BRB No. 08-0404 BLA

S.B. (Widow of B.B.) Claimant-Petitioner v. ITEC and STATE WORKERS INSURANCE FUND (PA) Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/27/2009 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Edward K. Dixon (Zimmer Kunz, P.L.L.C.), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits of Administrative Law Judge Daniel L. Leland 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). Claimant filed her survivor's claim on August 17, 2005, following the death of her husband (the miner) on August 1, 2005.[1] Director's Exhibits 3, 12. In a decision dated February 5, 2008, the administrative law judge credited the miner with forty-three years of coal mine employment,[2] as stipulated by the parties, and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the existence of simple pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as stipulated by the parties and supported by the evidence. The administrative law judge further found, however, that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in admitting the report of Dr. Swedarsky into the record because it was proffered by employer less than twenty days prior to the hearing. Claimant further asserts that the administrative law judge's evaluation of the autopsy and medical opinion evidence relevant to the cause of the miner's death pursuant to 20 C.F.R. §718.205(c) fails to comply with the Administrative Procedure Act (APA), 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). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response regarding the evidentiary issues arising in this case.[3]

[1] Prior to his death, the miner had filed a claim for benefits on February 3, 2000, and was finally awarded benefits by Administrative Law Judge Robert J. Lesnick on October 2, 2001. Director's Exhibit 1.

[2] The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 1. 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*).

[3] The administrative law judge's findings that claimant established forty-three years of coal mine employment and the existence of simple pneumoconiosis arising out of coal mine employment are affirmed as unchallenged on appeal. *See Coen v. Director,*

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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, 718.203, 718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (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. 20 C.F.R. §718.205(c)(5); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 205, 22 BLR 2-467, 2-471 (3d Cir. 2002); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

We first address the Director's assertion that the administrative law judge failed to properly apply the limitations on evidence, set forth at 20 C.F.R. §725.414, to the parties' evidence in this case. We agree. Claimant identified the opinions of Drs. Perper and Fino as her two affirmative-case medical opinions, and identified the opinion of Dr. Wecht as her affirmative-case autopsy opinion. On appeal, the Director asserts that because Dr. Wecht's opinion as to the cause of the miner's death is "based on his review of his autopsy results and his review of 'various medical records and other relevant documents in this matter,'" Dr. Wecht's report went beyond the scope of an autopsy report and instead constitutes more than an autopsy report. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-240 (2006) (*en banc*); Director's Brief at 2. Thus, the Director contends that claimant has submitted three affirmative-case medical opinions. The Board has held that the limitations on evidence are mandatory and may not be waived by the parties. *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-73-34 (2004). Thus, because the administrative law judge did not determine whether the parties' evidentiary submissions complied with the requirements of 20 C.F.R. §725.414,

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OWCP, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

we vacate the administrative law judge decision and remand the case for further consideration of the evidence in light of *Keener*.[4] 20 C.F.R. §725.414.

On remand, the administrative law judge must reconsider the admissibility of the medical evidence, pursuant to the limitations at 20 C.F.R. §725.414, prior to his evaluation of the evidence pursuant to 20 C.F.R. §718.205(c). *See Keener*, 23 BLR at 1-239. In addition, to the extent that Drs. Oesterling and Swedarsky also reviewed inadmissible evidence, while the administrative law judge is correct that he is not required to exclude a physician's opinion that is based in part on inadmissible evidence,[5]

[4] The record does not contain employer's evidence summary form or reflect, with specificity, employer's evidentiary designations pursuant to 20 C.F.R. §725.414. In its post-hearing brief, employer stated: "In support of its position, the Employer offered an October 15, 2007 physician's interpretation by Dr. Robert Swedarsky as rebuttal of claimant's report dated July 25, 2006, a medical report by Dr. Jayesh Gosai, dated July 5, 2005 as initial evidence, an April 6, 2006 autopsy report of Dr. Everett Oesterling, and hospitalization records and treatment notes concerning claimant's cardiac treatment at Washington Hospital." Employer's January 31, 2008 Brief at 3. The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit certain rehabilitative evidence. *Id.* Notwithstanding these limits, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Any x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or physician's opinion that appears in a medical report must be admissible under either the 20 C.F.R. §725.414(a) limits, or under 20 C.F.R. §725.414(a)(4) as a hospitalization or treatment record. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1). Finally, a "physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for the purposes of" 20 C.F.R. §725.414. 20 C.F.R. §725.414(a)(1).

[5] As the administrative law judge properly stated, the Board has held that when evidence exceeding the limitations is referenced in an otherwise admissible medical opinion, if an administrative law judge determines that a physician's medical opinion relied upon inadmissible evidence, he has several available options including: excluding the report, redacting the objectionable content, asking the physician to submit a new report, or factoring in the physician's reliance upon the inadmissible evidence when

if the administrative law judge decides to "factor" a physician's reliance on inadmissible evidence into his evaluation, he must explain how the physician's reliance on that evidence affects the weight accorded to his report. *See Keener*, 23 BLR at 1-242 n.15; *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-148 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(McGranery & Hall, J.J., concurring and dissenting).

In the interest of judicial economy, we next address claimant's contention that the administrative law judge's evaluation of the medical evidence fails to comply with the APA, because he failed to adequately explain his findings under 20 C.F.R. §718.205(c). Claimant's Brief at 13. The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Schaaf v. Mathews*, 574 F.2d 157 (3d Cir. 1978); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In addressing whether the miner's death was due to pneumoconiosis, the administrative law judge considered the conflicting medical opinions of Drs. Wecht and Perper, that pneumoconiosis was a substantially contributing cause of the miner's death, and of Drs. Oesterling and Swedarsky, that the miner's pneumoconiosis did not contribute to his death. In finding the opinion of Dr. Perper to be less credible that those of Drs. Oesterling and Swedarsky, the administrative law judge summarily stated:

> Dr. Perper wrote a very lengthy report finding that pneumoconiosis hastened the miner's death, but Dr. Perper's primary area of expertise is forensic pathology and he lacks the qualifications of Dr. Oesterling and Dr. Swedarsky who are anatomic and clinical pathologists and do not specialize in forensic pathology. Dr. Perper's specialization in forensic pathology, as well as his status as the medical examiner of Broward County, Florida, suggests that he lacks the expertise of Drs. Oesterling and Swedarsky who do not primarily concentrate in forensic pathology. The opinions of Drs. Oesterling and Swedarsky are very detailed and well reasoned, as opposed to Dr. Wecht's opinion, and they concluded that the miner's minimal micronodular pneumoconiosis did not contribute to his death from cardiac disease. I give their opinions greater weight than the lengthy but less well

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deciding the weight to which his opinion is entitled. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(*en banc*)*; Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-148 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(McGranery & Hall, J.J., concurring and dissenting).

> informed opinion of Dr. Perper. (To the extent that Dr. Oesterling or Dr. Swedarsky referred to evidence that is not part of the record, I have factored those references out in evaluating their opinions.)

Decision and Order at 5.

We consider the administrative law judge's analysis to be too cursory to satisfy the requirements of APA. *See Schaaf*, 574 F.2d at 157; *Wojtowicz*, 12 BLR at 1-165. First, we agree with claimant that the administrative law judge did not adequately explain the basis for according greater weight to the opinions of Drs. Swedarsky and Oesterling, than to the opinion of Dr. Perper, based upon the physicians' credentials. Claimant's Brief at 6. As noted by employer, forensic pathologists specialize in determining the cause of death, while clinical and anatomical pathologists specialize in the diagnosis of disease. Employer's Brief at 13. Thus, as claimant contends, on the facts of this case, where the existence of pneumoconiosis was conceded, and the sole issue before the administrative law judge was the cause of the miner's death, the administrative law judge did not adequately explain why Dr. Perper's Board-certification in forensic pathology, and his employment as a medical examiner, render him less qualified to proffer an opinion as to the cause of the miner's death than Drs. Oesterling and Swedarsky, who hold Board-certifications in anatomic and clinical pathology. Claimant's Brief at 6-7. In reconsidering the qualifications of the physicians on remand, the administrative law judge must explain his determinations to credit or discredit the physicians' expertise as it relates to the cause of the miner's death.

Further, we agree with claimant that the administrative law judge did not explain in what respect Dr. Perper's opinion was "less well informed" than were the opinions of Drs. Oesterling and Swedarsky. *See Schaaf*, 574 F.2d at 157; *Wojtowicz*, 12 BLR at 1-165; Claimant's Brief at 8. Thus, we are unable to determine whether substantial evidence supports the administrative law judge's finding. On remand, the administrative law judge must explain the basis for his credibility determinations. *See Wojtowicz*, 12 BLR at 1-165.

In light of the foregoing, we instruct the administrative law judge to reconsider whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Kramer*, 305 F.3d at 205, 22 BLR at 2-471; *Lukosevicz*, 888 F.2d at 1006, 13 BLR at

2-108. The administrative law judge's analysis of the evidence, on remand, must be supported by sufficient and correct rationale.[6]

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

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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JUDITH S. BOGGS
Administrative Appeals Judge

[6] In light of our determination to remand this case for proper development of the evidentiary record pursuant to 20 C.F.R. §725.414, we need not address claimant's additional contention that the administrative law judge erred in admitting the report of Dr. Swedarsky into the record because it was proffered by employer less than twenty days prior to the hearing, as claimant's contention is moot.