complicated pneumoconiosis under § 718.304(b). Notably, the regulation does not demand as fine a distinction as Dr. Oesterling has insisted upon: all that is required is that there are "massive lesions." This makes sense, because the definitions of § 718.304(a) and (b) are intended to be equivalent. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999)(The same condition

> that produces opacities greater than one centimeter in diameter on an X-ray should be considered "massive lesions").

Decision and Order on Remand at 9.

The report of Dr. Racadag and the opinion of Dr. Kahn provide overwhelming support for the administrative law judge's determination that the miner suffered from a chronic disease of the lung, complicated pneumoconiosis, as required by Section 718.304, and that this disease yielded massive lesions in the form of progressive massive fibrosis. Dr. Racadag's report reflects the diagnosis: progressive massive fibrosis, bilateral, upper lobes, complicated nodular coal workers' pneumoconiosis. Director's Exhibit 9 at 1. The doctor measured the progressive massive fibrosis he found in each upper lobe:

> Subpleural black masses are present one on each upper lobe each measuring 2 x 1.5 x 1 cm. The rest of the upper lobe on both sides also show[s] black coal macules and nodules measuring up to 1 cm in maximum dimension associated with emphysematous changes. Similar black coal macules are present in the middle and lower lobes.

Director's Exhibit 9 at 2. The doctor also provided a microscopic description of the progressive massive fibrosis in each upper lobe:

> Microsections from both lungs show similar changes. The black subpleural masses in the upper lobes are composed of aggregates of black histiocytes and pigment associated with collagenous fibrosis and emphysematous changes. Scattered smaller coal nodules with semi microscopic appearance are also present. Coal macules with less fibrosis also noted.

Director's Exhibit 3. The miner's autopsy slides were reviewed by Dr. Kahn, who concluded: "Progressive Massive Fibrosis is present by definition including multiple lesions measuring up to 2.6 cm." Claimant's Exhibit 4 at [3] (unpaginated).

The administrative law judge correctly determined that claimant established complicated pneumoconiosis, progressive massive fibrosis, and astutely observed that requiring the lesion to be composed of purely anthracotic or pneumoconiotic material is inconsistent with the law of the Fourth Circuit, which has declared that the "definition [of massive lesions] must be applied so that the term 'massive lesions' will describe the same condition that would be disclosed by application of the prong (A) standard based on the size of x-ray opacities." *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 259, 22 BLR 2-93, 2-106 (4th Cir. 2000). Significantly, employer offered no

evidence that the presence of hemosiderin or other material in the miner's lesions would prevent the lesion from showing as a large opacity.

Despite the compelling medical evidence of complicated pneumoconiosis, progressive massive fibrosis, the majority has determined that the survivor's award must be vacated again, because, according to an unpublished Board decision, the administrative law judge erred in not requiring that the massive lesions be comprised solely of anthracotic or pneumoconiotic material. In imposing its own definition of "massive lesions" on the parties in this case, the majority flagrantly disregards the Black Lung Benefits Act, 30 U.S.C. §921(b), in which Congress assigned the Secretary of Labor responsibility for prescribing standards under the Act. The majority also ignores the Supreme Court's description of "massive lesion" in *Usery*, and the Director's argument in *Cornelius* and *M.G.*, that massive lesions are lesions yielded by the medical condition, complicated pneumoconiosis. Lastly, the majority ignores Dr. Oesterling's testimony that the processes in the miner's lesions "have become one process…. They've fused into one area of firmer tissue than the tissue surrounding…." Employer's Exhibit 11 at 16. The majority's decision to vacate the administrative law judge's award of benefits and to impose its own definition of massive lesions is unlawful and unwise. Furthermore, by remanding the case for the administrative law judge to apply this new definition of massive lesions, the majority unnecessarily prolongs the mischief it has created because there is no evidence that the miner's lesions were composed purely of anthracotic or pneumoconiotic material. The majority's needless remand order requires that the case by considered a third time by the administrative law judge, and a third time by the Board, before the majority's error can be corrected by the Fourth Circuit, assuming that the seventy-six year old claimant has both strength and legal representation to litigate so long.

Finally, I will address the majority's determination that on remand the administrative law judge must consider Dr. Oesterling's statement that the massive lesions resulted from unspecified "confluent processes and not limited to the effects of coal mine dust" before determining whether the pneumoconiosis of this miner of more than thirty-one years arose "at least in part out of coal mine employment" pursuant to 20 C.F.R. §718.203. That determination is entirely unnecessary because the administrative law judge has properly determined that the miner's complicated pneumoconiosis, progressive massive fibrosis, produced the massive lesions in the miner's upper lobes; and the presumption applies that the miner's pneumoconiosis arose out of his thirty-one years of coal mine employment pursuant to 20 C.F.R. §718.203(b). Employer's argument that the case must be remanded for the administrative law judge to make a causation determination rests on a gross misrepresentation of the record. In its brief, employer declared: "The administrative law judge's finding that masses of complicated coal workers' pneumoconiosis do not need to be pneumoconiotic in origin is irrational and inconsistent with law." Brief for Employer at 15. That was true of the administrative

law judge in *M.G.*; it was not true of the administrative law judge in the case at bar who credited the medical opinion evidence that the massive lesions were produced by complicated pneumoconiosis, progressive massive fibrosis. Decision and Order on Remand at 9.

In sum, the administrative law judge's decision holding that claimant established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304(b) is supported by substantial evidence, accords with law and should be affirmed. The majority's decision today to vacate the administrative law judge's award of benefits is based on a usurpation of authority, without mooring in law or medical science. Furthermore, by needlessly remanding this case, the majority compounds the injustice it does to claimant by requiring her to persevere in litigation until such time as the Fourth Circuit can correct the majority's error. For these reasons, I must respectfully dissent.

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REGINA C. McGRANERY
Administrative Appeals Judge