BRB No. 06-0668 BLA

WANDA STEWART (Widow of HARRY STEWART, JR.) Claimant-Respondent v. PEABODY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/29/2007 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2004-BLA-5814) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge

accepted the stipulation of the parties that the miner had thirty-two years of qualifying coal mine employment, and adjudicated this claim, filed on December 4, 2002, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge failed to consider all relevant evidence in the record, and provided invalid reasons for the weight he assigned to the conflicting evidence on the issues of the existence of legal pneumoconiosis at Section 718.202(a)(4), and the cause of the miner's death at Section 718.205(c). Claimant responds, urging affirmance of the award of survivor's benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the administrative law judge's application of the evidentiary limitations at 20 C.F.R. §725.414 to exclude consideration of evidence in the record which was not designated by the parties on their respective evidence summary forms. Employer has also filed a reply brief in support of its position.

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

Employer initially argues that the administrative law judge erred in admitting all evidence submitted by the parties into the record, and then applying the evidentiary limitations at Section 725.414 to consider only that evidence designated by claimant and employer in their post-hearing evidence summary forms. Employer maintains that the evidentiary limitations are not mandatory, in that a good cause exception exists for the administrative law judge to exercise his discretion in admitting excess evidence into the record for consideration. Employer asserts that, after admitting into the record the reports of Drs. Renn and Naeye, and the autopsy report of the prosector, Dr. Dolor,[1] the administrative law judge was obligated to consider them, particularly since other physicians of record reviewed their reports, and in view of the fact that the Director

[1] The Director, Office of Workers' Compensation Programs (the Director), did not attend the hearing or submit an evidence summary form. At the hearing, counsel for claimant and employer indicated that it was their understanding that Dr. Dolor's autopsy report was included in the record as the Director's evidence. Hearing Transcript at 59. However, as no party explicitly designated Dr. Dolor's report, the administrative law judge did not consider this evidence.

changed his position regarding what constitutes a report of an autopsy. Employer's Brief at 14; Reply Brief at 2-3. Employer's arguments have merit.

The record reflects that the parties discussed potential problems concerning their evidence with the administrative law judge at the hearing, as several physicians had reviewed medical evidence in the miner's claim as well as excess evidence in the survivor's claim, and employer had substituted the opinion of Dr. Oesterling for that of Dr. Naeye in support of its affirmative case, only after claimant's expert had reviewed and critiqued Dr. Naeye's report. Hearing Transcript at 6-18, 60-63. The parties maintained that, because they could not know with certainty what evidence the other party would rely upon until the administrative law judge admitted evidence into the record at the hearing, they necessarily had their experts review all evidence submitted to the district director in preparing their cases for adjudication. Thus, the parties argued that good cause was demonstrated to allow consideration of evidence which did not comport with the limitations at Section 725.414. Hearing Transcript at 18. The administrative law judge indicated that he would admit all evidence into the record provisionally, and that if, upon review, he determined that any of it should be excluded for failure to comport with the evidentiary limitations, or because evidence appearing in a medical report was inadmissible, he would allow the parties to address the exclusion. Hearing Transcript at 12, 18, 63. The administrative law judge also granted the parties the opportunity to brief the evidentiary issues prior to his ruling on the merits of entitlement. Hearing Transcript at 14, 60-61.

The parties subsequently submitted their procedural briefs, and in support of their affirmative cases, claimant designated the reports of Drs. Haggenjos and Kander as her two medical reports, and the report of Dr. Perper as her autopsy report, while employer designated the reports and depositions of Drs. Rosenberg and Renn as its two medical reports, and the report and deposition of Dr. Oesterling as its autopsy report. The parties stipulated that no evidence should be excluded or given less weight for failure to fully comply with the provisions at Section 725.414, but that a good cause exception should be made to admit all medical evidence into the record for consideration pursuant to Section 725.456(b)(1), in view of the limited case law interpreting the amended regulations and the uncertainty of the parties as to whether their evidence would ultimately comform to the applicable provisions. Alternatively, the parties sought the opportunity to conform their evidence in accordance with the administrative law judge's evidentiary rulings.

On March 15, 2006, the administrative law judge issued an order wherein he admitted all evidence into the record, but indicated that he would only consider the evidence designated on the parties' evidence summary forms. The administrative law judge determined, however, that both parties had exceeded the evidentiary limitations, in that Drs. Perper and Oesterling conducted slide reviews and provided consultative reports, whereas, in an unpublished opinion, the Board had applied the Director's

position that only the original prosector's report constituted a "report of autopsy" at Section 725.414. As the reports of Drs. Perper and Oesterling could only be used as medical opinion reports, and the parties had each designated two medical opinion reports from other physicians, the administrative law judge allowed both parties the opportunity to resubmit evidence summary forms in compliance with Section 725.414. Claimant then designated the reports of Drs. Kander and Perper as her initial medical report evidence, and the report of Dr. Haggenjos, the miner's treating physician, as rehabilitative evidence, while employer designated the reports and depositions of Drs. Oesterling and Rosenberg as its two medical reports.[2] The administrative law judge found that these designations were in compliance with Section 725.414. Decision and Order at 5.

Subsequent to the issuance of the administrative law judge's Decision and Order, however, following a change in the Director's position as to what constitutes an autopsy report, the Board held that a report by a pathologist who has reviewed the autopsy tissue slides is in substantial compliance with the quality standards at 20 C.F.R. §718.106(a), and, therefore, can constitute a report of an autopsy for the purposes of Section 725.414(a)(2)(i) and (a)(3)(i). *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*). Moreover, while the Director correctly notes that the limitations at Section 725.414 are mandatory and cannot be waived, the administrative law judge never explicitly ruled on the parties' request pursuant to Section 725.456(b)(1) for a good cause exemption from the evidentiary limitations. *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004). As the parties are each entitled to submit an autopsy report in addition to their two medical reports, and the administrative law judge must determine whether a good cause exception is warranted, we vacate the administrative law judge's findings of pneumoconiosis pursuant to Section 718.202(a) and death due to pneumoconiosis pursuant to Section 718.205(c), and remand this case for further evidentiary findings consistent with *Keener* and *Smith*, and a readjudication of the merits of entitlement. *See also Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

Because the administrative law judge must redetermine what evidence is admissible into the record for consideration and, absent a finding of good cause, address the impact of Section 725.414(a)(2)(i), (a)(3)(i) if a medical report is based on evidence that was not properly admitted, and then reassess all relevant evidence and resolve the

[2] In a letter dated March 27, 2006, employer noted its disagreement with the administrative law judge's order, indicating that "it would appear that implicitly the Court is not making a 'good cause' exception to have evidence over the evidentiary limitations." Employer further indicated that it was submitting, as an offer of proof under 29 C.F.R. §18.44(e), the report and deposition of Dr. Renn.

conflicts, we need not reach the administrative law judge's weighing of the medical opinions. However, in order to avoid future error on the part of the administrative law judge on remand, we note our agreement with employer's argument that the administrative law judge provided an invalid reason for discounting Dr. Oesterling's opinion. The administrative law judge determined that Dr. Oesterling "refused to rely on a coal history of thirty-two to thirty-eight years, as reported by the Claimant and established by the record," Decision and Order at 16, and concluded that the opinion was based on a less accurate occupational history, as compared to the miner's smoking history. Decision and Order at 16-17. A review of the record, however, does not support the administrative law judge's characterization of Dr. Oesterling's opinion.

The record reflects that, at his deposition, Dr. Oesterling testified that he was provided a history of up to thirty-eight years of mining employment in this case, Employer's Exhibit 9 at 65-66, but was "surprised" at that history, Employer's Exhibit 9 at 58, 66-67, in view of the limited dust deposits and histological changes present in the miner's lungs and lymph nodes. Employer's Exhibit 9 at 52, 58, 62, 67. Dr. Oesterling acknowledged that his report did not specifically mention the length of the miner's coal mine employment because "I did not see sufficient amounts of dust in his lungs to substantiate that history. . . . If I had seen a lot of dust in his lungs, I probably would have commented on the fact that it would be in keeping with his 38 year mining history." Employer's Exhibit 9 at 66. When asked if he thought that the miner did not have thirty-eight years of coal dust exposure, however, Dr. Oesterling replied "I don't think that at all . . . I think he probably had 38 years." *Id.* Dr. Oesterling explained that various factors could have had an effect on the amount of dust and histological changes found in the miner's lungs, including the amount of dust he was exposed to in the mines, how good the miner was about using protective measures such as respirators, and the actual individual response to dust. *Id*. As substantial evidence does not support a finding that Dr. Oesterling did not accept the miner's lengthy coal mine employment history, the administrative law judge is instructed to reassess the opinion if it retains its status as designated record evidence on remand.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is vacated, and this case is remanded for further evidentiary findings and consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge