BRB No. 06-0848 BLA

COLLEEN MOORE (Widow of DALE A. MOORE)	)	
Claimant-Respondent	)	
v.	)	
MATT MINING COMPANY, INCORPORATED	)	DATE ISSUED: 08/30/2007
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 of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2005-BLA-5485) of Associate Chief Administrative Law Judge Thomas M. Burke 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). The administrative law judge accepted the stipulation of the parties that the miner engaged in qualifying coal mine employment for at least twenty-three years, and adjudicated this survivor's claim, filed on September 2, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator herein, and that the evidence was sufficient to establish the existence of simple and complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.304, and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3). Accordingly, benefits were awarded.

On appeal, employer challenges its designation as responsible operator, as well as the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414 and his weighing of the evidence on the issue of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant, the miner's widow, has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments on the responsible operator issue, but agreeing with some of employer's challenges to the administrative law judge's evidentiary rulings.

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.[1] 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).

Employer initially contends that because the Black Lung Disability Trust Fund (Trust Fund) was held liable for the payment of benefits in the living miner's claim, [2] applicable precedent of the United States Court of Appeals for the Fourth Circuit in *Boyd*

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 7.

[2] The district director identified Rish Equipment Company as the responsible operator in the miner's claim, filed on November 21, 1997. While the case was pending on appeal before the Board after an adjudication on the merits, the Director, Office of Workers' Compensation Programs (the Director), conceded that Rish could not be held responsible for payment of benefits in light of an intervening Fourth Circuit decision. As employer herein had not been identified as a potential responsible operator or notified of the miner's claim, and a decision on the merits had issued, the Black Lung Disability Trust Fund was held liable for the payment of benefits in the miner's claim.

& Stevenson Coal Co. v. Director, OWCP [*Slone*], 407 F.3d 663, 23 BLR 2-288 (4th Cir. 2005), precludes the naming of a different responsible party in the survivor's claim. Employer's Brief at 3-6. We disagree. The administrative law judge properly held that the narrow holding of *Slone* is not controlling herein. Decision and Order at 4-5. In that case, the Fourth Circuit applied Virginia law pertaining to insurance contracts to hold a reinsurer liable for coverage of a widow's claim, even though the claim was filed outside the allowable time period, because the claim was "derivative" of the deceased miner's claim, filed before the deadline. Since the present case involves no conflict with Virginia insurance law, the survivor's claim is governed solely by the Act and its implementing regulations, under which a miner's claim and a survivor's claim are considered to be separate claims with distinct procedural histories and different standards of proof. *See generally Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988). Employer was promptly identified and notified of its potential liability after claimant filed her survivor's claim, Director's Exhibit 8, and the medical evidence from the miner's claim that was admitted into evidence in the survivor's claim was exchanged by the parties, who had the opportunity to obtain medical review of this evidence. Consequently, employer had the opportunity to mount a meaningful defense and was not deprived of due process based on its lack of notification or receipt of the file in the miner's claim at the time of its adjudication. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer was properly designated the responsible operator herein.

Employer next challenges the administrative law judge's exclusion of evidence that exceeded the limitations set forth at Section 725.414. Initially, we reject employer's arguments that the evidentiary limitations are unconstitutional and that all of the evidence submitted by employer should have been admitted into the record because it is relevant, material and not unduly repetitious. Employer's Brief at 12. Employer urged the Board to delay its decision on this issue until a ruling was made by the Fourth Circuit; the court has now upheld the validity of the evidentiary limitations and the exclusion of evidence in excess of that permitted by the regulations, absent a showing of good cause. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *see also Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). As the administrative law judge's exclusion of excess evidence from consideration comports with the regulations and applicable precedent, we hold that the administrative law judge acted within his discretion in this regard.

Employer also challenges the administrative law judge's classification of various x-ray interpretations as treatment records pursuant to the provision at Section 725.414(a)(4), that "any record of a miner's . . . medical treatment for a respiratory or pulmonary or related disease, may be received into evidence," notwithstanding the evidentiary limitations. 20 C.F.R. §725.414(a)(4). As the regulations contain no

provision for the rebuttal of treatment records, and subsection (a)(4) does not create an exception to the evidentiary limitations for evidence submitted in response to treatment records, employer asserts that the administrative law judge should have found either that good cause was demonstrated under the facts of this case for the admission of rebuttal evidence pursuant to 20 C.F.R. §725.456(b)(1), or that the disputed x-ray readings did not constitute treatment records. Specifically, employer maintains that Dr. Robinette's interpretations of films taken on December 12, 1997 and May 8, 2001, and the interpretations of Drs. Humphreys and McReynolds of films taken on September 14, 1998 and May 8, 2001, properly should be characterized as evidence developed for purposes of litigation rather than treatment. While the interpretations were submitted by claimant as evidence contained within Dr. Robinette's treatment records at Director's Exhibit 5, employer notes that Dr. Robinette's interpretation of the December 12, 1997 film was made on a standard ILO form on June 20, 1998, six months after the film was taken, and the form bears a Virginia Workers' Compensation date stamp.[3] Further, employer asserts that Dr. Humphrey's interpretation of the September 14, 1998 film was obtained at the request of Dr. Robinette, whose report of the same date was forwarded to two attorneys representing claimant in his Virginia workers' compensation claim and his federal claim for benefits. Employer also notes that other reports by Dr. Robinette at Director's Exhibit 5 are either addressed to claimant's attorneys or copied to the attorneys, and employer maintains that because the file in the living miner's claim has been lost, *see* Director's Exhibit 29, employer is now unable to conclusively demonstrate that the disputed x-ray interpretations submitted as treatment records more likely than not were developed for purposes of litigation in conjunction with the miner's Virginia Workers' Compensation claim or his federal claim filed under the Act. Regardless of the administrative law judge's characterization of the readings, however, since this evidence was determined to be supportive of a finding of complicated pneumoconiosis, *see* Decision and Order at 6, and Dr. Robinette relied on the evidence in part to support his conclusions, employer seeks a "good cause" exception to the limitations in order to respond to this evidence. Employer's arguments have merit.

In proposing the limitations on evidence, the Department of Labor acknowledged the concerns of the United States Court of Appeals for the Sixth Circuit in *Woodward v.*

[3] The Director agrees with employer's argument that this interpretation apparently was developed for purposes of litigation, rather than treatment, and as claimant did not designate any affirmative case x-ray readings, the Director maintains that the reading should be reclassified as claimant's affirmative evidence, subject to rebuttal by employer. The Director takes no position as to whether the remaining x-ray interpretations were also related to litigation or whether the administrative law judge abused his discretion by finding that good cause was not established to justify the admission of evidence submitted in rebuttal to any interpretations that were properly classified as treatment records. Director's Brief at 4-5.

Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), that the superior financial resources of some parties allowed the development of a greater quantity of evidence with the result that "the truthseeking function of the administrative proceeding is skewed and directly undermined," 991 F.2d at 321, 17 BLR at 2-87. 62 Fed. Reg. 3356-61 (Jan. 22, 1997); 65 Fed. Reg. 79989 (Dec. 20, 2000). One of the Department's goals in enacting Section 725.414 was to impose identical limitations on claimants and responsible operators that would allow the parties to submit the same amount of evidence, *see Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006); 64 Fed. Reg. 54965, 54995 (Oct. 8, 1999), as the Department believed that "the limitation applicable to each type of evidence per side represents an inherently fair way of ensuring that the adjudication officer's focus is on the quality of the evidence submitted rather than on its quantity." 65 Fed. Reg. 79993 (Dec. 20, 2000). The Department created an exception at subsection (a)(4) for the admission of medical records relating to the treatment of the miner's respiratory or pulmonary condition without regard to the limitations set forth elsewhere in Section 725.414. Noting that, "[a]s a general rule, this evidence is not developed in connection with a party's affirmative case for or against entitlement," the Department did not include an independent provision governing rebuttal of treatment records. 64 Fed. Reg. 54996 (Oct. 8, 1999). In order to accommodate the differing circumstances of individual cases, however, and to ensure that all parties are accorded due process, the revised regulations permit parties to exceed the numerical limitations on documentary medical evidence upon a showing of good cause. 20 C.F.R. §725.456; 65 Fed. Reg. 79990, 79992. By including a "good cause" exception, the Department "fully expects that administrative law judges will be able to fashion a remedy in all cases that both permits the party opposing entitlement to develop such rebuttal evidence as is necessary to ensure a full and fair adjudication of the claim, and retains the principle inherent in these regulations that the fairest adjudication of a claimant's entitlement will occur when the factfinder's attention is focused on the quality of the medical evidence submitted by the parties rather than on its quantity." 65 Fed. Reg. 79993 (Dec. 20, 2000).

In the present case, as employer has identified specific reasons that the disputed x-rays contained in Director's Exhibit 5 should not be classified as treatment records under Section 725.414(a)(4), and as the administrative law judge summarily denied employer's request to admit rebuttal evidence into the record under a "good cause" exception at the hearing without addressing employer's due process concerns, we vacate the administrative law judge's award of benefits and remand this case for further findings. On remand, the administrative law judge must first determine whether the disputed evidence is properly admissible under the exception for treatment records and whether good cause was demonstrated under the facts of this case for the admission of rebuttal evidence or excess evidence into the record pursuant to Section 725.456. The administrative law judge must then redetermine whether the medical opinions of record are based on inadmissible evidence and, if so, the weight that should be accorded to such opinions. *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). Because the administrative law judge's evidentiary rulings on remand may affect his weighing of the evidence on the issue of complicated pneumoconiosis, we also vacate his findings pursuant to Section 718.304. On remand, the administrative law judge must reassess all relevant evidence and readjudicate the issue consistent with Fourth Circuit precedent. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

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

SO ORDERED.

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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