

BRB No. 07-0783 BLA

E.U.)
(Widow of C.U.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 06/20/2008
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg,
Pennsylvania, for claimant.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05778) of
Administrative Law Judge Janice K. Bullard 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).¹ In her Decision and Order, the

¹ Claimant, E.U., is the widow of the deceased miner, C.U., who was receiving
black lung benefits prior to his death on April 15, 2003. Director's Exhibits 1, 8.
Claimant filed her survivor's claim on March 25, 2004. Director's Exhibit 2.

administrative law judge decided to exclude from the record the deposition testimony of Dr. Rizkalla, Claimant's Exhibit 2, and the deposition testimony of Dr. Churg, Director's Exhibit 46, finding that this evidence was submitted in excess of the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge found that while the miner suffered from pneumoconiosis, the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in excluding the deposition testimony of Dr. Rizkalla. Claimant does not allege any error with respect to the administrative law judge's findings on the merits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's evidentiary ruling.

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.² 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).

Claimant's sole argument on appeal is that the administrative law judge erred in excluding the deposition testimony of Dr. Rizkalla, the autopsy prosector. At the hearing held on September 26, 2006, the parties designated evidence for admission into the record. Claimant designated the original report of autopsy performed by Dr. Rizkalla on April 16, 2003, Director's Exhibit 9, and Dr. Rizkalla's deposition testimony dated December 21, 2004, Claimant's Exhibit 2; a rebuttal autopsy report by Dr. Perper dated December 26, 2004, Claimant's Exhibit 1; an affirmative medical report by Dr. Schaaf dated August 24, 2005 and a supplement report by Dr. Schaaf dated August 26, 2005, Claimant's Exhibits 3, 4; a second affirmative medical report by Dr. Begley dated October 14, 2005, Claimant's Exhibit 5; and Dr. Schaaf's deposition transcript dated October 20, 2006, Claimant's Exhibit 6. The Director proffered an affirmative medical report by Dr. Fino dated February 2, 2005, Director's Exhibit 43; Dr. Fino's deposition transcript dated August 30, 2005, Director's Exhibit 45; an affirmative medical report by Dr. Renn dated July 19, 2005, Director's Exhibit 44, and Dr. Renn's deposition transcript dated September 29, 2005, Director's Exhibit 47; an affirmative autopsy report by Dr. Bush dated June 9, 2004, Director's Exhibit 3; and a rebuttal autopsy report by Dr. Churg

² Because the miner's coal mine employment occurred in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

dated August 3, 2004, Director's Exhibit 15, along with Dr. Churg's deposition transcript dated June 7, 2005, Director's Exhibit 46.

Although the administrative law judge tentatively admitted at the hearing, all of the evidence submitted by the parties, in her Decision and Order, she determined that, because the deposition testimony of Drs. Rizkalla and Churg "addresses a single objective test, to wit, an autopsy[.]" the deposition testimony was not admissible under the regulation at 20 C.F.R. §725.414. Decision and Order at 3; Hearing Transcript 37-38. Claimant asserts that it was irrational for the administrative law judge to exclude Dr. Rizkalla's deposition testimony because the autopsy prosector is the only physician to perform a gross examination of the decedent. Claimant's Brief (unpaginated). Claimant maintains that the administrative law judge based her denial of benefits on "less relevant, probative evidence." *Id.* Claimant further states:

It should be noted that the Administrative Law Judge never provided the [c]laimant notice that she was going to exclude Dr. Rizkalla's deposition. Had she done so, the [c]laimant certainly would have designated that the deposition testimony of Dr. Rizkalla was to be considered a second medical report and opinion.

Id. Claimant asks the Board to remand the case to the administrative law judge with instructions that she admit Dr. Rizkalla's opinion and reconsider her entitlement to benefits. *Id.*

The Director submits that the administrative law judge properly excluded Dr. Rizkalla's deposition, but for the wrong reason. The Director notes that, contrary to the administrative law judge's finding, "the regulations do not prohibit a party from deposing a physician who reviews a single objective test" as opposed to a physician who has prepared a medical report. We agree. The regulation at 20 C.F.R. §725.414(c) provides, in relevant part, that:

A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this subsection. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of §725.456 of this part.

20 C.F.R. §725.414(c). “Medical reports” as referenced in 20 C.F.R. §725.414(c) are defined as: “A physician’s written assessment of the miner’s respiratory or pulmonary condition.” 20 C.F.R. §725.414(a). A medical report may be prepared by the physician who examined the miner and/or reviewed the available admissible evidence. 20 C.F.R. §725.414(a)(1). However, “a physician’s written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report” for purposes of 20 C.F.R. §725.414. *Id.*

Contrary to the administrative law judge’s finding, Dr. Rizkalla’s deposition testimony was not *per se* inadmissible.³ Rather the deposition testimony was inadmissible under 20 C.F.R. §725.414(c) because claimant had already submitted her full complement of medical reports, *i.e.*, the affirmative medical reports of Drs. Begley and Schaaf pursuant to 20 C.F.R. §725.414(a)(2)(i). *See* 20 C.F.R. §725.414(c); Director’s Brief (unpaginated). Although the administrative law judge initially erred in the rationale she applied for excluding Dr. Rizkalla’s deposition testimony, because the result was proper, we consider her error to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), and we affirm the administrative law judge’s decision to exclude Dr. Rizkalla’s deposition from the record pursuant to 20 C.F.R. §725.414(c).

Additionally, claimant contends that the administrative law judge erred in failing to give her notice that she was going to exclude Dr. Rizkalla’s deposition, prior to the ruling contained in the Decision and Order. We note, however, that the administrative law judge indicated at the hearing that the evidence submitted by claimant was admitted into the record subject to the evidentiary limitations.⁴ Hearing Transcript at 37-38. Because an administrative law judge has broad discretion in the resolution of procedural matters, *see Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149, 1-153 (1989) (*en banc*), we

³ The Director, Office of Workers’ Compensation Programs (the Director), contends that “the [administrative law judge] incorrectly found that Dr. Rizkalla’s deposition was limited to a discussion of his autopsy findings” since the doctor also considered other medical data. Director’s Brief (unpaginated). According to the Director, Dr. Rizkalla’s deposition testimony constitutes a “medical report.” *Id.* The Director notes that “while a deposition is admissible as a ‘medical report,’ the deposition/medical report must comply with the two-medical report limit.” In this case, because claimant reached that limit with the medical reports of Drs. Begley and Schaaf, the Director maintains that Dr. Rizkalla’s deposition testimony was properly excluded. *Id.*

⁴ The Director filed a post-hearing brief asserting that Dr. Rizkalla’s deposition was inadmissible. Claimant did not file a brief or otherwise respond to the Director’s evidentiary challenge.

reject claimant's argument that the administrative law judge erred in excluding Dr. Rizkalla's deposition from the record in her Decision and Order.

We hold that the administrative law judge correctly applied the evidentiary limitations set forth at 20 C.F.R. §725.414, and properly excluded the excess medical evidence submitted in this case. 20 C.F.R. §725.414; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*); see *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006); *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004). Therefore, we affirm the administrative law judge's decision to exclude Dr. Rizkalla's deposition testimony. Because claimant does not challenge the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), we affirm the denial of benefits. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge