

BRB No. 07-0571 BLA

I.S. )  
(Widow of J.S.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
LT RUTH COAL COMPANY ) DATE ISSUED: 04/30/2008  
 )  
and )  
 )  
KENTUCKY CENTRAL INSURANCE )  
COMPANY )  
 )  
Employer/Carrier- )  
Petitioners )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits and Attorney Fee Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Johanna F. Ellison (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and Attorney Fee Order (2006-BLA-5008) of Administrative Law Judge Larry S. Merck (the administrative law judge) 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).<sup>1</sup> Adjudicating this survivor’s claim pursuant to 20 C.F.R. Part 718, the administrative law judge accepted the parties’ stipulation and credited the miner with ten and one-quarter years of coal mine employment. In addition, the administrative law judge noted that the miner was receiving benefits at the time of his death pursuant to an award of benefits by Administrative Law Judge Richard D. Mills, which was affirmed by the Board. [*J.S.*] *v. LT Ruth Coal Co.*, BRB No. 88-2061 BLA (Aug. 31, 1990)(unpub.). Acknowledging that the parties did not contest the issue of the existence of pneumoconiosis arising out of coal mine employment, the administrative law judge found the weight of the medical evidence sufficient to establish that the miner’s death was “caused or contributed to by pneumoconiosis” pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits, commencing as of September 2005.<sup>2</sup> In a supplemental Attorney Fee Order dated April 6, 2007, the administrative law judge awarded claimant’s counsel a total fee of \$2,812.50, representing twelve and one-half hours of legal services at an hourly rate of \$225.00.

On appeal, employer contends that the administrative law judge erred in finding that the medical reports reviewed by Dr. Westerfield were not properly designated as part of the medical record and exceeded the evidentiary limitations pursuant to 20 C.F.R. §725.414. In addition, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.205(c). Employer further contends that the administrative law judge erred in prematurely granting counsel’s attorney fee because there was an appeal filed with the Board and therefore there was no final decision in this case.

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<sup>1</sup> Claimant is the widow of the miner who died on September 25, 2004. Director’s Exhibits 2, 11. Claimant filed her survivor’s claim on October 13, 2004. Director’s Exhibit 2.

<sup>2</sup> The administrative law judge stated that benefits were being awarded as of September 2005, the month and year of the miner’s death. Decision and Order at 15. However, the correct year of the miner’s death is 2004. Director’s Exhibits 2, 11.

In response, claimant contends that the administrative law judge properly applied the evidentiary limitations set forth at Section 725.414 and properly found the medical opinion evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). In addition, claimant urges the Board to reject employer's contention that the administrative law judge prematurely awarded counsel's attorney fee. In a limited response, the Director, Office of Workers' Compensation Programs (the Director), asserts that the administrative law judge properly applied the Section 725.414 evidentiary limitations. The Director, however, declines to express an opinion on the administrative law judge's specific weighing of the medical evidence of record.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death.<sup>3</sup> 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Initially, we address employer's contentions regarding the administrative law judge's application of the evidentiary limitations set forth at Section 725.414. In setting forth the relevant medical opinion evidence, the administrative law judge found that Dr.

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<sup>3</sup> The record indicates that the claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Westerfield, who rendered a consultative report on behalf of employer, reviewed numerous medical reports and additional medical records contained in the closed living miner's claim, as enumerated in his medical report dated May 10, 2005. Decision and Order at 11-12; Employer's Exhibit 1. The administrative law judge, however, found that Dr. Westerfield "relied on evidence that was not properly designated as part of the medical evidence of record." Decision and Order at 13. The administrative law judge further concluded that "[e]ven if admitted, [e]mployer has not shown good cause for exceeding the evidentiary limitations." *Id.* Consequently, the administrative law judge found that because he was unable to determine the weight Dr. Westerfield placed on the excessive medical evidence, Dr. Westerfield's opinion was accorded "little probative weight." *Id.*

Employer contends that the administrative law judge erred in finding the medical opinion of Dr. Westerfield entitled to little weight because all of the evidence reviewed by Dr. Westerfield was contained in the record, either as part of the Director's Exhibits, Employer's Exhibits 1-8 or listed in an appendix to the Evidence Summary Form as Employer's Exhibit 9. Employer's Brief at 9. Therefore, employer contends that because it set forth the evidence reviewed by Dr. Westerfield on its Evidence Summary Form, it "did everything in its power" to ensure that all evidence reviewed by Dr. Westerfield was "in the record." *Id.* In addition, employer argues that this evidence was already a part of the record because the administrative law judge designated the closed miner's claim as Director's Exhibit 1-A at the hearing. *Id.* at 10. Employer further contends that the administrative law judge erred in finding that employer had not shown good cause for exceeding the evidentiary limitations, arguing that "no objection to the employer/petitioner's designation was ever lodged, nor was the petitioner ever required to show cause, [because] it can certainly do so." *Id.* at 11.

Furthermore, regarding the designation of the closed miner's claim, employer contends that Section 725.414 sets forth the evidentiary limitations for the objective evidence and medical opinions gathered in a living miner's claim and not a survivor's claim. Employer's Brief at 11. Employer argues that fairness would require that Dr. Westerfield be allowed to review all available medical evidence and that it would be unfair to place numerical restraints on the evidence a physician may review, particularly in a survivor's claim. *Id.* at 12. Employer further argues that the evidence was not submitted as part of its affirmative case, but was only filed so the parties knew what evidence Dr. Westerfield reviewed in rendering his opinion and, therefore, the evidentiary limitations are not applicable. *Id.* at 14.

In response, claimant contends that the administrative law judge properly applied Section 725.414, arguing that merely because the closed miner's claim was admitted into the record, does not mean that all the medical evidence is properly before the administrative law judge without specific designation by one of the parties. Claimant's

Brief at 12. Claimant also urges the Board to reject employer's contentions that the evidentiary limitations do not apply in survivor's claims and to reject employer's contention that good cause exists for exceeding the evidentiary limitations. *Id.* at 13-17.

The Director responds, arguing that the administrative law judge's decision to accord less weight to Dr. Westerfield's opinion because the physician relied on evidence that exceeded the evidentiary limitations and that employer failed to show good cause for exceeding the limitations, was consistent with Board precedent. Director's Letter Brief at 1-2. The Director also urges the Board to reject employer's contention that the evidentiary limitations were not intended to apply to survivor's claims. *Id.* at 2. Moreover, the Director urges the Board to reject employer's contention that the evidentiary limitations are invalid because they unfairly limit the amount of evidence a physician may consider in rendering his opinion, arguing that the Board, as well as the District of Columbia Circuit Court of Appeals (DCCCA) and the United States Court of Appeals for the Fourth Circuit, have upheld the regulations addressing evidentiary limitations. *Id.* at 2. In addition, the Director contends that the administrative law judge's decision, to accord Dr. Westerfield's opinion little probative weight because it was unclear what weight Dr. Westerfield accorded the evidence that exceeded the evidentiary limitations, was consistent with Board precedent. *Id.*

Based on the administrative law judge's findings, the arguments raised on appeal and the evidence of record, we hold that employer's contentions are not meritorious and, therefore, we affirm the administrative law judge's finding that Dr. Westerfield relied on evidence not properly designated in the record and, thus, the excessive evidence relied on by Dr. Westerfield violated the evidentiary limitations set forth at Section 725.414. Contrary to employer's contention, the regulations specifically hold that the evidentiary limitations apply to all claims filed after January 19, 2001, and do not differentiate between living miner's claims and survivor's claims. 20 C.F.R. §725.2(c). Furthermore, the Board, as well as the DCCCA and the Fourth Circuit, have upheld the validity of the evidentiary limitations. *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47, --- BLR --- (D.D.C. 2001); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Consequently, contrary to employer's contentions, the evidence relied upon by Dr. Westerfield in rendering his opinion is subject to the evidentiary limitations set forth in Section 725.414 and must also be admissible in the record. Specifically, Section 725.414 requires that:

Any chest x-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians'

opinion that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section.

20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Consequently, the administrative law judge properly considered the admissibility of the individual parts of Dr. Westerfield's medical report. 20 C.F.R. §725.414(a)(3)(i); see *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(*en banc*).

The administrative law judge reasonably found that the majority of the medical reports identified by Dr. Westerfield, in formulating his opinion, exceeded the evidentiary limitations because this evidence was not properly designated as part of the evidentiary record. Decision and Order at 13. Contrary to employer's contention, merely because the miner's closed claim is admitted as an exhibit in a survivor's claim does not automatically provide that the medical evidence contained therein is to be considered by the administrative law judge. Rather, the medical evidence from the living miner's claim 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. *Keener*, 23 BLR at 1-241. Herein, the administrative law judge admitted the miner's claim as Director's Exhibit 1-A, but employer did not specifically identify the medical reports contained therein, and relied upon by Dr. Westerfield, as part of employer's affirmative case. Therefore, it was within the administrative law judge's discretion as trier-of-fact to determine how to treat Dr. Westerfield's opinion, wherein the physician has relied on evidence in excess of the evidentiary limitations.<sup>4</sup> See *Keener*, 23 BLR at 1-241; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). Consequently, we affirm the administrative law judge's determination to accord less weight to Dr. Westerfield's opinion because he found the evidence relied on by Dr. Westerfield exceeded the evidentiary limitations and that employer did not establish good cause for the admission of the excessive evidence. Decision and Order at 13; 20 C.F.R. §725.456(b)(1); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006); *Dempsey*, 23 BLR at 1-62.

Addressing the merits of the survivor's claim pursuant to Section 718.205(c), the administrative law judge found that the record contains the miner's death certificate, the

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<sup>4</sup> When a medical report is based, in whole or in part, on inadmissible evidence, the administrative law judge may, in his discretion, exclude that report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(*en banc*).

medical opinions of Drs. Hieronymus and Westerfield and the miner's hospital records/treatment notes. The death certificate, signed by Dr. Hieronymus, listed metastatic adenocarcinoma as the cause of the miner's death, but stated that coal workers' pneumoconiosis was a significant condition that contributed to the miner's death. Director's Exhibit 11. In a letter dated May 26, 2005, Dr. Hieronymus, the miner's treating physician, stated that the immediate cause of the miner's death on September 25, 2004 was metastatic adenocarcinoma, but further stated that the presence of his pulmonary disease contributed to and hastened the miner's death. Director's Exhibit 14. Dr. Hieronymus stated that "more aggressive forms of treatment for his cancer were not feasible due to the severity of [the miner's] pulmonary condition" and that his difficulty breathing further debilitated his frail condition. *Id.* Dr. Westerfield, who reviewed numerous medical records, opined that the miner died due to metastatic adenocarcinoma of the lungs and that simple coal workers' pneumoconiosis did not contribute to the miner's death because inhalation of coal dust does not cause or contribute to the development of lung cancer. Employer's Exhibit 1.

Weighing this evidence, the administrative law judge found that based on Dr. Hieronymus's status as claimant's treating physician, and because the hospital and treatment records supported the conclusions set forth on the death certificate, the death certificate is probative on the issue of the cause of the miner's death. Decision and Order at 9; Director's Exhibit 11. The administrative law judge further found that Dr. Hieronymus's medical opinion, that legal pneumoconiosis hastened the miner's death, was entitled to substantial probative weight. Decision and Order at 11; Director's Exhibits 1-A, 14. However, the administrative law judge found that the contrary opinion of Dr. Westerfield, that the miner's death was not due to pneumoconiosis, was entitled to little probative weight because the physician relied on evidence in excess of the evidentiary limitations and he could not determine the weight Dr. Westerfield accorded this excessive evidence in forming his opinion. Decision and Order at 13; Employer's Exhibit 1. In addition, the administrative law judge found that "even if Dr. Westerfield's report was based on his review of admissible evidence that did not exceed the evidentiary limitations, I would still accord his opinion little weight because it is equivocal and vague." *Id.* Consequently, the administrative law judge found that the medical evidence demonstrates that the miner's death was caused or contributed to by pneumoconiosis pursuant to Section 718.205(c). *Id.* at 14.

On appeal, employer contends that the administrative law judge erred in according determinative weight to the opinion of Dr. Hieronymus, based on his status as the miner's treating physician, over that of Dr. Westerfield, who is Board-certified in pulmonary medicine. Employer's Brief at 15-16. Employer also contends that the administrative law judge erred in finding that Dr. Hieronymus's opinion was entitled to greater weight because he had the opportunity to gather a more complete picture of the miner's condition when Dr. Westerfield reviewed more evidence and had a more complete

picture of the miner's condition. *Id.* at 17. Employer further contends that the administrative law judge erred in finding Dr. Westerfield's opinion to be vague and equivocal, arguing that the administrative law judge mischaracterized Dr. Westerfield's opinion, when he found that Dr. Westerfield opined only that pneumoconiosis did not cause the miner's lung cancer. *Id.* at 18. These contentions are not meritorious.

Contrary to employer's contention, the administrative law judge acted within his discretion in according determinative weight to Dr. Hieronymus's opinion. The administrative law judge rationally considered the factors set forth at Section 718.104(d) in determining the weight to accord the opinion of a treating physician in light of contrary medical evidence. Specifically, the administrative law judge considered the fact that Dr. Hieronymus treated the miner over many years and that he treated him for multiple conditions, including coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD).<sup>5</sup> Decision and Order at 11. In addition, the administrative law judge noted the extensive treatment records of Dr. Hieronymus and that this evidence supported Dr. Hieronymus's conclusions. *Id.* Therefore, contrary to employer's contention, the administrative law judge did not mechanically accord Dr. Hieronymus's opinion greater weight solely because he was the miner's treating physician. Rather, the administrative law judge considered the merits of Dr. Hieronymus's medical opinion and, within a reasonable exercise of his discretion, found the opinion entitled to substantial probative weight. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996).

In addition, the administrative law judge reasonably found Dr. Westerfield's opinion entitled to little probative weight because the administrative law judge found that he was unable to determine the amount of weight that Dr. Westerfield placed on the evidence deemed as exceeding the evidentiary limitations in forming his opinion that the miner's death was not due to pneumoconiosis. Decision and Order at 13; *Keener*, 23 BLR at 1-241; *Harris*, 23 BLR at 1-108. Moreover, contrary to employer's contention, the administrative law judge reasonably exercised his discretion in finding that Dr. Westerfield's opinion was vague and equivocal. Specifically, the administrative law judge found that Dr. Westerfield's opinion did not address the specific issue of whether the miner's pneumoconiosis contributed to his death. Decision and Order at 13. Rather,

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<sup>5</sup> The miner's medical reports and treatment notes date back to 1984. Director's Exhibit 1-A.



Dr. Westerfield concluded that:

It is my opinion that [the miner] died from lung cancer. The development of lung cancer is most likely related to cigarette smoking. Coal Workers' Pneumoconiosis did not cause or contribute to the development of lung cancer which took his life.

Employer's Exhibit 1 at 5. The administrative law judge therefore found that Dr. Westerfield focused on whether the miner's pneumoconiosis was related to his lung cancer, which was the ultimate cause of death. Decision and Order at 13; Employer's Exhibit 1. Consequently, the administrative law judge rationally found that Dr. Westerfield's opinion did not adequately address the determinative issue, whether the miner's pneumoconiosis contributed to his death, including whether it hastened his death. *Id.*

Because the administrative law judge considered all of the relevant evidence and reasonably accorded greater weight to the opinion of Dr. Hieronymus, that pneumoconiosis hastened the miner's death, over the contrary opinion of Dr. Westerfield, we affirm his finding that the weight of the medical evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, we affirm the administrative law judge's award of benefits.

We now consider the attorney fee issue presented in this case. Subsequent to employer's filing of its current appeal with the Board, claimant's counsel submitted an itemized fee petition to the administrative law judge for work performed before him. In a supplemental Attorney Fee Order, the administrative law judge found that claimant's counsel filed an attorney fee application requesting a total fee of \$2,812.50, representing twelve and one-half hours of legal services at a rate of \$225.00 per hour and that there was no objection to the fee petition. Attorney Fee Order at 1. Considering the fee petition in light of the criteria set forth at 20 C.F.R. §725.366, the administrative law judge found that the work involved and total number of hours expended were reasonable and necessary to the successful prosecution of the claim. Attorney Fee Order at 2. Consequently, the administrative law judge awarded the total requested attorney fee of \$2,812.50. *Id.*

On appeal, employer contends that the administrative law judge erred by prematurely granting counsel's attorney fee petition because employer had filed a Notice of Appeal to the Board and, therefore, there has not been a "successful" prosecution of this case. Employer's Brief at 19-20. In response, claimant contends that the administrative law judge properly granted counsel's attorney fee, arguing that the regulations contemplate this type of situation as they provide that the fee application is to be filed with the tribunal before whom the work was performed, at each level of the proceedings. *Id.*

Employer's contention lacks merit. A fee award does not become effective and, thus, is not enforceable, until there has been a successful prosecution of the claim and an award of benefits is payable. However, it was not unreasonable for the administrative law judge, as a matter of judicial efficiency, to render his decision on counsel's attorney fee petition subject to final adjudication of the claim. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991). Further, because employer does not otherwise challenge the administrative law judge's award of counsel's attorney fee, we affirm the administrative law judge's Attorney Fee Order granting claimant's counsel a total fee of \$2,812.50. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits and Attorney Fee Order are affirmed.

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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BETTY JEAN HALL  
Administrative Appeals Judge