BRB No. 06-0961 BLA

S.P. (Widow of J.P.) Claimant-Petitioner v. WESTMORELAND COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/25/2007 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5061) of Administrative Law Judge Richard A. Morgan denying benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq*. (the Act). The miner died on October 20, 2002, and claimant filed her application for survivor's benefits on September 17, 2003. Director's Exhibits 4, 14. In a decision dated August 29, 2006, the administrative law judge credited the miner with nineteen years of coal mine employment[1] and found that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(4), but failed to establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence relevant to the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), and in finding that claimant failed to meet her burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant further asserts that the administrative law judge erred in failing to redact portions of Dr. Caffrey's report, submitted by employer in response to claimant's autopsy report, pursuant to the rebuttal provision at 20 C.F.R. §725.414(a)(3)(ii). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response addressing the evidentiary issues pursuant to 20 C.F.R. §725.414.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Turning first to the issue of complicated pneumoconiosis, the regulations provide that 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 a large opacity greater than one centimeter in diameter, 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 reasonably be expected to reveal a result equivalent to (a) or (b). 20 C.F.R. §718.304(a)-

[1] The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), or complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

(c); 30 U.S.C. §921(c)(3); *see Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must, however, weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

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. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Melnick*, 16 BLR at 1-33.

Claimant initially asserts that in evaluating the medical opinion evidence relevant to 20 C.F.R. §718.304, the administrative law judge erred in finding ambiguous Dr. Cohen's statement that silicotic nodules identified on review of the autopsy slides by Dr. Kahn, measuring up to 1.2 centimeters, "would be the equivalent of category A opacities that Dr. Alexander identified radiographically." Claimant's Exhibits 2, 7; Claimant's Brief at 4. We agree. The administrative law judge has taken Dr. Cohen's statement out of context.

In evaluating the evidence relevant to the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge noted, correctly, that the record contains autopsy evidence of lesions of varying sizes, up to and including two centimeters.[3] Decision and Order at 22. The administrative law judge further noted the statements by the United States Court of Appeals for the Fourth Circuit in *Scarbro* and *Blankenship*, that the "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. *Scarbro*, 220 F.3d at 258, 22 BLR at 2-105; *Blankenship*, 177 F.3d at 244, 22 BLR at 2-561. Turning first to the inquiry of whether any of the nodules or lesions identified in the pathology evidence could constitute "massive lesions" sufficient to support a finding of complicated

[3] Dr. Kahn stated that the miner's lung tissue slides revealed several conglomerate silicotic nodules measuring up to 1.2 centimeters in diameter. Director's Exhibit 21. Dr. Green identified three lesions measuring 1.2 centimeters, 1.5 centimeters, and 2.0 centimeters in maximum dimension. Claimant's Exhibit 3. Dr. Bush identified anthrosilicotic nodules measuring up to 0.8 centimeter. Employer's Exhibits 1, 5. Dr. Caffrey identified lesions measuring up to 1.0 centimeter. Employer's Exhibit 2A.

pneumoconiosis by autopsy evidence at 20 C.F.R. §718.304(b), *i.e.* whether these nodules would equate, when x-rayed, to a showing of opacities greater than one centimeter in diameter, *see* 20 C.F.R. §718.304(a), the administrative law judge correctly stated that Dr. Cohen was the only physician who offered an opinion on this issue. Decision and Order at 22.

Dr. Cohen reviewed the affirmative autopsy report of Dr. Kahn, and opined that "[a]ccording to Dr. Kahn, the silicotic nodules measured up to 1.2 cm, which would be the equivalent of category A opacities that Dr. Alexander identified radiographically." Claimant's Exhibit 2. The administrative law judge found, however, that Dr. Alexander's opinion, referenced by Dr. Cohen, that the miner had at least pneumoconiosis 1/1, and at most, Category A, 2/2 pneumoconiosis, was "ambiguous on the matter of category A opacities." Decision and Order at 22. The administrative law judge concluded that because Dr. Cohen's opinion "expressly relies upon Dr. Alexander's finding of category A opacities," it was based on an "ambiguous factual predicate," and was, therefore, "correlatively ambiguous." Decision and Order at 22.

In his April 8, 2006 report, Dr. Cohen summarized Dr. Alexander's report, in which Dr. Alexander reviewed numerous x-rays developed between 1982 and 1999. Claimant's Exhibits 2, 7. In particular, Dr. Cohen noted Dr. Alexander's opinion that "two facts" were established by his retrospective radiologic review: first, that the miner had developed coal workers' pneumoconiosis of at least category p/q, 1/1; and second, that by 1999, the miner had also developed a "moderately severe bilateral lung disease comprising a constellation of findings including: round and irregular small opacities, bilateral upper zone large opacities, bilateral chest wall pleural thickening, a 4 x 2 c[entimeter] right posterior lower lobe mass, probable interstitial fibrosis . . . and upper lobe emphysema." Claimant's Exhibits 2, 7. Dr. Cohen then summarized Dr. Alexander's conclusion that the miner had at least coal workers' pneumoconiosis, category p/q, 1/1, "with all the subsequent pulmonary abnormalities due to superimposed infections or inflammatory lung disease (probably rheumatoid lung disease by history)," and at most, the miner's pneumoconiosis had progressed to "category A" complicated coal workers' pneumoconiosis, with the lower pleural abnormalities attributable to a superimposed infectious or inflammatory pulmonary process. Claimant's Exhibits 2, 7. Thus, contrary to the administrative law judge's findings, Dr. Cohen was clearly aware that Dr. Alexander merely considered the presence of Category A opacities to be a possible diagnosis, a worst-case scenario, and that Dr. Alexander himself did not consider the presence of Category A opacities to be one of the "two facts" established by the x-ray evidence he reviewed. Thus, we hold that the evidence does not support the administrative law judge's conclusions that Dr. Cohen "expressly relies upon Dr. Alexander's finding of category A opacities," or that Dr. Cohen's equivalency opinion is based on an "ambiguous factual predicate" rendering it "correlatively ambiguous." Decision and Order at 22; Claimant's Exhibit 2. Rather, a review of Dr. Cohen's

complete report reveals no ambiguity in his statement that the silicotic nodules identified by Dr. Kahn, measuring up to 1.2 centimeters, "would be the equivalent of category A opacities . . . ," and supports the conclusion that Dr. Cohen's reference to Dr. Alexander's report was merely illustrative.

As the administrative law judge mistakenly analyzed Dr. Cohen's opinion in finding it "correlatively ambiguous," we vacate the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304(b), and remand this case to the administrative law judge for further consideration of Dr. Cohen's equivalency determination opinion. *See* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984).

Moreover, on remand, the administrative law judge should resolve the conflicting pathology evidence regarding the existence of complicated pneumoconiosis. As noted by the administrative law judge, the autopsy physicians described lung lesions of varying sizes up to and including two centimeters, and attributed these lesions to varying conditions, including rheumatoid lung disease, Caplan's disease, and progressive massive fibrosis (PMF). Decision and Order at 10-12; Claimant's Exhibit 3; Director's Exhibit 21; Employer's Exhibits 1, 2A, 5. In addition, the autopsy and medical opinions were mixed as to whether these additional diagnosed conditions were related to coal dust exposure. Decision and Order at 10-15; Claimant's Exhibits 2, 3, 7; Director's Exhibit 21; Employer's Exhibits 1, 2A, 3, 5. In *Blankenship*, where an administrative law judge credited evidence establishing a diagnosis of "massive fibrosis" and the presence of a lesion measuring 1.3 centimeters, the court required additional evidence showing that this lesion, if x-rayed, would measure greater than one centimeter. *See Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. However, in *Scarbro*, where an administrative law judge found that the evidence established "massive lesions" measuring up to 1.7 centimeters, the Fourth Circuit affirmed the award of benefits, holding that the administrative law judge's failure to make a proper equivalency determination did not undermine the administrative law judge's ultimate conclusion that both the x-ray and autopsy evidence established complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The court stated that, given the record in that particular case, the court was "given no reason to believe that nodules of 1.7 centimeters would not produce x-ray opacities of greater than one centimeter." *Scarbro*, 220 F.3d at 258, 22 BLR at 2-105. Most recently, in *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006), where the evidence included a diagnosis of PMF and lung lesions measuring four and six centimeters, the court held that these determinations "may only lead one to conclude that massive lesions were present . . . sufficient to trigger the presumption under (b) of 20 C.F.R. §718.304." *Perry*, 469 F.3d at 365, 23 BLR at 2-384-85. Thus, in addition to reconsidering Dr.

Cohen's medical opinion to determine whether it supports an equivalency determination, the administrative law judge should also resolve the conflicting pathology evidence as to the size of the lesions present and whether they represent PMF, or some other condition, and consider this evidence in light of the above-referenced statements in *Scarbro* and *Perry*. Finally, the administrative law judge must consider the pathology evidence, together with the x-ray, computerized tomography scan, and medical opinion evidence of record, to determine whether the evidence establishes invocation of the irrebuttable presumption at 20 C.F.R. §718.304. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Braenovich v. Cannelton Industries*, 22 BLR 1-236, 1-239 (2003). On remand, the administrative law judge must reconsider the evidence supporting equivalency, and must further consider all of the relevant evidence under 20 C.F.R. §718.304(a), (b), and (c).

Claimant next challenges the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In evaluating the medical evidence at 20 C.F.R. §718.205(c), the administrative law judge found that Drs. Kahn, Cohen, Bush, Caffrey and Castle all addressed the cause of the miner's death, but that Dr. Green "offer[ed] no opinion on the cause of death." Decision and Order at 24 n.44. The administrative law judge accorded greatest weight to Dr. Caffrey's opinion as the most reasoned and documented on this issue, but emphasized that "more importantly . . . no physician has provided a report worthy of credit" that supports the position that pneumoconiosis contributed to the miner's death. Decision and Order at 24-25.

Claimant initially contends that the administrative law judge erred in finding that Dr. Green did not offer an opinion on the cause of death. Claimant's Brief at 11; Decision and Order at 24 n.44. Claimant's contention has merit. The record reflects that

the cause of the miner's death was largely respiratory.[4] Dr. Green opined that the miner had both simple and complicated pneumoconiosis, and dust-induced emphysema, which combined, would have caused significant pulmonary impairment. Dr. Green concluded: "Based on the severity of these pathologic findings, both pneumoconiosis/silicosis and dust induced emphysema undoubtedly had an adverse effect on this patient's lung function and contributed significantly to his respiratory failure." Claimant's Exhibit 3. As claimant contends, because the miner died of respiratory failure, and because Dr. Green opined that pneumoconiosis contributed to the miner's respiratory failure, Dr. Green's opinion is relevant to the issue of whether pneumoconiosis contributed to the miner's death. Therefore, the administrative law judge erred in failing to consider Dr. Green's opinion pursuant to 20 C.F.R. §718.205(c). *See Johnson v. Califano*, 585 F.2d 89, 90 (4th Cir. 1978); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979).

Claimant further asserts that the administrative law judge mischaracterized the opinion of Dr. Cohen when he found that Dr. Cohen "relie[d] largely on epidemiologic studies" and "did not . . . reference specific evidence from the miner's condition" in supporting his conclusion that pneumoconiosis contributed to the miner's death. We agree. Contrary to the administrative law judge's finding, Dr. Cohen relied on the miner's specific test results to exclude the miner's asthma and rheumatoid lung disease as other possible causes of death, and further relied on the "pathologic evidence of both coal workers' pneumoconiosis and significant silicosis" to support his conclusion that the miner's "exposure to coal mine dust substantially contributed to his respiratory failure and his death." Claimant's Exhibit 2; Claimant's Brief at 13-14.

As Dr. Cohen's opinion reflects that he relied on the objective evidence of obstructive lung disease and the pathologic evidence of coal workers' pneumoconiosis to support his conclusion that pneumoconiosis contributed to the miner's death, we hold that the administrative law judge mischaracterized Dr. Cohen's opinion as being based on "documentation [which] is overly generalized" and failing to "reference specific evidence from the miner's condition." *See Tackett*, 7 BLR at 1-706; *Branham*, 2 BLR at 1-113.

[4] In the sixteen months prior to his death, the miner was hospitalized nine times for respiratory insufficiency; the death summary lists respiratory failure, severe congestive heart failure, severe chronic obstructive pulmonary disease (COPD), diabetes, coal workers pneumoconiosis, and cor-pulmonale as the first six diagnoses; the death certificate lists COPD as the immediate cause of death; the autopsy prosector lists bronchopneumonia among the final diagnoses; and the miner died of respiratory failure after declining to be placed on a ventilator. Drs. Cohen, Green, and Bush, each described what happened to the miner at the end of his life as "respiratory failure." Claimant's Exhibits 2, 3; Employer's Exhibit 1.

Finally, claimant contends that the administrative law judge erred, pursuant to 20 C.F.R. §725.414, in his consideration of Dr. Caffrey's opinion, which was submitted by employer in rebuttal to claimant's affirmative case autopsy report by Dr. Kahn.[5] Claimant's contention has merit. The administrative law judge initially determined that, for the purposes of the evidentiary limitations at 20 C.F.R. §725.414, an autopsy report is one that is based on the pathology tissue slides and the gross macroscopic and microscopic descriptions of the lungs. Decision and Order at 9, 10 n.18, 11 n.24. Applying this definition of an autopsy report, the administrative law judge stated that he would redact Dr. Caffrey's references to, and derivative conclusions from, his review of "the entire prosector's report, the miner's occupational history, the death certificate, and various pieces of correspondence." Decision and Order at 11 n.24.

As claimant and the Director contend, however, in weighing Dr. Caffrey's report, the administrative law judge specifically credited his opinion because the physician "supported his characterization of the degree of [coal workers' pneumoconiosis] with reference to the prosector's report, Dr. Kahn's report, and his own slide review," and explained his opinion as to the relative effect of pneumoconiosis, as opposed to the miner's other conditions, on death, with references to several medical treatises. Decision and Order at 24. As the Director correctly contends, it is unclear whether, as claimant alleges, the administrative law judge credited Dr. Caffrey because the administrative law judge believed the physician's opinion was supported by the extraneous evidence he reviewed (which the administrative law judge earlier said he would redact) or whether the administrative law judge credited Dr. Caffrey's opinion based solely on the strength of the physician's review of the prosector's gross description, Dr. Kahn's 2004 autopsy report, and the tissue slides. Therefore, the administrative law judge's analysis of Dr. Caffrey's opinion fails to comport with the APA. *See* 5 U.S.C. §557(c)(3)(A).

In addition, subsequent to the issuance of the administrative law judge's decision, the Board held, in *Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229 (2007)(*en banc*), that an autopsy rebuttal opinion may be based on evidence that is within the scope of the autopsy submitted by claimant. Thus, on remand, the administrative law judge need redact only those portions of Dr. Caffrey's rebuttal opinion that he determines exceed the scope of the affirmative autopsy opinion offered by claimant.[6] In light of the foregoing,

[5] Dr. Kahn is not the autopsy prosector. Claimant chose to submit Dr. Kahn's autopsy opinion in lieu of the autopsy prosector's opinion. However, the administrative law judge found that the prosector's opinion is admissible evidence because it is included in the hospital treatment notes. Decision and Order at 2-3, 9.

[6] The Board further held in *Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229 (2007)(*en banc*), that an autopsy opinion may be based exclusively on the microscopic tissue samples.

we vacate the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge