

BRB No. 13-0219 BLA

OMA H. HATTON)	
(Widow of CLYDE HATTON))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 02/20/2014
)	
WESTMORELAND COAL COMPANY)	
)	
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 and Order Denying Motion for Reconsideration of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (11-BLA-5437) of Administrative Law Judge Lystra A. Harris rendered on a survivor's claim¹ filed on March 8, 2010, pursuant to the provisions

¹ Claimant is the widow of the miner, who died on September 27, 2009. Director's Exhibit 9. The miner filed three claims for federal black lung benefits, all of

of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with 38.65 years of coal mine employment.² Considering the merits of the claim, the administrative law judge credited the autopsy report of Dr. Dennis,³ and found that the autopsy evidence established that the miner had complicated pneumoconiosis. The administrative law judge therefore determined that claimant invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge further found that the miner's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

Employer timely moved for reconsideration. In support of its motion, employer attached a copy of a Complaint filed with the Kentucky Board of Medical Licensure (the Licensure Board), alleging that, between March 2011 and April 2012, Dr. Dennis improperly prescribed controlled substances to one or more patients, and engaged in inappropriate conduct with one of those patients. Employer also attached a copy of an Emergency Order issued by an investigative panel of the Licensure Board suspending Dr. Dennis's license to practice medicine pending resolution of the Complaint. Employer requested that the administrative law judge reopen the record, admit the attached documents, and reconsider the weight she accorded Dr. Dennis's opinion. Claimant did not respond to employer's motion.

The administrative law judge denied reconsideration because she found that the documents employer submitted set forth only allegations, "not any substantiated wrongdoing." Order at 2. Further, the administrative law judge found that the documents did not allege any issue with Dr. Dennis's medical license at the time he conducted the miner's autopsy, and she noted that the alleged misconduct took place after

which were finally denied by the district director. LM-1 Closed Claim; LM-2 Closed Claim; LM-3 Closed Claim (unstamped exhibits).

² The administrative law judge found that the miner's coal mine employment took place in Kentucky and, therefore, she applied the law of the United States Court of Appeals for the Sixth Circuit. Decision and Order at 7 n.10; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

³ The administrative law judge credited the opinion of Dr. Dennis, who performed the miner's autopsy, Director's Exhibit 10, Employer's Exhibit 2; over the contrary opinion of Dr. Caffrey, who reviewed the miner's autopsy report and lung tissue slides and concluded that the miner suffered from simple pneumoconiosis only. Director's Exhibit 11; Employer's Exhibit 7.

Dr. Dennis wrote the miner's autopsy report and was deposed. The administrative law judge therefore declined to reopen the record, and denied reconsideration. *Id.*

On appeal, employer argues that the administrative law judge erred in declining to discount Dr. Dennis's opinion in light of the circumstances that led to the suspension of his medical license. Additionally, employer contends that the Board should take official notice that, after the administrative law judge denied reconsideration, Dr. Dennis surrendered his medical license. Employer argues that the Board should therefore reverse the award of benefits.⁴ Alternatively, employer argues that the Board should remand the case for the administrative law judge to consider the effect of the surrender of Dr. Dennis's medical license on the credibility of his opinion.⁵ Employer argues further that the administrative law judge did not apply the correct law in determining whether claimant established the existence of complicated pneumoconiosis, and erred in her analysis of the medical evidence regarding the existence of complicated pneumoconiosis. Claimant urges the Board to reject employer's contentions regarding the suspension and surrender of Dr. Dennis's medical license, and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer, in its reply brief, reiterates its arguments on appeal.

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).

⁴ In its Brief in Support of Petition for Review, employer directs the Board to an internet address of the Kentucky Board of Medical Licensure where, employer states, the Agreed Order of Surrender of Dr. Dennis's medical license can be found. Employer's Brief at 15 n.7. Claimant does not dispute employer's description of the documents available online at that specific internet address.

⁵ Employer argues that, contrary to the administrative law judge's determination that only allegations of misconduct exist against Dr. Dennis, the Agreed Order of Surrender establishes that the misconduct occurred. Employer maintains that the Agreed Order of Surrender, and the Complaint upon which it was based, contain information establishing that Dr. Dennis "engaged in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public." Employer's Brief at 14. Employer argues further that this information "shows that [Dr. Dennis] is willing to perform dishonest acts when it benefits him," and thus may also be "willing to exaggerate . . . information in a pathology report, if he believes it will help him financially." Employer's Brief at 16.

The administrative law judge denied reconsideration because, at the time she considered employer's motion, there existed only allegations of misconduct against Dr. Dennis. Further, the administrative law judge noted that the alleged misconduct took place after Dr. Dennis performed the autopsy in this case. Employer, however, points out, and claimant does not dispute, that there are no longer allegations of misconduct; there has been an adjudication by the Licensure Board resulting in the surrender of Dr. Dennis's medical license. As for the administrative law judge's remaining reason for denying reconsideration, it is unclear to the Board whether the administrative law judge would still credit Dr. Dennis's opinion, based on her observation that the then-alleged misconduct took place after Dr. Dennis performed the miner's autopsy and testified in this case.

Therefore, because employer's new evidence, if admitted, could affect the administrative law judge's weighing of the autopsy evidence pursuant to 20 C.F.R. §718.304, we vacate the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration, and remand the case to the administrative law judge to consider whether the evidence regarding the surrender of Dr. Dennis's medical license should be admitted into the record. See 20 C.F.R. §§725.455(c), 802.404(a), 802.405(a); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999) (en banc); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989) (en banc). If the administrative law judge admits the evidence regarding Dr. Dennis's surrender of his medical license, she must determine whether it alters the weight to which Dr. Dennis's opinion of complicated pneumoconiosis is entitled, and the weight accorded to the other relevant autopsy evidence on the issue. If the administrative law judge finds that Dr. Dennis's opinion is entitled to diminished weight, the administrative law judge must reconsider her findings as to whether claimant has established the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

In the interest of judicial economy, we will address certain additional issues regarding the administrative law judge's finding that the miner had complicated pneumoconiosis. On remand, the administrative law judge must explain her basis for finding that, because Dr. Dennis conducted the miner's autopsy, he had an advantage over Dr. Caffrey, a reviewing pathologist, in determining whether complicated pneumoconiosis was present in the miner's lungs. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191-92, 22 BLR 2-251, 2-262 (4th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-22-23 (1992). The administrative law judge should consider the conflicting testimony of Drs. Dennis and Caffrey on that issue. Employer's Exhibit 2 at 46; Employer's Exhibit 7 at 25-26. Additionally, if the administrative law judge relies on Dr. Dennis's opinion on remand, she must explain why she finds it to be well-reasoned

and documented.⁶ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

We also instruct the administrative law judge, on remand, to reconsider and clearly explain her determination of the circuit in which the miner performed his last coal mine employment. The administrative law judge apparently consulted the CM-911a form contained in the survivor's claim record when she determined that all of the miner's coal mine employment was in Kentucky and, therefore, that the survivor's claim is governed by the law of the United States Court of Appeals for the Sixth Circuit. Decision and Order at 7 n.10. However, the closed living miner's claims exhibits, which are paginated and labeled LM-1, LM-2, and LM-3, were forwarded with the survivor's claim by the district director. Those claim exhibit files contain employment records indicating that the miner's last coal mine employment was in Virginia, in which case, the Board would apply the law of the United States Court of Appeals for the Fourth Circuit to the survivor's claim. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc). The distinction is relevant because, as the administrative law judge noted, the law of the Sixth Circuit does not require that an equivalency determination be made in order to determine whether Dr. Dennis's autopsy findings establish complicated pneumoconiosis, *see Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-624 (6th Cir. 1999), whereas the law of the Fourth Circuit requires an equivalency determination. *E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100 (4th Cir. 2000); Decision and Order at 7.

The district director included a notice with the miner's claim files stating that no piece of medical evidence contained in those files could be considered in the survivor's claim unless a party designated that evidence in compliance with the evidentiary limitations of 20 C.F.R. §725.414, or established good cause for its admission. The notice stated further, however, that "[t]hese limitations apply only to medical evidence. Other evidence in this file may be considered without regard to these limitations." Notice

⁶ We reject, however, employer's argument that Dr. Dennis's opinion cannot support a finding of complicated pneumoconiosis because the doctor did not use the term "massive lesions" in his report. A diagnosis of "progressive massive fibrosis," such as Dr. Dennis made in this case, may be found to equate to "massive lesions" under the Black Lung Benefits Act. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365 n.4, 23 BLR 2-374, 2-385 n.4 (4th Cir. 2006); *Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-624 (6th Cir. 1999); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1359, 20 BLR 2-227, 2-229-30 (4th Cir. 1996).

Regarding Closed LM Claims. Given the district director's accurate statement,⁷ it is unclear to the Board why the administrative law judge did not consult any of the employment information contained in the miner's claim records when she determined where the miner's last coal mine employment took place.⁸

Accordingly, on remand, the administrative law judge should specifically address whether the records from the closed living miner's claims are admitted into evidence, or explain why they were not admitted. *See* 20 C.F.R. §§725.421(b), 725.456(a). If the administrative law judge admits the closed living miner's claims records, she must determine the state in which the miner's last coal mine employment took place. If the administrative law judge determines that the miner last worked in Virginia, she should apply the law of the Fourth Circuit and, if she again credits Dr. Dennis's opinion, she must determine whether the lesions that Dr. Dennis described on the miner's autopsy would appear as greater-than-one-centimeter opacities if seen on an x-ray.⁹ *See Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100; *Shupe*, 12 BLR at 1-202.

If the administrative law judge concludes that claimant cannot prove that the miner had complicated pneumoconiosis, she must determine whether claimant can establish entitlement to benefits by considering whether claimant is entitled to invocation of the rebuttable presumption of death due to pneumoconiosis set forth in amended Section

⁷ In *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2006) (en banc), the Board held that medical evidence from the prior living miner's claim must be designated as evidence by one of the parties in order for it to be considered in the survivor's claim, in light of the evidentiary limitations at 20 C.F.R. §725.414. We note, however, that a record of the miner's coal mine employment history is not medical evidence that is limited by 20 C.F.R. §725.414. In sum, *Keener* does not bar the administrative law judge's consideration of information regarding the miner's coal mine employment history that is contained in the miner's claim files.

⁸ At a different point in her decision, the administrative law judge noted that the miner's claim files, "though attached to the Director's file, are not part of the record in this case." Decision and Order at 3 n.4. A review of the administrative law judge's Decision and Order does not disclose an explanation as to why the claim files that were forwarded and attached by the district director were not admitted as part of the record for any purpose. *See* 20 C.F.R. §§725.421(b), 725.456(a).

⁹ A review of the record reflects that Dr. Dennis testified that the lesions he detected on autopsy would show as greater-than-one-centimeter opacities on an x-ray, if the x-ray were taken properly. Employer's Exhibit 2 at 27, 46-47.

411(c)(4) of the Act, 30 U.S.C. §921(c)(4),¹⁰ or whether she has established entitlement pursuant to 20 C.F.R. Part 718.¹¹

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹⁰ Amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner had fifteen or more years of underground or substantially similar coal mine employment, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012).

¹¹ In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must affirmatively establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).