U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0046 BLA

THERESA C. KIRKPATRICK (Widow of WILLIAM G. KIRKPATRICK) Claimant-Petitioner v. RUSHTON MINING COMPANY and PENNSYLVANIA POWER & LIGHT Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/27/2021 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for Employer/Carrier.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals Administrative Law Judge Drew A. Swank's Decision and Order Denying Benefits on Remand (2016-BLA-05670) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on May 12, 2015 and is before the Benefits Review Board for the second time.

In his August 28, 2017 Decision and Order, the administrative law judge found Claimant did not establish the Miner had complicated pneumoconiosis and thus could not invoke the irrebuttable presumption that his death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). He further found Claimant established the Miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. Therefore, he found Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found Employer did not rebut the presumption and awarded benefits.

In response to Employer's appeal, the Board affirmed the administrative law judge's finding the Miner had at least fifteen years of qualifying coal mine employment. *Kirkpatrick v. Rushton Mining Co.*, BRB No. 18-0010 BLA, slip op. at 2 n.5 (Nov. 15, 2018) (unpub.). It vacated, however, his finding that Claimant established the Miner was totally disabled at 20 C.F.R. §718.204(b)(2) and thus invoked the Section 411(c)(4) presumption. *Id.*, slip op. at 4-5. The Board also vacated his findings that Claimant failed to establish the Miner had complicated pneumoconiosis at 20 C.F.R. §718.304 and therefore could not invoke the irrebuttable presumption at Section 411(c)(3). *Id.*, slip op. at 5-6. Thus, the Board remanded the case to the administrative law judge to consider whether Claimant invoked the Section 411(c)(3) or Section 411(c)(4) presumption or is entitled to benefits under 20 C.F.R. Part 718. *Id*., slip op. at 6.

On remand, the administrative law judge found Claimant did not establish the Miner had complicated pneumoconiosis and therefore could not invoke the Section 411(c)(3) presumption. Decision and Order on Remand at 13. He further found Claimant did not establish the Miner was totally disabled and thus could not invoke the Section 411(c)(4) presumption. *Id*. at 19. Considering whether Claimant could establish entitlement to benefits without the presumptions, the administrative law judge found she established the Miner had simple clinical and legal pneumoconiosis arising out of his coal mine

[1] Claimant is the widow of the Miner, who died on October 10, 2014. Director's Exhibit 5. The Miner's death certification lists his immediate cause of death as acute respiratory distress syndrome and shock due to pneumonia and bilateral lung consolidation due, in turn, to lymphoma and neutropenia. Director's Exhibit 4.

employment at 20 C.F.R. §§718.202(a), 718.203(b), but did not establish the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.205 and denied benefits. *Id.* at 23-24, 28-29, 32-33.

On appeal, Claimant argues the administrative law judge erred in finding she did not establish the Miner had complicated pneumoconiosis or a totally disabling respiratory impairment at the time of his death. Employer filed a response in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner's death was due to pneumoconiosis if he 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 that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. The administrative law judge must weigh together the evidence at subsections (a), (b), and (c) to determine if a claimant has invoked the irrebuttable presumption. *See Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc). Autopsy evidence can support a finding of complicated pneumoconiosis where a physician diagnoses massive lesions or where an

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant did not establish the Miner's pneumoconiosis was a substantially contributing cause of his death at 20 C.F.R. §718.205. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit as the Miner's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4.

evidentiary basis exists for the administrative law judge to make an equivalency determination between the autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304(b); *Clites v. J & L Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981).

The administrative law judge found the chest x-rays do not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a), the autopsy and biopsy evidence does not establish complicated pneumoconiosis at 20 C.F.R. §718.304(b), and the computed tomography (CT) scans, treatment records, and medical opinions do not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c). Therefore, he found Claimant failed to invoke the irrebuttable presumption at Section 411(c)(3).

Claimant contends the administrative law judge erred in weighing the biopsy and autopsy evidence at 20 C.F.R. §718.304(b). Claimant's Brief at 6-9. We agree.

The administrative law judge addressed the pathology opinions of Drs. Heggere, Qian, Oesterling, Swedarsky, and Perper. Dr. Heggere diagnosed simple coal workers' pneumoconiosis based on slides from a biopsy of the left upper lobe of the Miner's lung taken on January 19, 2010. Director's Exhibit 4. Dr. Qian conducted the Miner's autopsy on October 11, 2014 and, based on slides of lung tissue, observed "anthrasilicotic pigment laden macrophages" which formed "macules measuring up to 1.0 cm and micronodules measuring up to 5.0 mm." Director's Exhibit 5. He diagnosed "severe simple coal workers' pneumoconiosis with moderate to severe chronic interstitial pneumonitis with pulmonary fibrosis." *Id*. Drs. Oesterling, Swedarsky, and Perper also reviewed autopsy slides of lung tissue. Dr. Oesterling diagnosed moderate micronodular predominately pleural-based simple coal workers' pneumoconiosis, minimal centrilobular pulmonary emphysema, extensive alveolar damage, and interstitial fibrosis not due to coal dust. Employer's Exhibits 2, 4 at 46, 47, 56. Dr. Swedarsky diagnosed simple coal workers' pneumoconiosis, mild to moderate emphysema, diffuse alveolar damage, and mild to moderate patchy interstitial pulmonary fibrosis. Employer's Exhibits 1, 3 at 31, 32. He found no evidence of complicated coal workers' pneumoconiosis. *Id*. In contrast, Dr. Perper diagnosed complicated pneumoconiosis based on finding "2 silicotic nodules merged by a wide fibro-anthracotic bridge into a pneumoconiotic nodular areas (sic) exceeding 1.0 cm in maximal dimension." Director's Exhibit 4.

The administrative law judge credited the opinions of Drs. Heggere, Qian, Oesterling, and Swedarsky because he found they are well-documented and reasoned. Decision and Order on Remand at 12. Weighing the conflicting evidence, he found the preponderance of the pathology evidence does not establish complicated pneumoconiosis. *Id.*

Citing *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991), Claimant asserts the administrative law judge erred in finding Dr. Qian's opinion does not support a finding of complicated pneumoconiosis. Claimant's Brief at 6-8. Although Dr. Qian described his findings as "severe simple coal workers' pneumoconiosis," Claimant argues his observation of pneumoconiosis nodules measuring up to one centimeter satisfies the statutory criteria for complicated pneumoconiosis. Claimant's Brief at 6-8.

Claimant's assertion has merit. In *Gruller*, the Board affirmed an administrative law judge's finding that the evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(b) based on an autopsy prosector's diagnosis of complicated pneumoconiosis and identification of lesions measuring "up to 1.0 cm in diameter." *Gruller*, 16 BLR at 1-5. In this case, Dr. Qian similarly found the Miner had macules measuring "up to 1.0 centimeter." Director's Exhibit 4. A doctor's opinion does not need to specifically identify either complicated pneumoconiosis or massive lesions; it is sufficient if the doctor identifies lesions of pneumoconiosis that meet the standards set forth in 20 C.F.R. §718.304. *See Clites*, 663 F.2d at 16; *see also The Pittsburg & Midway Coal Mining Co. v. Director, OWCP*, 508 F.3d 975, 987 (11th Cir. 2007) (citing with approval the Board's holding in *Gruller* that irrebuttable presumption invoked based on identification of lesions measuring up to 1.0 cm); *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 364-65 (4th Cir. 2006) (diagnosis of a "massive" opacity "becomes a proxy for the tissue mass characteristic of complicated pneumoconiosis" and satisfies the "statutory ground for application of the presumption").

Moreover, Dr. Perper's identification of complicated pneumoconiosis in the form of nodules measuring greater than 1.0 cm in diameter provides additional support that the nodules observed by Dr. Qian meet the regulatory standards for complicated pneumoconiosis. *See Clites*, 663 F.2d at 16. Dr. Perper opined:

> [T]he current criteria for diagnosing complicated coal workers pneumoconiosis, and clearly supported by the medical literature, consider an actual pathological lesion of 1.0 cm or larger sufficient to qualify for a nodule of complicated coal workers pneumoconiosis (Progressive Massive Fibrosis) *and equivalent with a radiological lesion of the same size*.

Director's Exhibit 4 at 39 (emphasis added). He also provided reasons that "a pathological lesion of 1.0 cm is equivalent to a radiological lesion of 1.0 cm or larger, which is clearly the medico-legal standard for diagnosing complicated coal workers' pneumoconiosis . . . ." *Id*. at 39-40. Thus, the administrative law judge erred in finding Dr. Qian's description of "macules measuring up to 1.0 cm" does not establish complicated pneumoconiosis because he did not specifically identify the opacities as "complicated pneumoconiosis." *See, e.g., Pittsburg & Midway Coal Mining Co*, 508 F.3d at 987 (physician need not employ "magic

words" – it is sufficient if the autopsy slides are consistent with a diagnosis of complicated pneumoconiosis under "accepted medical standards.")

Claimant also argues the administrative law judge erred in crediting Dr. Oesterling's and Dr. Swedarsky's opinions over Dr. Perper's. The administrative law judge noted Dr. Perper attempted to discredit Drs. Oesterling and Swedarsky based on how they measured micronodules on autopsy slides. Decision and Order on Remand at 12. He stated Dr. Perper alleged Drs. Oesterling and Swedarsky used "eyeball measurements" as opposed to an electronic ruler to determine the size of lesions. *Id*.; Claimant's Exhibit 2. He further noted Drs. Oesterling and Swedarsky explained while they do not use electronic rulers like Dr. Perper, micrometer mechanisms are built into their microscope eyepieces to measure lesions. Decision and Order on Remand at 12; Employer's Exhibits 3 at 55-59; 4 at 53-5. The administrative law judge found Drs. Oesterling and Swedarsky "sufficiently explained" how they measured the Miner's micronodules and other opacities and found their opinions entitled to greater weight than Dr. Perper's because he determined the CT scans and x-rays from treatment records support them. Decision and Order on Remand at 12. We agree with Claimant's argument that his weighing of the medical opinions cannot be affirmed.

To the extent the administrative law judge intended to give greater weight to the x-rays and CT scans over the autopsy reports, he did not explain his basis for doing so. The Board has recognized that autopsy evidence is generally the most reliable evidence for determining the existence of pneumoconiosis. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Moreover, while the administrative law judge found Drs. Oesterling and Swedarsky explained how they measured the opacities, he did not address any of the other rationales they and Dr. Perper provided for why they did or did not diagnose complicated pneumoconiosis. Thus, the administrative law judge has not adequately explained the basis for his finding that Dr. Oesterling's and Dr. Swedarsky's opinions as to the autopsy evidence are well-documented, well-reasoned, and entitled to greater weight than the contrary opinions of Drs. Perper and Qian. Decision and Order on Remand at 12; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In view of the foregoing, we vacate the administrative law judge's finding that Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304(b) and remand the case for further consideration of the evidence. Thus, we also vacate his finding that Claimant failed to invoke the irrebuttable presumption at Section 411(c)(3).

On remand, the administrative law judge must reconsider whether the autopsy evidence establishes complicated pneumoconiosis. He must critically examine all the relevant medical evidence, resolve the conflict in the physicians' opinions, and explain his

weighing of the evidence in accordance with the requirements of the Administrative Procedure Act.[4] 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); *Wojtowicz*, 12 BLR at 1-165. He must also weigh together the evidence at subsections (a)-(c) before determining whether Claimant met her burden of proving the Miner had complicated pneumoconiosis by a preponderance of the evidence. *See Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34.

Invocation of the Section 411(c)(4) Presumption—Total Disability

In the interest of judicial economy, we address Claimant's arguments on total disability. Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1).

A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Claimant contends the administrative law judge erred in finding she did not establish the Miner was totally disabled based on the blood gas study and medical opinion evidence.[5] We disagree.

[4] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A).

[5] We affirm, as unchallenged, the administrative law judge's findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 14, 16.

The administrative law judge addressed the results of nineteen blood gas studies contained in the Miner's treatment records, performed on July 28, 2013, July 29, 2013, and October 4, 5, 6, 7, 8, and 9, 2014. Director's Exhibit 4. Dr. Crawford conducted all of the studies at rest. *Id*. Eleven studies administered on July 28, 2013, July 29, 2013, and October 4, 5, 8, and 9, 2014 produced non-qualifying results.[6] *Id*. Three studies administered on October 6, 2014 produced qualifying results while one study administered that same date produced non-qualifying results. *Id*. Finally, one study administered on October 7, 2014 produced qualifying results while three studies administered that same date produced non-qualifying results. *Id*. The administrative law judge found each of the qualifying blood gas studies administered from October 4, 2014 to October 9, 2014 unreliable.[7] Decision and Order on Remand at 15-16. Thus, he found the blood gas study evidence does not establish total disability.

We reject Claimant's assertion that the administrative law judge erred in discrediting the "four qualifying [blood gas studies] taken in the last four full days of the miner's life." Claimant's Brief at 4. The administrative law judge properly assigned little weight to these studies, which were obtained during the Miner's final hospitalization from October 4, 2014 to October 9, 2014.[8] The regulation at 20 C.F.R. §718.105(d) provides that:

> If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied

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[6] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[7] Because all the blood gas studies in this case are contained in the Miner's treatment records, the quality standards set forth at Appendix C and 20 C.F.R. §718.105 do not strictly apply. *See* 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Despite the inapplicability of the specific quality standards, however, an administrative law judge must still determine if the arterial blood gas study results are sufficiently reliable to support a finding of total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[8] The Miner was admitted to Conemaugh Valley Memorial Hospital on October 3, 2014 with acute respiratory status and septic shock secondary to pneumonia and neutropenia, and he was intubated. Director's Exhibit 4. The Miner died in the hospital on October 10, 2014. *Id*.

> by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. *Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death*.

20 C.F.R. §718.105(d) (emphasis added). Because the administrative law judge correctly found no report in the record satisfies the requirements of 20 C.F.R. §718.105(d), we affirm his finding that Claimant did not establish the Miner was totally disabled at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order on Remand at 16.

With regard to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge addressed the opinions of Drs. Qian, Oesterling, Perper, and Swedarsky. He correctly noted Dr. Swedarsky is the only physician to opine on whether the Miner was disabled prior to his death.[9] Decision and Order on Remand at 18. Dr. Swedarsky noted the May 14, 2013 and June 18, 2013 pulmonary function studies demonstrated normal spirometry, normal lung volumes, and mildly to moderately reduced diffusion capacity. Employer's Exhibit 1. He found "no suggestion that [the Miner] suffered a primary respiratory disability."[10] *Id*. The administrative law judge found Dr. Swedarsky's opinion well-documented and reasoned.[11] Decision and Order on Remand at 18; *see Balsavage*, 295 F.3d at 396. Because substantial evidence supports it, we affirm the administrative law judge's finding that Claimant did not establish the Miner was totally disabled at 20 C.F.R. §718.204(b)(2)(iv).

Based on our affirmance of the administrative law judge's finding that the Miner did not have a totally disabling respiratory or pulmonary impairment at the time of his death, we affirm his finding that Claimant did not invoke the Section 411(c)(4) presumption.

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[9] Drs. Qian, Oesterling, and Perper did not render opinions on whether the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. Decision and Order on Remand at 18.

[10] Dr. Swedarsky further found no objective evidence of a respiratory impairment due to mild to moderate emphysema and simple coal workers' pneumoconiosis. Employer's Exhibit 1.

[11] The administrative law judge also noted the treatment records support Dr. Swedarsky's opinion on total disability. Decision and Order on Remand at 18.

If Claimant establishes complicated pneumoconiosis on remand, the administrative law judge must determine whether the complicated pneumoconiosis arose out of the Miner's coal mine employment at 20 C.F.R. §718.203, before concluding she is entitled to the irrebuttable presumption that his death was due to pneumoconiosis.[12] If the administrative law judge determines Claimant does not establish the Miner had complicated pneumoconiosis, however, he must deny benefits in view of our affirmance of his findings that Claimant did not invoke the Section 411(c)(4) presumption or establish the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.205, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

[12] The Miner's pneumoconiosis is presumed to have arisen out of his coal mine employment based on the administrative law judge's uncontested finding of more than fifteen years of coal mine employment. 20 C.F.R. §718.203(b).

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order Denying Benefits on Remand. We remand the case for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge