

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0436 BLA

JOAN HARMON (on behalf of ROBERT W. HARMON))

Claimant-Respondent)

v.)

CONSOLIDATION COAL COMPANY)

and)

CONSOL ENERGY, INCORPORATED)

Employer/Carrier-
Petitioners)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 08/13/2019

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-05520) of Administrative Law Judge Natalie A. Appetta, rendered on a claim¹ filed on April 7, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.

Pursuant to employer's previous appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that claimant established at least twenty-four years of qualifying coal mine employment.² *Harmon v. Consolidation Coal Co.*, BRB No. 16-0352 BLA, slip op. at 3 n.3 (May 25, 2017) (unpub.). The Board, however, vacated several of the administrative law judge's evidentiary rulings relevant to the autopsy evidence and thus vacated the award of benefits.³ *Id.* at 6-7; 20 C.F.R. §725.414.

Claimant initially designated the findings of the autopsy prosector, Dr. Adams, as an affirmative autopsy report and the opinion of Dr. Perper as an affirmative medical report. Hearing Transcript at 10-14. The Board held the administrative law judge erred in admitting Dr. Perper's opinion as a medical report; because he based his opinion on a review of the autopsy prosector's findings and the autopsy slides, the Board held it must be considered an autopsy report. *Harmon*, BRB No. 16-0352 BLA, slip op. at 6. The Board determined she also erred in alternatively admitting his opinion as a rebuttal autopsy report because employer did not designate any affirmative autopsy evidence. *Id.* The Board further held the administrative law judge abused her discretion by sua sponte redesignating Dr. Oesterling's opinion from employer's rebuttal autopsy evidence to its available affirmative autopsy evidence.⁴ *Id.* at n.5.

¹ The miner died on November 22, 2014. Director's Exhibit 34. Claimant, the widow of the miner, is pursuing the claim on behalf of his estate. Decision and Order at 2.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6; Director's Exhibit 4.

³ The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than . . . one report of an autopsy[.]" 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each . . . autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii).

⁴ The Board held that the administrative law judge also erred in sua sponte raising the issue of whether claimant established good cause to admit Dr. Perper's autopsy report

Because the administrative law judge relied on Dr. Perper's opinion in finding total disability, the Board vacated her finding that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.⁵ 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.204(b)(2). *Harmon*, BRB No. 16-0352 BLA, slip op. at 6-7. The Board remanded the case for the administrative law judge to resolve the parties' evidentiary designations, rule on the admissibility of the autopsy reports, advise the parties of her rulings before issuing her Decision and Order, and provide them with an opportunity to respond. *Id.* The Board instructed the administrative law judge that she "may consider whether it is appropriate to reopen the record for the parties to redesignate their evidence and, if necessary, develop additional evidence." *Id.* at n. 6.

On remand, the administrative law judge reopened the record and allowed the parties to redesignate their autopsy evidence. *See* September 8, 2017 Evidence Order. Claimant designated Dr. Perper's opinion as an affirmative autopsy report and employer designated Dr. Oesterling's opinion as a rebuttal autopsy report; neither party designated Dr. Adams's report. *See* Parties' Evidence Forms. Over employer's objection, the administrative law judge admitted Dr. Perper's autopsy report. *See* January 8, 2018 Evidence Order. She also excluded Dr. Adams's report and allowed employer to obtain supplemental reports from Drs. Oesterling and Renn based on their review of Dr. Perper's report. *Id.*

In her Decision and Order on Remand, which is the subject of this appeal, the administrative law judge found the miner had a totally disabling respiratory impairment, and thus claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge abused her discretion by reopening the record, allowing the parties to redesignate their evidence, and admitting Dr. Perper's autopsy report. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response.

in excess of the evidentiary limitations, and in failing to issue her evidentiary rulings before she issued her Decision and Order. *Harmon v. Consolidation Coal Co.*, BRB No. 16-0352 BLA, slip op. at 6-7 (May 25, 2017) (unpub.).

⁵ Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where the miner had at least fifteen years of underground or substantially similar coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's findings if they are 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. 20 C.F.R. §725.455(c); see *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

Initially, we reject employer's contention that the administrative law judge lacked authority to reopen the record to allow the parties to redesignate their evidence. Employer's Brief at 18-20. As discussed above, the Board instructed the administrative law judge that she may choose to take this action if appropriate in order to resolve the parties' evidentiary designations. *Harmon*, BRB No. 16-0352 BLA, slip op. at 6-7, n.6. Further, such a decision is within the province of the administrative law judge and employer has not shown she abused her discretion. See 20 C.F.R. §725.456; *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989); *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169, 1-173-74 (1989) (en banc); see also *Keener*, 23 BLR at 1-236.

We also reject employer's argument that the administrative law judge's resolution of the evidentiary issue constitutes a due process violation. Employer's Brief at 18-19. Due process requires that a party be permitted to exercise its rights at a meaningful time and in a meaningful manner. See *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807 (4th Cir. 1998). The administrative law judge addressed employer's argument that allowing claimant to redesignate her affirmative autopsy evidence "requires a complete reconstruction of the parties' original evidentiary designations" and "changes the legal landscape under which the parties developed their evidence." January 8, 2018 Evidence Order at 2. The administrative law judge permissibly resolved this issue by allowing employer "to submit a supplemental report by Dr. Oesterling and/or Dr. Renn for purposes of rebuttal or discussion of Dr. Perper's autopsy report." *Id.* at 3; see *Keener*, 23 BLR 1-229. Employer submitted a February 22, 2018 supplemental report by Dr. Oesterling based on his review of Dr. Perper's opinion. Employer's Exhibit 22. Because employer was provided a meaningful opportunity to be heard, its due process rights were not violated.

Employer raises no additional arguments. Thus, we affirm, as unchallenged, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and employer failed to rebut it. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 6-28.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge