BRB No. 08-0214 BLA

K.L. (Widow of M.L.) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/13/2008 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2004-BLA-06396) of Administrative Law Judge Michael P. Lesniak 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] Adjudicating the claim pursuant to 20 C.F.R. Part 718, based on claimant's March 15, 2002 filing date, the administrative law judge accepted the parties' stipulation of forty-one years of coal mine employment and the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge then found the medical evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2), (5). Accordingly, the administrative law judge awarded survivor's benefits, commencing November 2001.

On appeal, employer contends that the administrative law judge erred in excluding the autopsy report of Dr. Bush because it exceeded the evidentiary limitations. In addition, employer contends that the administrative law judge erred in weighing the medical opinion evidence at Section 718.205(c), arguing that the administrative law judge erred in crediting the opinion of Dr. Schmidt, that pneumoconiosis was a contributing cause of the miner's death, over the contrary opinions of Drs. Renn and Oesterling. Employer further argues that the administrative law judge erred in crediting the opinion of Dr. Schmidt, based solely on her status as one of the miner's treating physicians. Claimant has not filed a response brief in this appeal. In a limited response, the Director, Office of Workers' Compensation Programs (the Director), concurs with employer that the administrative law judge erred in excluding Dr. Bush's autopsy report because employer is entitled to submit more than one autopsy report. The Director states that employer is entitled to submit an affirmative autopsy report and also an autopsy report in rebuttal of each affirmative autopsy report submitted by claimant. Consequently, the Director argues that the administrative law judge must reconsider the admissibility of each of employer's autopsy reports. The Director, however, states that he will not respond to employer's allegations of error in the administrative law judge's consideration of the evidence on the merits of entitlement.[2]

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,

[1] Claimant is the widow of the miner, M.L., who died on November 29, 2001. Director's Exhibit 9. Claimant filed her survivor's claim on March 15, 2002. Director's Exhibit 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's decision to accept the parties' stipulations of forty-one years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[3] 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).

Evidentiary Limitations

Initially, we address employer's contention that the administrative law judge erred in excluding the autopsy report by Dr. Bush. In his Decision and Order, the administrative law judge excluded the autopsy report of Dr. Bush, finding that this report constitutes a second autopsy report, in addition to the report of Dr. Oesterling, and the regulations allow for the submission of only one autopsy report. Decision and Order at 6. Specifically, the administrative law judge found that, while employer designated Dr. Oesterling's report as an affirmative medical opinion and Dr. Bush's report as its affirmative autopsy report, because both reports were based, in part, on the review of the histological slides from the miner's autopsy, they both constitute autopsy reports. Thus, the administrative law judge excluded Dr. Bush's report as being in excess of the evidentiary limitations. *Id.*

On appeal, employer contends that the administrative law judge erred in excluding Dr. Bush's autopsy report, arguing that the administrative law judge misapplied the regulations and case law. In particular, employer contends that it is entitled to submit one affirmative autopsy report and one rebuttal autopsy report and that the reports of Drs. Oesterling and Bush satisfy these criteria.[4] The Director, in response, states that employer's argument has merit because employer is permitted to submit both an affirmative case autopsy report and also an autopsy report in rebuttal of claimant's affirmative evidence. The Director, however, notes that both Dr. Oesterling and Dr. Bush relied on medical evidence in addition to autopsy evidence and, therefore, the administrative law judge must consider the extent to which these medical reports are admissible on remand. We agree.

[3] Because the miner's coal mine employment was in West Virginia, 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 (1989) (*en banc*); Director's Exhibit 4.

[4] Employer acknowledges that it mistakenly referred to Dr. Bush's report as its affirmative autopsy report and Dr. Oesterling's report as its rebuttal case evidence on the Evidence Summary Form submitted to administrative law judge. Employer's Brief at 6. However, employer contends any error in doing so is harmless, because Dr. Oesterling's report qualifies as its affirmative autopsy evidence and Dr. Bush's report qualifies as its rebuttal evidence. *Id.*

In *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*), the Board held that the regulations set forth in Section 725.414 permit claimant and employer to each submit, as affirmative-case autopsy evidence pursuant to Sections 725.414(a)(2)(i), (a)(3)(i), a report by a pathologist who has reviewed the autopsy tissue slides in accordance with 20 C.F.R. §718.106. *See Keener*, 23 BLR at 1-237-238. In addition, the Board held that where a party submits an affirmative-case autopsy report, such as here, the opposing party is permitted to submit an additional report in rebuttal under Sections 725.414(a)(2)(ii), (a)(3)(ii). *Id*. Thus, in effect, employer, in this case, should have been permitted to submit two autopsy reports; specifically, one affirmative-case report and one rebuttal report. *See Keener*, 23 BLR at 1-240. Because the administrative law judge summarily excluded Dr. Bush's autopsy report because he found that employer was entitled to submit only one autopsy report, we vacate the administrative law judge's findings under Section 725.414 and remand the case for the administrative law judge to reconsider the autopsy evidence of record.

Moreover, in *Keener*, the Board addressed the scope of autopsy rebuttal evidence, as contemplated by the evidentiary limitations, and held that the regulations contemplate that an opinion offered in rebuttal of the case will analyze or interpret that evidence to which it is responsive. *Keener*, 23 BLR at 1-240. In the event that the autopsy rebuttal physician bases his conclusions on materials beyond the scope of that evidence, the administrative law judge must review and redact those portions of the rebuttal physician's conclusions that exceed the scope of the evidence to which it responds. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting) (*aff'd on recon*.) (complete exclusion of relevant evidence is disfavored). However, because the reports of Drs. Oesterling and Bush are based on medical evidence, in addition to the histological evidence obtained at autopsy, they qualify as both autopsy evidence as well as medical opinion evidence, pursuant to Section 725.414(a)(3)(i). Therefore, on remand, the administrative law judge is instructed to allow employer to designate the autopsy report that it wishes to submit in support of its affirmative case, as well as its two affirmative-case medical reports. In addition, employer must designate which physician's interpretation of claimant's autopsy evidence it wishes to submit as rebuttal evidence. However, if, on remand, the administrative law judge determines that the reports submitted as autopsy evidence exceed the scope of an autopsy report, the administrative law judge has the discretion to determine how to proceed, including admitting the reports in part. *See Keener*, 23 BLR at 1-242 n.15; *Harris*, 23 BLR at 1-108-09.

Survivor's Claim

Employer also challenges the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to Section

718.205(c). In light of our holding to vacate and remand this case because the administrative law judge erred in failing to consider all of the relevant autopsy evidence, we must also vacate the administrative law judge's Section 718.205(c) findings, as the administrative law judge's determination of the admissibility of additional medical evidence may impact on his credibility determinations. However, in order to avoid a repetition of error on remand, we will address employer's allegations of error with regard to the administrative law judge's weighing of the medical opinions of Drs. Schmidt, Oesterling and Renn pursuant to Section 718.205(c).[5]

On appeal, employer contends that the administrative law judge erred in according greater weight to the opinion of Dr. Schmidt over the opinions of Drs. Renn and Oesterling, arguing that the administrative law judge failed to adequately explain his finding that Dr. Schmidt's opinion was entitled to greater weight, based on her status as one of the miner's treating physicians. In addition, employer contends that the administrative law judge failed to adequately explain his determination that Dr. Schmidt's opinion was well-reasoned and well-documented and entitled to greater weight than the opinions of Drs. Oesterling and Renn. There is merit to these contentions.

The administrative law judge, in weighing the opinion of Dr. Schmidt, found, pursuant to Section 718.104(d), that it was entitled to additional weight, as Dr. Schmidt was the miner's treating physician. Decision and Order at 8. The administrative law judge found that while the duration of Dr. Schmidt's treatment of the miner was not long in duration, lasting only the last two months of his life, it was nonetheless extensive because either Dr. Schmidt or one of her team members examined the miner at least three times a week during his kidney dialysis sessions. *Id*. Consequently, the administrative

[5] In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). 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).

law judge found that Dr. Schmidt's opinion is entitled to greater weight. However, in discussing the relevant criteria pursuant to Section 718.104(d), the administrative law judge did not adequately address all of the criteria thereunder. In particular, the administrative law judge did not adequately discuss how the nature of Dr. Schmidt's treatment relationship with the miner afforded her a superior understanding of the miner's pulmonary condition.[6] 20 C.F.R. §718.104(d)(1). Consequently, on remand, the administrative law judge must more fully discuss his consideration of the criteria set forth at Section 718.104(d), particularly, whether Dr. Schmidt's treatment of the miner's kidney disease affords her a superior understanding of the miner's pulmonary conditions and the cause of his death. 20 C.F.R. §718.104(d)(1); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Moreover, on remand, the administrative law judge must more fully discuss his credibility determinations concerning the conflicting medical evidence, particularly the conflicting opinions of Drs. Schmidt and Renn, in light of Dr. Renn's specific criticisms of Dr. Schmidt's opinion and his comments refuting Dr. Schmidt's conclusions. *See* Employer's Exhibits 7, 11. In addition, the administrative law judge must discuss all of the relevant medical evidence, including the opinion of Dr. Bush, if it is found to be admissible, on the issue of the cause of the miner's death. Consequently, the administrative law judge must consider the relevant medical opinions, in their entirety, including the deposition testimony of the physicians, in determining whether these opinions are well-reasoned and well-documented and, thus, entitled to determinative weight. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

---

[6] The comments to the Section 718.104(d) of the regulations state that:

> In order to ensure a critical analysis of the physician–patient relationship, the guidelines describe four basic factors the adjudicator must consider: whether the physician provided pulmonary or non-pulmonary treatment; how long the physician treated the miner; how often the physician treated the miner; and what types of tests and examinations the physician conducted.

65 Fed. Reg. 79931 (Dec. 20, 2000).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge