BRB No. 05-1008 BLA

EDSIL B. KEENER, executor for the estate of SHIRLEY S. KEENER, on behalf of SHIRLEY S. KEENER, deceased survivor of EDSIL L. KEENER, and on behalf of EDSIL L. KEENER, deceased	)	
Claimant-Petitioner	)	
v.	)	
PEERLESS EAGLE COAL COMPANY	)	DATE ISSUED: 01/26/2007
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER *EN BANC*

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.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (04-BLA-6265) of Administrative Law Judge Richard A. Morgan on a miner's subsequent claim[2] and 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).[3] The administrative law judge credited the miner with at least twenty-nine years of coal mine

[1] This case involves both a miner's claim and a survivor's claim, which were consolidated for the purposes of the hearing. Both the miner, Edsil L. Keener, and his widow, Shirley S. Keener, are now deceased. Claimant is Edsil B. Keener, executor of the estate of the miner's widow. The administrative law judge designated the record evidence as follows: Miner's Director's Exhibits 1-4, 6-8, filed in the miner's claim; Widow's Director's Exhibits 1-49, filed in the survivor's claim; and Claimant's Exhibits 1-7 and Employer's Exhibits 1-4, 6-8, filed by the parties after the claims were consolidated for hearing. Decision and Order at 2.

[2] This claim, the miner's third, was filed on February 8, 2001 and is considered a "subsequent claim for benefits" because it was filed after January 19, 2001 and more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Miner's Director's Exhibit 3. The miner's initial claim, filed on February 21, 1973, was finally denied on August 8, 1980 because the miner was still working in coal mine employment. Miner's Director's Exhibit 1. His second claim was filed on August 25, 1989, and was finally denied because no elements of entitlement were established. Miner's Director's Exhibit 2. The miner passed away on February 1, 2002, while his third claim was still pending. Miner's Director's Exhibit 32; Widow's Director's Exhibit 11. The district director issued a proposed denial of the claim on February 11, 2002. Miner's Director's Exhibit 30. The miner's widow "protested" the denial on March 7, 2002, requested "reconsideration" of the denial on March 20, 2002, and filed her own claim for survivor's benefits on March 26, 2002. Miner's Director's Exhibits 32, 36; Widow's Director's Exhibit 2. The district director denied the survivor's claim on October 15, 2003, and denied the miner's claim on January 27, 2004. Miner's Director's Exhibit 36; Widow's Director's Exhibit 29. By letter dated February 5, 2004, the widow requested a hearing on the miner's claim, and the miner's claim was forwarded to the Office of Administrative Law Judges, where it was consolidated with her survivor's claim for purposes of the hearing. Miner's Director's Exhibit 38; Widow's Director's Exhibits 39, 41. The widow died on December 11, 2004. The miner's and survivor's claims are being pursued by claimant, Edsil B. Keener, executor of the estate of the miner's widow, Shirley S. Keener.

[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, 725 and 726 (2002).

employment,[4] as stipulated by the parties, and found that the medical evidence submitted since the prior denial of benefits established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, the administrative law judge determined that claimant met his burden to establish a change in at least one applicable condition of entitlement.[5] 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him); Decision and Order at 4, 6 n.6. Considering the merits of the claim, the administrative law judge found that the evidence of record established the existence of simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202, 718.203, respectively, as well as a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), but failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or that simple pneumoconiosis contributed to the miner's total disability or his death, pursuant to 20 C.F.R. §§718.204(c), 718.205(c). Accordingly, benefits were denied.

On appeal, claimant initially contended that the administrative law judge erred in admitting into the record, pursuant to 20 C.F.R. §725.414(a)(3)(i), Dr. Oesterling's review of the pathology slides as employer's report of an autopsy. Claimant now agrees, however, that Dr. Oesterling's slide review may constitute a report of an autopsy. Claimant continues to assert, however, that the administrative law judge erred in failing to redact portions of Dr. Bush's report, submitted by employer in response to claimant's autopsy report pursuant to the rebuttal provision at Section 725.414(a)(3)(ii), which claimant asserts go beyond the scope of claimant's autopsy report. Claimant contends that, in effect, Dr. Bush's medical report constitutes both an autopsy rebuttal report and an affirmative medical opinion, and, by failing to redact portions of this report, the

[4] The record indicates that the miner's last coal mine employment occurred in West Virginia. Miner's Director's Exhibit 4. 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*).

[5] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

administrative law judge allowed employer to submit medical opinion evidence in excess of the evidentiary limitations set forth at Section 725.414. Claimant further argues that the administrative law judge erred in denying claimant's Motion to Compel Discovery, erred in crediting claimant with only twenty-nine years of coal mine employment, and erred in his analysis of the medical opinion evidence when he found that claimant failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, or that simple pneumoconiosis contributed to the miner's total disability or his death pursuant to Sections 718.204(c) and 718.205(c). Employer responds, urging affirmance of the administrative law judge's evidentiary rulings and the denial of benefits. Employer contends that even if Dr. Bush's autopsy rebuttal report went beyond the scope of the affirmative autopsy, the admission of Dr. Bush's entire report was harmless, as the consolidated nature of these claims allows employer to submit additional medical evidence. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response addressing the evidentiary issues.[6]

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

[6] On October 17, 2006, the Board held oral argument in this case in Charleston, West Virginia, to address the issues raised concerning the administrative law judge's evidentiary rulings and his application of revised 20 C.F.R. §725.414. Claimant and the Director, Office of Workers' Compensation Programs, (the Director) submitted oral argument briefs in support of their positions. By Motion for a Corrected Transcript dated November 8, 2006, employer requested that the Board allow it to submit an errata/corrections sheet for the transcript, in the captioned case. No objections to employer's motion were received by the Board. By order dated December 11, 2006, the Board granted employer's request to submit a correction sheet, and further granted the parties ten days from the date of receipt of employer's corrections to submit responses. Employer's correction sheet of errors it has identified within the transcript was received by the Board on January 4, 2007. Employer again moved that the transcript be corrected so that the oral argument proceedings before the Board are properly preserved for appellate purposes. No responses to employer's corrections have been received by the Board. The Board notes that the errors identified by employer are typographical in nature and that in each case the correct meaning is clear from the context of the transcript. In light of the fact that no objections to employer's motion have been received by the Board, employer's request is granted and a copy of employer's corrections has been filed as part of the record.

Admission of Dr. Oesterling's Report

At the hearing in this case, claimant submitted the report of Dr. Plata, the autopsy prosector, as his report of an autopsy pursuant to Section 725.414(a)(2)(i).[7] Widow's Director's Exhibit 12; Miner's Director's Exhibit 34; Hearing Transcript at 14. Employer submitted the report of Dr. Oesterling, who reviewed the pathology tissue slides, prepared by Dr. Plata, as its affirmative autopsy report. Employer's Exhibit 1; Hearing Transcript at 22. As noted above, claimant initially contended that Dr. Oesterling's slide review could not constitute a report of an autopsy. In support of his contention, claimant relied upon the quality standards for autopsy evidence, set forth at 20 C.F.R. §718.106, which provide, in pertinent part, that:

> [a] report of an autopsy . . . submitted in conjunction with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung.
>
> 20 C.F.R. §718.106(a).

Claimant reasoned that because Dr. Oesterling did not examine the miner's body after death, and therefore did not provide a gross macroscopic description of the lungs, his report was insufficient to constitute a report of an autopsy. Claimant's Petition for Review at 17. The Director responded, asserting that a report by a pathologist who has

[7] The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit certain rehabilitative evidence. *Id.* Notwithstanding these limits, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Any x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report that appears in a medical report must be admissible under either the 20 C.F.R. §725.414(a) limits, or under 20 C.F.R. §725.414(a)(4) as a hospitalization or treatment record. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1). "A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for the purposes of" 20 C.F.R. §725.414. 20 C.F.R. §725.414(a)(1).

reviewed the autopsy tissue slides is in substantial compliance with the Section 718.106(a) quality standards,[8] and, therefore, can constitute a report of an autopsy for the purposes of Section 725.414(a)(2)(i) and (a)(3)(i).[9] Director's Oral Argument Brief at 6. In support of his position, the Director points out that the comments to the regulations make clear that a physician who simply reviews slides is not required to include macroscopic findings in his report, as the "provision only requires macroscopic findings for the purposes of the autopsy itself," and "a physician other than the autopsy prosector may submit an opinion based exclusively on the microscopic tissue samples" and "no change is necessary to permit such opinions." 64 Fed. Reg. 54978 (Oct. 8, 1999); 65 Fed. Reg. 79936 (Dec. 20, 2000); Director's Oral Argument Brief at 6; Oral Argument Transcript at 19. The Director further contends that, since only claimant is likely to produce an autopsy prosector's report, this interpretation of the regulations is the most practical approach to satisfying the inclusive nature of Section 725.414(a)(2)(i), (a)(3)(i), which allows for both parties to submit an affirmative report of an autopsy. Director's Oral Argument Brief at 4.

In light of the comments to the regulations and the practical concerns surrounding the requirement for a detailed macroscopic description of the lungs, we hold that the administrative law judge properly admitted Dr. Oesterling's slide review as employer's affirmative report of an autopsy pursuant to Section 725.414(a)(3)(i).[10] *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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[8] The regulations state that:

> The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with a claim governed by this part. . . . Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. Unless otherwise provided, any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered.

20 C.F.R. §718.101(b).

[9] The Director acknowledged that this represented a change from his previously expressed position. Director's Oral Argument Brief at 8 n.2.

[10] Claimant now agrees with employer and the Director that a slide review can constitute a report of an autopsy. Claimant's Oral Argument Brief at 2.

Admission of Dr. Bush's Autopsy Rebuttal Report

Employer submitted the reports of Dr. Bush as rebuttal evidence responsive to Dr. Plata's autopsy report, pursuant to Section 725.414 (a)(3)(ii).[11] Widow's Director's Exhibit 16; Employer's Exhibit 8; Hearing Transcript at 6. Dr. Plata, the autopsy prosector, performed a macroscopic and microscopic examination of the lungs and, in his report dated February 2, 2002, diagnosed, in pertinent part, complicated pneumoconiosis, severe chronic obstructive pulmonary disease/bullous emphysema, acute bibasilar bronchopneumonia and aspergillosis. Miner's Director's Exhibit 34; Widow's Director's Exhibit 12. Based on his macroscopic and microscopic observations, Dr. Plata concluded that bilateral acute bronchopneumonia was the possible cause of the miner's death. Dr. Plata did not address the issue of total disability. Miner's Director's Exhibit 34; Widow's Director's Exhibit 12. By contrast, Dr. Bush, who provided employer's autopsy rebuttal opinion, reviewed Dr. Plata's autopsy report and pathology slides, and additionally reviewed medical records, including the reports of Drs. Rasmussen and Zaldivar, and two readings of a May 24, 2001 computerized tomography scan.[12] Widow's Director's Exhibit 16. In his report dated May 17, 2002, Dr. Bush explained that while the pathology slides revealed evidence of coal workers' pneumoconiosis, the degree and extent of the disease could not "be evaluated pathologically because of the confounding changes from the cancer, radiation treatment and infection." Widow's Director's Exhibit 16. Rather, Dr. Bush stated, "the degree and extent of disease must be evaluated on the clinical findings prior to radiation treatment." Widow's Director's Exhibit 16. Based on the clinical findings, Dr. Bush opined that the degree of disease was "significantly less than complicated coal workers' pneumoconiosis." Dr. Bush then concluded that coal workers' pneumoconiosis was too limited in degree and extent to have contributed to the miner's respiratory impairment, disability, or death, and that death was due to complications of treatment for cancer of the lung, including extensive pulmonary fibrosis due to radiation therapy with bronchopneumonia, and that centrilobular emphysema resulting from smoking was a significantly contributing factor. Widow's Director's Exhibit 16.

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[11] Dr. Bush provided an original report dated May 17, 2002, and a supplemental report dated March 3, 2005. Widow's Director's Exhibit 16; Employer's Exhibit 8.

[12] We note that, while unchallenged, the administrative law judge's admission into the record of two re-readings by employer's experts of the May 24, 2001 computerized tomography (CT) scan is contrary to the Board's recent decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), holding that 20 C.F.R. §718.107, which provides for the submission of other medical evidence such as CT scans, is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant.

Claimant asserts[13] that because Dr. Bush not only reviewed Dr. Plata's autopsy report and slides, but also reviewed additional medical records and then based his findings and conclusions both on the pathological and clinical evidence, his report constitutes both an autopsy rebuttal opinion, responsive to Dr. Plata's autopsy report, and an additional affirmative medical report, and that both are subject to the limitations on evidence set forth at Section 725.414. Claimant's Oral Argument Brief at 4. The Director responds, agreeing with claimant that Dr. Bush's opinion constitutes both an autopsy rebuttal report and a medical report, for the purposes of the evidentiary limitations. Director's Oral Argument Brief at 11. We agree.

Section 725.414 provides that each party may submit one "physician's interpretation of each . . . autopsy . . . submitted" by the opposing party, in rebuttal of the opposing party's case. 20 C.F.R. §725.414(a)(2)(i)-(ii), (a)(3)(i)-(ii). In addition, in its final comments to the revised regulations, the Department of Labor explained that: "In rebuttal, each party would be able to submit one piece of evidence analyzing each piece of evidence submitted by the opposing side. For example, an operator could have each of the claimant's chest X-rays reread once, and could submit one report challenging the validity of each pulmonary function test submitted by the claimant." 65 Fed. Reg. 79990 (Dec. 20, 2000). Thus, the regulations contemplate that an opinion offered in rebuttal of the case presented by the opposing party will analyze or interpret the evidence to which it is responsive. In this case, Dr. Plata, the autopsy prosector, based his conclusions on his macroscopic and microscopic review of the miner's body. In contrast, Dr. Bush, the autopsy rebuttal physician, specifically stated that the degree of the miner's disease could not be evaluated pathologically, and that, therefore, he had relied in part on his review of the clinical evidence of record to formulate his opinion. Thus, Dr. Bush based his conclusions on materials beyond the scope of the autopsy submitted by claimant. At the hearing, the administrative law judge stated that he would review Dr. Bush's report and redact any portions that went beyond the scope of Dr. Plata's autopsy; however, he failed to do so in his decision. As the administrative law judge relied in part on Dr. Bush's complete opinion in evaluating the evidence relevant to the issues of the existence of

[13] At the hearing, claimant objected to the admission into the record of Dr. Bush's medical report, asserting that because Dr. Bush based his conclusions in part upon the clinical evidence of record, his report constituted both an autopsy rebuttal opinion and a medical opinion, and thus exceeded employer's affirmative medical opinion quota pursuant to 20 C.F.R. §725.414(a)(3)(i). Hearing Transcript at 23-26. At the hearing, the administrative law judge stated that he would review Dr. Bush's report and determine whether any portion of it should be redacted as beyond the scope of Dr. Plata's autopsy. Hearing Transcript at 27. In his decision, however, the administrative law judge did not address claimant's concerns and considered Dr. Bush's opinion in full. Consequently, on appeal, claimant renews his objection to the admission of Dr. Bush's report.

complicated pneumoconiosis, and disability and death causation, as they pertain to both the miner's and survivor's claims, we must vacate the administrative law judge's findings pursuant to Sections 718.304, 718.204(c) and 718.205(c). On remand, the administrative law judge must review Dr. Bush's May 17, 2002 rebuttal opinion, and address those portions of his opinion that exceed the scope of the autopsy submitted by claimant.

Evidentiary Limitations in Cases Consolidated for Hearing

In response to claimant's challenge to the admissibility of Dr. Bush's May 17, 2002 autopsy rebuttal opinion, employer asserted that because this case involves two claims, a miner's claim and a survivor's claim, which were consolidated for a hearing, employer is allowed to submit, *inter alia*, two affirmative medical reports and one autopsy report in each case, for a total of four medical reports and two autopsy reports. Employer's Brief at 18. Employer concludes that even if portions of Dr. Bush's report constitute an additional affirmative medical report, employer's evidence is still within the limitations on evidence described at Section 725.414 because it has submitted only two affirmative case medical reports, and, therefore, the administrative law judge properly considered Dr. Bush's entire medical report. Employer's Brief at 18.

The Director responds, agreeing with employer that because this case involves two claims, a miner's claim and a survivor's claim, each party may designate separate affirmative, rebuttal and rehabilitative evidence, as set forth at Section 725.414, in support of each claim. The Director contends that this approach is in accord with the fact that the elements of entitlement in miners' claims and survivors' claims are not identical, and may be best addressed by separate medical evidence. Director's Oral Argument Brief at 14. The Director insists, however, that he is not of the opinion that an administrative law judge may consider all of the evidence together, *e.g.* two autopsy reports and four affirmative medical reports, when adjudicating each claim. Rather, the Director asserts, each party must designate the evidence intended to support each claim, and such evidence must be separately considered as to the elements of entitlement in each claim. Director's Oral Argument Brief at 16. The Director contends that the permissive language of Section 725.460, which sets forth that where claims are consolidated for hearing, evidence introduced in one claim *may* be considered to have been offered into evidence in the other claim, does not provide that this evidence is considered to have been *admitted* into evidence in the other claim. 20 C.F.R. §725.460; Director's Oral Argument Brief at 15 (emphasis added). Rather, the Director asserts, Section 725.460 must be read in conjunction with the limitations of Section 725.414, and, consequently, the evidence must be considered in accordance with the limitations for each claim. Director's Oral Argument Brief at 14-16.

We agree with the Director and, to an extent, with employer, that in this miner's claim and survivor's claim consolidated for purposes of the hearing pursuant to Section

725.460, the parties are entitled to submit separate affirmative case, rebuttal and rehabilitative evidence, as set forth at Section 725.414, in support of the miner's claim and in support of the survivor's claim. We further agree with the Director's reasonable position, however, that the parties must designate the claim that each piece of evidence supports, and the administrative law judge should consider this evidence on the specific issues of entitlement in each claim, and in accordance with the evidentiary rules applicable to each claim. *See United States v. Mead Corp.*, 533 U.S. 5218, 121 S.Ct. 2164 (2001). Such separate consideration is particularly important in consolidated claims, such as the instant one, where one of the claims is a miner's subsequent claim. When a living miner files a subsequent claim, all the evidence from the miner's prior claims is specifically made a part of the record. *See* 20 C.F.R. §725.309(d). There is no comparable provision for the automatic inclusion of evidence in a survivor's claim filed pursuant to the revised regulations. Thus, the medical evidence from the prior living miner's claims must be designated as evidence by one of the parties in order for it to be included in the record relevant to the survivor's claim. Furthermore, Section 725.414(a)(2)(i), (a)(3)(i) provides:

> Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible….

20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Consequently, if a medical report is based on evidence in the record that was not properly admitted into the survivor's claim,[14] the administrative law judge is required to address the impact of Section 725.414(a)(2)(i), (a)(3)(i).[15] In this case, the administrative law judge considered all of the evidence

[14] We note that the regulations specifically provide that "[n]otwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). We further note that medical evidence in excess of the limitations contained in Section 725.414 may be admitted into the hearing record for good cause. 20 C.F.R. §725.456(b)(1).

[15] If an administrative law judge determines that a physician's medical opinion relied upon inadmissible evidence, he has several available options including: excluding the report, redacting the objectionable content, asking the physician to submit a new report, or factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *See Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). We note, however,

together on the issues of the existence of complicated pneumoconiosis, disability causation and death causation, including the reports of Drs. Rasmussen, Bush, Zaldivar and Castle, who each reviewed evidence from the miner's prior claims, admissible in the miner's subsequent claim but not in the widow's claim. Claimant's Exhibit 2; Miner's Director's Exhibits 15, 28; Widow's Director's Exhibit 16; Employer's Exhibits 2, 4, 6-8. Therefore, on remand, the administrative law judge must instruct the parties to designate the evidence submitted in support of each claim, within the evidentiary limitations set forth at Section 725.414. We further note that the separate designation of the evidence submitted in support of each claim does not preclude the parties from submitting the same medical reports in support of both the miner's claim and the survivor's claim, where appropriate. The administrative law judge must then reconsider the parties' designated evidence on the specific elements of entitlement in each claim, and under the evidentiary rules that apply to that claim.

Claimant's Motion to Compel Discovery

Claimant's final contention with respect to the procedural aspect of this case is that the administrative law judge erred in denying claimant's Motion to Compel Discovery. By motion dated January 14, 2005, and again at the hearing, claimant sought production of medical evidence obtained by employer, which employer did not intend to introduce into evidence. Hearing Transcript at 34-35. Employer responded, asserting that the targeted documents were privileged, and requested a protective order from the administrative law judge. By Order dated April 12, 2005, the administrative law judge denied both claimant's motion and employer's request for a protective order. April 12, 2005 Ruling and Order on Claimant's Motion to Compel and Employer's Motion for Protective Order. We hold that the administrative law judge's ruling was proper.

Contrary to claimant's arguments, in denying claimant's motion, the administrative law judge properly relied on 29 C.F.R. §18.14 of The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges.[16] *See Cline v. Westmoreland Coal Co.*, 21 BLR 1-71 (1997). In addition, the

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that exclusion is not a favored option, because it may result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id*.

[16] The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide, in pertinent part, that a party may obtain discovery regarding any relevant matter, not privileged, upon showing substantial need of the materials in the preparation of the party's case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 29 C.F.R. §18.14.

administrative law judge acted within his discretion in finding that, while employer had not established that the targeted documents were protected by privilege, claimant had not established the requisite "substantial need" for the requested documents, or that "undue hardship" would result from not obtaining them. April 12, 2005 Ruling and Order at 13-15. In so finding, the administrative law judge specifically noted that claimant had well-prosecuted his claim, that claimant had not shown any undue hardship in obtaining materials substantially equivalent to the documents being sought, and that the withheld reports, even if obtained, would not be admissible given the evidentiary limitations and the quantity of evidence already submitted. April 12, 2005 Ruling and Order at 18. Finally, while we acknowledge claimant's argument that the reports of examining physicians are separately discoverable pursuant to Rule 35(b) of the Federal Rules of Civil Procedure, which does not require a showing of undue hardship or substantial need, as employer has asserted that all documents resulting from the physical examination of the miner have already been duly exchanged, this provision does not attach to allow for the discovery of the additional materials sought by claimant. Oral Argument Transcript at 59. The Board has held that an administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark*, 12 BLR at 1-149, 1-153. As employer does not challenge the administrative law judge's finding that the targeted documents are not protected by privilege, and as the administrative law judge fully explained his reasoning for concluding that claimant failed to establish the requisite "substantial need" for the requested documents, or that "undue hardship" would result from not obtaining them, we affirm the administrative law judge's April 12, 2005 Ruling and Order on Claimant's Motion to Compel and Employer's Motion for Protective Order. 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); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark*, 12 BLR at 1-149, 1-153; *Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

Merits of Entitlement

Regarding the merits of entitlement, claimant initially asserts that the administrative law judge erred in determining claimant's length of coal mine employment to be "at least" twenty-nine years. Claimant's Brief at 17; Decision and Order at 4. We disagree. The administrative law judge properly accepted the parties' stipulation that claimant engaged in coal mine employment for "at least" twenty-nine years. *See Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985)(McGranery, J., dissenting); Decision and Order at 4; Hearing Transcript at 9. The administrative law judge further acknowledged that claimant alleged more than forty-three years of coal mine employment, but permissibly concluded that in light of the parties' stipulation, which entitled the miner to the presumption that his pneumoconiosis arose of out of his coal mine employment, any discrepancy in the exact number of years of coal mine employment is inconsequential for the purpose of rendering a decision on the merits. 20 C.F.R. §718.203(b); *see Justice v.*

Island Creek Coal Co., 11 BLR 1-91 (1988). Because claimant has not demonstrated how the administrative law judge's determination is unduly prejudicial to claimant, we affirm the administrative law judge's finding that claimant established at least twenty-nine years of coal mine employment. *See Justice*, 11 BLR at 1-92; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Finally, claimant contends that the administrative law judge erred in according greater weight to the opinions of Drs. Bush, Oesterling, Zaldivar and Castle, who opined that the miner did not have complicated pneumoconiosis and that his simple pneumoconiosis did not contribute to his respiratory impairment or death, than to the contrary opinions of Drs. Plata, Green and Rasmussen. Claimant's Brief at 4-9; Claimant's Exhibits 1, 2, 7; Miner's Director's Exhibits 15, 28, 34; Widow's Director's Exhibits 12, 16; Employer's Exhibits 1, 2, 4, 6-8. Claimant specifically challenges, *inter alia*, the administrative law judge's finding that "the opinions of Drs. Bush, Oesterling, Zaldivar and Castle are better reasoned and documented than those of Drs. Plata, Green, and Rasmussen, because the former are more consistent with the miner's medical history, including his treatment immediately prior to death." Claimant's Brief at 10; Decision and Order at 23. Claimant contends that the administrative law judge's conclusion is illogical in light of the administrative law judge's prior determination that the miner's lifetime treatment records, which did not establish even the existence of simple pneumoconiosis, were proven inaccurate by the subsequent, more credible pathology evidence that the miner did suffer from at least simple pneumoconiosis. *See Scott*, 289 F.3d at 263, 22 BLR at 2-372; Claimant's Brief at 10; Decision and Order at 5-6, 21-22. However, as we have vacated the administrative law judge's weighing of the medical opinion evidence pursuant to Sections 718.304, 718.204(b) and 718.204(c), and remanded this case for revaluation of all of the medical opinion evidence on the issues of complicated pneumoconiosis, and total disability and death causation, we need not address claimant's specific contentions on the merits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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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

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JUDITH S. BOGGS
Administrative Appeals Judge