BRB No. 10-0681 BLA
Case No. 2008-BLA-05951

TRULA M. EDWARDS (Widow of BILLY J. EDWARDS) Claimant-Respondent v. GRACE COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/02/2012 DECISION and ORDER on RECONSIDERATION EN BANC

Appeal of the Decision and Order Granting Modification and Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer has filed a timely Motion for Reconsideration En Banc of the Board's Decision and Order in *Edwards v. Grace Coal Corp.*, BRB No. 10-0681 BLA (Aug. 26, 2011) (unpub.). In *Edwards*, the Board considered employer's appeal of the August 2, 2010 Decision and Order Granting Modification and Benefits of Administrative Law

Judge Pamela Lakes Wood, rendered on a survivor's claim, filed on August 6, 2001, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1]

In her Decision and Order Granting Modification and Benefits, the administrative law judge found that the parties had stipulated to the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and that the evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Thus, the administrative law judge found that claimant established a basis for modification, by proving a mistake in a determination of fact, at 20 C.F.R. §725.310, and she awarded benefits.

Employer appealed the award, asserting that the administrative law judge erred in admitting a May 7, 2009 medical/autopsy report by Dr. Green, contained at Claimant's Exhibit 1, and a supplemental report by Dr. Green dated July 15, 2009, contained at Claimant's Exhibit 2, on the ground that the reports were submitted by claimant in excess of the evidentiary limitations at 20 C.F.R. §§725.310 and 725.414. Employer argued that the autopsy report was inadmissible because claimant already submitted an affirmative autopsy report by Dr. Segen, and claimant is not entitled to submit two affirmative autopsy reports. Employer argued that Dr. Green's medical opinion was inadmissible because claimant already reached his full complement of medical reports and because Dr. Green referenced evidence that is not in the record.

On the merits of the claim, employer argued that the administrative law judge erred in failing to address whether granting claimant's modification request was in the interest of justice, and that the administrative law judge erred in not giving res judicata effect to the initial denial of the survivor's claim by Administrative Law Judge Stuart A. Levin, dated April 11, 2007. In addition, employer maintained that the administrative law judge erred in weighing the conflicting medical opinions and in rendering her credibility determinations, as to the issues of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and death causation at 20 C.F.R. §718.205(c).

In regard to the evidentiary challenge, the Board agreed with employer that Dr. Green's opinion constituted both an autopsy report and a medical report, and had to meet

[1] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The amendments are not applicable to this case, as it was filed prior to January 1, 2005.

the evidentiary requirements for both types of evidence. *Edwards,* BRB No. 10-0681 BLA, slip op. at 5-6. The Board concluded, however, that Dr. Green's autopsy report was admissible as a rebuttal autopsy report. *Id*. The Board explained:

> Prior to the hearing, claimant's counsel specifically designated, as affirmative evidence, the March 23, 2001 autopsy report of Dr. Segen, the April 16, 2002 medical report of Dr. Robinette, and the May 7, 2009 medical report of Dr. Green. *See* Claimant's Black Lung Evidence Summary. *The record reveals that employer submitted an affirmative autopsy report by Dr. Naeye dated January 1, 2004.* Director's Exhibit 50.

Id. at 5 (emphasis added). The Board agreed with the Director's position that "Dr. Green's review of the autopsy slides is admissible as rebuttal autopsy evidence contradicting Dr. Naeye's interpretation of the tissue slides." *Id*. at 6. The Board also concluded that Dr. Green's medical opinion complied with the evidentiary limitations on medical reports and was admissible pursuant to 20 C.F.R. §§725.310 and 725.414. *Id.* The Board also rejected employer's argument that Dr. Green's opinion was inadmissible, based on employer's contention that Dr. Green cited to evidence that was not of record. *Id*. at 6-8.

On the merits, the Board rejected employer's contention that the administrative law judge was precluded, based on principles of res judicata, from considering whether a mistake in a determination of fact occurred pursuant to 20 C.F.R. §725.310. *Edwards,* BRB No. 10-0681 BLA, slip op. at 9 n.9. The Board affirmed the administrative law judge's finding that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310 by proving that the miner's death was due to pneumoconiosis. *Id*. at 9-13. However, the Board vacated the award of benefits because the administrative law judge did not make a specific finding as to whether granting claimant's modification request would render justice under the Act. *Id*. at 13.

Employer seeks reconsideration en banc of the Board's decision, asserting that the Board mischaracterized the designations of evidence. Employer asserts that, contrary to the Board's statement, Dr. Naeye's opinion was not proffered as affirmative evidence, but was submitted as a rebuttal autopsy report in response to the report of the autopsy prosector, Dr. Segen. Employer asserts that because Dr. Naeye's report is not affirmative evidence, Dr. Green's report does not constitute an admissible rebuttal autopsy report, as suggested by the Board. Employer asserts that the regulations do not permit claimant to "rebut" employer's rebuttal evidence. Furthermore, employer maintains that claimant is not entitled to submit Dr. Green's report under the evidentiary limitations, insofar as claimant designated the report of the autopsy prosector, Dr. Segen, as her one affirmative autopsy report, and the regulations do not provide for the submission of a second affirmative autopsy report.

Employer's arguments on reconsideration have merit, in part. We agree that the Board misstated that Dr. Naeye's report was specifically proffered as affirmative evidence by employer. Employer did not identify this report as either an affirmative or a rebuttal autopsy report at any hearing held in this case or on its Evidence Summary Form.[2] *See* Hearing Transcripts dated February 24, 2004 and June 23, 2009; Employer's June 23, 2009 Black Lung Evidence Summary Form. Although employer now characterizes Dr. Naeye's report as an autopsy "rebuttal" report, it did not do so before the administrative law judge.[3] Whether or not Dr. Naeye's report was properly submitted by employer as an autopsy rebuttal report remains a factual issue to be resolved by the administrative law judge. *See Director, OWCP v. Rowe,* 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (remand to fact-finder necessary where additional factual findings are needed as Board does not have jurisdiction to make factual findings); *Clark v. Karst-Robbins Coal Co.* 12 BLR 1-149, 1-153 (1989) (en banc).

After further reflection, we conclude that it is necessary to vacate the award of benefits and remand this case for the administrative law judge to resolve the content of the evidentiary record and determine the admissibility of the autopsy reports of Drs. Green and Naeye. Thus, we vacate the administrative law judge's finding that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c), and her finding that claimant established a basis for modification by proving a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

On remand, the administrative law judge must resolve the parties' evidentiary designations in this case, as they relate to the opinions of Drs. Naeye and Green.[4] If the administrative law judge determines on remand that Dr. Green's autopsy report is inadmissible, she must consider whether any portion of Dr. Green's opinion that constitutes a medical report under 20 C.F.R. §725.414 is based on his autopsy review.[5] If

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[2] Employer did not complete an Evidence Summary Form in conjunction with the February 24, 2004 hearing.

[3] Employer did not object to the admission of Dr. Green's autopsy review at the hearing, when it was represented by different counsel. June 23, 3009 Hearing Transcript at 9-10.

[4] The administrative law judge may consider whether it is appropriate to reopen the record for the parties to re-designate their respective evidence.

[5] If an administrative law judge determines that a physician relied upon inadmissible evidence, she 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 deciding the

the administrative law judge determines that Dr. Green's autopsy report is admissible evidence, the administrative law judge may reinstate her findings at 20 C.F.R. §§718.202(a), 718.205(c) and 725.310. If the evidentiary record is altered on remand, the administrative law judge must render new findings as to claimant's entitlement to benefits.

Moreover, if the administrative law judge awards benefits on remand, she must determine whether a grant of modification would render justice under the Act.[6] The modification of a claim does not automatically flow from a finding that a mistake was made on an earlier determination, and should be made only where doing so will render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007); *see Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification under the Longshore Act, also applicable to the Black Lung Benefits Act, is to "render justice.").

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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 (2006); *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting).

[6] Employer argues that claimant had ample opportunity to develop evidence in this case, including the opinion of Dr. Green, and that consideration of her modification request is not in the interest of justice. Employer's Brief in Support of Petition for Review at 18.

Accordingly, Employer's Motion for Reconsideration En Banc is granted, the Board's Decision and Order of August 26, 2011, is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur:

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

The issue presented is whether employer's statement, that it offered Dr. Naeye's autopsy report as rebuttal evidence, not affirmative evidence, which employer first expressed in its Motion for Reconsideration and Suggestion for Rehearing En Banc, is sufficient to warrant vacating the administrative law judge's determinations on the issues of entitlement, which the Board had previously affirmed, and remanding the case to determine whether Dr. Green's opinion was admitted in violation of the evidentiary limitations. I respectfully dissent from my colleagues' decision to exceed the Board's statutory authority and to ignore the doctrine of waiver. I believe the majority's decision is contrary to law.

In its brief on appeal to the Board, employer argued, *inter alia,* that the administrative law judge's decision awarding benefits, relying principally on Dr. Green's opinion, must be vacated because Dr. Green's opinion, which is both a medical report and autopsy review, constituted inadmissible evidence under the evidentiary limitations. Employer's Brief in Support of Petition for Review at 18-25. Employer asserted that Dr. Green's autopsy review was precluded because 20 C.F.R. §725.310 does not permit submission of an additional autopsy report on modification, and claimant had designated on the Black Lung Evidence Summary Form that Dr. Segen's report was her Initial Autopsy Evidence. *Id*. Employer also asserted that Dr. Green's medical report constituted inadmissible evidence because it incorporated the doctor's knowledge of his autopsy review, which is inadmissible evidence. *Id*. at 18-21.

In his response letter, the Director urged the Board to reject employer's contentions. Director's Letter Brief at 3-4. The Director explained that Dr. Green's opinion complies with both the medical report and autopsy evidentiary limitations. *Id*. Because the regulations provide that a party is permitted to submit both an affirmative case autopsy report and a rebuttal report where the opposing party has submitted affirmative autopsy evidence, Dr. Green's autopsy review is admissible rebuttal evidence contradicting Dr. Naeye's report which had been submitted as employer's affirmative case. *Id*.

In its decision, the Board agreed with the Director's analysis and rejected employer's contention that Dr. Green's opinion was inadmissible. *Edwards v. Grace Coal Corp.*, BRB No. 10-0681 BLA, slip op. at 4-8 (Aug. 26, 2011) (unpub.). The Board affirmed the administrative law judge's determinations on the medical evidence but remanded the case for the administrative law judge to determine whether granting modification would be in the interest of justice. *Id*. at 4-13.

Now, in its Motion for Reconsideration and Suggestion for Rehearing En Banc, employer asserts that the Board erred in holding that Dr. Green's autopsy review was

admissible as rebuttal to Dr. Naeye's report. Motion for Reconsideration at 6-8. Without any reference to the record, employer asserts that Dr. Naeye's report was offered as rebuttal to Dr. Segen's report. *Id*. The majority recognizes that this assertion is unsupported by the record, but the majority is concerned because employer correctly points out that the record does not support the statement in the panel's decision that Dr. Naeye's report was offered as affirmative evidence. Accordingly, the majority vacates the administrative law judge's determinations on the medical evidence and remands the case to the administrative law judge to resolve the disputed evidentiary designations.

Employer has succeeded in persuading the majority that the purposes for which the parties submitted the autopsy reports at issue must be resolved in order to determine that the evidentiary limitations have not been violated. Employer's argument is a red herring. There is no evidence that the parties were considering the evidentiary limitations when submitting their autopsy reports. Furthermore, it is unnecessary to resolve the question of the subjective intent of the parties when submitting their reports. The burden is on employer to show that Dr. Green's autopsy report was erroneously admitted. Admission of Dr. Green's autopsy report would violate the evidentiary limitations only if there is not an evidentiary slot available, or if employer had interposed an objection below and preserved it for appeal. The record shows, however, that employer waived its objection to the admission of Dr. Green's autopsy report and thereby waived its right to contend that the report did not fill the available evidentiary slot. I believe that consideration of employer's argument in light of the relevant evidence and applicable law reveals that it is unsupported in fact and in law, and should be rejected.

Procedural and Factual Background

Claimant is the widow of a former coal miner with more than seventeen years of coal mine employment. His claim for lifetime disability benefits had been finally denied prior to his death. Director's Exhibits 1, 2. Claimant filed a timely survivor's claim on August 6, 2001. Director's Exhibit 3. In support of her application, claimant submitted the miner's treatment records from Dr. Robinette, the death certificate signed by Dr. Robinette, Dr. Robinette's April 16, 2002 medical report, and the autopsy examination report prepared by Dr. Segen. Director's Exhibits 6-10, 22. Upon review of this evidence, the district director denied the claim. Director's Exhibit 23. Claimant timely petitioned for modification and submitted a second report from Dr. Robinette. Director's Exhibit 38. When, again, the district director denied benefits, claimant requested a hearing. Director's Exhibits 40, 43. At the hearing, employer submitted, without comment or explanation, Dr. Naeye's autopsy report and curriculum vitae. *See* February 24, 2004 Hearing Transcript at 8-9. Administrative Law Judge Mollie Neal awarded benefits. Director's Exhibit 55. Employer appealed to the Board, which ultimately remanded the case for reconsideration of the medical opinion evidence. *See Edwards v. Grace Coal Corp.* BRB No. 05-0197 BLA (Mar. 29, 2006) (Order on Motion for Recon.)

(unpub.). On remand, Administrative Law Judge Stuart Levin denied benefits. Director's Exhibit 71. Claimant timely filed a second request for modification, which she supported with additional medical opinion evidence from Dr. Robinette. Director's Exhibit 72. The district director denied benefits and claimant requested a hearing. Director's Exhibits 76, 77.

Prior to the hearing, each party submitted a Black Lung Evidence Summary Form. Under the heading of Medical Reports, claimant's benefits counselor identified: as Initial Evidence, the 2009 report of Dr. Green and the 2002 report of Dr. Robinette; as Rehabilitative Medical Report Evidence, the 2008 report of Dr. Robinette; as Initial Autopsy Evidence, the report of Dr. Segen. Claimant's Black Lung Evidence Summary Form. He also identified Hospitalization Record and Treatment Notes. *Id*. On Employer's Evidence Form, employer's attorney identified: as Initial X-Ray Evidence, a 1988 reading, as Initial Pulmonary Function Evidence, a 1999 study; as Initial Blood Gas Study Evidence, a 1999 test; as Initial Medical Report Evidence, the 2009 report of Dr. Tuteur and the 1999 report of Dr. Castle. Employer's Black Lung Evidence Summary Form. Counsel left blank all categories of Autopsy Evidence. *Id*. Nowhere on the form did counsel reference Dr. Naeye's report. *Id*.

At the hearing, the administrative law judge admitted evidence, including: from employer, a medical report by Dr. Castle and his curriculum vitae, and a medical report, with two supplemental reports, by Dr. Tuteur and his curriculum vitae; and from claimant, a medical report, autopsy slide review and supplemental report by Dr. Green. *See* June 23, 2009 Hearing Transcript at 10-16. Employer's attorney stated at the hearing that employer would have no objection to the admission of Dr. Green's medical opinion if employer's expert is provided with the opportunity to review the same evidence as Dr. Green, and to supplement his opinion accordingly.[7] *Id*. at 10-11. Employer's attorney also stated that employer had no objection to admission of a rehabilitative report by Dr. Green to be submitted following the hearing. *Id*. at 16. At the conclusion of the hearing, claimant's benefits counselor made a closing statement and employer reserved the right to file a post-hearing brief. *Id*. at 17-19. Thereafter, employer filed a supplemental

[7] When the administrative law judge asked employer's counsel at the hearing whether employer objected to admission of Claimant's Exhibit 1 containing Dr. Green's opinion, counsel replied:

> As long as I would be provided the opportunity to have my doctor look at that same evidence and supplement [sic] his opinion[,] I do not object to admission of Dr. Greene's [sic] report as filed under cover of May 15.

June 23, 2009 Hearing Transcript at 11.

report by Dr. Tuteur and claimant filed a supplemental report by Dr. Green. Claimant's Exhibit 2; Employer's Exhibit 5. The record was then closed. Employer submitted a post-hearing brief in which its attorney argued that Dr. Green's opinion should be discredited. Employer's Post-Hearing Brief at 3. Counsel did not argue that Dr. Green's opinion was inadmissible. *Id*.

Employer's Argument in Motion for Reconsideration

Employer requests the full Board to overturn the panel decision in this case, holding that Dr. Green's opinion constituted admissible rebuttal evidence to Dr. Naeye's opinion. Motion for Reconsideration at 4-9. In its Statement of the Case, employer summarizes its argument:

> Contrary to the panel's reasoning, Dr. Green's autopsy and medical review was not identified by claimant as "rebuttal" evidence to Dr. Naeye's report. Dr. Naeye's report, in fact, was submitted as rebuttal to Dr. Segen's report. Therefore, the Board has misconstrued the designation of the evidence submitted in this claim. Employer requests the full Board to reconsider this issue and to require Dr. Green's report to be excluded from the record on remand.

Id. at 3. In the argument section of its Motion for Reconsideration, employer begins with the assertion that it submitted Dr. Naeye's report as rebuttal to Dr. Segen's report. *Id*. at 4-6. It is surprising that employer's appellate counsel purports to know employer's intent in submitting Dr. Naeye's report since appellate counsel is not the attorney who submitted it and appellate counsel is unable to cite any evidence in the record indicating employer's intent. *Id*. at 4-9. Employer attempts to support its assertion by scrutinizing claimant's evidence summary form. *Id*. First, employer states: because claimant had identified Dr. Segen's report as affirmative autopsy evidence, employer had a right to rebut it, which employer did with Dr. Naeye's report. *Id*. at 4-6. As the evidentiary limitations do not permit claimant to rebut employer's rebuttal evidence, employer concludes that the panel erred in holding Dr. Green's autopsy report admissible as rebuttal evidence. *Id*. The linchpin of employer's argument is that Dr. Naeye's report was, in fact, submitted as rebuttal evidence. *Id*. Employer does not acknowledge that Dr. Naeye's report was not identified as rebuttal evidence on its evidence summary form. *Id*.; Employer's Black Lung Evidence Summary Form.

Second, employer points to claimant's failure to designate Dr. Green's opinion as rebuttal evidence on her evidence summary form. Motion for Reconsideration at 7; Claimant's Black Lung Evidence Summary Form. Again, employer overlooks a similar omission on its evidence summary form.

Third, employer cites to claimant's designation of Dr. Green's opinion as "initial" evidence on her evidence summary form. Motion for Reconsideration at 7; Claimant's Black Lung Evidence Summary Form. Based on this entry, employer argues: "this also supports a determination that Dr. Green's report constituted inadmissible autopsy evidence and excess evidence under the limitation of Section 725.414 and Section 725.310 of the regulations." *Id*. Employer's insinuation that claimant was attempting to circumvent the evidentiary limitations by using Dr. Green's opinion improperly is entirely baseless. Dr. Green's opinion consists of both a medical report and an autopsy review. Claimant's Exhibit 1. Claimant designated it properly as initial *medical report evidence*. *Id*. As the Director argued, and the panel held, it was admissible as such.

Employer concludes its argument with the warning that if the Board rejects its request to exclude Dr. Green's opinion, it will seek modification to obtain another autopsy report, consistent with the goal of the evidentiary limitations to provide the parties with equal evidence. Motion for Reconsideration at 7-8. Employer explains that since claimant designated Dr. Green's opinion as initial evidence, there is an evidentiary slot available for rebuttal of that evidence, which employer will fill with another autopsy report. *Id*. at 8.

Employer's threat is empty because, as discussed above, Dr. Green's opinion was designated as initial *medical report* evidence. Claimant's Black Lung Evidence Summary Form. It cannot be rebutted with an autopsy report. And Dr. Green's autopsy review cannot be rebutted because it was held admissible as rebuttal to employer's affirmative evidence, Dr. Naeye's report.

The shamelessness of employer's argument is astonishing, both because of what employer says and what employer does not say. Employer urges the Board to overturn the panel decision based upon nothing more than the failure of claimant's *benefits counselor* to indicate on the evidence summary form that Dr. Green's autopsy review was offered as rebuttal evidence, even though employer's *attorney* similarly failed to indicate on the evidence summary form that Dr. Naeye's report was offered as rebuttal evidence. Motion for Reconsideration at 7; Employer's Black Lung Evidence Summary Form. Also noteworthy in employer's argument is the absence of acknowledgement of two crucial points: first, nothing in the record supports employer's assertion that Dr. Naeye's report was offered as rebuttal evidence; and second, employer's counsel explicitly stated at the hearing that employer had no objection to admission of Dr. Green's opinion. Motion for Reconsideration at 4-9.

The Applicable Law

The law applicable to the issue presented is contained in the Board's authorizing statute, 33 U.S.C. §921(b), and in the case law which sets forth the doctrine of waiver. Both impose significant limitations on the Board's authority which are not acknowledged in either employer's Motion for Reconsideration or in the majority's decision.

A. The Board's Statutory Authority

Employer's argument is an extraordinary invitation to ignore the statutory limitations of the Board's authority. Based upon a representation never made to the administrative law judge, employer asks the Board to issue an order which would effectively reopen the record to amend Employer's Black Lung Evidence Summary Form so as to reflect that Dr. Naeye's report was filed as rebuttal evidence, and, on the basis of the amended form, would require exclusion of Dr. Green's opinion, currently in the record, even though counsel stated at the hearing that employer had no objection to admission of Dr. Green's opinion. Employer thereby urges the Board to contravene its statutory authority set forth in 33 U.S.C. §921(b)(3). That section provides in relevant part:

> The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.

33 U.S.C. §921(b)(3).

Although the majority has not granted employer's request in all respects, the majority's decision exceeds the Board's authority in two fundamental ways. The majority's decision violates Congress's directive to base its order upon the hearing record. The majority based its order on speculation, without any support in the hearing record. The majority has compounded this error by violating Congress's directive to affirm the administrative law judge's findings of fact if they are supported by substantial evidence. The majority's order vacates the administrative law judge's findings of fact, even though they have been properly held to be supported by substantial evidence. The majority's decision thereby far exceeds the Board's statutory limitations: "to review[] the record for substantial evidence and legal correctness." *Consolidation Coal Co. v. Smith* 699 F.2d 446, 449 (8th Cir. 1983); *see Lisa Lee Mines v. Director, OWCP,* 57 F.3d 402, 405 (4th Cir. 1995); *see also Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989). Ultimately, if confronted with this issue, I believe the Fourth Circuit would vacate the majority's decision as an unlawful exercise pursuant to 33 U.S.C. §921(b)(3).

B. The Doctrine of Waiver

Employer has cited no legal authority to justify its request that the Board exclude Dr. Green's opinion from the record, notwithstanding counsel's statement at the hearing that employer had no objection to admission of Dr. Green's opinion and employer's failure to identify Dr. Naeye's report as rebuttal evidence until long after the record was closed and the case was on appeal. *See* June 23, 2009 Hearing Transcript at 10-11; Employer's Black Lung Evidence Summary Form; Motion for Reconsideration at 4-9. Similarly, the majority cites no legal authority to justify its decision to entertain an evidentiary argument that employer disavowed at the hearing, and, based on that argument, to vacate the administrative law judge's findings on the issues of entitlement and remand the case to the administrative law judge to resolve the content of the evidentiary record. Both employer and the majority have ignored the legal authority relevant to this case, which requires protection of the orderly administration of justice by application of the doctrine of waiver. In *U.S. v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952), the Supreme Court declared the importance of application of this doctrine:

> We have recognized in more that a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts… . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice. (footnote omitted)

Id.

The record reveals that, by acts of both omission and commission, employer has waived its right to designate Dr. Naeye's report as rebuttal evidence and thereby preclude admission of Dr. Green's opinion. First, employer has waived the argument both by failing to make it to the administrative law judge and by failing to create an appropriate record. Employer argues that its mere statement to the Board, that Dr. Naeye's autopsy review was submitted as rebuttal evidence, establishes that the administrative law judge violated the evidentiary limitations by considering Dr. Green's autopsy review. Motion for Reconsideration at 4-9. The United States Court of Appeals for the Fourth Circuit has made clear that such an argument comes too late:

> [A] litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level. (citation omitted).

First-Citizen Bank and Trust Co. v. Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969). The law is clear that employer waived the issue by raising it for the first time to the Board, not the administrative law judge. *See Cisternas-Estay v. Immigration and Naturalization Service*, 531 F.2d 155, 160 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976) ("[I]f counsel wishes to preserve an issue for appeal, he must raise it in the proper administrative forum."); *see also Pleasant Valley Hospital, Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994) (holding that a party waived its challenge to the regulations by failing to make it during the administrative proceedings.); *accord, Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002). Employer's failure to raise the issue in its post-hearing brief to the administrative law judge constitutes waiver. Employer's Post-Hearing Brief at 3. *See South Carolina v. U.S. Dept. of Labor*, 785 F.2d 375, 378 (4th Cir. 1986) (South Carolina argued that the administrative law judge had committed reversible error by failing to afford it a hearing which the state had requested and which is required by the Administrative Procedure Act, but the court held that the state had waived its right by failing to re-assert it in its Written Brief Submission to the administrative law judge).

Employer also waived its argument by failing to create a proper record before the administrative law judge. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1010 (7th Cir. 1997). The record reflects that employer did not complete the Black Lung Evidence Summary Form's provisions for Autopsy Reports, including Initial Evidence, Rehabilitative Evidence and Rebuttal Evidence, and that employer never stated, while the case was before the administrative law judge, the purpose for which Dr. Naeye's report was submitted. Moreover, employer raises its argument despite its failure to comply with the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, which state that an allegation of error may not be predicated upon a ruling admitting evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . ." 29 C.F.R. §18.103(a)(1). Accordingly, employer forfeited its right to object to the admission of Dr. Green's opinion by failing to make the argument to the administrative law judge and to create the appropriate record. *See Consolidation Coal Co. v. Director, OWCP*, 294 F.3d 885, 895 (7th Cir. 2002) (employer waived its argument by failing to submit an appendix or properly identify those portions of the record that support its claim.).

Second, employer waived its right to designate its evidence and thereby prevent admission of Dr. Green's autopsy review when counsel stated on the record at the hearing

on modification that employer had no objection to the admission of Dr. Green's opinion. *See* June 23, 2009 Hearing Transcript at 10-11. Of course, if Dr. Green's opinion had not qualified for admission in an available category under the evidentiary limitations, consideration of his opinion would be precluded because the evidentiary limitations cannot be waived. *Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 1020 (10th Cir. 2010). But in the case at bar, Dr. Green's autopsy review is admissible if Dr. Naeye's autopsy review is considered as affirmative evidence. By stating that it had no objection to the admission of Dr. Green's opinion, employer waived its ability to contest the admissibility of Dr. Green's opinion and conceded the propriety of the consideration of Dr. Green's opinion as rebuttal evidence. *See Big Horn Coal Co. v. Director, OWCP*, 55 F.3d 545, 550, 19 BLR 2-209, 2-222 (10th Cir. 1995) (when counsel for employer stated at the hearing that employer did not contest its designation as "responsible operator," it waived its ability to contest liability. . .). The *Big Horn* court emphasized the importance of application of the doctrine of waiver where, as here, "a party voluntarily waived the issue, and did not just fail to raise it below." 55 F.3d at 551 n.8, 19 BLR at 2-222 n.8.

In its Motion for Reconsideration, employer suggests that its various objections to consideration of Dr. Green's opinion, stated in its post-hearing brief, are sufficient to preserve its right to object to the admission of Dr. Green's opinion as excess evidence under the evidentiary limitations. Motion for Reconsideration at 2-3. Employer's contention is contrary to law. *See Spiller v. Atchison, T. & S.F. Ry. Co*., 253 U.S. 117, 130 (1920) (general objections to the reception of evidence are not equivalent to an objection on the ground of hearsay.). As the Fourth Circuit observed in *Elizabethtown Gas Co. v. National Labor Relations Board*, 212 F.3d 257, 265 (4th Cir. 2000), "to be preserved for appellate review, an allegation of error must be grounded in an appropriately specific objection," *citing L.A. Tucker Truck Lines, Inc*., 344 U.S. at 37.

Conclusion

In sum, both by what it has done and by what it has failed to do, employer has repeatedly waived its right to designate Dr. Naeye's report as rebuttal evidence and thereby preclude admission of Dr. Green's opinion. The majority's decision to vacate the administrative law judge's determinations regarding the medical evidence and remand the case for the administrative law judge to determine the admissibility of Dr. Green's opinion is an unlawful exercise of authority under 33 U.S.C. §921(b)(3). In addition, it is "manifestly improper" in light of employer's "expressly waived objection" to the admission of Dr. Green's opinion. *United States v. Hancock Truck Lines, Inc.*, 324 U.S. 774, 778-79 (1945) ("It was manifestly improper [for the three-judge court] to reverse the [Interstate Commerce] Commission's order in respect of a provision therein as to which the suitor had advised that body it no longer objected."). The majority's decision is also manifestly unjust because it further delays resolution of the case and sows the seed of error in the record, which cannot be corrected until such time as the case comes to the

United States Court of Appeals for the Fourth Circuit. Unlike employer and its law firms, claimant and her benefits counselor might not have the strength and perseverance to wait so long. The orderly administration of justice requires application of the doctrine of waiver to reject employer's contention that Dr. Green's opinion is inadmissible and to prevent further delay in resolution of the case. *L.A. Tucker Truck Lines, Inc*., 344 U.S. at 36-37.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge