BRB No. 09-0188 BLA

COLLEEN MOORE (Widow of DALE A. MOORE) Claimant-Respondent v. MATT MINING COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/25/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Staurt & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 on Remand (05-BLA-5485) of Administrative Law Judge Thomas M. Burke (the administrative law judge) awarding benefits 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).

This case is before the Board for the second time. In the original Decision and Order dated July 3, 2006, the administrative law judge credited the miner with at least 23 years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Nevertheless, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's finding that employer was properly designated as the responsible operator in this case. *Moore v. Matt Mining Co.*, BRB No. 06-0848 BLA, slip op. at 3 (Aug. 30, 2007)(unpub.). The Board also rejected employer's arguments that the evidentiary limitations were unconstitutional and that all of the evidence submitted by employer should have been admitted into the record because it was relevant, material, and not unduly repetitious. *Id*. The Board additionally held that the administrative law judge acted within his discretion in excluding evidence that exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. *Id*. However, the Board vacated the administrative law judge's award of benefits because the administrative law judge summarily denied employer's request to admit rebuttal evidence into the record under a "good cause" exception at the hearing, without addressing employer's due process concerns. *Moore*, slip op. at 5. The Board noted that employer identified specific reasons that the disputed x-rays contained in Director's Exhibit 5 should not have been characterized as treatment records under 20 C.F.R. §725.414. *Id*. The Board therefore instructed the administrative law judge, on remand, to first determine whether the disputed evidence was properly admissible under the exception for treatment records, and to then determine whether "good cause" was demonstrated under the facts of this case for the admission of rebuttal evidence or excess evidence into the record pursuant to 20 C.F.R. §725.456. *Id*. The Board also instructed the administrative law judge to determine whether the medical opinions of record were based on inadmissible evidence and, if so, the weight that should be accorded to such opinions. *Id*. Further, the Board vacated the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 because his evidentiary rulings on remand may affect his weighing of the evidence on the issue of complicated pneumoconiosis. *Moore*, slip op. at 6. Hence, the Board instructed the administrative law judge to reassess all of the relevant evidence and readjudicate the issue of complicated pneumoconiosis in accordance with the precedent of the United States Court of Appeals for the Fourth Circuit. *Id*.

On remand, the administrative law judge determined that employer was entitled to offer a reading in rebuttal to Dr. Robinette's reading of the December 12, 1997 x-ray, pursuant to 20 C.F.R. §724.414(a)(3)(ii), as Dr. Robinette's "reading was more likely than not made for the purpose of litigation, not for treatment." Decision and Order on Remand at 2. The administrative law judge therefore admitted Dr. Wheeler's reading of the December 12, 1997 x-ray into the record as a reading in rebuttal to Dr. Robinette's reading of the x-ray. *Id*. However, the administrative law judge determined that the readings of the May 8, 2001 and September 14, 1998 x-rays were not made for any purpose other than the treatment of the miner. *Id*. at 2, 3. Further, in considering whether "good cause" had been shown under Section 725.456 for admitting into the record readings in rebuttal to the readings of the May 8, 2001 and September 14, 1998 x-rays in the treatment records, the administrative law judge rejected employer's argument that, from a quantitative standpoint, the allowable evidence is so tilted in favor of claimant[1] that its due process rights were violated. *Id*. at 4. The administrative law judge also found that, from a qualitative standpoint, the parties' evidentiary development was equivalent. *Id*. On the merits, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the reading of the September 14, 1998 x-ray by Dr. Humphreys and the readings of the May 8, 2001 x-ray by Drs. Robinette and McReynolds were admissible as treatment records. Employer also challenges the administrative law judge's finding that employer did not establish "good cause" for the admission into the record of readings in rebuttal to the readings of the September 14, 1998 and May 8, 2001 x-rays. Further, employer contends that the administrative law judge erred in failing to determine whether Dr. Robinette's opinion was based on inadmissible evidence. Lastly, employer challenges the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), responds by letter, urging the Board to affirm the administrative law judge's finding that the reading of the September 14, 1998 x-ray by Dr. Humphreys and the readings of the May 8, 2001 x-ray by Drs. Robinette and McReynolds were admissible as treatment records at 20 C.F.R. §725.414(a)(4). The Director also urges the Board to reject employer's argument that the administrative law judge erred by refusing to find that "good cause" existed to allow

[1] Claimant is the widow of the miner, who died on June 17, 2003. Director's Exhibit 4. She filed her survivor's claim on September 2, 2003. Director's Exhibit 1.

employer to submit readings in rebuttal to the readings of the September 14, 1998 and May 8, 2001 x-rays. The Director agrees, however, with employer's argument that the administrative law judge failed to follow the Board's directive to determine whether Dr. Robinette's opinion was based on inadmissible evidence and, if so, what weight to accord to his opinion. Hence, the Director urges the Board to vacate the administrative law judge's award of benefits and remand the case to the administrative law judge to reassess Dr. Robinette's opinion.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act 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, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[3]

---

[2] The record indicates that the miner was employed in the coal mining industry in Virginia. Director's Exhibit 7. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Initially, we will address employer's contention that the administrative law judge erred in finding that the reading of the September 14, 1998 x-ray by Dr. Humphreys and the readings of the May 8, 2001 x-ray by Drs. Robinette and McReynolds were admissible as treatment records. Employer asserts that the readings of these x-rays were made for the purpose of litigation. The administrative law judge noted that the treatment records included Dr. Humphreys's reading of the September 14, 1998 x-ray and the readings of the May 8, 2001 x-ray by Drs. Robinette and McReynolds. The administrative law judge also noted that Dr. Robinette referred the September 14, 1998 x-ray to Dr. Humphreys for his reading. The administrative law judge additionally noted that Dr. Robinette read the May 8, 2001 x-ray and then referred the x-ray to Dr. McReynolds for his reading. Further, in rejecting employer's argument that Dr. Humphreys's reading of the September 14, 1998 x-ray must have been made for the purpose of litigation because Dr. Robinette's memorandum with the same date as the x-ray was copied to two attorneys who represented the miner, the administrative law judge stated:

> However, the memo supports an opposite finding, that is, it supports a finding that the x-ray reading was made for treatment purposes. The memo explains that the miner had returned to Dr. Robinette's office for follow-up of his coal workers' pneumoconiosis and progressive massive fibrosis, and notes that Dr. Robinette discussed with the miner the procedures involved in the follow-up, including a physical examination, the aforesaid chest x-ray, negative cultures for tuberculosis, and a prescription for medicine to treat bronchitis.

Decision and Order on Remand at 3. Thus, the administrative law judge reasonably found that the reading of the September 14, 1998 x-ray by Dr. Humphreys and the

---

> (5) 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).

readings of the May 8, 2001 x-ray by Drs. Robinette and McReynolds do not indicate that they were made for any purpose other than for the treatment of the miner. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*) (recognizing that an administrative law judge has broad discretion in handling procedural matters). Consequently, we reject employer's assertion that the administrative law judge erred in finding that the reading of the September 14, 1998 x-ray by Dr. Humphreys and the readings of the May 8, 2001 x-ray by Drs. Robinette and McReynolds were admissible as treatment records.

Next, we address employer's contention that the administrative law judge erred in finding that employer did not establish "good cause" for the admission into the record of readings in rebuttal to the readings of the September 14, 1998 and May 8, 2001 x-rays. The administrative law judge noted that "the Board's decision requires a determination of whether good cause has been shown under §725.456 for considering evidence in rebuttal of the readings of the September 14, 1998 and May 8, 2001 x-rays." Decision and Order on Remand at 3. In considering employer's argument that it would be a violation of due process to preclude employer from submitting readings in rebuttal to the three readings of the September 14, 1998 and May 8, 2001 x-rays in the treatment records, the administrative law judge compared claimant's x-ray evidence to employer's x-ray evidence. The administrative law judge specifically stated:

> Claimant's x-ray evidence consists of the four x-rays at Director's Exhibit 5, that is, the two readings by Dr. Robinette and the readings by Dr. Humphreys and Dr. McReynolds. Claimant did not offer any readings as part of its case in chief. Employer's x-ray evidence consists of readings by Dr. William Scott of an x-ray dated May 28, 1998, and an x-ray dated November 8, 1999, as well as the reading by Dr. Wheeler of the x-ray dated December 12, 1997. *See* p. 2, herein. Thus, [claimant's] evidence consists of four readings from three physicians, and [employer's] evidence consists of three readings from two physicians. Thus, from a quantity of evidence standpoint, [e]mployer's argument that the allowable evidence is so tilted in favor of the [c]laimant that its due process rights are violated is rejected. There is nothing in the regulations that requires that the parties have [an] equal number of readings.

Id. at 4. The administrative law judge also found that, from a qualitative standpoint, the parties' evidentiary development of the x-ray evidence was equivalent.

We hold that the administrative law judge did not abuse his discretion in rejecting employer's assertion that its due process rights were violated because it was precluded from submitting readings in rebuttal to the readings of the September 14, 1998 and May 8, 2001 x-rays in the treatment records. *Dempsey*, 23 BLR at 1-67. Consequently, we reject employer's assertion that the administrative law judge erred in finding that

employer did not establish "good cause" for the admission into the record of readings in rebuttal to the readings of the September 14, 1998 and May 8, 2001 x-rays.

Finally, employer contends that the administrative law judge erred in failing to consider whether Dr. Robinette's opinion was based on inadmissible evidence. Dr. Robinette treated the miner for his pulmonary condition from 1998 until his death in 2003. In a report dated June 18, 1998, Dr. Robinette opined that the miner had complicated pneumoconiosis with evidence of progressive massive fibrosis, Category A mass. Director's Exhibit 5. In his prior Decision and Order dated July 3, 2006, the administrative law judge weighed all of the relevant evidence together at 20 C.F.R. §718.304(a)-(c) and gave greater weight to Dr. Robinette's opinion than to the contrary medical evidence because of the doctor's superior qualifications and because he treated the miner. Decision and Order at 17. In addition, the administrative law judge found that Dr. Robinette's opinion was well-reasoned and well-documented. *Id*. Further, the administrative law judge found that Dr. Robinette's opinion was buttressed by other physicians who found large opacities and/or progressive massive fibrosis on chest x-ray and/or CT scan. *Id*. at 18.

In its Decision and Order, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge with the following instructions: 1) determine whether the disputed evidence was properly admissible under the exception for treatment records; 2) determine whether "good cause" was demonstrated under the facts of this case for the admission of rebuttal evidence or excess evidence into the record pursuant to 20 C.F.R. §725.456; and 3) determine whether the medical opinions of record were based on inadmissible evidence and, if so, the weight that should be accorded to such opinions. *Moore*, slip op. at 5.

In his current Decision and Order on Remand dated October 29, 2008, the administrative law judge noted that "[he previously] determined that [c]laimant had established the existence of complicated pneumoconiosis through the opinion of Dr. Robinette." Decision and Order on Remand at 5. Further, after noting the reasons that he had previously given for crediting Dr. Robinette's opinion over the contrary medical evidence, the administrative law judge stated:

> [My previous] finding that the relevant evidence establishes the presence of complicated pneumoconiosis which arose out of the [miner's] 23 years of coal mine employment is not changed by consideration of Dr. Wheeler's reading of the December 12, 1997 x-ray as Dr. Wheeler's interpretation of the lung mass was considered when his reading of the CT scans were considered.

Id. at 6.

However, as employer argues and the Director agrees, the administrative law judge did not consider the medical opinion evidence in accordance with the Board's instructions, since he failed to consider whether Dr. Robinette's opinion was based on inadmissible evidence. *See* 20 C.F.R. §802.405(a); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Consequently, we vacate the administrative law judge's award of benefits and remand the case for further consideration of the evidence.

At the outset, on remand, the administrative law judge must consider whether the medical opinions of record are based on inadmissible evidence and, if so, the weight that should be accorded to such opinions.[4] *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting).

Furthermore, on remand, the administrative law judge must reassess all of the relevant medical evidence and determine whether it establishes the presence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.[5] *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114,

---

[4] The administrative law judge, on remand, has several available options for addressing a physician's opinion that was based on inadmissible evidence, namely, excluding the report, redacting the objectionable content, asking the physician to submit a new report, and factoring in the physician's reliance on the inadmissible evidence when deciding the weight to which the doctor's opinion is entitled. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). We note, however, that exclusion is not a favored option because it results in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

[5] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated 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

_____
BETTY JEAN HALL
Administrative Appeals Judge