BRB Nos. 06-0124 BLA
and 06-0124 BLA-S

DOROTHY A. KIDD (Widow of DONALD J. KIDD) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/30/2006 DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits and Attorney Fee Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Teresa M. Dewey Bacho, Toledo, Ohio, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits and Attorney Fee Order (05-BLA-5033) of Administrative Law Judge Daniel J. Roketenetz 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 June 23, 2003, and claimant filed her claim for survivor's benefits on September 9, 2003. Director's Exhibit 3. The administrative law judge accepted the parties' stipulations that the miner had at least seventeen years of coal mine employment,[1] that the existence of pneumoconiosis arising out of coal mine employment was established, and that employer was the responsible operator. Next, the administrative law judge excluded from the record two physicians' reports submitted by employer, because he found that the reports did not comply with the evidentiary limitations of 20 C.F.R. §725.414(a). Addressing the merits of entitlement, the administrative law judge found that an autopsy report and testimony by the autopsy prosector established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Subsequently, the administrative law judge considered claimant's counsel's petition for a fee and employer's objections thereto, and awarded a fee of $6,640.00, conditional on a final award of benefits.

On appeal, employer contends that the administrative law judge erred in excluding employer's two reports in his decision after he had received them into evidence without objection at the hearing. Employer argues further that the administrative law judge erred in excluding Dr. Bush's entire autopsy rebuttal report because Dr. Bush reviewed additional medical evidence beyond the autopsy report. Specifically, employer contends that the administrative law judge should have determined whether Dr. Bush's report could be considered to the extent it was admissible as an autopsy rebuttal report. Regarding the merits of claimant's entitlement, employer alleges that the administrative law judge erred by mechanically crediting the autopsy prosector's opinion to find that the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief asserting that the administrative law judge did not err in striking the medical reports in his decision despite the lack of an objection at the hearing. However, the Director agrees with employer that the administrative law judge should have considered Dr. Bush's autopsy rebuttal report to the extent it was consistent with the evidentiary limitations, if possible to do so. Consequently, the Director requests that this case be remanded "so the

[1] The record indicates that the miner's last coal mine employment occurred in Ohio. Director's Exhibit 4; Hearing Tr. at 18. 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*).

[administrative law judge] can determine whether Dr. Bush's autopsy review can be considered." Director's Brief at 3.

In its appeal of the Attorney Fee Order, employer argues that the administrative law judge erred in awarding claimant's counsel a fee for travel time to and from a deposition that was cancelled. Claimant responds, urging affirmance of the fee award. The Director has indicated that he will not respond to employer's appeal of the fee award.

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).

At the hearing, the administrative law judge admitted all of the evidence submitted by the parties without addressing whether the evidence was in compliance with the evidentiary limitations set forth at 20 C.F.R. §725.414.[2] Hearing Tr. at 5-7. However, in his decision, the administrative law judge addressed the limitations and excluded Dr. Bush's and Dr. Rosenberg's reports, submitted by employer. Decision and Order at 5-6.

Specifically, the administrative law judge found that although Dr. Bush's report was designated as an autopsy rebuttal report, Dr. Bush had reviewed not only the autopsy report submitted by claimant, but had also reviewed the other medical evidence submitted in the survivor's claim, as well as medical evidence from the record of the miner's unsuccessful claim for benefits.[3] The administrative law judge therefore found that "Dr. Bush's March 25, 2005 report does not qualify as a rebuttal autopsy report under §725.414(a)(3)(ii)." Decision and Order at 5. The administrative law judge further found that Dr. Bush's report could not be considered as one of employer's two affirmative case medical reports under 20 C.F.R. §725.414(a)(3)(i), because employer had already submitted two medical reports from Drs. Tomashefski and Fino. Consequently, the

[2] With respect to the specific evidentiary issues argued on appeal, 20 C.F.R. §725.414(a) limited employer to "no more than two medical reports" in its affirmative case. 20 C.F.R. §725.414(a)(3)(i). In "rebuttal of the case presented by the claimant," employer could submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the claimant . . . ." 20 C.F.R. §725.414(a)(3)(ii). A showing of "good cause" was necessary to exceed these limits. 20 C.F.R. §725.456(b)(1).

[3] The miner filed a claim for benefits on January 25, 2000, which was denied on July 25, 2002. Director's Exhibit 1. The miner did not appeal, and the denial became final.

administrative law judge ruled that "Dr. Bush's report will not be considered herein." Decision and Order at 6.

Additionally, the administrative law judge found that Dr. Rosenberg's report, designated as a response to claimant's evidence, did not fall within the rebuttal provision of 20 C.F.R. §725.414(a)(3)(ii), and could not be considered an affirmative case medical report, as employer had already reached its two-report limit. Decision and Order at 6. The administrative law judge therefore ruled that Dr. Rosenberg's report would not be considered.

Employer contends that the administrative law judge erred in excluding the two reports in his decision even though he had received them into evidence at the hearing without objection. Employer's contention lacks merit. The parties may not waive the evidentiary limitations. *Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-74 (2004). Therefore, the administrative law judge properly enforced the limitations in his decision.

Employer argues further that the administrative law judge's approach deprived it of the opportunity to argue that good cause justified the admission of evidence in excess of the evidentiary limitations. We disagree. If employer wished to submit excess evidence, it was employer's obligation to raise the good cause issue with the administrative law judge and make the good cause showing. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-144-45 (2006). The record reflects that employer did not attempt to raise the good cause issue below. We therefore reject employer's allegation that the administrative law judge deprived employer of the opportunity to argue good cause.

Employer next argues that the administrative law judge summarily excluded Dr. Bush's entire autopsy rebuttal report, when "[r]eferences to other evidence prohibited in 'rebuttal' evidence could have been ignored."[4] Employer's Brief at 6. Claimant responds that the administrative law judge properly excluded the report once he found that it was overbroad. Claimant's Brief at 7-8. The Director agrees with employer that the administrative law judge "was not precluded from considering only those portions of Dr. Bush's report that are consistent with the limitations, i.e., his review of the autopsy evidence." Director's Brief at 3. The Director states that the administrative law judge may not have considered whether Dr. Bush's report was admissible in part, before he excluded it:

[4] Employer does not challenge the administrative law judge's finding that Dr. Bush's report referred to medical evidence beyond the scope of an autopsy rebuttal report under 20 C.F.R. §725.414(a)(3)(ii).

> It is not clear from the [administrative law judge's] decision whether he believed, erroneously, that the entire report should be automatically excluded because portions were inadmissible or whether he simply determined that it was impossible to parse out conclusions based on the autopsy evidence from those made based on the entire body of medical evidence.

Director's Brief at 3. The Director therefore suggests that we "remand the case so the [administrative law judge] can determine whether Dr. Bush's autopsy review can be considered." *Id*.

An administrative law judge has the discretion to determine how to treat a medical report that refers to inadmissible evidence. *Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). In this case, employer and the Director agree that the administrative law judge should have determined whether Dr. Bush's autopsy rebuttal report could be considered in part, to the extent that it was based on a review of the autopsy evidence. As the Director notes, a review of the administrative law judge's Decision and Order does not disclose whether he attempted to exercise his discretion in this regard. Therefore, the administrative law judge's award of benefits is vacated and this case is remanded for him to reconsider Dr. Bush's autopsy rebuttal report. *See Harris*, 23 BLR at 1-108; *Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-66-67 (2004)(*en banc*).

Employer argues further that the administrative law judge erred by excluding Dr. Rosenberg's report without allowing employer to either explain why the report was admissible as rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii), or why good cause justified its admission. Employer's Brief at 8. The administrative law judge noted that Dr. Rosenberg's report, designated by employer as a response to claimant's evidence, was "not clearly marked," but appeared to be submitted "in response to Dr. Parmar's April 15, 2004 medical report . . . offered by the Claimant." Decision and Order at 6. The administrative law judge found that, although employer was entitled to submit as rebuttal evidence "one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the claimant," 20 C.F.R. §725.414(a)(3)(ii), there was no provision for rebutting claimant's medical report. Decision and Order at 6. Since employer had already submitted two affirmative case medical reports, the administrative law judge excluded Dr. Rosenberg's report. The Director argues that the administrative law judge properly excluded Dr. Rosenberg's report because it did not interpret any particular piece of claimant's affirmative evidence; the document was simply a medical report on the cause of the miner's death that was based on a review of the entire record. Director's Brief at 3-4.

A review of Dr. Rosenberg's proffered report supports the administrative law judge's determination that it was not an interpretation of any particular piece of claimant's affirmative evidence as listed in 20 C.F.R. §725.414(a)(3)(ii). Employer's Exhibit 4 (excluded). Considering that there was no clear explanation from employer for this exhibit, and no argument for good cause, the administrative law judge did not abuse his discretion in excluding Dr. Rosenberg's report.[5] *See Brasher*, 23 BLR at 1-144-45; *Dempsey*, 23 BLR at 1-55.

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 (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); *Brown v. Rock Creek Mining Co*., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Employer contends that the administrative law judge mechanically credited the opinion of the autopsy prosector to find that the miner's death was due to pneumoconiosis. Employer's Brief at 11-13. Employer's contention has merit.

An administrative law judge must provide an adequate rationale for deferring to the autopsy prosector's opinion over those of reviewing physicians. *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992). Here, Dr. Booth, the autopsy prosector, opined that pneumoconiosis contributed to the miner's death. Director's Exhibits 10, 28. However, reviewing pathologist Dr. Tomashefski, and reviewing pulmonologist Dr. Fino, opined that pneumoconiosis played no role in the miner's death from liver and kidney disease. Director's Exhibit 32; Employer's Exhibits 2, 7, 8.

The sole reason the administrative law judge gave for according "greater weight" to Dr. Booth's opinion than to Dr. Tomashefski's opinion was that Dr. Booth "actually performed the autopsy." Decision and Order at 12. In so finding, the administrative law judge did not explain the rationale for his conclusion that Dr. Booth's ability to perform the autopsy gave him an advantage over Dr. Tomashefski to determine whether

[5] We find no merit in employer's additional argument that the Director improperly obtained and submitted into evidence Dr. Booth's August 7, 2003 autopsy report. The record reflects that Dr. Booth's report was claimant's affirmative case autopsy report. Claimant's Evidence Summary, May 24, 2005, at 4.

pneumoconiosis hastened the miner's death. *See Urgolites*, 17 BLR at 1-23. Similarly, the administrative law judge discounted Dr Fino's opinion solely because Dr. Fino "admitted in his deposition that he did not review the slides" of the miner's lung tissue. Decision and Order at 11. While it is true that Dr. Fino, who is not a pathologist, did not review the autopsy slides, the record reflects that he reviewed Dr. Booth's and Dr. Tomashefski's reports on the autopsy slides, and he agreed that the miner had pneumoconiosis. Employer's Exhibit 2 at 5, 9-10; Employer's Exhibit 8 at 15, 32-33. On these facts, the administrative law judge did not explain how Dr. Fino's inability to review the lung tissue slides detracted from his opinion on the cause of the miner's death. *See Urgolites*, 17 BLR at 1-23. Therefore, on remand the administrative law judge should reconsider the opinions and explain the rationale for his findings pursuant to 20 C.F.R. §718.205(c). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Urgolites*, 17 BLR at 1-23.

Employer challenges the administrative law judge's award of an attorney's fee. The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer challenges the fee awarded to claimant's counsel for travel time between Toledo, Ohio and Wheeling, West Virginia to attend Dr. Parmar's deposition scheduled for April 1, 2005. Employer objected to the travel time as unnecessary and unreasonable, because Dr. Parmar's deposition scheduled for April 1 did not occur, as Dr. Parmar was recuperating from a recent hospitalization and was unable to attend the deposition. However, because neither counsel was notified beforehand that Dr. Parmar was unavailable, they both traveled to his office in Wheeling before learning that his deposition had to be rescheduled.

The administrative law judge found that "Dr. Parmar's failure to appear at the scheduled deposition was not due to [claimant's counsel's] error," and he found that the travel time for Dr. Parmar's deposition was reasonable. Attorney Fee Order at 2. Employer alleges that this was error, because "Dr. Parmar failed to act to prevent unnecessary travel . . . ." Employer's Supplemental Appeal Brief at 4.

Reasonable and necessary travel time and expenses are compensable. *See* 20 C.F.R. §§725.366(b),(c), 725.459(a); *Branham v. Eastern Associated Coal Corp*., 19 BLR 1-1, 1-4 (1994); *Bradley v. Director, OWCP*, 4 BLR 1-241, 1-245 (1981). The test for compensability is whether the attorney, at the time work was performed, could reasonably regard it as necessary to establish claimant's entitlement. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984). The fact that claimant's expert was not able to attend the deposition has no bearing on whether, at the time claimant's counsel traveled, she could reasonably regard the travel as necessary. *See Lanning*, 7 BLR at 1-

316. Since employer has failed to establish an abuse of discretion in the administrative law judge's finding that the requested travel time was reasonable, the finding is affirmed.[6] *See Jones*, 21 BLR at 1-108.

Therefore, we affirm the fee award. A fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

[6] Employer additionally argues that any time for Dr. Parmar's deposition should be disallowed, because Dr. Parmar's opinion was discredited by the administrative law judge. Employer did not raise this objection below. Consequently, we will not consider it on appeal. *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is vacated, and the case is remanded for further consideration consistent with this opinion, and the Attorney Fee Order is affirmed.

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