BRB Nos. 11-0125 BLA
and 11-0125 BLA-A

LAHOMA MULLINS (Widow of RAYMOND MULLINS)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
PEN COAL CORPORATION	)	DATE ISSUED: 10/28/2011
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals,[1] the Decision and Order on Remand (2005-BLA-05137) of Administrative Law Judge Ralph A. Romano awarding benefits on a request for modification of the denial of a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for the second time. In his initial Decision and Order, the administrative law judge credited the miner with six years of coal mine employment, and found that employer did not contest the issue of whether the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge then found that claimant 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.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to more fully explain the weight he accorded the conflicting evidence of record pursuant to Section 718.205(c). *L.M.* [*Mullins*] *v. Pen Coal Corp.*, BRB No. 07-0765 BLA (June 20, 2008) (unpub.). In addition, the Board instructed the administrative law judge to render a specific finding regarding the length of the miner's coal mine employment. The Board noted that the parties had not stipulated to a total number of years of coal mine employment, only that employer had stipulated to the six years for which it employed the miner. *Mullins*, slip op. at 5.

On remand, the administrative law judge set forth the Board's remand instructions regarding the issues to be addressed in evaluating the medical evidence, as well as the Board's instruction to render a specific finding regarding the total length of the miner's coal mine employment. Decision and Order on Remand at 2-3. Initially, the administrative law judge credited the miner with a total of twenty-one years of coal mine employment, as supported by the miner's Social Security Administration earning records. *Id*. at 5. Addressing the merits of entitlement, the administrative law judge then found the medical evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), crediting the opinions of Drs. Perper and

[1] Claimant is the widow of the miner, who died on March 5, 2002. Claimant filed a survivor's claim on May 20, 2002, on behalf of herself and her two minor children. Director's Exhibit 2. The record is devoid of evidence that the miner filed a claim during his lifetime.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed this claim on May 20, 2002, prior to the effective date of the new amendments. Director's Exhibit 2.

Mahmoud over the contrary opinions of Drs. Crouch, Bush and Rosenberg. *Id*. at 6-7. Accordingly, the administrative law judge again awarded benefits. Employer filed a Motion for Reconsideration of the administrative law judge's award of benefits, which was summarily denied by the administrative law judge.

On appeal, employer challenges the administrative law judge's award of benefits, contending that the administrative law judge erred in weighing the medical evidence of record pursuant to Section 718.205(c). In addition, employer contends that the administrative law judge violated the Administrative Procedure Act [APA], 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), in summarily denying employer's Motion for Reconsideration, without providing any explanation for his conclusions. In particular, employer contends that the administrative law judge erred in denying employer's challenge to the exclusion of the medical opinions of Drs. Hippensteel and Oesterling at the time of the hearing on modification.[3] Employer also argues that this case should be assigned to a new administrative law judge. In response, claimant urges affirmance of the administrative law judge's award of benefits, as within a reasonable exercise of his discretion in weighing the medical evidence. Claimant also argues that the Board should reject as waived employer's contention, raised in its Motion for Reconsideration, that the opinions of Drs. Hippensteel and Oesterling should not have been excluded at the time of the hearing on modification. Additionally, claimant urges the Board to reject employer's request that this case be transferred to a new administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response brief in this appeal.

[3] Claimant filed her initial survivor's claim on May 20, 2002, which was denied by the district director on September 5, 2003. Director's Exhibits 2, 20. Claimant then filed a request for modification on May 19, 2004. Director's Exhibit 22. At the formal hearing on claimant's modification request, employer argued that it should be permitted to submit the full complement of medical evidence allowed under the evidentiary limitations set forth at 20 C.F.R. §725.414, as well as the additional evidence allowable on modification under 20 C.F.R. §725.310(b). Hearing Transcript at 10-11, 13. Specifically, employer argued that because it did not have the opportunity to submit all of its evidence at the time of the original claim, it should now be permitted to submit its full complement of evidence. *Id*. However, noting that the only interpretation of the interaction of these regulations was an unpublished decision from the Office of Administrative Law Judges to the contrary, the administrative law judge rejected employer's argument. *Id*. at 10-15. Consequently, the administrative law judge limited the parties to evidence allowable under Section 725.310(b), thus, resulting in the exclusion of the opinions of Drs. Hippensteel and Oesterling. *Id*. at 12-15.

In her cross-appeal, claimant contends that the administrative law judge properly awarded benefits. Claimant argues, however, that if the Board remands this case, additional reasons support the administrative law judge's according less weight to employer's physicians. Employer responds, arguing that claimant has failed to provide a valid basis for the Board to review the administrative law judge's decision. The Director has also declined to file a substantive response brief in claimant's cross-appeal.

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.[4] 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).

Initially, we address employer's contention that the administrative law judge erred in failing to provide any explanation for his refusal to address the issues raised in employer's Motion for Reconsideration. Employer contends that, at the time of the hearing, the administrative law judge erred in excluding the medical opinions of Drs. Hippensteel and Oesterling, based on his finding that these opinions exceeded the evidentiary limitations in modification proceedings. Specifically, employer contends that the administrative law judge erred in holding that the parties were allowed to submit, on modification, only that evidence enumerated in 20 C.F.R. §725.310(b), regardless of whether the parties had submitted their full complement of evidence in the original claim, pursuant to 20 C.F.R. §725.414. Employer's Brief at 30-31; *see* Hearing Transcript at 8-15. Employer points out that, subsequent to the hearing and contemporaneous with the administrative law judge's 2007 Decision and Order, the Board ruled on this issue, holding that the evidentiary limitations at Sections 725.414 and 725.310(b) are not mutually exclusive, but should be read together. Specifically, the Board held that the parties must be allowed to submit, for the first time on modification, the full complement of medical evidence allowed pursuant to Sections 725.414 and 725.310(b), if it was not previously submitted. *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007); Employer's Brief at 31-32. Consequently, employer argues that, in light of *Rose*, and because the evidentiary limitations set forth at Section 725.414 are mandatory, and not subject to waiver,[5] the medical opinion of Dr. Hippensteel and autopsy report of Dr.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[5] Employer cites the Board's holding in *Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004), wherein the Board held that the evidentiary limitations, pursuant to 20 C.F.R. §725.414, are mandatory and, as such, they are not subject to waiver by the parties. 20 C.F.R. §§725.414, 725.456(b)(1); *Id*. at 1-74.

Oesterling should have been admitted into the record on modification. In response, claimant argues that, even though employer correctly interprets *Rose* as allowing for the full complement of evidence to be admitted for the first time on modification, employer waived its right to raise the issue by failing to raise it in its first appeal to the Board. Claimant's Response Brief at 25-26.

The regulations at Sections 725.414 and 725.310(b) establish combined evidentiary limitations. See 20 C.F.R. §§725.2(c), 725.414, 725.310(b); *Rose*, 23 BLR at 1-227. Pursuant to Section 725.414(a), absent a finding of good cause, each party may submit, in support of its affirmative case, no more than two chest x-ray interpretations, two pulmonary function studies, two arterial blood gas studies, one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). The regulation at Section 725.310(b) further provides that, in a modification proceeding, each party shall be entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as affirmative case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). If a party did not submit the full complement of evidence allowed by Section 725.414 in support of its affirmative case in the underlying claim, that party is permitted to submit any additional evidence allowed under Section 725.414, on modification, as well as the additional medical evidence allowed by Section 725.310(b). *Rose*, 23 BLR at 1-227. Additionally, the regulations provide that if any evidence exceeding the limitations is offered by a party, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Based on the facts of this case, we conclude that it is necessary to vacate the administrative law judge's Decision and Order on Remand and remand this case to the administrative law judge. Although the administrative law judge correctly observed at the hearing on modification that the parties are entitled to submit one medical report on modification pursuant to Section 725.310(b), he did not find that the parties were also entitled to submit any additional evidence to initially complete the complement of evidence permitted by Section 725.414. *See Rose*, 23 BLR at 1-227; Hearing Transcript at 11-15. The administrative law judge erred, therefore, in not properly applying the evidentiary limitation provisions set forth pursuant to Section 725.414 and 725.310, and, may have, consequently, excluded evidence admissible under Section 725.414(a). Further, because the administrative law judge discredited some of the medical evidence because it relied on improperly excluded evidence, principles of fundamental fairness require that the parties be permitted to resubmit or redesignate their evidence in light of Sections 725.414 and 725.310(b). *See L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55, 1-63 (2008)(*en banc*). Consequently, we vacate the administrative law judge's Decision and Order on Remand and remand the case for the administrative law judge to provide the parties the opportunity to submit medical evidence pursuant to the evidentiary

limitations set forth at Sections 725.414 and 725.310(b), in light of the holding in *Rose*.[6]

On remand, the administrative law judge should also allow for the submission of any additional rebuttal evidence, depending on the parties' designation of their affirmative evidence. Once the evidentiary record is closed, the administrative law judge must then consider the medical evidence to determine whether it is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). On remand, the administrative law judge must fully discuss the medical evidence, resolve conflicts contained therein, and provide a full rationale for his assignment of weight to the particular opinions.[7] 20 C.F.R. §718.205(c); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *see 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).

[6] Employer has failed to meet its burden of showing intransigence or bias on the part of the administrative law judge in evaluating the evidence. We, therefore, decline to direct the reassignment of this case to a new administrative law judge. *See generally Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-23 (1999)(employer's request for reassignment to another administrative law judge on remand was denied when the record did not support employer's allegations of intransigence and bias on part of administrative law judge); *cf. Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)(Fourth Circuit directed the Board to remand to a new administrative law judge; where same administrative law judge had evaluated the evidence three times); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

[7] In light of our disposition vacating the administrative law judge's weighing of the medical evidence and remanding the case for the administrative law judge to address initially the evidentiary limitations issue, we need not address the issues raised in claimant's cross-appeal as such arguments are moot.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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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JUDITH S. BOGGS
Administrative Appeals Judge