BRB No. 04-0728 BLA

BETTY NEUMEISTER (Widow of ROBERT W. NEUMEISTER)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 05/26/2005
HEGINS MINING COMPANY	)	
and	)	
LACKAWANNA CASUALTY COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Helen H. Cox (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow,[1] appeals the Decision and Order - Denying Benefits (2003-BLA-06147) of Administrative Law Judge Paul H. Teitler 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 parties' stipulations to thirty-four years of coal mine employment[2] and that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge found, however, that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in requiring her to withdraw certain evidence at the hearing. Claimant further asserts that the administrative law judge should have permitted her to respond to evidence that employer submitted on the deadline for the timely submission of evidence. Additionally, claimant argues that the administrative law judge abused his discretion in admitting evidence that employer did not exchange with claimant prior to the hearing. Claimant also contends that the administrative law judge erred in his analysis of the medical evidence when he found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's evidentiary rulings.

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).

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

[1] Claimant is Betty Neumeister, the surviving spouse of the deceased miner, Robert W. Neumeister, who died on September 28, 1998. Decision and Order at 2; Director's Exhibit 3. Claimant filed her survivor's claim on September 5, 2002. Decision and Order at 2; Director's Exhibit 3.

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

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 (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); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 205, 22 BLR 2-467, 2-471 (3d Cir. 2002); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

Claimant contends that the administrative law judge improperly required her to withdraw from the record statements by the miner's treating physician that pneumoconiosis hastened the miner's death because the administrative law judge mistakenly believed that the physician's reports exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414.[3] The applicable portions of the regulation permitted claimant to submit two medical reports in support of her affirmative case plus the deposition testimony of a physician who prepared a medical report admitted as part of claimant's affirmative case. 20 C.F.R. §§725.414(a)(2)(i); 725.414(c). Claimant submitted two reports from Dr. Kraynak and his deposition testimony. Claimant's Exhibits 1, 3, 4. The record also contained a third report by Dr. Kraynak that was submitted by the district director. Director's Exhibit 6. Ultimately, only Dr. Kraynak's deposition testimony was admitted into evidence because claimant withdrew Dr. Kraynak's written reports at the hearing.

Claimant, however, contends that she withdrew Dr. Kraynak's reports because of the administrative law judge's suggestion at the hearing that each separate document prepared by Dr. Kraynak would count as a medical report for purposes of the limitations on claimant's evidence under 20 C.F.R. §725.414(a)(2)(i). Claimant states that the administrative law judge's application of the regulation effectively forced her to withdraw everything but Dr. Kraynak's deposition testimony before the administrative law judge would allow her to submit a second physician's deposition testimony in response to medical evidence that employer submitted upon the twenty-day deadline for the submission of evidence. *See* 20 C.F.R. §725.456(b)(2). A review of the hearing transcript tends to confirm claimant's position that the administrative law judge counted each document from a physician as a medical report under 20 C.F.R. §725.414. Hearing Tr. at 5-6, 21-22, 27-29.

The Director responds that the administrative law judge's apparent approach of counting each document from a physician as a medical report for purposes of the evidentiary

[3] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on September 5, 2002, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

limitations was inconsistent with the Director's view of the regulation:

> [T]he regulations do not require a party's medical expert to submit his medical opinion in [a] single document. Section 725.414(a)(1) states that "a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner **and/or** reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1) . . . . The regulations do not require that the doctor's report be contained in a single document submitted into evidence at a single point in time. For example, an examining doctor may submit an initial report covering only the physical examination, and later submit a supplemental report addressing the objective tests taken at the time of the examination . . . [or] commenting upon other admissible evidence . . . . Similarly, in a survivor's claim, a claimant may submit the report of a treating physician in one document, and later have that physician address the results of the miner's autopsy in a supplemental report.

Director's Brief at 2 (emphasis in original). The Director notes that while there may be legitimate reasons for excluding a physician's supplemental report in a particular case, "there is no requirement that in each case two separate documents from a single physician count as two medical reports under the evidentiary limitations." Director's Brief at 2.

The Director's reasonable interpretation of his regulation is entitled to deference. *See Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994). Because the administrative law judge did not have the benefit of the Director's interpretation of 20 C.F.R. §725.414(a)(1) when he ruled on the parties' evidence, we will vacate the administrative law judge's Decision and Order and remand this case for him to reconsider the admissibility of Dr. Kraynak's reports.

We have considered the Director's argument that claimant was not prejudiced by the administrative law judge's ruling, but we conclude that the better approach is to remand this case for the administrative law judge to properly apply 20 C.F.R. §725.414. The Director suggests that the administrative law judge correctly refused to consider Dr. Kraynak's November 11, 2002 report submitted by the district director as Director's Exhibit 6 because the district director lacks the authority to develop medical evidence in a survivor's claim where, as here, there is a responsible operator. Director's Brief at 3, citing 20 C.F.R. §725.405(c). Under the facts of this case, the administrative law judge needs to determine whether the report by Dr. Kraynak, developed by the district director, should have been part of the record.

Nor are we persuaded by the Director's suggestion that Dr. Kraynak's January 12,

2004 withdrawn report merely duplicated the contents of his deposition testimony considered by the administrative law judge. The administrative law judge discounted Dr. Kraynak's deposition testimony that pneumoconiosis hastened the miner's death because Dr. Kraynak did not consider the miner's heart condition. Decision and Order at 6. Review of Dr. Kraynak's January 12, 2004 report, however, reflects that Dr. Kraynak therein discussed the impact of the miner's heart condition on his death. Claimant's Exhibit 3. Finally, although the Director argues that Dr. Kraynak's January 27, 2004 report was excludable under 20 C.F.R. §725.456(b)(2) because claimant submitted it after the twenty-day deadline prior to the hearing, we note that claimant explained that she submitted Dr. Kraynak's report after the deadline in an attempt to respond to reports by Drs. Levinson and Hertz that employer submitted upon the twenty-day deadline. Hearing Tr. at 26. Review of the record does not disclose whether the administrative law judge considered if claimant demonstrated "good cause" excusing her untimely submission.[4] 20 C.F.R. §725.456(b)(3); *see also North Am. Coal Co. v. Miller*, 870 F.2d 948, 952, 12 BLR 2-222, 2-228 (3d Cir. 1989)(holding that due process may require that the opposing party be afforded an opportunity to rebut evidence submitted on or just prior to the twenty-day deadline).

Claimant additionally contends that the administrative law judge erred in admitting into evidence hospital records that employer did not exchange with claimant before the hearing in violation of 20 C.F.R. §725.456(b)(2). As the Director notes, claimant dropped her objection to the hospital records. Hearing Tr. at 41. We detect no abuse of discretion by the administrative law judge in discussing with claimant the potential advantage to her of consenting to the admission of the miner's hospital records. Hearing Tr. at 38-40, 43-44. Moreover, claimant does not explain how she has been prejudiced by the admission of the hospital records, in view of the fact that Dr. Kraynak referred in his deposition to the miner's September 1998 hospitalization documented by these records. Claimant's Exhibit 1 at 10-11.

Lastly, claimant requests that the Board require that this case be reassigned to a new administrative law judge on remand in light of the administrative law judge's handling of the evidentiary issues at the hearing. However, since claimant has not demonstrated any bias or prejudice on the part of the administrative law judge, her request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). In view of our disposition of this case, we do not reach the issues raised concerning the administrative law judge's findings on claimant's entitlement to benefits.

[4] Although the administrative law judge permitted claimant to submit another doctor's deposition testimony in exchange for withdrawing Dr. Kraynak's reports, he advised claimant that the doctor should not address the reports of Drs. Levinson and Hertz. Hearing Tr. at 29-30.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge