BRB No. 08-0503 BLA

L.V. (Widow of W.V.) Claimant-Respondent v. EASTERN COAL CORPORATION and THE PITTSTON COMPANY c/o ACORDIA EMPLOYERS SERVICE Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/20/2009 DECISION and ORDER

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

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-5576) 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). The miner died on July 8, 2002, and claimant filed her claim for survivor's benefits on August 30, 2002. Director's Exhibits 3, 11. This case is before the Board for the second time.

In the prior appeal, the Board initially considered the administrative law judge's post-hearing admission of Dr. Perper's deposition testimony. The Board noted that the administrative law judge had given claimant the opportunity to depose Dr. Perper specifically for the purpose of allowing him to "rehabilitate" his opinion by responding to the opinions of Drs. Fino and Rosenberg, submitted by employer close to the twenty day deadline for the submission of evidence pursuant to 20 C.F.R. §725.456. The Board held, however, that the administrative law judge did not make a specific finding as to whether Dr. Perper's post-hearing deposition constituted appropriate rehabilitative evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). Consequently, the Board vacated the administrative law judge's admission of Dr. Perper's post-hearing deposition testimony and instructed the administrative law judge to re-address its admissibility on remand. [*L.V.*] *v. Eastern Coal Corp.*, BRB No. 06-0583 BLA (Apr. 27, 2007)(unpub.), slip op at 5.

Regarding the merits of entitlement, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that employer is the responsible operator, and that claimant established forty-three years of coal mine employment[1] and the existence of simple, but not complicated, pneumoconiosis, arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, 718.304. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). However, in light of the need for clarification of the medical record, the Board also vacated the administrative law judge's finding of entitlement pursuant to 20 C.F.R. §718.205(c), and instructed the administrative law judge to reconsider whether claimant

[1] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

established that the miner's death was due to pneumoconiosis "in light of all the relevant and properly admitted evidence of record." [*L.V.*], slip op. at 5.

On remand, the administrative law judge found that Dr. Perper's medical report and deposition testimony constituted admissible evidence, within the evidentiary limitations set forth at 20 C.F.R. §725.414. Considering the merits of entitlement, the administrative law judge credited the opinions of Drs. Dennis, Musgrave, and Perper, over those of Drs. Fino and Rosenberg, to find that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On appeal, employer challenges the administrative law judge's admission of the written report and deposition testimony of Dr. Perper, pursuant to 20 C.F.R. §725.414. Employer also challenges the administrative law judge's weighing of the medical opinions pursuant to 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the administrative law judge's admission of Dr. Perper's report and testimony as within the limitations on evidence, and further urges affirmance of her finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting that Dr. Perper's report and deposition testimony are properly admissible within the limitations on evidence. Employer filed a reply brief reiterating its contentions on 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. 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).

Turning first to the merits of entitlement, we address employer's contention that the administrative law judge erred in her evaluation of the medical evidence in finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

To establish entitlement to survivor's benefits, claimant must demonstrate 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.[2] *See* 30 U.S.C. §901;

[2] As noted above, the administrative law judge's prior findings that claimant established that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) were affirmed as unchallenged in the prior appeal. [*L.V.*] *v. Eastern Coal Corp.*, BRB No. 06-0583 BLA (Apr. 27, 2007)(unpub.).

20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993).

For survivors' 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, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(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); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

Employer contends that the administrative law judge erred in crediting the opinions of Drs. Musgrave, Dennis, and Perper, over those of Drs. Fino and Rosenberg, to conclude that the miner's death was due to pneumoconiosis. Employer's Brief at 12-18. Employer specifically contends that the opinions of Drs. Musgrave, Dennis, and Perper do not constitute substantial evidence sufficient to support claimant's burden of proof, and that the administrative law judge erred in discrediting the opinions of Drs. Fino and Rosenberg. Some of employer's contentions have merit.

The evidence relevant to the cause of the miner's death includes the death certificate prepared by Dr. Musgrave, the miner's treating oncologist, Dr. Musgrave's treatment records, the autopsy report by Dr. Dennis, the autopsy report by Dr. Caffrey, and the medical opinions of Drs. Perper,[3] Rosenberg, and Fino. On the death certificate, Dr. Musgrave listed the immediate cause of death as chronic lung disease, and listed aspiration pneumonia and colon cancer as conditions leading to the immediate cause. Director's Exhibit 11. An autopsy was performed by Dr. Dennis, whose final diagnoses included moderate anthracosilicosis, panlobular and panacinar emphysema, cor pulmonale "and/or" pulmonary hypertension, and a pulmonary embolus. Director's Exhibit 12 at 3. Dr. Dennis concluded:

> This patient died as a result of cardiovascular disease and coexist[e]nt black lung disease. The pulmonary component of the disease was moderate to severe. Pulmonary hypertension was demonstrated satisfactorily by sections. Anthracosilicosis with macule formation greater than 1 to 1.5 cms and macular changes were demonstrated as well. The pulmonary embolus

[3] As will be discussed, *infra*, Dr. Perper's report may also constitute an autopsy rebuttal report.

> certainly hastened his problems and was probably secondary to the sedentary changes coexist[e]nt with his disease.

Director's Exhibit 12 at 3. The record also contains the autopsy report of Dr. Caffrey, who reviewed Dr. Dennis' autopsy report, the autopsy slides, and additional record evidence, and concluded that the miner's simple pneumoconiosis did not cause or hasten his death.[4] Employer's Exhibit 6 at 5. Dr. Perper rendered a report dated February 26, 2005, wherein he reviewed the autopsy report and slides, Dr. Caffrey's opinion, the death certificate, and hospital and treatment records from Dr. Musgrave, together with other medical evidence developed during the miner's lifetime. Claimant's Exhibit 1. Dr. Perper concluded that coal workers' pneumoconiosis was a contributing cause and a hastening factor of the miner's death. Claimant's Exhibit 1 at 20, 21. Dr. Perper reiterated and explained his conclusions in a deposition on July 11, 2005. Claimant's Exhibit 2. Dr. Fino rendered a report dated April 18, 2005, and was subsequently deposed on May 2, 2005, and he opined that the miner died due to unresectable colon cancer and severe coronary artery disease, unrelated to coal mine employment. Employer's Exhibits 4 at 9-10, 5 at 9. Finally, the record contains Dr. Rosenberg's April 6, 2005 report, and April 20, 2005 deposition testimony, in which the physician opined that the miner died due to metastatic colon cancer with aspiration and pulmonary emboli, unrelated to coal mine employment. Employer's Exhibits 1 at 10-11, 3 at 39-41, 54.

The administrative law judge credited Dr. Musgrave's opinion as set forth on the miner's death certificate "because the doctor treated the [m]iner and her conclusions were supported by the medical records." Decision and Order on Remand at 5. The administrative law judge further found that while it was proper to credit Dr. Musgrave's opinion as that of a treating physician, pursuant to the factors set forth at 20 C.F.R. §718.104(d), Dr. Musgrave's opinion was *not* entitled to controlling weight as she did not fully explain her conclusions. Decision and Order on Remand at 5 (emphasis added). Thus, we initially reject employer's assertion that the administrative law judge mechanically accorded controlling weight to Dr. Musgrave's opinion based solely on her status as the miner's treating physician. In addition, a determination of whether Dr. Musgrave's opinion is reasoned and documented is committed to the discretion of the administrative law judge. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185,

[4] In the prior appeal, the Board affirmed the administrative law judge's determination to limit consideration of Dr. Caffrey's opinion to the physician's comments regarding the autopsy slides. [*L.V.*] slip op. at 3 n.4. However, the administrative law judge's Decision and Order on Remand does not reflect her consideration of Dr. Caffrey's opinion, based on the autopsy slides, that the miner's mild degree of simple coal workers' pneumoconiosis "did not cause, contribute to, or hasten his death." Employer's Exhibit 6 at 5.

12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). However, we agree with employer that the administrative law judge's crediting of Dr. Musgrave is inadequately explained.

First, as employer correctly asserts, having specifically acknowledged that Dr. Musgrave did not provide adequate rationale for her conclusions on the death certificate, the administrative law judge did not explain why she found Dr. Musgrave's opinion to be credible. The Administrative Procedure Act (APA) requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Schaaf v. Mathews*, 574 F.2d 157 (3d Cir. 1978); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As the administrative law judge did not explain why she credited the conclusions of Dr. Musgrave in light of her finding that the physician did not provide a rationale for those conclusions, we must vacate the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In addition, we agree with employer that the administrative law judge did not explain how either Dr. Musgrave's statement on the death certificate, or her treatment records, support a conclusion that pneumoconiosis contributed to the miner's death. Employer's Reply Brief at 5. On the death certificate itself, Dr. Musgrave stated only that the miner's death was due to "chronic lung disease."[5] Director's Exhibit 11. Further, while her records support the conclusion that the miner had pneumoconiosis, the existence of the disease is not in dispute. Rather, it is the potential impact of the disease on the miner's death that is at issue in this case. Therefore, the administrative law judge, on remand, must explain her finding that Dr. Musgrave's opinion supports claimant's burden of establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 5 U.S.C. §557(c)(3)(a); *Wojtowicz*, 12 BLR at 1-165.

We further find merit in employer's contention that the administrative law judge did not adequately explain her determination that Dr. Dennis' autopsy opinion, that the miner died as a result of cardiovascular disease and coexistent black lung disease, was well-reasoned, supported by the miner's treatment records, and entitled to substantial weight. Decision and Order on Remand at 5. Employer specifically asserts that Dr.

[5] In addition, Dr. Musgrave did not indicate that the miner's chronic lung disease was related to coal mine dust exposure, or legal pneumoconiosis. See 20 C.F.R. §718.201(a)(2). Nor has the administrative law judge found that the miner suffered from legal pneumoconiosis.

Dennis' opinion is conclusory, unexplained, and unsupported by any documentation. As employer contends, and as discussed above, while the miner's treatment records support Dr. Dennis' conclusion that the miner suffered from pneumoconiosis, the existence of which has been stipulated by the parties, it is not clear, and the administrative law judge has not explained, how the treatment records support Dr. Dennis' conclusion that pneumoconiosis contributed to the miner's death through a specifically defined process. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

On remand, the administrative law judge must also reconsider the opinion of Dr. Fino, that pneumoconiosis played no role in the miner's death. Employer's Exhibits 4, 5. The administrative law judge accorded less weight to the opinion of Dr. Fino, than to the opinions of Drs. Musgrave and Dennis, in part, because Dr. Fino did not examine the miner. *See Cole v. East Kentucky Collieries*, 20 BLR 1-51, 1-55 (1996). The administrative law judge also found Dr. Fino's opinion to be outweighed by the better reasoned and documented opinions of Drs. Dennis and Perper. Decision and Order on Remand at 6. Because the administrative law judge provided more than one reason for according less weight to Dr. Fino's opinion, there is no merit to employer's specific contention that the administrative law judge erred by discrediting the opinion of Dr. Fino solely because he did not examine the miner. However, in light of our determination to vacate the administrative law judge's crediting of the opinions of Drs. Musgrave and Dennis, on remand the administrative law judge must re-weigh Dr. Fino's opinion together with the other medical opinion evidence of record. Employer's Brief at 16.

Employer also asserts that the administrative law judge erred in discrediting the opinion of Dr. Rosenberg, that the miner's mild pneumoconiosis did not contribute to his death, as based "on medical evidence that was a decade old, rather than on the more recent and reliable pathology evidence." Decision and Order on Remand at 6; Employer's Brief at 8. As employer contends, Dr. Rosenberg specifically stated that he based his diagnosis of simple pneumoconiosis on the pathology evidence of record, and explained why the minimal x-ray evidence of pneumoconiosis supported his conclusion that the degree of pneumoconiosis was mild. Employer's Exhibits 1 at 4, 3 at 33, 39; Employer's Reply Brief at 8. The administrative law judge has not explained how Dr. Rosenberg's discussion of the x-ray evidence undermined his conclusions.

We also agree with employer that the administrative law judge did not adequately explain her determination to discredit Dr. Rosenberg's opinion as contrary to the congressional determination that pneumoconiosis can be latent and progressive. Decision and Order on Remand at 6; Employer's Reply Brief at 8. In his medical report dated April 6, 2005, Dr. Rosenberg stated that "while medical [coal workers' pneumoconiosis] with respect to progressive massive fibrosis . . . can be latent and progressive, this simply does not apply to simple [coal workers' pneumoconiosis]." Employer's Exhibit 1 at 8.

Dr. Rosenberg further stated, however, that "[i]ssues with respect to subacute silicosis need to be considered [o]n an individual basis." Employer's Exhibit 1 at 8. While a physician's opinion as to the progressivity and latency of pneumoconiosis may be considered when evaluating the credibility of the physician's conclusions, *see Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72 (6th Cir. 1987), an administrative law judge should avoid selectively analyzing a physician's opinion. *See Barnes v. Director, OWCP*, 19 BLR 1-71, 1-77 (1995); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984). On remand, the administrative law judge should consider the entirety of Dr. Rosenberg's rationale in determining whether the physician's belief as to the progressivity and latency of simple pneumoconiosis undermines his conclusion that the miner's simple pneumoconiosis was too mild to have contributed to his death from advanced colon cancer, aspiration, pneumonia and pulmonary emboli.[6] *See Adams*, 816 F.2d at 1119, 10 BLR at 2-72; Employer's Exhibits 1 at 5, 3 at 40.

Employer next challenges the administrative law judge's consideration of Dr. Perper's opinions as set forth in his medical report and deposition testimony, asserting that Dr. Perper's opinions are both inadmissible pursuant to 20 C.F.R. §725.414, and legally insufficient to support claimant's burden of proof. We first address employer's challenge to the admissibility of Dr. Perper's medical report.[7] Employer specifically

[6] We further note that the administrative law judge erred in additionally discrediting Dr. Rosenberg's conclusions on the ground that his opinion as to the cause of the miner's emphysema was speculative. Decision and Order on Remand at 6. 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). In this case, the administrative law judge did not make a specific finding as to the existence of legal pneumoconiosis, but rather accepted employer's stipulation at the hearing that the miner suffered from "pneumoconiosis," as supported by the autopsy and medical opinion evidence. Therefore, we hold that it was error to discount Dr. Rosenberg's opinion as speculative as to the etiology of the miner's emphysema. Decision and Order on Remand at 6.

[7] We initially reject claimant's assertion that employer is precluded from challenging the administrative law judge's admission of Dr. Perper's written report because employer did not challenge its admission in the prior appeal. As employer contends, this issue became ripe for adjudication on remand, when employer challenged the admission of Dr. Perper's medical report before the administrative law judge, and the administrative law judge entertained, and specifically addressed employer's contentions in her decision. Decision and Order on Remand at 4; Employer's Reply Brief at 2.

contends that because Dr. Perper reviewed the autopsy slides, pursuant to *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007)(*en banc*), his opinion constitutes an autopsy report.[8] Thus, employer contends, because claimant had already designated Dr. Dennis' report as her affirmative autopsy report, the administrative law judge's admission of Dr. Perper's report exceeds the evidentiary limits on autopsy evidence. Employer's Brief at 9-11; Employer's Reply Brief at 2-4.

The revised regulation at 20 C.F.R. §725.414 provides that each party is entitled to submit, *inter alia*, two affirmative medical opinions, one autopsy report, one autopsy rebuttal report, and one rehabilitative autopsy report.[9] The record reflects that employer identified the report of Dr. Caffrey as its affirmative autopsy report, and the reports of Drs. Fino and Rosenberg as its two affirmative medical reports. Claimant submitted Dr. Dennis' report, but she did not designate it as her affirmative autopsy report. Rather, claimant's sole evidentiary designation was the identification of Dr. Perper's February 26, 2005 report as one of her affirmative medical reports. While employer correctly asserts that, because Dr. Perper reviewed the autopsy slides, his report can constitute an

[8] In *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007)(*en banc*), the Board held that a physician's review of a miner's autopsy slides could constitute an autopsy report.

[9] Specifically, the revised regulation at 20 C.F.R. §725.414 provides, in pertinent part, that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit, in rebuttal, one physician's interpretation of each x-ray reading, autopsy report, biopsy report, pulmonary function study, and blood gas study submitted as the opposing party's affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit certain rehabilitative evidence. *Id.* The regulations do not specifically provide for rebuttal of medical reports. Notwithstanding these limits, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Any x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report that appears in a medical report must be admissible under either the 20 C.F.R. §725.414(a) limits, or under 20 C.F.R. §725.414(a)(4) as a hospitalization or treatment record. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1). "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 the purposes of" 20 C.F.R. §725.414. 20 C.F.R. §725.414(a)(1).

autopsy opinion, we agree with the Director that, alternatively, Dr. Perper's opinion may also be considered to be both a medical report and an autopsy rebuttal report to Dr. Caffrey's autopsy report. We further agree with the Director that, regardless of its designation, the proper inquiry is whether Dr. Perper's report falls within claimant's allowable evidence pursuant to 20 C.F.R. §725.414. As it appears from the record that claimant would be entitled to designate Dr. Dennis' report as her affirmative autopsy report, and Dr. Perper's report as both one of her two medical reports and as her autopsy rebuttal report, employer has not shown how it has been prejudiced by the administrative law judge's consideration of Dr. Perper's report. However, because we must remand the case for further consideration of the merits, in order to clarify the proceedings, on remand the administrative law judge should instruct claimant to properly designate her evidence. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621, 23 BLR 2-345, 2-370-71 (4th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007).

We reject, however, employer's additional contention that the administrative law judge erred in admitting Dr. Perper's deposition testimony as "rehabilitative" evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). At the May 11, 2005 hearing, employer sought to admit the reports and deposition testimony of Drs. Fino and Rosenberg just prior to twenty days before the hearing. Hearing Tr. at 26-27. The administrative law judge provided claimant the opportunity to respond to employer's recently submitted evidence by allowing claimant to obtain the post-hearing deposition of Dr. Perper. *Id.* Because the administrative law judge phrased her ruling in terms of allowing claimant "to rehabilitate Dr. Perper's opinion," Hearing Tr. at 26-27, in the prior appeal, the Board instructed the administrative law judge to consider employer's argument that Dr. Perper's testimony was not proper "rehabilitative" evidence. A review of the hearing transcript reveals, however, that the administrative law judge further explained that she was allowing claimant the opportunity to depose Dr. Perper because the reports of Drs. Fino and Rosenberg were "submitted [by employer] within the 20 days of the hearing, but not with enough time to allow [claimant] to rebut [them]." Hearing Tr. at 27. Thus, the question presented in this case is not whether Dr. Perper's testimony constitutes appropriate rehabilitative evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii), but whether claimant was entitled to submit additional medical evidence in response to employer's last-minute evidentiary submissions.

An administrative law judge is afforded broad discretion in dealing with procedural matters. *Clark*, 12 BLR at 1-153. Moreover, "the administrative law judge is obliged to insure a full and fair hearing on all the issues presented." *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*). Where a party would be denied the full presentation of its case if unable to respond to evidence submitted just prior to or upon the twenty-day deadline, the

APA, and considerations of due process, require the opportunity to respond.[10] *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 148-49, 16 BLR 2-1, 2-5 (4th Cir. 1991); *North Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990); *Shedlock*, 9 BLR at 1-200.

Having more closely reviewed the administrative law judge's ruling at the hearing, we hold that the administrative law judge committed no abuse of discretion in admitting Dr. Perper's post-hearing deposition into the record, in response to employer's last-minute evidence.[11] *See Clark*, 12 BLR at 1-153; *Shedlock*, 9 BLR at 1-200.

Finally, we hold that there is no merit to employer's assertion that Dr. Perper's opinion is legally insufficient to support a finding that pneumoconiosis hastened the miner's death. Employer's Reply Brief at 6. Contrary to employer's assertion, Dr. Perper did not simply state that pneumoconiosis hastened the miner's death by generally weakening him and lowering his resistance. Employer's Reply Brief at 6; *see Williams*, 338 F.3d at 518, 22 BLR at 2-655. Rather, in both his report and deposition testimony Dr. Perper opined that pneumoconiosis hastened the miner's death, both directly and indirectly, by causing pulmonary insufficiency and by contributing to, and aggravating the development of cardiac arrhythmia and pulmonary hypertension. Claimant's Exhibits 1 at 28, 2 at 22-24.

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[10] Section 556(d) of the Administrative Procedure Act (APA) provides that:

> A party is entitled to present his case or defense by oral or documentary evidence, *to submit rebuttal evidence*, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5 U.S.C. §556(d)(emphasis supplied). The requirements of the APA are incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

[11] We further note that, as the administrative law judge properly found on remand, to the extent that Dr. Perper's report constitutes one of claimant's affirmative medical reports, pursuant to 20 C.F.R. §725.414(a)(2)(i), Dr. Perper's post-hearing deposition testimony is admissible pursuant to 20 C.F.R. §725.414(c). Decision and Order on Remand at 4. In addition, Dr. Perper's deposition testimony could also be properly considered as a supplemental medical report, or even as claimant's second affirmative medical report.

In summary, on remand, following clarification of the designated evidence pursuant to the evidentiary limitations at 20 C.F.R. §725.414, the administrative law judge should reconsider the relevant medical opinion evidence of record pursuant to 20 C.F.R. §718.205(c), address the explanations provided by the physicians, and fully set forth her reasons for crediting or discrediting their opinions as to whether pneumoconiosis hastened the miner's death. *See McCune*, 6 BLR at 1-988. In so doing, the administrative law judge should consider the physicians' credentials, the quality of their reasoning, and whether their reports are supported by the remaining evidence of record. *See* 30 U.S.C. §923(b); *Williams*, 338 F.3d at 517-18, 22 BLR at 2-655*; Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-327 (6th Cir. 2002)*; Rowe*, 710 at 255 n.6, 5 BLR at 2-103 n.6.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, and vacated in part, 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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge