

BRB No. 07-1000 BLA

D.S.)
(Widow of C.S.))
)
Claimant-Petitioner)
)
v.)
)
WESTMORELAND COAL COMPANY)
) DATE ISSUED: 09/30/2008
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Stephen L. Purcell, Associate Chief Judge, United States Department of Labor.

D. S., Rock, West Virginia, *pro se*.¹

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

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

¹ Brenda Yates, Benefits Counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

McGRANERY, Administrative Appeals Judge:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (2006-BLA-06069) of Associate Chief Judge Stephen L. Purcell rendered 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).² The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, credited the miner with eight years of coal mine employment, and found that the miner suffered from simple coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), and 718.203(c). The administrative law judge also found, however, that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he denied benefits.

On appeal, claimant generally contends that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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, 1-87-88 (1983). The requirement that claimant establish that the miner's death was due to pneumoconiosis can be satisfied by evidence

² The miner died on August 31, 2005. Director's Exhibit 14. Claimant, the miner's widow, filed an application for survivor's benefits on December 5, 2005. Director's Exhibit 2.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

demonstrating that the miner suffered from complicated pneumoconiosis, thereby invoking the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304. In cases in which the irrebuttable presumption is not invoked and pneumoconiosis was not the direct cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

As an initial matter, we affirm the administrative law judge's findings that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2), (4), and 718.203(b), as these findings are not adverse to claimant and are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9, 10. In considering the evidence relevant to the existence of simple pneumoconiosis, the administrative law judge also rendered a finding that the evidence of record was insufficient to establish that the miner suffered from complicated pneumoconiosis, thereby precluding invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. *Id.* at 9. The administrative law judge noted that Dr. Plata's pathology report included diagnoses of simple pneumoconiosis and complicated pneumoconiosis. Decision and Order at 9; Director's Exhibit 15. The administrative law judge determined that Dr. Plata's report was insufficient to establish the existence of complicated pneumoconiosis, however, because Dr. Plata "revised his opinion at deposition, limiting his diagnosis to simple coal workers' pneumoconiosis." Decision and Order at 9; Employer's Exhibit 7. The administrative law judge concluded, therefore, that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. *Id.*

We cannot affirm the administrative law judge's finding, however, as he did not address the entirety of Dr. Plata's opinion and did not consider evidence that could support a finding of complicated pneumoconiosis pursuant to Section 718.304. At his deposition, Dr. Plata stated, based upon the gross and microscopic examinations of the miner's lung tissue and lymph nodes:

[T]he pleura was black. It was thickened. It was fibrotic. It was kind of nodular ... Also, the lung tissue, lung parenchyma, was black in multiple areas. I want to emphasize that [the] aim of the examination was the tumor. I wasn't really aiming my examination to occupational lung disease or other things. It was mainly the tumor. I believe there was evidence grossly of coal workers' pneumoconiosis to my eye because I examined it with my own eyes. I was there. And then when I examined it microscopically, the histologic sections corroborated the findings of the gross exam In

retrospect, if I put it together, I would say that there's a minimal [sic], at least, of coal workers' pneumoconiosis, no less than that.

Employer's Exhibit 7 at 10-11. The administrative law judge accurately quoted a significant portion of the foregoing testimony in rendering his finding that claimant did not establish that the miner had complicated pneumoconiosis. Decision and Order at 7. The administrative law judge did not, however, consider other parts of Dr. Plata's deposition in which he indicated that he was "less certain" that the biopsy evidence supported a diagnosis of complicated pneumoconiosis in light of the medical standard for diagnosing complicated pneumoconiosis established by a committee of pathologists. Employer's Exhibit 7 at 13, 15.

In claims arising under the Act, however, the medical standard for diagnosing complicated pneumoconiosis is not relevant. Rather, the applicable criteria are set forth in Section 411(c) of the Act, 30 U.S.C. §921(c)(2)(A), as implemented by Section 718.304, which provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffers 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)(A); 20 C.F.R. §718.304(a)-(c). An administrative law judge must first determine whether the evidence relevant to each category under Section 718.304(a)-(c), tends to establish the existence of complicated pneumoconiosis, and then weigh the evidence at subsections (a)-(c) together to determine whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Melnick v. Consolidation Coal Co*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

A review of the record in this case indicates that the administrative law judge did not consider evidence that may support a finding of complicated pneumoconiosis under the legal standards set forth in Section 718.304(a)-(c). This evidence appears in Director's Exhibit 15, which contains records related to surgical procedures performed to assist in the diagnosis and treatment of the miner's lung cancer. Included among these records is a "Surgical Pathology Report" from the Charleston Area Medical Center, prepared on November 18, 2004, and signed by Drs. Mangano and Llaudes. In the portion of the report containing Dr. Llaudes's gross description of the miner's right paratracheal lymph node, the doctor observed a "black lymph node 1 cm in aggregate." Director's Exhibit 15. This evidence also includes a November 22, 2004 "Operative Report" prepared by Dr. Kim, in which he described the right upper lobectomy performed on the miner on that date. Dr. Kim reported in the section entitled "Operative Findings," that "[t]he entire lungs were infiltrated with coal dust[,] felt to be a clinical finding consistent with a severe form of coal miner's pneumoconiosis." *Id.*

The administrative law judge also did not consider relevant portions of Dr. Plata's "Surgical Pathology Report," dated November 24, 2004, which was based upon his review of lymph nodes and lung tissue obtained during the operation which was the subject of Dr. Kim's report. In the section labeled "Diagnosis," Dr. Plata reiterated the "operative finding" made by Dr. Kim regarding the appearance of the miner's lungs. *Id.* Dr. Plata also reported that "the nontumerous portion of [the] lung shows severe emphysema and complicated coal workers' pneumoconiosis." *Id.* Dr. Plata further indicated that the lymph nodes submitted for examination ranged in size from 1 centimeter to 2 centimeters and consisted of a right paratracheal lymph node, a right upper paratracheal lymph node, a periazygous lymph node, a hilar lymph node, and an interlobar lymph node. Dr. Plata stated that the lymph nodes showed "severe anthracosis-silicosis."⁴ *Id.* Lastly, the administrative law judge did not weigh Dr. Khalid's "Consultation Summary," dated November 25, 2004, in which he reiterated the findings reported by Dr. Plata. *Id.*

Because the administrative law judge did not consider whether this evidence was sufficient to satisfy the legal standards for complicated pneumoconiosis set forth in Section 718.304(a)-(c), we must vacate the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption of death due to pneumoconiosis. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). This case is remanded, therefore, to the administrative law judge for reconsideration of whether the evidence of record is sufficient to establish invocation of the irrebuttable presumption at Section 718.304(a)-(c).

On remand, the administrative law judge must weigh the evidence of record relevant to the invocation of the irrebuttable presumption under the appropriate subsections of Section 718.304(a)-(c). If the administrative law judge finds that there is evidence meeting the legal criteria set forth in one or more of the subsections, he must then weigh the evidence together before determining whether invocation of the irrebuttable presumption has been established. *See Melnick*, 16 BLR at 1-33. In particular, when considering the biopsy evidence at Section 718.304(b), the administrative law judge must determine whether the descriptions of lymph nodes ranging in size from 1 to 2 centimeters, contained in the "Surgical Pathology Reports" of Drs. Mangano, Plata, and Llaudes, satisfy the legal criteria for complicated pneumoconiosis.⁵ *See Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134

⁴ Dr. Plata testified at his deposition that Dr. Llaudes was a second-year pathology resident who dictated the gross description of the miner's lung under Dr. Plata's supervision. Employer's Exhibit 7 at 8-9.

⁵ Dr. Bush reviewed seventeen slides containing material obtained during the miner's right upper lobectomy on November 22, 2004 and Dr. Plata's "Surgical

(4th Cir. 1985)(anthracosis of hilar lymph nodes is pneumoconiosis); *see also Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984). If the administrative law judge finds that the biopsy reports describing lymph nodes ranging in size from 1 to 2 centimeters constitute evidence supportive of a finding of complicated pneumoconiosis at Section 718.304(b), he must then determine whether there is medical evidence in the record establishing that the lymph nodes would appear on x-ray as opacities greater than 1 centimeter in diameter. *Clites v. J & L Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

The administrative law judge must also address the statements in which Drs. Naeye and Hippensteel indicated that, because there were no lesions greater than 2 centimeters in diameter on biopsy, there was no evidence of complicated pneumoconiosis. Employer's Exhibits 3, 9. The Department of Labor has declined to adopt the view that a 2 centimeter lesion on autopsy or biopsy is a prerequisite for a diagnosis of complicated pneumoconiosis, noting that there is no consensus among physicians that this criterion is valid. 65 Fed. Reg. 79,936 (2000); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003). Lastly, if the administrative law judge determines on remand that the miner had complicated pneumoconiosis, he must determine whether the evidence establishes that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Pathology Report" dated November 24, 2004. Employer's Exhibit 4. Dr. Bush did not reference the measurements of lymph nodes described by Dr. Plata as showing severe anthracosis-silicosis. Dr. Bush stated "[t]he gross description [in Dr. Plata's report] did not include the description of lesions one centimeter or greater in size with the features of coal worker lesions such as firm tissue with pigment discoloration." Employer's Exhibit 4. Drs. Caffrey and Plata indicated that pneumoconiosis is a disease of lung tissue, not of lymph node tissue. Employer's Exhibits 5, 7 at 5-6. Dr. Naeye reviewed seventeen slides from the miner's right upper lobectomy and other evidence that appears in the record. Without specifically discussing the slides containing tissue from the miner's lymph nodes, Dr. Naeye concluded that "the minimum requirements for the diagnosis of coal workers' pneumoconiosis (CWP) are absent in the plentiful lung tissue available for microscopic review." Employer's Exhibit 2. Dr. Hippensteel, whose opinion was based, in part, upon a review of Dr. Plata's biopsy report, stated that none of the pathologic criteria needed to make a diagnosis of complicated pneumoconiosis was present. Dr. Hippensteel indicated that a diagnosis of pneumoconiosis cannot be made based upon lymph node tissue. Employer's Exhibits 3, 8.

If the administrative law judge determines on remand that claimant has not established invocation of the irrebuttable presumption at Section 718.304, or has not established that the miner's complicated pneumoconiosis arose out of coal mine employment, he must reconsider his finding that claimant did not establish death due to pneumoconiosis at Section 718.205(c). The administrative law judge indicated that the death certificate was completed by "Dr. Nabeel Ghabramd" who identified "lung cancer with liver mets" as the immediate cause of the miner's death, and "black lung (pneumoconiosis)" as a significant condition contributing to death. Director's Exhibit 14. The administrative law judge found that the opinion expressed on the death certificate was entitled to little weight because "[t]here is no evidence of Dr. Nabeel Ghabramd's credentials or that he had any prior knowledge of the [m]iner's condition and treatment preceding the miner's death." Decision and Order at 11. The administrative law judge further determined that the other physicians of record who offered an opinion as to the cause of death reported that pneumoconiosis played no role in the miner's demise. *Id.* The administrative law judge concluded that claimant did not satisfy her burden of proof under Section 718.205(c), as "the well-reasoned opinions of Drs. Hippensteel, Naeye, Bush, and Caffrey outweigh the contrary conclusion listed on the Certificate of Death." *Id.*

The administrative law judge's finding cannot be affirmed, however, as he did not accurately characterize the death certificate. *See Tackett*, 7 BLR at 1-705; *see also Wojtowicz*, 12 BLR at 1-165. A review of this document establishes that the correct name of the physician who completed the certificate is Dr. Ghabra. Director's Exhibit 14. More importantly, contrary to the administrative law judge's determination that there is no indication that Dr. Ghabra had any prior knowledge of the miner's condition, Dr. Kim stated in the "History and Physical Examination" section of his November 17, 2004 report that Dr. Ghabra was the miner's nephrologist and had been his primary care physician since the miner's 1998 kidney transplant. Director's Exhibit 15. Because the administrative law judge's determination that there was "no evidence" in the record regarding Dr. Ghabra's prior knowledge of the miner's condition was incorrect, Decision and Order at 11, the administrative law judge must reconsider on remand whether the death certificate is sufficient to satisfy the claimant's burden of proof under Section 718.205(c).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' decision to vacate the denial of benefits and to remand the case to the administrative law judge for reconsideration of the evidence relevant to invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304. However, I respectfully dissent from my colleagues' determination that remand is also required for the administrative law judge to reconsider whether the death certificate, prepared by Dr. Ghabra, is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

In my view, remand is not necessary, as the administrative law judge determined correctly that "a death certificate stating that pneumoconiosis contributed to the miner's death, without some further explanation...is insufficient to prove causation." Decision and Order at 11, citing *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); Director's Exhibit 14. Because Dr. Ghabra provided no explanation of his finding that pneumoconiosis was a contributing cause of the miner's death, and did not identify any evidence in support of his finding, the administrative law judge rationally

concluded that Dr. Ghabra's opinion, as expressed on the death certificate, was entitled to less weight than the reasoned and documented opinions of the remaining physicians of record, all of whom opined that pneumoconiosis played no role in the miner's death. *Willis v. Birchfield Mining Co.*, 15 BLR 1-59 (1991); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 11; Director's Exhibit 14. In light of the administrative law judge's appropriate weighing of the death certificate, therefore, any error that the administrative law judge made in misstating Dr. Ghabra's name, or in neglecting to address evidence suggesting that Dr. Ghabra was a treating physician, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, I would affirm the administrative law judge's finding that claimant did not satisfy her burden of proof under Section 718.205(c), and remand this case solely for reconsideration of whether claimant has established invocation of the irrebuttable presumption at Section 718.304.

ROY P. SMITH
Administrative Appeals Judge