U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0500 BLA
and 16-0501 BLA

LINDA S. SCOTT (o/b/o and Widow of KENNETH G. SCOTT, SR.) Claimant-Respondent v. MEG-LYNN LAND COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	))))))))))))))))))	DATE ISSUED: 05/25/2017 DECISION and ORDER

Appeal of the Decision and Order of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond and Matthew J. Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Rita A. Roppolo (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (2012-BLA-05426, 2013-BLA-05595) of Administrative Law Judge Morris D. Davis denying benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a miner's subsequent claim filed on March 24, 2010,[2] and a survivor's claim filed on November 14, 2012.

After crediting the miner with 7.72 years of coal mine employment,[3] the administrative law judge found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] However, the administrative law judge found that the evidence did not establish the

---

[1] The appeal of the Director, Office of Workers' Compensation Programs (the Director), in the miner's claim was assigned BRB No. 16-0500 BLA, and the Director's appeal in the survivor's claim was assigned BRB No. 16-0501 BLA. By Order dated July 19, 2016, the Board consolidated these appeals for purposes of decision only.

[2] The miner's previous claim, filed on February 29, 2000, was finally denied by the district director on May 18, 2000 because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1.

[3] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibit 32. Accordingly, the Board will apply the law 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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited the miner with less than fifteen years of coal mine employment, he found that claimant was not entitled to the Section 411(c)(4) presumption. Therefore, the administrative law judge addressed whether the miner satisfied his burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits in the miner's claim. The administrative law judge further found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge also denied benefits in the survivor's claim.

On appeal, the Director contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The Director also argues that the administrative law judge erred in finding that the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). In a response brief, claimant[5] notes her agreement with the Director's contentions of error. Employer responds in support of the administrative law judge's denial of benefits.

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

The Miner's Claim

Because no party asserts any error regarding the administrative law judge's calculation of the length of the miner's coal mine employment, we affirm the administrative law judge's determination that the miner worked for 7.72 years in coal employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of this affirmance, we also affirm the administrative law judge's finding that the miner could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), as the miner did not establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the presumption.

Without the Section 411(c) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[5] Claimant is the surviving spouse of the miner, who died on November 2, 2010. Director's Exhibit 4 (Survivor's Claim).

The Director contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4).[6] The Director initially argues that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

The administrative law judge considered the autopsy reports of Drs. Oesterling, Caffrey, and Perper. Drs. Oesterling and Caffrey opined that the miner's autopsy slides did not reveal the existence of clinical pneumoconiosis.[7] Employer's Exhibits 5, 12. Although Drs. Oesterling and Caffrey diagnosed emphysema, they did not attribute the disease to the miner's coal mine dust exposure. *Id.* Drs. Oesterling and Caffrey therefore opined that the miner did not suffer from legal pneumoconiosis.[8] *Id.* Conversely, Dr. Perper opined that the miner's autopsy slides revealed the existence of clinical pneumoconiosis, as well as legal pneumoconiosis, in the form of emphysema due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 4.

In considering the conflicting autopsy evidence, the administrative law judge found that the opinions of Drs. Oesterling and Caffrey were not well-reasoned.[9] Decision

---

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[9] The administrative law judge accorded less weight to Dr. Oesterling's opinion because he found that it was based upon the improper premise that severe emphysema does not typically occur in the absence of clinical pneumoconiosis. Decision and Order at 26. This determination is unchallenged and therefore is affirmed. *Skrack*, 6 BLR at 1-711. The administrative law judge found that Dr. Caffrey's opinion was not sufficiently reasoned because the doctor failed to explain why the mild amount of anthracotic pigment that he identified on the miner's slides did not support a diagnosis of clinical pneumoconiosis. We note that anthracotic pigmentation is not sufficient by itself to establish the existence of pneumoconiosis. 20 CFR 718.202(a)(2). Consequently, the

and Order at 25-26. Turning to Dr. Perper's opinion, the administrative law judge noted that Dr. Perper's qualifications were not in the record.[10] *Id.* at 25. The administrative law judge further found that Dr. Perper's pathological findings were not well-reasoned because he did not explain his conclusions. Decision and Order at 25. Specifically, the administrative law judge noted that Dr. Perper "stated that the pathology is the 'gold standard' [for diagnosing pneumoconiosis] without any analysis of why." *Id.* The administrative law judge therefore found that the autopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

The Director contends that the administrative law judge erred in his consideration of Dr. Perper's opinion. The Director initially argues that the administrative law judge erred in not considering Dr. Perper's status as a Board-certified pathologist. The Director does not challenge the administrative law judge's finding that Dr. Perper's curriculum vitae is not in the record.[11] Decision and Order at 14. Instead, the Director argues that the administrative law judge erred in not taking "official notice" of Dr. Perper's qualifications. Director's Brief at 6. The decision to take official notice of a matter is a procedural issue committed to an administrative law judge's discretion. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-14, 1-21 (1999) (en banc); *Clark*, 12 BLR at 1-153. Moreover, because neither claimant nor the Director requested that the administrative law judge take official notice of Dr. Perper's qualifications, the argument is waived. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003). We therefore find no error in the administrative law judge's consideration of Dr. Perper's qualifications. *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-140 (1990).

We agree, with the Director, however, that the administrative law judge erred in finding that Dr. Perper's opinion was not well-reasoned. The administrative law judge faulted the doctor for failing to explain why he considered autopsy evidence to be the "gold standard" for diagnosing the disease. The Board has long recognized that autopsy

---

administrative law judge must consider the regulatory provision in his evaluation of the physicians' opinions.

[10] The administrative law judge explained that he "attach[ed] less probative weight to [Dr. Perper's] opinion than if his qualifications were fully established." *Id.*

[11] The Director notes that claimant indicated that Dr. Perper is a Board-certified pathologist in her closing brief. The Director, however, has offered no authority for its position that a party's statement in its closing argument is affirmative evidence of a physician's qualifications.

evidence generally is the most reliable evidence for determining the existence of pneumoconiosis, however. *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Dr. Perper was simply articulating a widely held view. The administrative law judge thus erred in discrediting Dr. Perper's opinion on this basis, particularly since the judge, not the physician, ultimately determines how much weight particular evidence receives in the context of the individual case. We therefore vacate the administrative law judge's finding that the autopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and remand the case for further consideration.

The Director also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Al-Khasawneh, Perper, Sargent, Hippensteel, and Klayton. Dr. Al-Khasawneh conducted the Department of Labor (DOL)-sponsored pulmonary evaluation and opined that the miner suffered from legal pneumoconiosis in the form of an obstructive pulmonary impairment and hypoxemia, which he attributed to cigarette smoking and coal mine dust exposure. Director's Exhibit 14. Dr. Klayton opined that the miner suffered from clinical pneumoconiosis. Claimant's Exhibit 3. Dr. Perper opined that the miner suffered from clinical pneumoconiosis and legal pneumoconiosis in the form of emphysema due to cigarette smoking and coal mine dust exposure. Claimant's Exhibit 4. Drs. Sargent and Hippensteel opined that the miner did not suffer from either clinical or legal pneumoconiosis. Employer's Exhibits 3, 4, 8-10.

The administrative law judge discredited the medical opinions of Drs. Sargent and Hippensteel because he found them inconsistent with the scientific evidence credited by the DOL in the preamble to the 2001 regulatory revisions. Decision and Order at 28. The administrative law judge also discredited Dr. Klayton's diagnosis of clinical pneumoconiosis because the physician relied upon a positive chest x-ray interpretation, contrary to the administrative law judge's determination that the chest x-ray evidence did not establish the existence of clinical pneumoconiosis. *Id.* at 27. The administrative law judge further found that Dr. Al-Khasawneh's opinion was not well-reasoned. Finally, the administrative law judge accorded less weight to Dr. Perper's opinion because the doctor reviewed medical evidence not in the record. *Id.* at 27-28. The administrative law judge therefore found that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The Director argues that the administrative law judge erred in his consideration of the opinions of Drs. Al-Khasawneh and Perper.[12] We agree in part. The administrative

[12] Because neither the Director nor claimant challenge the administrative law judge's basis for discrediting Dr. Klayton's diagnosis of clinical pneumoconiosis, it is

law judge discredited Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis (an obstructive pulmonary impairment due to cigarette smoking and coal mine dust exposure) because he provided no objective evidence to support it. This was a determination within the discretion of the administrative law judge, who has wide latitude in determining whether a physician's opinion is well-reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark,* 12 BLR at 1-155.

However, we agree with the Director's contention that the administrative law judge erred in according less weight to Dr. Perper's opinion because the doctor reviewed medical records outside the record in this case.[13] The applicable regulations are silent as to what an administrative law judge should do when evidence that exceeds the evidentiary limitations is referenced in an otherwise admissible medical opinion. Thus, the disposition of this issue is committed to an administrative law judge's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004). However, an administrative law judge should not *automatically* exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. *Id*. Moreover, even if an administrative law judge finds that a medical opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Id*. Rather, he may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67. Exclusion of evidence is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

In this case, the administrative law judge did not consider whether Dr. Perper's opinion was inextricably tied to his review of the inadmissible medical evidence.[14] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Moreover, the administrative law judge failed to explain why he elected to accord reduced weight to Dr.

---

affirmed. *Skrack*, 6 BLR at 1-711.

[13] The administrative law judge noted that Dr. Perper reviewed a number of x-rays that are not in the record, as well as a 2012 medical report by Dr. Gallai that was withdrawn at the hearing. Decision and Order at 28 n.54.

[14] The record reflects that Dr. Perper relied extensively on his review of the autopsy slides in formulating his opinion.

Perper's opinion, rather than electing one of the lesser sanctions set forth in *Harris*. Consequently, we vacate the administrative law judge's decision to accord "reduced probative weight" to Dr. Perper's opinion, and remand the case for the administrative law judge to reconsider Dr. Perper's opinion in accordance with *Harris*.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[15] and remand the case for further consideration. On remand, if the administrative law judge finds that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a),[16] *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), he must consider whether the evidence establishes that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

---

[15] Employer contends that the administrative law judge erred in finding that the miner had only a twenty-five pack-year smoking history. Employer's Brief at 10. We agree. Although the administrative law judge acknowledged that the miner reported inconsistent smoking histories, he found that the miner "started smoking at the age of eleven and smoked a half a pack [of cigarettes] a day until 2005." Decision and Order at 6. Employer accurately notes that the administrative law judge did not consider greater reported smoking histories in medical reports submitted in connection with the miner's prior claim. Employer's Brief at 9-10. Because the administrative law judge failed to resolve the conflict in the smoking histories, his analysis of the miner's smoking history does not comport with the requirements of the Administrative Procedure Act, which provide that every adjudicatory decision must 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, vacate the administrative law judge's finding regarding the miner's smoking history and instruct him to reconsider this issue on remand.

[16] If the administrative law judge finds that the evidence establishes the existence of pneumoconiosis, the miner will have established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §718.309(c).

The Survivor's Claim

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.[17] 20 C.F.R. §718.205(b)(6).

In addressing whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Sargent, Oesterling, Hippensteel, Caffrey, and Perper. The administrative law judge accurately found that Dr. Perper's opinion was the only one that supports a finding that the miner's death was due to pneumoconiosis.[18] Decision and Order at 30. The administrative law judge accorded Dr. Perper's opinion little weight, however, because he reviewed evidence not in the record. *Id.* As discussed, *supra,* the administrative law judge failed to consider the extent to which Dr. Perper relied upon the inadmissible evidence not in the record, before discrediting his opinion. *Harris* 23 BLR at 1-108. We therefore vacate the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and remand the case for further consideration.

---

[17] On remand, if the administrative law judge finds the miner entitled to benefits, then claimant is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*)(2012).

[18] Dr. Perper opined that the miner's death was "caused and hastened by coal workers' pneumoconiosis." Claimant's Exhibit 4.

Accordingly, the administrative law judge's Decision and Order 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge