BRB No. 02-0741 BLA

MILDRED GOLLIE (Widow of JOE GOLLIE) Claimant-Petitioner v. ELKAY MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))	DATE ISSUED: 07/31/2003 DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand B Denying Benefits (97-BLA-0891) of Administrative Law Judge Daniel L. Leland on a survivor=s claim[2] filed pursuant to

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[1]Claimant is the surviving spouse of the miner, who died on June 8, 1996. The miner=s death certificate, signed by Dr. Bae, indicates the cause of the miner=s death was cardio-respiratory arrest, and that lung cancer and arteriosclerotic heart disease were underlying causes. Director=s Exhibit 22.

[2]The miner originally filed a claim on July 31, 1990. Director=s Exhibit 35. In a Decision and Order dated November 1, 1995, Administrative Law Judge John C. Holmes noted that employer stipulated that the miner established the existence of simple

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).[3] This case is before the Board for the third time. In the initial Decision and Order dated July 30, 1999, the administrative law judge noted that employer stipulated that the miner worked for thirty years in coal mine employment and suffered from simple coal workers= pneumoconiosis. The administrative law judge then found the evidence sufficient to establish the existence of complicated pneumoconiosis, and, therefore, sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis set out at 20 C.F.R. '718.304 (2000). Consequently, the administrative law judge awarded benefits. Employer appealed. The Board vacated the administrative law judge=s finding that claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304 (2000), and remanded the case for reconsideration of all the relevant evidence in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Bethenergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996), as well as the Fourth Circuit=s decisions in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, --- BLR --- (4th Cir. 1999), and *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).[4] *Gollie v. Elkay Mining Corp.*, BRB No. 99-1217 BLA (Nov. 2, 2000)(unpublished).

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pneumoconiosis. *Id*. Judge Holmes denied the miner=s claim, however, based upon the miner=s failure to establish total disability due to pneumoconiosis under 20 C.F.R. '718.204 (2000) or the existence of complicated pneumoconiosis under 20 C.F.R. '718.304 (2000). *Id*. The miner took no further action in pursuit of benefits.

[3]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4]Because the miner=s coal mine employment occurred in West Virginia, the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See*

The Board further instructed the administrative law judge to address the issue of etiology of the miner=s pneumoconiosis at 20 C.F.R. '718.203(b) (2000), if reached. *Id*.

Shupe v. Director, OWCP, 12 BLR 1-200 (1989)(*en banc*).

In a Decision and Order on Remand dated February 1, 2001, the administrative law judge found that none of the evidence which was previously developed in the miner=s claim B *i.e.*, neither the x-ray evidence nor the pathological evidence B established invocation of the irrebuttable presumption under Section 718.304 (2000). However, the administrative law judge found the medical opinions of Drs. Naeye and Kleinerman, which are based upon a review of the autopsy slides, sufficient to establish invocation of the irrebuttable presumption under Section 718.304 (2000). The administrative law judge accorded greatest weight to the opinions of Drs. Naeye and Kleinerman on the basis that the two doctors are experts in the field of the pathology of occupational lung diseases. The administrative law judge also found that claimant established that the miner=s pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. '718.203(b) (2000). Consequently, the administrative law judge awarded benefits. The Board vacated the administrative law judge=s finding under Section 718.304 (2000), holding that the administrative law judge did not properly make the requisite equivalency determination in finding the opinions of Drs. Naeye and Kleinerman sufficient to establish invocation of the irrebuttable presumption. *Gollie v. Elkay Mining Corp.*, BRB No. 01-0507 BLA (Mar. 29, 2002)(unpublished). The Board remanded the case for the administrative law judge to reconsider all the relevant evidence and to determine its sufficiency to establish invocation of the irrebuttable presumption pursuant to Section 718.304 (2000).[5] *Id.*

On remand for the second time, the administrative law judge found the opinions of Drs. Naeye and Kleinerman insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis under Section 718.304, as neither doctor=s opinion supported the requisite equivalency determination pursuant to *Blankenship*. The administrative law judge also found that the remaining pathologists= opinions do not support the requisite equivalency determination, and that, therefore, the evidence was insufficient to establish invocation of the irrebuttable presumption under Section 718.304. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that it is inappropriate for the Fourth Circuit to have adopted the equivalency determination standard for establishing complicated pneumoconiosis. Claimant further argues, in the alternative, that, even if the equivalency standard is an appropriate legal standard, the administrative law judge improperly concluded that the opinions of Drs. Naeye and Kleinerman do not meet the standard. Finally, claimant contends that, because the court=s holding in *Blankenship*, wherein the court held that an equivalency determination must be made, represents new law, this case should be remanded with both parties granted appropriate time for submission of

[5]In vacating the administrative law judge=s finding at 20 C.F.R. '718.304 (2000), the Board also vacated the administrative law judge=s finding that the miner=s pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. '718.203(b) (2000). *Gollie v. Elkay Mining Corp.*, BRB No. 01-0507 BLA (Mar. 29, 2002)(unpublished). The Board held that this finding, which was unchallenged on appeal, was subject to reinstatement by the administrative law judge, should he again find invocation of the irrebuttable presumption established at Section 718.304 (2000) on remand. *Id.*

evidence relative to the new standard. Employer responds in support of the administrative law judge=s decision denying benefits. The Director, Office of Workers= Compensation Programs, has filed a letter indicating he does not presently intend to participate in the proceedings on 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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. '921(b)(3), as incorporated by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, claimant first contends that the equivalency determination analysis, applied by the administrative law judge on remand pursuant to the Board=s remand instruction and the Fourth Circuit=s decisions in *Scarbro* and *Blankenship*, is an inappropriate legal standard for determining the existence of complicated pneumoconiosis. Claimant argues that the Fourth Circuit=s requirement that an equivalency determination analysis be made is inconsistent with 30 U.S.C. '921(c)(3), and the implementing regulations at Section 718.304(a)-(c), which provide for alternative methods for establishing complicated pneumoconiosis; namely, that a finding of complicated pneumoconiosis may be based upon either: (a) a finding of opacities greater than one centimeter on x-ray; (b) a finding of massive lesions diagnosed by biopsy or autopsy; or (c) a finding of a condition which could reasonably be expected to yield the results described in method (a) or (b) based upon a diagnosis made in accordance with acceptable medical procedures other than an x-ray, biopsy or autopsy. *See* 30 U.S.C. '921(c)(3); 20 C.F.R. '718.304(a)-(c). Claimant further argues that a determination of the existence of complicated pneumoconiosis pursuant to Section 718.304(a)-(c) necessitates that all relevant evidence be weighed, similar to the weighing of evidence under the various methods of establishing the existence of simple pneumoconiosis under 20 C.F.R. '718.202(a)(1)-(4), as mandated by the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Claimant asserts that, moreover, the equivalency determination is inappropriate where progressive massive fibrosis is established, since the United States Supreme Court noted in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), that complicated pneumoconiosis involves progressive massive fibrosis, and because the regulatory definition of pneumoconiosis at 20 C.F.R. '718.201 includes progressive massive fibrosis.

Contrary to claimant=s contention, the Fourth Circuit, in requiring an equivalency determination in *Blankenship*, recognized that 30 U.S.C. '921(c)(3) and the regulations at Section 718.304(a)-(c) provide for alternative means of establishing complicated pneumoconiosis. The court stated that:

> because clauses (A), (B), and (C) of ' 921(c)(3) are three different ways of diagnosing complicated pneumoconiosis, in construing the requirements of each, one must perform equivalency determinations to make certain that regardless of which diagnostic technique is used, the same underlying

condition triggers the irrebuttable presumption. In other words, the same condition that triggers the presumption by producing opacities greater than one centimeter in diameter on an x-ray should be considered "massive lesions" under the statute if diagnosed through biopsy.

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Logic commands that prongs (A) and (B) be similarly equivalent. Any other rule would lead to the irrational result that the determination of whether a miner has totally disabling pneumoconiosis could turn on the method of diagnosis rather than on the severity of his disease.

Blankenship, 177 F.3d at 243.

The court has also addressed the necessity that all relevant evidence be weighed in establishing the existence of complicated pneumoconiosis similar to the weighing of evidence required for establishing the existence of simple pneumoconiosis pursuant to *Compton*. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100-101; *Blankenship*, 177 F.3d at 243-244. In addition, contrary to claimant=s contention, the fact that the miner was diagnosed with progressive massive fibrosis based upon autopsy findings does not negate the requirement that the equivalency determination be made. Moreover, the Board does not have the authority to overrule the Fourth Circuit=s requirement that an equivalency analysis be conducted, as the Board=s decisions are subject to review by the United States Courts of Appeals.[6] *See* 33 U.S.C. '921(c), as incorporated by 30 U.S.C. '932(a); 20 C.F.R.

[6]Claimant argues that the United States Court of Appeals for the Sixth Circuit held in *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999), that complicated pneumoconiosis may be established by the finding of massive lesions without any requirement of an equivalency determination. In *Gray*, the court held that a one-centimeter nodule which appeared on the miner=s autopsy slides could only justify invocation of the presumption if a physician provided an opinion that such a nodule would produce an opacity of greater than one centimeter if viewed by x-ray, *or* an opinion that such a nodule constitutes a massive lesion. *Gray*, 176 F.3d at 390, 21 BLR at 2-629-630. Because the doctor=s opinion at issue in *Gray* did not indicate that the one centimeter nodule viewed by autopsy was a Amassive lesion,@ that doctor=s opinion was held to be insufficient to establish invocation of the irrebuttable presumption under 20 C.F.R. '718.304 (2000). *Id.* While the record in the instant case includes Dr. Dy=s autopsy findings of massive lesions indicative of progressive massive fibrosis, Director=s Exhibit 23, we need not address claimant=s suggestion that this evidence is sufficient to establish the existence of complicated pneumoconiosis under Section 718.304 in light of *Gray*. The United States Court of Appeals for the Fourth Circuit, which has jurisidiction in the instant case, has mandated that the equivalency determination must be made to support a finding of invocation of the irrebuttable presumption under Section 718.304. *Eastern Associated Coal Corp. v. Director, OWCP*

' 802.410. Accordingly, we reject claimant=s contention that it was inappropriate for the administrative law judge to undertake an analysis of whether there was an equivalency determination in considering whether claimant established the existence of complicated pneumoconiosis and the consequent invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304.

Claimant argues, in the alternative, that if the administrative law judge did apply the appropriate legal standard, he erred in finding that the testimony of Drs. Naeye and Kleinerman did not support an equivalency determination. We disagree. The administrative law judge properly found that Dr. Naeye=s deposition testimony, that a twelve millimeter nodule viewed on the miner=s 1990 lobectomy and two centimeter lesions viewed on the autopsy slides would Alook like complicated pneumoconiosis on x-ray,@

[*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, --- BLR --- (4th Cir. 1999).

[7] Employer=s Exhibit 9 at 18, Afalls short of a specific finding that these lesions would be seen as at least one centimeter opacities on x-ray.@ 2002 Decision and Order on Remand at 2; Employer=s Exhibit 9. The administrative law judge also properly found Dr. Kleinerman=s opinion and testimony not supportive of an equivalency finding, as Dr. Kleinerman never indicated that there were lesions viewed on autopsy that would be seen as at least one centimeter opacities on x-ray.
[8] 2002 Decision and Order on Remand at 2; Employer=s Exhibits 10, 12. Furthermore, the administrative law judge correctly found that the opinions of the other pathologists of record also fail to support an equivalency determination and invocation of the Section 718.304 presumption pursuant to *Blankenship*, and claimant does not contend otherwise on appeal. 2002 Decision and Order on Remand at 2. Accordingly, we affirm the administrative law judge=s finding that the evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a)-(c).

Finally, claimant argues that this case should be remanded to the administrative law judge for the development of additional evidence relevant to the equivalency determination requirement adopted in *Blankenship*. Claimant did not raise this argument before the administrative law judge, however, when the case was remanded previously by the Board in November 2000 and March 2002, subsequent to the court=s decision in *Blankenship*, which was issued in 1999. Consequently, claimant waived her right to argue that the requirement of the Fourth Circuit in *Blankenship,* that the physicians perform an equivalency determination between the autopsy and x-ray evidence, represents a change in the law requiring remand for further evidentiary development. *See Chaffin v. Peter Cave Coal Co,* BRB No. 02-0643 BLA (June 17, 2003)(published), slip op. at 3-4.

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[7] Dr. Naeye indicated in his April 19, 1995 report that, with regard to the 1990 lobectomy, masses of carcinoma engulfed anthracotic micro and macronodules, and that, in combination, some of these masses might have been large enough on gross examination and x-ray to appear to be complicated pneumoconiosis. Employer=s Exhibit 1. Dr. Naeye further indicated that the masses were not complicated pneumoconiosis, however, but rather a combination of simple pneumoconiosis and carcinoma. *Id.* Similarly, in his 1998 deposition, Dr. Naeye testified that, with regard to the autopsy slides, the two centimeter lesion found on autopsy was comprised of micro and macronodules which joined together, and which indicated a disease process different from features associated with complicated pneumoconiosis, namely, simple pneumoconiosis and carcinoma. Employer=s Exhibit 9 at 19-20.

[8] In his deposition, Dr. Kleinerman discussed a 1.5 centimeter nodule which he identified on a 1992 x-ray and characterized as a tumor. Employer=s Exhibit 10 at 67-68.

Accordingly, the administrative law judge=s Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge