BRB No. 06-0808 BLA

AMBER F. WALSH (Widow of RONALD WALSH)	)	
Claimant-Respondent	)	
v.	)	
BUFFALO MINING COMPANY	)	
	)	DATE ISSUED: 07/20/2007
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Amber F. Walsh, Logan, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6583) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 July 8, 2003.[1] Director's Exhibit 4. The district director issued a Proposed Decision and Order denying benefits on April 26, 2004. Director's Exhibit 31. At claimant's request, the matter was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on January 24, 2006.[2] The administrative law judge accepted the parties' stipulation that the miner suffered from coal workers' pneumoconiosis prior to his death. The administrative law judge further determined that the evidence was sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, alleging that the administrative law judge improperly excluded Dr. Bush's report from the evidentiary record. Employer challenges the administrative law judge's determination as to the severity of the miner's pneumoconiosis, alleging that the administrative law judge improperly relied on evidence from the living miner's claim that was not admitted into the record. Employer challenges the weight accorded the conflicting medical opinions as to whether the miner's death was hastened by pneumoconiosis, alleging that the administrative law judge mischaracterized the findings of employer's experts. Employer also argues that the administrative law judge erred in assigning greatest probative to the "speculative" opinion of Dr. Racadag, that pneumoconiosis hastened the miner's death due to lung cancer, based solely on Dr. Racadag's status as the autopsy prosector. Claimant responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, agreeing with employer's argument that the report of a physician who merely reviews autopsy slides may constitute a report of an autopsy for purposes of the evidentiary limitations. Director's Letter at 1 n.1. However, because Dr. Bush reviewed not only autopsy slides, but "a host of other medical evidence," the Director asserts that his report must also be considered a "medical report" pursuant to 20 C.F.R. §725.414(a)(1). *Id.* Thus, the Director maintains that "to the extent that

[1] Claimant is the widow of the miner who died on June 20, 2003. Director's Exhibit 16.

[2] At the hearing, the administrative law judge admitted Director's Exhibits 1-38 without objection, and also admitted Employer's Exhibits 1-7 for the purposes of identification. Hearing Transcript at 17-19. In his Decision and Order, the administrative law judge excluded Employer's Exhibit 5, consisting of the report of Dr. Bush dated February 6, 2004, Employer's Exhibit 6, consisting of the report of Dr. Castle dated September 30, 2005, and Employer's Exhibit 7, consisting of the report of Dr. Zaldivar dated September 28, 2004, because the administrative law judge found that these exhibits were proffered by employer in excess of the evidentiary limitations at 20 C.F.R. §725.414.

[employer] submitted two other medical reports into the record, Dr. Bush's report may be considered only to the extent he reviewed the autopsy materials." *Id.* The Director takes no position on the merits of claimant's entitlement to benefits in this 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.[3] 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).

Initially, we address employer's contention that the administrative law judge erred in excluding Dr. Bush's report dated February 6, 2004, which employer proffered as an affirmative autopsy report pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer's Brief in Support of Petition for Review at 20-21; Decision and Order at 3; Employer's Exhibit 5. The administrative law judge ruled at the hearing that the only "report of autopsy" that was admissible was the report prepared by Dr. Racadag, the autopsy prosector. Hearing Transcript at 25-26. It is apparent from the administrative law judge's ruling that he adopted the position that the only report that can count as an autopsy report is the report prepared by the autopsy prosector, and not a report based on a pathologist's microscopic review of the autopsy slides. *Id*.

Employer asserts on appeal that the administrative law judge's erred by not admitting Dr. Bush's report into the record as employer's one permissible autopsy opinion allowed under 20 C.F.R. §725.414(a)(3)(i). We agree. In *Keener v. Peerless Eagle Coal Corp*., 23 BLR 1-229 (2007) (*en banc*), the Board held that "in light of the comments to the regulations and the practical concerns surrounding the requirement for a detailed macroscopic description of the lungs," a physician's review of a miner's autopsy slides could constitute an affirmative report of an autopsy pursuant to 20 C.F.R. §725.414(a)(3)(i). *Keener*, 23 BLR at 1-237-238. In this case, the administrative law judge erred in finding that Dr. Bush's report, Employer's Exhibit 5, could not constitute an "autopsy report" for purposes of the evidentiary limitations at 20 C.F.R. §725.414; and therefore, that the administrative law judge erred in excluding Dr. Bush's report from the record. *Id.*

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's most recent coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

The Director contends that Dr. Bush's report, in addition to being an "autopsy report" for purposes of the evidentiary limitations, also constitutes a "medical report," since Dr. Bush reviewed the medical evidence as well as autopsy slides. Director's Letter at 1 n.1 Consequently, the Director urges that the Board reject employer's contention that the entire report is admissible, but should allow the employer to submit only that portion of Dr. Bush's report that constitutes a review of the autopsy slides and a review of the prosector's gross examination report. The Director notes that the portion of Dr. Bush's report, that contains the doctor's review of other medical evidence, would not be admissible as a "medical report," under the circumstances of this case, because employer has already designated two affirmative medical reports pursuant to 20 C.F.R. §725.414(a)(3)(i).

In light of the administrative law judge's evidentiary error in not admitting Dr. Bush's opinion as an autopsy report, we vacate his award of benefits and remand the case for proper consideration of Dr. Bush's report. On remand, the administrative law judge should consider the Director's argument that Dr. Bush's report also constitutes a "medical report" within the meaning of 20 C.F.R. §725.414(a)(3)(i). If the administrative law judge determines that Dr. Bush's report exceeds the scope of an autopsy report, the administrative law judge has the discretion to determine how to proceed to admit that report, including portions thereof. *See Keener*; 23 BLR at 1-241; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

Additionally, employer contends that the administrative law judge's determination as to the extent of pneumoconiosis present in the miner's lungs was in error because he reviewed x-ray readings and other evidence from the living miner's claim, which evidence had not been designated by the parties as medical evidence in the survivor's claim pursuant to 20 C.F.R. §725.414. Employer's assertion of error has merit. When a living miner files a subsequent claim, all the evidence from the first miner's claim is specifically made part of the record. 20 C.F.R. §725.309(d)(1); *see Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-61 (2004) (*en banc*). Such an inclusion is not automatically available in a survivor's claim filed pursuant to the revised regulations. *Keener*, 23 BLR at 1-241; *see* 20 C.F.R. §§725.309(d)(1); 725.414. As this case involves a survivor's claim, the medical evidence from the prior living miner's claim must have been designated as evidence by one of the parties in order for it to have been included in the record relevant to the survivor's claim. *Keener*, 23 BLR at 1-241. Thus, we hold that the administrative law judge erred in his consideration of evidence from the living miner's claim, which was included in the Director's Exhibits but had not been specifically designated by the parties as evidence pursuant to 20 C.F.R §725.414. Director's Exhibits 1, 2. On remand, the administrative law judge is directed to comply with the evidentiary limitations in his consideration of the evidence relevant to the survivor's claim.

In the interest of judicial economy we also address employer's arguments with respect to the weight, thus far, accorded the medical opinion evidence relevant to the merits of entitlement. In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must establish 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's 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, if the miner died due to complications of pneumoconiosis, or if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement.[4] *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In the instant case, the miner's treatment records show that he was diagnosed with metastatic lung cancer in May of 2003. Director's Exhibit 21, 22. The miner died on June 20, 2003. Director's Exhibit 16. The death certificate was signed by the miner's treating physician, Dr. Stoll, who listed metastatic lung cancer as the immediate cause of death. *Id*. Dr. Stoll also listed chronic obstructive pulmonary disease and atrial fibrillations as "other significant conditions." *Id.*

An autopsy was performed by Dr. Racadag on June 20, 2003. Director's Exhibit 18. Dr. Racadag noted coal macules as large as 0.8 centimeters and diagnosed that the miner suffered from simple coal workers' pneumoconiosis. *Id*. He further diagnosed squamous cell carcinoma, poorly differentiated with necrosis, left lobe of the lung; pulmonary congestion and edema; acute bronchiolitis; focal interstitial fibrosis; and severe pleural adhesions, bilateral. *Id*. In the "Comments" section of the autopsy report, Dr. Racadag stated that "above conditions probably contributed to the patient's suffering and demise." Director's Exhibit 18. In a supplemental report dated December 1, 2003, Dr. Racadag opined that the miner's chronic lung disease was equally due to smoking and coal dust exposure. Director's Exhibit 19. He further stated that "pneumoconiosis

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the miner worked thirty-seven years in coal mine employment and that he suffered from pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2, 7; Hearing Transcript at 21.

contributed as hastening role [sic] to the miner's death because it made his breathing difficult." *Id*.

Dr. Naeye reviewed the miner's autopsy slides, noting a "rare anthracotic macule with some associated fibrosis was present in the lungs…Rims of focal emphysema are rare around these macules…[t]hese findings meet the minimum criteria for the diagnosis of very mild simple coal workers' pneumoconiosis." Dr. Naeye further stated:

> The largest deposit is less than 1 [millimeter] diameter. At a few sites the pigment is accompanied by a small amount of fibrosis tissue, but only rarely by rather large birefringent crystals. Centrilobular emphysema is moderate in severity. The ratio of mucous to serous glands in bronchial walls is 10:1 (normal 1:1). This 10:1 ratio indicates the presence of severe chronic bronchitis. Tissue preservation is too poor to determine if any goblet cell hyperplasia was present in the walls of bronchioles.

Id. Based on these pathological findings, Dr. Naeye opined that the miner's pneumoconiosis was too mild to have caused any measurable effect on lung function during the miner's lifetime, and that the pneumoconiosis was too mild to have played any role in the miner's death. *Id*. In addition, Drs. Rosenberg and Hippensteel reviewed the autopsy findings along with other medical evidence. Dr. Rosenberg stated that there was a "very minimal degree of simple coal workers' pneumoconiosis pathologically, this would not have generally been associated with any significant respiratory impairment." Employer's Exhibit 1. Dr. Rosenberg further opined that the miner was not disabled from a respiratory standpoint by coal dust exposure, and related claimant's disability to lung cancer from smoking. *Id*. Dr. Rosenberg concluded that the events surrounding the miner's death were due to smoking-induced lung cancer and bore no relationship to coal dust exposure. *Id*. Dr. Hippensteel specifically rejected Dr. Racadag's opinion that the miner's death was hastened by pneumoconiosis, and opined that the miner would have died at the same time and from the same cause, complications from lung cancer due to smoking, had the miner never been exposed to coal mine dust. Employer's Exhibits 3, 4, 5.

The administrative law judge weighed the conflicting medical opinions and determined to assign controlling weight to Dr. Racadag's opinion. Employer contends that Dr. Racadag's opinion that coal workers' pneumoconiosis "probably" contributed to the miner's death is equivocal and, therefore, insufficient as a matter of law to carry claimant's burden of proof at 20 C.F.R §718.205(c). In support of its argument, employer relies upon *United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), in which the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, reversed an administrative law judge's award of benefits in a survivor's claim, holding that an

administrative law judge has under the Section 556(d) of the, Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 5 U.S.C. §554(c)(2), "the affirmative duty to qualify evidence as 'reliable, probative, and substantial' before relying upon it to grant or deny a claim." *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647. The court held that because the medical opinion credited by the administrative law judge was speculative, the opinion did not satisfy the requirements of Section 556(d). However, in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999), the court held that a physician's opinion expressed in conditional language was not necessarily speculative, but "simply acknowledg[ed] the uncertainty inherent in medical opinions, while nevertheless offering a positive opinion about [the miner's] cause of death." *Mays*, 176 F.3d at 763, 21 BLR at 2-605.

In summarizing Dr. Racadag's autopsy report findings and his supplemental report, the administrative law judge did not address the doctor's use of the word "probably" in rendering his opinion. While an administrative law judge is not required to discount an opinion expressed in qualified terms, *Mays*, 176 F.3d at 764, 21 BLR at 2-606, he cannot credit an opinion which is pure speculation and he must explain the basis for his interpretation. *Jarrell*, 187 F.3d at 389, 21 BLR 2-647; *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501, 1-503 (1984). Because the administrative law judge has not fully addressed whether Dr. Racadag's opinion constitutes a reasoned opinion, we direct the administrative law judge on remand to consider the probative value of Dr. Racadag's opinion in accordance with *Jarrell* and *Mays*.

The administrative law judge has also failed to explain why Dr. Racadag's opinion, regarding the degree or amount of coal workers' pneumoconiosis that was present in the miner's lungs, was found to be more credible than Dr. Naeye's opinion. An administrative law judge may not mechanically credit the autopsy prosector's opinion merely because the prosector examined the whole body. *Sparks*, 213 F.3d at 192, 22 BLR at 2-262. Because the administrative law judge failed to explain how Dr. Racadag's gross examination of the miner's body at autopsy enhanced his diagnosis, it was error for the administrative law judge to credit a prosector's opinion over those opinions of reviewing pathologists, solely on the basis that the prosector examined the miner's whole body at the time of death. *See Sparks*, 213 F.3d at 190, 22 BLR at 2-259. On remand, if the administrative law judge finds that Dr. Racadag's opinion is reasoned and documented, he must explain the basis for his decision to credit Dr. Racadag's opinion. Specifically, the administrative law judge must explain why Racadag's ability to conduct a gross examination placed him in a superior position than Dr Naeye, who reviewed the slides and the autopsy report, to render an opinion as to nature and extent of pneumoconiosis present in the miner's lungs and whether pneumoconiosis hastened the miner's death. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992).

Lastly, we agree with employer that the administrative law judge erred in assigning less probative weight to the opinions of Drs. Hippensteel and Rosenberg on the grounds that the physicians did not explain their understanding of the word "hastening," particularly when such a requirement was not equally imposed on Dr. Racadag. Decision and Order at 7. Furthermore, employer asserts that the administrative law judge improperly substituted his opinion for that of the medical experts when he speculated that the miner suffered respiratory impairment prior to being diagnosed with lung cancer, and that he suffered from emphysema and bronchitis due to coal dust exposure. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Employer's Brief in Support of Petition for Review at 12-13. We agree. To the extent that the administrative law judge criticized Drs. Hippensteel and Rosenberg for failing to explain whether emphysema or bronchitis played a part in hastening the miner's death, the administrative law judge has failed to provide any medical support in the record for his supposition that these conditions were due to coal dust exposure or for his statement that "[g]iven the history, pneumoconiosis combined with emphysema and bronchitis, whether 'caused' by them or not." Decision and Order at 9. Although the regulatory definition of legal pneumoconiosis may include chronic respiratory conditions such as emphysema and bronchitis, when those conditions are due in part to coal dust exposure, *see* 20 C.F.R. §718.201, claimant has the burden to establish the existence of legal pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Contrary to the administrative law judge's finding, based on our review of the medical opinion evidence, a finding of legal pneumoconiosis is not supported by the record as none of employer's experts attributed the miner's bronchitis and emphysema to coal dust exposure. Employer's Exhibits 1, 3, 4. Moreover Dr. Racadag did not make a diagnosis of either bronchitis or emphysema. Director's Exhibits 16, 19.

Thus, on remand, the administrative law judge must reweigh the medical evidence on the issue of whether pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). In so doing, the administrative law judge must be cognizant that claimant bears the burden of proving her entitlement to benefits. *See* 20 C.F.R. §§7108.201; 718.205(c); *Shuff*, 967 F.2d at 979-80; 16 BLR at 2-92-93.

Accordingly, the Decision and Order of the administrative law judge is affirmed in part, and vacated in part, and 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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BETTY JEAN HALL
Administrative Appeals Judge