

BRB No. 08-0123 BLA

E.G.)
(Widow of I.G.))
)
Claimant-Respondent)
)
v.)
)
U.S. STEEL CORPORATION)
) DATE ISSUED: 10/23/2008
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Howard G. Salisbury, Jr. (Kay, Castro & Chaney PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-5236) of Administrative Law Judge Stephen L. Purcell awarding benefits on a 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 involves a survivor's claim filed on October 31, 2002.¹

¹ The miner filed a claim on April 9, 1973. Director's Exhibit 1. The district director denied benefits on May 26, 1981. *Id.* There is no indication that the miner took any further action in regard to his 1973 claim. The miner filed a duplicate claim on July 13, 1992. Director's Exhibit 2. The district director denied benefits on January 4, 1993.

After crediting the miner with thirty-two years of coal mine employment,² the administrative law judge found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge further found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence 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.

On appeal, employer argues that the administrative law judge erred in denying its request to submit a rebuttal report in response to Dr. Green's October 20, 2005 report. Employer argues, therefore, that the administrative law judge erred in finding that the medical opinion evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Alternatively, employer challenges the administrative law judge's finding, on the merits, that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant³ responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Employer argues that the administrative law judge improperly denied it an opportunity to submit rebuttal evidence regarding Dr. Green's interpretation of the miner's autopsy tissue slides. At the December 2, 2005 hearing, the administrative law judge correctly found that claimant's survivor's claim was subject to the evidentiary

Id. There is no indication that the miner took any further action in regard to his 1993 claim.

² The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, 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*).

³ Claimant is the widow of the deceased miner, who died on October 1, 2002. Director's Exhibit 11.

limitations set forth at 20 C.F.R. §725.414. Hearing Transcript at 8. After the administrative law judge noted that Dr. Fulks's autopsy report had been admitted as Director's Exhibit 12,⁴ claimant sought to submit Dr. Green's October 20, 2005 report. Hearing Transcript at 9. Although Dr. Green's report was based upon his review of the miner's autopsy tissue slides, as well as other medical evidence, claimant designated this evidence as "a medical report." *Id.* The administrative law judge admitted Dr. Green's October 20, 2005 report into the record without objection as Claimant's Exhibit 1.⁵ *Id.* at 10.

Employer submitted a transcript of the testimony of Dr. Wirts, the miner's primary care physician, Employer's Exhibit 2, and Dr. Bush's August 11, 2003 report. Employer's Exhibit 1. Dr. Bush's report, like that of Dr. Green, was based upon his review of the miner's autopsy tissue slides, as well as other medical evidence.⁶ The administrative law judge admitted Dr. Wirts's deposition testimony and Dr. Bush's August 11, 2003 report, without objection, as employer's two affirmative medical reports.⁷ Hearing Transcript at 12; *see* 20 C.F.R. §725.414(a)(3)(i).

At the hearing, employer also sought to admit a second report from Dr. Bush⁸ in rebuttal to Dr. Green's report. The administrative law judge excluded the proffered report because the regulations do not provide for the rebuttal of medical reports. Hearing Transcript at 10-12.

The administrative law judge's evidentiary rulings, rendered at the December 2,

⁴ Neither claimant nor employer designated Dr. Fulks's autopsy report as affirmative autopsy evidence. Consequently, the administrative law judge, on remand, is instructed to determine the basis for the admissibility of Dr. Fulks's autopsy report.

⁵ Dr. Green is Board-certified in Anatomic Pathology. Claimant's Exhibit 1.

⁶ Dr. Bush is Board-certified in Anatomic and Clinical Pathology. Employer's Exhibit 1. Dr. Bush also holds a "Special Competence" from the American Board of Pathology in Medical Microbiology. *Id.*

⁷ Although Drs. Green and Bush each opined that the miner suffered from pneumoconiosis, they differed as to the extent of the miner's pneumoconiosis and therefore whether it was sufficient to have contributed to his death. Claimant's Exhibit 1; Employer's Exhibit 1.

⁸ Employer notes that Dr. Bush's second report is dated December 5, 2005, three days after the hearing. Employer's Brief at 9.

2005 hearing, were based upon his reliance on the Board's holding in *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.),⁹ that only the original report of the autopsy prosector constituted an autopsy report for the purposes of the evidentiary limitations. The administrative law judge was under the impression that Dr. Green's report could not serve as affirmative-case autopsy evidence under 20 C.F.R. §725.414(a)(3)(i), because the report of Dr. Fulks, the autopsy prosector, which was a part of the miner's hospitalization records, was the only autopsy report allowed at 20 C.F.R. §725.414(a)(3)(i).

Subsequent to the administrative law judge's evidentiary rulings in this case, the Board held that the regulations set forth in 20 C.F.R. §725.414 permit both claimant and employer to submit, as affirmative-case autopsy evidence pursuant to 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), a report by a pathologist who has reviewed the autopsy tissue slides. See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237-38 (2006) (*en banc*). In addition, the Board held that, where a party submits an affirmative-case autopsy report, the opposing party is permitted to submit an additional report in rebuttal under 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). *Keener*, 23 BLR at 1-240.

Moreover, the Board held that, where a physician reviews not only the autopsy report and slides, but also reviews additional medical records and then bases his or her findings and conclusions both on the pathological and clinical evidence, the report constitutes both an autopsy report and a medical report for the purposes of the evidentiary limitations. *Keener*, 23 BLR at 1-239.

In this case, the administrative law judge did not consider that Dr. Green's report could constitute both an affirmative autopsy report and a medical report for the purposes of the evidentiary limitations. To the extent that Dr. Green's report was an affirmative autopsy report, the regulations permitted employer to submit an autopsy rebuttal report. 20 C.F.R. §725.414(a)(3)(ii). Thus, the administrative law judge, on remand, should consider whether Dr. Bush's second report dated December 5, 2005 is admissible as autopsy rebuttal evidence.

Similarly, the administrative law judge did not consider that Dr. Bush's August 11, 2003 report could constitute both an affirmative autopsy report and a medical report for the purposes of the evidentiary limitations. To the extent that Dr. Bush's report was

⁹ The administrative law judge noted that the Board, in *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.), adopted the Director's position at that time that "an autopsy report was only the original prosector's report . . . [a]nd [that] any pathologist report that was not prepared by a physician who actually examined the deceased miner . . . was a medical report." Hearing Transcript at 18.

an affirmative autopsy report, the regulations permitted claimant to submit an autopsy rebuttal report. 20 C.F.R. §725.414(a)(2)(ii).

Claimant argues that, because she submitted Dr. Green's report as one of her two affirmative-case "medical reports," and because she "did not designate any affirmative autopsy evidence . . . there was nothing for the [e]mployer to rebut." Claimant's Brief at 8. We disagree. As noted, the Board has held that a single report can be both an autopsy report and a medical report, if it contains a slide review. *Keener*, 23 BLR at 1-239. Moreover, even if we agreed with claimant that Dr. Green's report was solely a "medical report," we disagree with claimant's conclusion that the regulations therefore barred employer from responding to it. In rejecting employer's proffer of a second report from Dr. Bush, the administrative law judge relied upon the fact that the regulations do not provide for the rebuttal of medical opinion evidence. The administrative law judge neglected to consider, however, whether Dr. Bush's August 11, 2003 report and his second December 5, 2005 report could constitute a single, affirmative medical report. Since a medical report may be submitted by a physician who has examined the miner "and/or" reviewed admissible evidence, and the evidentiary limitations do not require that a "medical report" be contained in a single document, 20 C.F.R. §725.414(a)(1), the administrative law judge should have addressed whether Dr. Bush's second December 5, 2005 report, to the extent that it reviewed and commented on Dr. Green's report, could be considered a supplement to his initial, August 11, 2003 report. *See generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006); *C.L.H. v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007)(unpub.)(deferring to the Director's position that supplemental reports based on review of admissible evidence do not exceed the two-report limitation). Thus, if necessary, on remand, the administrative law judge is instructed to consider whether Dr. Bush's December 5, 2005 report constitutes an admissible, supplemental report.

Consequently, we vacate the administrative law judge's findings under 20 C.F.R. §§725.414 and 718.205(c) and remand the case so that the administrative law judge can afford claimant and employer the opportunity to redesignate their evidence in accordance with *Keener*.¹⁰ *See Keener*, 23 BLR at 1-236-40. The administrative law judge should then reconsider whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

¹⁰ On remand, claimant and employer should each designate which reports constitute the party's affirmative-case medical reports and which report constitutes the party's affirmative-case autopsy report. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Depending upon these designations, claimant and employer, if appropriate, should also designate which report constitutes the party's rebuttal autopsy report. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

Accordingly, the administrative law judge's Decision and Order 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