

BRB No. 07-0834 BLA

B.F.)	
(Widow of E.F.))	
)	
Claimant-Petitioner)	
v.)	
)	DATE ISSUED: 07/24/2008
ISLAND CREEK COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Douglas S. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05858) of Administrative Law Judge Linda S. Chapman on a survivor's claim filed on June 8, 2005, 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 procedural history of the case is as follows. Claimant filed her survivor's claim following the death of the miner on March 27, 2005.¹ Director's Exhibit 2. The district director awarded benefits on March 2, 2006. Director's Exhibit 23. Employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges. In preparation for the hearing, claimant submitted an original autopsy report by Dr. Abrenio as her affirmative autopsy report, and a report by Dr. Perper, as her only affirmative medical report.² Director's Exhibit 5; Claimant's Exhibit 1. Employer submitted a report by Dr. Oesterling as an affirmative autopsy report and an autopsy rebuttal report by Dr. Crouch. Employer's Exhibits 1, 7, 8. Employer also submitted the reports of Drs. Bush and Castle as its two affirmative medical reports. Employer's Exhibits 2, 5, 6, 9, 10. At the December 13, 2006 hearing, claimant objected to the admission of Dr. Bush's opinion as a medical report since Dr. Bush had performed a microscopic review of the autopsy slides in forming his opinion as to the cause of the miner's death.³ Because Dr. Bush performed a microscopic examination of the autopsy slides, claimant asserted that Dr. Bush's constituted an autopsy report, subject to the evidentiary limitations and since employer had already submitted its complement of permitted autopsy opinions, claimant maintained that Dr. Bush's report was inadmissible under 20 C.F.R. §725.414. Hearing Transcript at 12.

The administrative law judge deferred her evidentiary ruling until after the hearing, and by Order dated January 17, 2007, admitted Dr. Bush's opinion, in its entirety, as one of employer's affirmative medical reports. The administrative law judge then issued her Decision and Order Denying Benefits on June 27, 2007. The administrative law judge accepted the parties' stipulation that the miner suffered from simple coal workers' pneumoconiosis. In weighing the conflicting medical opinions as to the cause of the miner's death, the administrative law judge gave "determinative" weight

¹ Claimant is the widow of E.F., the miner.

² In his June 30, 2006 report, Dr. Perper reviewed the autopsy report by Dr. Abrenio, treatment notes, the miner's death certificate and he also performed a microscopic review of the autopsy slides. Claimant's Exhibit 1.

³ In a report dated March 28, 2006, Dr. Bush reviewed the miner's treatment records, the death certificate, Dr. Abrenio's autopsy report and the autopsy slides. Employer's Exhibit 2. Dr. Bush later reviewed Dr. Perper's report and prepared a supplemental opinion on October 20, 2006. Employer's Exhibit 5. At the hearing, claimant argued that by designating the medical opinion of Dr. Bush, as an affirmative medical report, employer was able to circumvent the evidentiary limitations and submit three autopsy opinions. Hearing Transcript at 12.

to Dr. Bush's opinion and "significant" weight to the opinions of Drs. Oesterling and Crouch, that the miner's death was not hastened by pneumoconiosis. Decision and Order at 14. The administrative law judge gave less weight to the opinions of Drs. Abrenio and Perper, that the miner's death was due to pneumoconiosis, because she found that their opinions were insufficient "to outweigh Dr. Bush's opinion, as supported by the opinions of Drs. Oesterling, Crouch and Castle." *Id.* Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in rejecting the opinions of Drs. Abrenio and Perper that the miner's death was hastened by pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, asserting that the administrative law judge erred "in admitting Dr. Bush's [autopsy] slide review and in considering those portions of Dr. Bush's report which referred to his inadmissible slide review." Director's Brief at 3. The Director also contends that "[b]ecause the [administrative law judge's] denial of benefits rests to a large extent on her crediting of Dr. Bush's opinion, the [administrative law judge's] decision must be vacated and the case remanded" in order "to permit the parties to construct a record which complies with the evidentiary limitations." *Id.*

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.⁴ 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).

Initially, we address the Director's assertion that the administrative law judge erred in admitting Dr. Bush's autopsy slide review. In her evidentiary Order, the administrative law judge ruled that Dr. Bush's opinion was admissible as a medical report, despite his review of the miner's autopsy slides. She specifically stated:

As one of her two allowable initial medical reports, [claimant] submitted the report by Dr. Perper, while employer designated reports by Dr. Bush and Dr. Castle. As I discussed at the hearing, a medical report consists of a review and evaluation of *available admissible evidence*. Both Dr. Bush and Dr. Perper examined the autopsy tissue slides, and also reviewed available

⁴ The case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

medical records. The fact that these physicians examined the tissue slides does not prevent their reports from being designated medical reports. The autopsy slides, as well as Dr. Abrenio's autopsy report, are admissible evidence, and both Dr. Bush and Dr. Perper were entitled to examine this evidence in preparing their reports. In other words, these reports are properly designated as "medical reports."

Order Closing the Record and Establishing Briefing Schedule at 2 (emphasis added).

The Director asserts that the administrative law judge's ruling that Dr. Bush's report contains a review of admissible evidence is incorrect. The Director maintains that "a pathologist's report which reviews both the autopsy slides and other medical evidence is not only a medical report; it is also an autopsy report." Director's Brief at 3, citing *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239 (2007) (*en banc*). The Director argues that because employer has already submitted its full complement of autopsy evidence in this case, "there is no room for Dr. Bush's third review of the autopsy slides" and therefore his slide review constitutes inadmissible evidence under Section 725.414. *Id.* We agree with the Director's position.

The regulation at Section 725.414(a)(1) provides that a medical report "shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition" and that a medical report "may be prepared by a physician who examined the miner and/or reviewed *the available admissible evidence.*" 20 C.F.R. §725.414(a)(1) (emphasis added). The Director interprets the phrase "available admissible evidence" to include only that evidence which is deemed admissible under the parameters of Section 725.414. Although the administrative law judge reasoned that Dr. Bush's examination of the autopsy slides, which she characterized as admissible evidence, was permitted under Section 725.414(a)(1), the Director disagrees with the administrative law judge's interpretation of that regulation. The Director explains:

Dr. Bush's report is not saved by the [administrative law judge's] characterization of the tissue slides as admissible evidence. For one thing, the miner's actual lung tissue is not generally admitted as evidence in black lung proceedings, and was not admitted here. *See Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 298-99 (4th Cir. 2007) (recognizing that it is x-ray interpretations, and not x-ray films, that are admissible in black lung proceedings). More importantly, the regulations require that each autopsy report that appears in a medical report must be independently admissible in accordance with the limitations. 20 C.F.R. §725.414(a)(3)(i). Thus, because Dr. Bush's review of the autopsy slides constitutes an autopsy report, that review must be consistent with the limitations,

regardless of whether the tissues [sic] slides would theoretically be admissible at the hearing.

Director's Brief at 3 n.1.

Since the Director is charged with the administration of the Act, special deference is generally given to the Director's reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). To the extent that Dr. Bush prepared a microscopic review of the autopsy tissue slides, and also reviewed additional medical evidence, including the miner's treatment records and objective test results, we agree with the Director that Dr. Bush's opinion constitutes both an autopsy report and a medical report subject to the evidentiary limitations.

Furthermore, although the administrative law judge determined that Dr. Bush's autopsy slide review was admissible because it was part of a "medical report," that finding is in error. As noted by the Director, the regulation at Section 725.414(a)(3)(i) requires that

Any chest x-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible....

20 C.F.R. §725.414(a)(3)(i); *see* Director's Brief at 3 n.1. While the regulations are silent as to what an administrative law judge should do when evidence exceeding the limitations is referenced in an otherwise admissible medical opinion, the Board has held the administrative law judge should not automatically exclude the opinion without first ascertaining what portions of the opinion are tainted by the review of inadmissible evidence. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). If the administrative law judge finds that the opinion is tainted, he or she may redact the objectionable content; ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *Id.*; *see also* *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*).

Because employer designated the report of Dr. Oesterling as an affirmative autopsy report and the report of Dr. Crouch as a rebuttal autopsy report, Dr. Bush's autopsy slide review constitutes a third autopsy report, in excess of the evidentiary limitations. Therefore, to the extent that, Dr. Bush's "medical report" is based, in part, on his review of inadmissible evidence (albeit his own review of the autopsy slides), the administrative law judge erred in failing to consider Dr. Bush's opinion in light of

Section 725.414(a)(3)(i) and the Board's holding in *Harris*. See *Harris*, 23 BLR at 1-108. Based on this evidentiary error, and because administrative law judge assigned "determinative" weight to Dr. Bush's opinion in weighing the conflicting evidence as to the cause of the miner's death, Decision and Order at 14, we vacate her findings pursuant to Section 718.205(c), vacate the denial of benefits, and remand the case for further consideration of the proper weight to accord Dr. Bush's opinion.

Although we are remanding this case for further consideration and acknowledge that the evidentiary record may change on remand, in the interest of judicial economy, we will address two of claimant's arguments on the merits. Claimant asserts that the administrative law judge erred in giving less weight to the opinion of the autopsy prosector, Dr. Abrenio, because she found that the doctor reached "bald conclusions" as to the cause of the miner's death. Claimant's Brief at 5, citing Decision and Order at 14. A review of Dr. Abrenio's autopsy report shows that he described the microscopic and macroscopic findings on autopsy and then summarily stated:

The immediate cause of death is due to bronchopneumonia. Contributing causes of death include metastatic carcinomatosis and Coal Worker's Pneumoconiosis. The manner of death is natural.

Employer's Exhibit 9. Contrary to claimant's contention, Dr. Abrenio's three-sentence discussion of the cause of the miner's death does not explain how pneumoconiosis caused or hastened the miner's death. Decision and Order at 5. Because the administrative law judge reasonably found that Dr. Abrenio "offered no support or rationale" for his medical conclusion, the administrative law judge permissibly assigned less weight to Dr. Abrenio's opinion in her consideration of the evidence at Section 718.205(c). See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

Additionally, although claimant suggests that employer's experts are biased, she does not specifically cite to any evidence of bias in the record. Without specific evidence indicating that a report prepared for one party is unreliable, the administrative law judge should consider that report to be as reliable as the other reports of record in determining whether claimant established that the miner's death was due to pneumoconiosis. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*) (Allegations of bias must be supported by specific evidence present in the record).

In summary, on remand, the administrative law judge must determine what weight, if any, to assign Dr. Bush's opinion, based on his review of inadmissible evidence. The administrative law judge must then determine whether the evidence is

sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). In so doing, the administrative law judge must evaluate the bases for each physician's opinion, determine whether the opinion is reasoned and documented, and fully articulate the rationale underlying her credibility determinations, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge