BRB No. 04-0554 BLA

LINDA D. MANGIANTINI (Survivor and on behalf of JOSEPH A. MANGIANTINI)	)	
Claimant-Respondent	)	
v.	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 04/06/2005
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits in Miner's and Widow's Claims of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Julie A. Roland (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits in Miner's and Widow's Claims (03-BLA-5646 and 03-BLA-0140) of Administrative Law Judge Michael P. Lesniak rendered on miner's and survivor's claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The deceased miner originally filed a claim on January 13, 2000, which was awarded by the district director on July 12, 2001. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. The miner subsequently died and his widow, claimant herein, filed a survivor's claim on January 17, 2002, which was consolidated with the miner's claim.[1] On December 10, 2002, the district director issued a Proposed Decision and Order Awarding Benefits. Employer requested a hearing, which was held on September 22, 2003.[2] The administrative law judge accepted employer's concession that the miner had coal workers' pneumoconiosis and that he was totally disabled due to coal workers' pneumoconiosis prior to his death. The administrative law judge also found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both claims.

Employer appeals, challenging the administrative law judge's award of benefits in the survivor's claim. Employer's sole argument is that the administrative law judge erred in admitting Dr. Perper's report into evidence because it was illegally developed by the district director. Employer's Brief at 4; Director's Exhibit 73; Claimant's Exhibit 2. Employer also argues that claimant exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(2)(i). Employer's Brief at 9. Claimant responds, urging affirmance of the award of benefits based on the record evidence.[3] The Director, Office of Workers' Compensation Programs, (the Director) also responds, arguing that while the district

[1] On January 16, 2002, claimant notified Judge Michael P. Lesniak that the miner had died on October 24, 2001 and she requested a continuance of the hearing scheduled in the miner's claim for March 28, 2002. Director's Exhibit 55. She further expressed her intent to file a survivor's claim and asked that the miner's claim be remanded to the district director. *Id.* Claimant then filed her survivor's claim on January 17, 2002. Director's Exhibit 61. On January 22, 2002, Judge Lesniak issued an Order of Remand in the miner's claim for consolidation with the survivor's claim. Director's Exhibit 56.

[2] At the hearing, employer advised that it was no longer contesting claimant's entitlement to benefits in the living miner's claim. With respect to the survivor's claim, employer continued to contest claimant's entitlement and objected to the admission of Dr. Perper's report and deposition testimony into the record. Hearing Transcript at 7, 10.

[3] Claimant contends that she submitted only the report of Dr. Perper in support of her affirmative case. Claimant's Brief at 5.

director was without authority under 20 C.F.R. §725.405(c) to develop Dr. Perper's initial written report, the administrative law judge properly admitted Dr. Perper's opinion into the record because that initial report was adopted by claimant and proffered by her as one of her exhibits. The Director notes that while claimant was entitled to submit no more than one report of autopsy pursuant to 20 C.F.R. §725.414(a)(2)(i), any error committed by the administrative law judge in considering the report of Dr. Mittal, in addition to Dr. Perper's opinion, is harmless because the administrative law judge assigned Dr. Mittal's opinion no weight. The Director also maintains that Dr. Perper's deposition testimony, standing alone, is within the evidentiary limitations of 20 C.F.R. §725.414 as the deposition testimony constitutes a medical report and not an additional autopsy report.

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).[4]

A. Relevant Procedural History:

In order to properly address employer's arguments on appeal, we summarize the relevant procedural history. After claimant filed her survivor's claim, she was sent a letter from Claims Examiner Bloomfield on January 23, 2002 requesting that she provide a copy of the miner's autopsy report. On January 29, 2002, a similar letter was sent to Dr. Moore and the Armstrong Memorial Hospital, also requesting a copy of the autopsy report and autopsy slides.[5] By letter dated February 2, 2002, Claims Examiner Bloomfield requested that Dr. Perper review the miner's autopsy slides and some additional evidence and render an opinion as to whether pneumoconiosis hastened the miner's death. (Employer was not copied on that letter). Director's Exhibit 73. Dr. Perper's report was prepared on February 16, 2002. Dr. Perper opined that the miner suffered from coal workers' pneumoconiosis and that the disease was a substantially contributing factor leading to the miner's death. Director's Exhibit 73. By letter dated March 1, 2002 addressed to claimant's counsel, Claims Examiner Bloomfield

[4] The record indicates that the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 2; Decision and Order at 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[5] Claimant provided a copy of Dr. Mittal's autopsy report on February 26, 2002. Director's Exhibit 69.

acknowledged that 20 C.F.R. §725.405(c) did not authorize the district director to have a pathologist review autopsy slides. Director's Exhibit 69. Claimant was advised that the report would be excluded from the record unless she wished to adopt it as her one autopsy report under the regulations.[6] *Id*. Claimant was contacted on April 9, 2002 because she had not responded to the prior letter. Director's Exhibit 71. A copy of this letter was sent to employer along with a copy of Dr. Perper's report. Both parties were given thirty days to adopt Dr. Perper's report as their own or else it was to be excluded from the record. *Id*. In claimant's counsel's response, also dated April 9, 2002 , she stated that she was adopting Dr. Perper's February 16, 2002 report as "[c]laimant's primary evidence in this matter[,]" reserving the right to "supplement his opinions by way of either deposition and/or supplemental report in the form of rebuttal evidence of any evidence developed by the [r]esponsible [o]perator." Director's Exhibit 72. When the "Schedule for the Submission of Additional Evidence" was issued on May 8, 2002, the district director listed Dr. Perper's report as "C-N," indicating that it was *new* evidence submitted by *claimant*. Schedule for Admission of Evidence (May 8, 2002). The original autopsy report of Dr. Mittal and other medical records were listed as a D-E, indicating that they were submitted by the Director and constituted *evidence of record*. *Id*. A report from Dr. Oesterling dated April 30, 2002 was also listed "E-N" or new evidence submitted by Employer. *Id*. Following a Proposed Decision and Order Awarding Benefits dated December 10, 2002, claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges. Director's Exhibits 86, 87.

In a September 2, 2003 letter, employer advised the administrative law judge that claimant was in violation of the evidentiary limitations because she had submitted the reports of two pathologists, Dr. Perper and Dr. Rizkalla. Employer further asserted that "the report of Dr. Perper was developed illegally by the Department of Labor and then offered to Claimant's counsel but such does not obviate the illegality of the report itself." Employer's letter (September 2, 2003). Employer objected to "either Dr. Rizkalla's report or Dr. Perper's report as being one more than that to which the Claimant is entitled…." *Id*. Claimant responded on September 8, 2003, arguing that Dr. Perper's report had not been "illegally developed" and that the report constituted relevant and material evidence in the proceeding before the administrative law judge. Claimant's letter (September 8, 2003). Claimant noted that there were no evidentiary limitations applicable to the miner's claim and that both the reports of Drs. Perper and Rizkalla were being offered as evidence in the miner's claim. *Id*. With respect to the widow's claim, claimant noted that Dr. Rizkalla's report was being "offered as a potential alternative

[6] This letter was apparently sent in response to claimant's request for a copy of Dr. Perper's report, although no copy of that request, if made in writing, is of record. We further note that a copy of the February 8, 2002 letter was not provided to employer.

report depending on the Court's ruling in regard to [employer's] initial objections to Dr. Perper's report." *Id*.

At the hearing held on September 21, 2003, the parties disagreed on the admissibility of Dr. Perper's report.[7] Hearing Transcript at 7-16. On September 25, 2003, the administrative law judge ordered the parties to file briefs addressing the issue of whether, in a survivor's black lung claim, a district director may retain an expert medical witness despite the case involving a known responsible operator. Order To File Briefs (September 23, 2003). The administrative law judge noted that "unstated in [Section] 725.406(c) is the extent of the Department's authority to obtain medical evidence in a widow's claim." He further stated that, "[t]he question appears to involve whether a district director is allowed to retain an expert medical witness absent the special situations described at [Sections] 724.406 and 725.414(a)(3)(iii). The parties will address what the [r]egulations' failure to provide for such a situation indicates and/or implies." *Id*.

The Director responded on October 24, 2003, noting his position that the revised regulations did not authorize a district director to develop medical evidence in a responsible operator case except for the original examination and test contemplated at 20 C.F.R. §725.406; and that, consequently, any evidence developed by the Director in a case where a responsible operator is identified, beyond that authorized at 20 C.F.R. §725.406, should be withdrawn from the record as a Director's Exhibit, although the evidence could then be adopted by either claimant or the responsible operator if such evidence was offered in accordance with the evidentiary limitations. Director's letter (October 24, 2003) at 1-2. Claimant filed a brief, noting that the regulations did not specifically prohibit the district director from requesting an opinion from Dr. Perper. Claimant's Brief in Support of Admissibility of Evidence Developed by Dr. Joshua Perper at 1-2. Claimant further asserted that Dr. Perper's deposition testimony was admissible as it took into account a substantial portion of the miner's lifetime medical

[7] Employer objected to the admission of Dr. Perper's report on the grounds that it was illegally developed by the district director. Hearing Transcript at 7, 10. In the alternative, if Dr. Perper's report was found to be admissible, employer argued that claimant must withdraw either Dr. Perper's report or Dr. Rizkalla's pathology review report. Employer's counsel stated "So, we have three claimant's pathologists involved, we have one [e]mployer's pathologist involved. And it is my contention that [claimant] is entitled to one, maybe two, but not three." Hearing Transcript at 7. Employer, however, did not raise any specific objection to Dr. Mittal's report as being part of the record. When asked to clarify his objection, employer's counsel stated, "I object to Rizkalla if you're going to admit Perper. That is the whole key to this problem." Hearing Transcript at 12.

evaluations and clinical findings that had not been available to Dr. Perper in preparation of his initial report. *Id* at 2. Employer also filed a brief, maintaining that there was no right of the district director to request the review by a pathologist of the slides from the autopsy report of Dr. Mittal under 20 C.F.R. §725.406 because an autopsy report is not a medical examination or test of a living miner and therefore did not fall within the exception provided at 20 C.F.R. §725.414(a)(3)(iii) for situations where the district director is permitted to exercise the rights of a responsible operator. Employer's Brief at 6. Employer thus argued that Dr. Perper's report, which involved a review of the miner's autopsy slides and not a pulmonary evaluation of a living miner, must be excluded in the survivor's claim. *Id*.

On November 4, 2003, the administrative law judge overruled employer's objection and directed claimant to designate her medical evidence, noting that "in addition to the autopsy protocol of Dr. Mittal, [c]laimant appears to be submitting two autopsy reports as affirmative evidence in the survivor's claim." Order Overruling Employer's Objection to Claimant's Evidence and Directing Claimant to Designate Medical Evidence. Claimant was directed to designate whether she wished to submit Dr. Perper's report as it was admissible, or Dr. Rizkalla's autopsy report as her "one allowable autopsy report in affirmative evidence." *Id*. In a November 7, 2003 letter, claimant advised that she relied on Dr. Perper's report in the survivor's claim. On November 10, 2003, employer filed a motion for reconsideration of the Order Overruling Employer's Objection to Claimant's Evidence, which was denied by the administrative law judge. *See* Order Granting Motion for Reconsideration and Sustaining Previous Evidentiary Order (December 22, 2003).

B. Propriety of the Evidentiary Ruling

Employer argues that the administrative law judge erred in admitting Dr. Perper's opinion into the record because the district director violated 20 C.F.R. §725.405(c) when he sought to develop medical evidence in a claim where there was an identified responsible operator. Section 725.405(c) specifically states:

> In the case of a claim filed by or on behalf of a survivor of a miner, the district director shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim.

20 C.F.R. §725.405(c).

In this appeal, Employer and the Director interpret the inclusion of the word "available" in the regulation as limiting the development of evidence by the district director in survivor's claims where there is an identified responsible operator. They propose that the district director is able to gather only evidence that is existing or available from sources such as hospital and treatment records. Because employer had

been identified as the responsible operator in the living miner's claim, employer and the Director agree, based on the language of Section 725.405(c), that the district director improperly developed Dr. Perper's report. Employer argues that the administrative law judge was required to exclude Dr. Perper's opinion as his report constitutes "illegally obtained evidence." Conversely, claimant and the Director argue that since Dr. Perper's report was adopted by claimant, it was admissible as evidence despite the origin of its development.

The administrative law judge noted in his Decision and Order that there is no guidance in the regulations as to what to do when evidence is erroneously developed by the district director but adopted by another party, which proffers the evidence as its own. In his Order, the administrative law judge also correctly noted that regulations do not specifically preclude admission of Dr. Perper's report as a claimant's exhibit. Order (November 4, 2003). Additionally, none of the parties to this appeal has cited case law to support the exclusion of Dr. Perper's report. We are therefore asked to decide whether the administrative law judge acted within his discretion in deciding to admit Dr. Perper's report based on an equitable argument presented by claimant that the evidence was probative and worthy of consideration, and that employer was not unduly prejudiced by its admission.

After review of the record and consideration of the arguments presented by the parties on appeal, we hold that the administrative law judge properly admitted Dr. Perper's report. We specifically reject employer's contention that Dr. Perper's report constitutes "illegally obtained evidence" and was subject to exclusion from the record. The exclusionary rule has limited application to federal criminal proceedings where the rule operates to exclude evidence obtained by police or government officials by means of an illegal search and seizure conducted in violation of the Fourth Amendment, U.S. Const. Amend IV. *See generally Arizona v. Evans*, 514 U.S. 1 (1995*); United States v. Janis*, 428 U.S. 433 (1976). The exclusionary rule, which requires the suppression of unlawfully obtained evidence from an illegal search and seizure, has a limited purpose to deter police misconduct, and has no application to an administrative proceeding, such as the instant case, where that purpose is not served. *See Honeycut v. Aetna Insurance Co.*, 510 F.2d 340 (7th Cir. 1975) (The Fourth and Fourteen Amendments do not require in civil cases that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through unauthorized searches made by state officials); 2 Am Jur. 2d Administrative Law § 348 "Illegally Obtained Evidence;" Hearing Transcript at 34.

Furthermore, the regulation at 20 C.F.R. §725.455(b) states that in deciding whether to admit evidence in an administrative proceeding, an administrative law judge is not bound by common law or statutory rules of evidence. Instead, a less stringent standard is applicable to evidence submitted in administrative hearings under the

pertinent provisions of the Administrative Procedures Act, 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). Subject to the constraints of 20 C.F.R. §725.456, the administrative law judge is required to admit timely developed evidence. While relevancy is the critical issue in the admission of evidence, court rulings and treatise authorities favor the admission of evidence, even where relevancy is questionable, with reliance on the trier-of-fact to determine the weight to be assigned the evidence. *See Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Martinez Clayton Coal Co.*, 10 BLR 1-24 (1987).

In this case, the administrative law judge properly determined that, while Dr. Perper's initial report was developed by mistake, it constituted relevant evidence that should be admitted into the record:

> I am inclined to agree that relevant medical evidence in a Black Lung benefits claim is admissible under these circumstances. The record in this case suggests that the district director's original request that Dr. Perper create the report was simply human error. DX-70. However, the result of the error was the creation of potentially valuable evidence. The report itself is not particularly complete, as Dr. Perper had no information whatsoever on Claimant's coal-mining history. Director's Exhibit 73. However, Claimant has developed the evidence as if it had begun as her own; she tried to rectify the possible incompleteness of Dr. Perper's report by deposing him and providing him with more comprehensive medical records on the miner. CX-3 at 13-14. Now that Dr. Perper's report is supported by his deposition testimony, the evidence he provided certainly appears to be both relevant and probative. Nor does the evidence appear to prejudice the party who opposes its admission into evidence. I am therefore ruling that Dr. Perper's report may be admitted into evidence.

Order (November 4, 2003) at 2.

Even in criminal cases, where there is illegally obtained evidence in violation of the Fourth Amendment, such evidence is nevertheless admissible if the evidence was "inevitably discoverable" and there is no other basis for exclusion.[8] *See Nix v. Williams*,

[8] Whereas the exclusionary rule deprives the prosecution of evidence tainted by official wrongdoing and thereby discourages future improprieties, the inevitable discovery exception to the rule permits the introduction of evidence that eventually would have been located had there been no error, for in that instance "there is no nexus sufficient to provide a taint." *See Nix v. Williams*, 467 U.S. 431 (1984).

467 U.S. 431 (1984). Because claimant could have obtained Dr. Perper's initial opinion reviewing the autopsy evidence on her own, and she expanded and perfected his opinion by independently providing Dr. Perper with the miner's complete medical record and by seeking out his deposition testimony, we agree with the administrative law judge that Dr. Perper's opinion was relevant evidence and that employer was not unduly prejudiced by the admission of his report. Because there is no useful purpose served by excluding Dr. Perper's opinion from the record, we affirm the administrative law judge decision to admit Dr. Perper's report as it was rational and within his discretion as the trier-of fact.

Lastly, with respect to employer's argument that Dr. Mittal's opinion was improperly admitted as part of claimant's affirmative case in excess of the evidentiary limitations of 20 C.F.R. §725.414(a)(2)(i), we agree with the Director that any error committed by the administrative law judge in considering the original autopsy report of Dr. Mittal was harmless. S*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge's Decision and Order makes clear that he did not assign weight to Dr. Mittal's diagnosis that the miner's death was due to pneumoconiosis as he found Dr. Mittal's opinion to be equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 11. Nor does employer attempt to argue that the administrative law judge placed any reliance on Dr. Mittal's report, thereby unduly prejudicing its case. Thus, because the administrative law judge's award of benefits was based on his crediting of Dr. Perper's opinion, which was properly admitted as claimant's exhibit, and the award was not based on Dr. Mittal's opinion, we affirm as supported by substantial evidence, the award of benefits in the survivor's claim pursuant to 20 C.F.R. §718.205(c).

Accordingly, the Decision and Order - Awarding Benefits in Miner's and Widow's Claims of the administrative law judge is hereby affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only:

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JUDITH S. BOGGS
Administrative Appeals Judge