BRB No. 03-0616 BLA

VIOLA M. NECESSARY (Widow of ALVIN H. NECESSARY) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/26/2004 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2002-BLA-05497) of Administrative Law Judge Daniel F. Solomon 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] The miner died on February 3, 2001 and claimant filed her application for survivor's benefits on April 6, 2001.[2] Director's Exhibit 3.

The administrative law judge accepted the parties' stipulations to twenty-four years of coal mine employment[3] and to the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge additionally found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the evidence when he found that the miner's death was due to pneumoconiosis. Employer requests reversal of the award of benefits. Assuming that the award of benefits is not reversed, employer argues further that the administrative law judge abused his discretion when he excluded from the record autopsy and medical reports submitted by employer in excess of the amount of such evidence permitted by 20 C.F.R. §725.414. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's evidentiary rulings under 20 C.F.R. §725.414.

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).

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that the miner filed three lifetime claims for benefits, which were finally denied and are not at issue herein. Director's Exhibit 1.

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

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The record indicates that the miner died at age eighty in a nursing home. Director's Exhibit 8. According to his treating physician, Dr. Tolosa, the miner was bedridden by severe arthritis, and he also had Alzheimer's disease, heart disease, kidney failure, smoking-related emphysema, seizure disorder, depressed immunity caused by arthritis medication, and coal workers' pneumoconiosis. Employer's Exhibit 9 at 14, 16-18, 22, 24, 26-29. On the miner's death certificate, Dr. Tolosa identified the cause of death as acute bronchopneumonia due to or as a consequence of coal workers' pneumoconiosis, due to or as a consequence of emphysema. Director's Exhibit 8.

Dr. Racadag, who is Board-certified in Anatomical and Clinical Pathology, conducted an autopsy limited to the lungs and diagnosed simple coal workers' pneumoconiosis, severe bilateral pleural adhesions, emphysematous changes, acute bronchopneumonia, interstitial pneumonia, foreign body giant cell reaction, and granulomatous inflammation. Director's Exhibit 9 at 1. Dr. Racadag stated that the "above conditions contributed to the patient's morbidity and demise." *Id*.

Dr. Bush, who is Board-certified in Anatomical and Clinical Pathology, reviewed the autopsy report, lung tissue slides, and the miner's medical records, and diagnosed coal workers' pneumoconiosis that was too mild to hasten the miner's death. Employer's Exhibit 1 at 5. Based on the number of lesions on the lung tissue slides, Dr. Bush opined that "[l]ess than 5 percent of lung tissue is affected by coal worker lesions." Employer's Exhibit 1 at 4. Dr. Bush also diagnosed bronchopneumonia, emphysema due to smoking, aspiration pneumonitis, and inflammation of the pleura unrelated to coal dust exposure. *Id*. Dr. Bush opined that the miner would have died at the same time, of general physical deterioration and multiple organ failure with aspiration pneumonia, had he never been exposed to coal mine dust. Employer's Exhibit 1 at 5.

Drs. Hippensteel and Zaldivar, who are Board-certified in Internal Medicine and Pulmonary Disease, reviewed the autopsy report, Dr. Bush's report, and the miner's medical records. Employer's Exhibits 2, 4, 8. Drs. Hippensteel and Zaldivar opined that coal workers' pneumoconiosis was too mild to hasten the miner's death, which was due to aspiration pneumonia stemming from the miner's senile dementia, his inability to move around, and his general debility due to illnesses unrelated to coal dust exposure.

Dr. Tolosa testified that in light of the autopsy findings, coal workers' pneumoconiosis was "minimal, or no contributory factor to" the miner's death. Employer's Exhibit 9 at 34. Dr. Tolosa opined that because the miner was bedridden, had a depressed immune system, and had emphysema, he was at an increased risk for developing pneumonia. Employer's Exhibit 9 at 28-30.

Dr. Racadag testified that the miner's death was due to a combination of pneumonia, coal workers' pneumoconiosis, and emphysema. Claimant's Exhibit 1 at 11. His examination revealed that the miner had a "moderate" degree of coal workers' pneumoconiosis which "injured" the lung. Transcript at 9-10. The doctor explained that although the coal nodules and macules themselves did not impair lung function, his examination revealed "shaded changes" around the nodules and macules which "definitely, affected his pulmonary function and eventually lead [sic] to his death." Transcript at 9. The combination of coal workers' pneumoconiosis with emphysema and interstitial pneumonia fibrosis "really affected the lungs' ability to resist any further insults…." Transcript at 9-10. Dr. Racadag also observed that coal workers' pneumoconiosis "can cause" emphysema, interstitial pneumonia and fibrosis. Transcript at 11-12. He admitted that he could not state that in every case in which an individual had the same degree of coal workers' pneumoconiosis as the miner had and died of pneumonia, that pneumoconiosis played a role in his death. Transcript at 21. When asked whether he was speculating that coal workers' pneumoconiosis contributed to the miner's death, Dr. Racadag responded, "Yes. It's a speculation. That's why I said 'probably contributed,' because I believe there is no 100 percent in medicine." Claimant's Exhibit 1 at 22. Dr. Racadag reiterated that coal workers' pneumoconiosis was a contributing factor to the miner's death. Claimant's Exhibit 1 at 22-23. Notwithstanding calling his opinion a "speculation," the doctor testified that there was no question in his mind that pneumoconiosis made some contribution to the miner's death. Transcript at 22.

The administrative law judge found that Dr. Racadag unequivocally opined that pneumoconiosis hastened the miner's death, and he credited Dr. Racadag's opinion. Employer contends that Dr. Racadag's opinion is insufficient as a matter of law to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(5), because the opinion is too speculative and equivocal to carry claimant's burden of proof.

Employer relies upon *United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), in which the Fourth Circuit court reversed an administrative law judge's award of benefits in a survivor's claim. In reversing the award of benefits, the court held that an administrative law judge has, under Section 556(d) of the Administrative Procedure Act (APA), "the affirmative duty to qualify evidence as 'reliable, probative, and substantial' before relying upon it to grant or deny a claim. *Jarrell*, 187 F.3d at 389, 21 BLR 2-647. The court held that because the medical opinion credited by the administrative law judge was speculative, the opinion did not satisfy the requirements of Section 556(d). However, in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999), the court held that a physician's opinion expressed in conditional language was not necessarily speculative, but "simply acknowledg[ed] the uncertainty inherent in medical opinions, while nevertheless offering a positive opinion about [the miner's] cause of death."

We decline employer's request to reverse the award of benefits in this case, but we remand the case for further consideration of Dr. Racadag's opinion. Dr. Racadag stated affirmatively that coal workers' pneumoconiosis contributed to the miner's death. When asked to specify how coal workers' pneumoconiosis related to death in this case, he stated, *inter alia*, that coal workers' pneumoconiosis "can" lower one's resistance to other pathogens and it "can" cause emphysema and pneumonia. Claimant's Exhibit 1 at 10, 21. Dr. Racadag labeled his opinion "a speculation," yet maintained that coal workers' pneumoconiosis contributed to death in this case. Claimant's Exhibit 1 at 22. Review of the administrative law judge's Decision and Order reflects that he found Dr. Racadag's opinion to be unequivocal, but did not discuss the specific terms in which Dr. Racadag expressed his opinion. While an administrative law judge is not required to discount an opinion expressed in qualified terms, *Mays*, 176 F.3d at 764, 21 BLR at 2-606, he cannot credit an opinion which is pure speculation and he must explain the basis for his interpretation. *Jarrell*, 187 F.3d at 389, 21 BLR 2-647; *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501, 1-503 (1984). Consequently, we vacate the administrative law judge's finding pursuant to Section 718.205(c)(5) and remand this case for him to consider Dr. Racadag's opinion in accordance with *Jarrell* and *Mays*.

Employer contends that the administrative law judge mechanically credited the autopsy prosector's opinion as to the amount of coal workers' pneumoconiosis that was present in the miner's lungs. An administrative law judge may not mechanically credit the autopsy prosector's opinion merely because the prosector examined the whole body. *Sparks*, 213 F.3d at 192, 22 BLR at 2-262.

As noted, Dr. Bush counted the coal macules on the lung tissue slides and concluded that "less than 5 percent of lung tissue is affected by coal worker lesions." Employer's Exhibit 1 at 4. While Dr. Racadag agreed with Dr. Bush's count of the coal macules on the slides, he testified that "[p]robably a little bit more" than five percent of

the lung tissue was affected, "[m]aybe 10, 20 percent." Claimant's Exhibit 1 at 19. The administrative law judge credited Dr. Racadag's opinion on this point because he had the opportunity to view the gross anatomy of the lung, and testified that gross and microscopic examination gave him greater insight into the lung tissue. Decision and Order at 13.

If on remand the administrative law judge finds that Dr. Racadag's opinion is reliable, substantial, and probative, the record contains evidence potentially to support a determination that Dr. Racadag's opportunity to view the gross anatomy of the lung placed him in a better position to calculate the extent of coal workers' pneumoconiosis present. Director's Exhibit 9 at 2; Claimant's Exhibit 1 at 5-6, 12-13, 15. However, since the wording of his response to a question is susceptible to the interpretation that he was merely in a better position than non-pathologists, Claimant's Exhibit 1 at 12-13, the administrative law judge should explain the basis for his finding that Dr. Racadag's ability to conduct a gross examination placed him in a superior position than Dr. Bush, who reviewed the slides and the autopsy report. *See Sparks*, 213 F.3d at 192 n.6, 22 BLR at 2-262 n.6.

Employer contends that on remand, the administrative law judge must admit into the record and consider additional medical evidence submitted by employer, which the administrative law judge had excluded as exceeding the evidentiary limits imposed by revised 20 C.F.R. §725.414.[4] Employer argues that Section 725.414 is invalid. Employer argues further that the administrative law judge erred in his application of the regulation.

Section 725.414, in conjunction with Section 725.456(b)(1), sets flexible limits on the number of various kinds of medical evidence that can be admitted into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The applicable provision in this case permitted employer to "obtain and submit, in support of its affirmative case . . . no more than one report of an autopsy . . . and no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). Employer obtained and submitted three autopsy review reports and four medical reports. Employer's Exhibits 1-8. Employer could justify exceeding the numerical limits of Section 725.414 if employer demonstrated "good cause." 20 C.F.R. §725.456(b)(1). At the hearing, employer argued that good cause existed because the extra autopsy reports and medical reports were "relevant and probative." Hearing Transcript (Tr.) at 24. The administrative law judge was not persuaded, and instructed employer to identify which autopsy report and which two medical opinions constituted its affirmative case. Tr. at 23-24. The administrative law judge admitted those exhibits, and

[4] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on April 6, 2001, after the effective date of the amended regulations. 20 C.F.R. §725.2(c).

excluded employer's remaining autopsy and medical reports as exceeding the evidentiary limits of Section 725.414. Tr. 29-31.

Employer contends that Section 725.414 is invalid because it conflicts with the Act's requirement that "all relevant evidence shall be considered . . . ." 30 U.S.C. §923(b). We reject employer's contention. Employer does not address the statutory authority under which the Department of Labor acted when it promulgated Section 725.414. Specifically, the Department of Labor relied upon Section 923(b) itself, which incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence . . . ." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a); Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3358 (Jan. 22, 1997). Additionally, the Department of Labor relied upon 5 U.S.C. §556(d), which empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." 5 U.S.C. §556(d); 62 Fed. Reg. at 3359. These statutory provisions were cited by the United States Court of Appeals for the D.C. Circuit when it upheld Section 725.414 as a valid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002). Therefore, we reject employer's contention that Section 725.414 is invalid because it is in conflict with the Act.

Employer argues further that Section 725.414 is invalid because it imposes arbitrary limits on evidence in violation of the APA. Employer contends that the "APA authorizes each party to submit whatever evidence that party thinks is needed to prove its case or defense." Employer's Brief at 16. The United States Court of Appeals for the D.C. Circuit rejected the identical argument as "flatly contradicted by the statute itself, which empowers agencies to 'exclu[de] . . . irrelevant, immaterial, or unduly repetitious evidence' as 'a matter of policy . . . .'" *Nat'l Mining*, 292 F.3d at 873-74. Similarly, the Fourth Circuit court has recognized that the APA does not require "the wholesale admission of all evidence . . . ." *Jarrell*, 187 F.3d at 388, 21 BLR at 2-647. Consequently, we reject employer's contention that Section 725.414 is invalid because it conflicts with the APA.

Employer contends that Section 725.414 is invalid because it conflicts with *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), and with *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Employer's reliance on *Mullins* is misplaced. In *Mullins*, the Supreme Court held that in a Part 727 claim, Section 923(b) of the Act is satisfied so long as all relevant evidence is considered at some point, at either the invocation stage or rebuttal stage of the claim. *Mullins*, 484 U.S. at 149-50, 11 BLR at 2-8-9. The Court did not address the amount of evidence that could be considered relevant under Section 923(b), nor did the court address the agency's authority to impose limitations on the admission of evidence in black lung claims.

Employer's argument that Section 725.414 is barred by *Underwood* lacks merit. In *Underwood*, decided prior to the regulatory revisions, the Fourth Circuit court set a standard for administrative law judges to apply in exercising their discretion to exclude unduly repetitious evidence under Section 556(d) of the APA, while considering all relevant evidence under Section 923(b) of the Act. The court held that administrative law judges "must consider all relevant evidence, erring on the side of inclusion, but . . . they should exclude evidence that becomes unduly repetitious in the sense that the evidence provides little or no additional probative value." *Underwood*, 105 F.3d at 951, 21 BLR at 2-32. Because the issue in *Underwood* concerned case-by-case rulings by administrative law judges under Section 556(d) of the APA, the court did not decide the issue of the Department of Labor's authority to impose limits on the admission of evidence in black lung claims. Subsequent to *Underwood*, the Department of Labor exercised its authority to "as a matter of policy . . . provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence," 5 U.S.C. §556(d), and replaced the ad hoc determinations of administrative law judges with a bright-line rule in Section 725.414, including a "good cause" exception at Section 725.456(b)(1). In *Underwood*, the court recognized "the discretion reposed in agencies when it comes to deciding whether to permit the introduction of particular evidence at a hearing," so long as the agency "is not arbitrary . . . ." *Underwood*, 105 F.3d at 950, 21 BLR at 2-30-32 (citations omitted). Consequently, we reject employer's argument that Section 725.414 is invalid because it conflicts with *Underwood*.

Employer argues that the administrative law judge erred in finding that no good cause existed under Section 725.456(b)(1) for exceeding the limits of Section 725.414 with extra autopsy review reports and medical reports. The Board reviews an administrative law judge's "good cause" finding for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

The administrative law judge did not abuse his discretion in determining that employer did not establish good cause under Section 725.456(b)(1). Employer argued to the administrative law judge that good cause existed because "the more evidence available to you is more helpful, and it's relevant and probative." Tr. at 24. The administrative law judge, however, found employer's additional submissions to be "superfluous documents." Tr. at 31. On appeal, employer again argues that its additional reports are "relevant." Employer's Brief at 17. The Director responds that the "good cause" provision requires a party to "convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence," rather than assert generally that additional evidence is relevant. Director's Brief at 4, quoting 65 Fed. Reg. 79920, 80000 (Dec. 20, 2000). The Director's reasonable interpretation of a regulation is entitled to deference. *See Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994). Moreover, the Board has held that an assertion that evidence is relevant does not, in and of itself, establish "good cause" for a party's failure to timely submit the evidence

under Section 725.456(b)(1)(2000). *Conn v. White Deer Coal Co.*, 6 BLR 1-979, 1-981-82 (1984). On the facts and arguments presented, we detect no abuse of discretion in the administrative law judge's determination that employer did not demonstrate good cause for exceeding the limits of Section 725.414. *Clark*, 12 BLR at 1-153.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand this case to the administrative law judge for further consideration. I would reverse the administrative law judge's award of survivor's benefits because his finding that pneumoconiosis hastened the miner's death rests on a medical opinion which Dr. Racadag admits is speculation that pneumoconiosis hastened death in this particular case. *See United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999). Absent Dr. Racadag's speculative opinion, there is no substantial evidence that the miner's death was hastened by pneumoconiosis. Dr. Racadag's autopsy report states only that the "above conditions," including coal workers' pneumoconiosis, "contributed to the patient's morbidity and demise." Director's Exhibit 9. Because Dr. Racadag provides no additional support or explanation for this notation, his autopsy report is insufficient to support a finding that pneumoconiosis hastened the miner's death. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192-93, 22 BLR 2-251, 2-259, 2-263 (4th Cir. 2000). On the death certificate, Dr. Tolosa listed coal workers' pneumoconiosis as a condition leading to the immediate cause of death, acute bronchopneumonia, but later testified that in view of the minimal amount of coal workers' pneumoconiosis found

on autopsy, coal workers' pneumoconiosis was not a contributing factor to the miner's death. Director's Exhibit 8; Employer's Exhibit 9 at 34. Drs. Bush, Hippensteel, and Zaldivar opined that pneumoconiosis did not hasten the miner's death. Employer's Exhibits 1, 2, 4, 8. Consequently, claimant has not proved by a preponderance of the evidence that pneumoconiosis was a substantially contributing cause of the miner's death. 20 C.F.R. §718.205(c)(5).

Because I would reverse the award of survivor's benefits, I would not address whether the administrative law judge permissibly credited the opinion of the autopsy prosector based on his ability to conduct a gross examination of the lungs, nor would I address the administrative law judge's exclusion of evidence pursuant to 20 C.F.R. §725.414.

NANCY S. DOLDER, Chief
Administrative Appeals Judge