BRB Nos. 08-0853 BLA
and 08-0853 BLA-A

B.J. (Widow of R.J.) Claimant-Petitioner Cross-Respondent v. CUMBERLAND RIVER COAL COMPANY Self-insured through ARCH COAL INCORPORATED Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/29/2009 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Sarah M. Hurley (Carol A. DeDeo, 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:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2007-BLA-6014) of Administrative Law Judge Janice K. Bullard 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] The administrative law judge credited the miner with sixteen years of qualifying coal mine employment, and adjudicated this survivor's claim, filed on October 19, 2006, pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4), but insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §§725.456 and 725.414, and her weighing of the evidence relevant to the cause of the miner's death pursuant to Section 718.205(c), arguing that the administrative law judge misapplied the law and failed to comply with the provisions of 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). Employer responds, urging affirmance of the denial of survivor's benefits, and cross-appeals, arguing in the alternative that the administrative law judge erred in failing to admit the evidence of record in the living miner's claims in its entirety into the record in the survivor's claim. Employer further challenges the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4).[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, urging affirmance of the administrative law judge's evidentiary rulings. Claimant responds to the cross-appeal, arguing in support of her position.

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,

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[1] Claimant is the widow of the miner, who died on May 5, 2006. Director's Exhibit 12.

[2] Employer concedes that its arguments on cross-appeal need not be reached if the Board affirms the administrative law judge's denial of benefits. Employer's Brief at 1.

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).

Turning first to the evidentiary issues, claimant contends that the administrative law judge properly denied employer's motion to admit all evidence contained in the miner's claims into the record of the survivor's claim, but then violated claimant's due process rights by admitting into the record evidence submitted by employer in violation of the twenty-day rule pursuant to 20 C.F.R. §725.456,[4] including evidence from the miner's claims, without articulating how "good cause" had been established for such admittance. Claimant also asserts that, while claimant was privy to the evidence contained in the living miner's claims, due process was not served by employer's "last minute" designation of evidence at the hearing,[5] as claimant developed her evidence on the premise of Dr. Jarboe's newly developed report of April 10, 2007, and not on his prior reports contained within the miner's claims. Additionally, claimant maintains that employer designated evidence in excess of the limitations at 20 C.F.R. §725.414.[6]

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[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc)*; Director's Exhibit 1.

[4] Any evidence developed after a formal hearing is requested must be exchanged with all other parties at least twenty days prior to the hearing in order to be admissible at the hearing. 20 C.F.R. §725.456(b). If the twenty-day rule is violated, the evidence must be excluded unless the other parties waive the noncompliance or good cause is shown for failure to comply. 20 C.F.R. §725.456(b)(3).

[5] While employer submitted Employer's Exhibits 1-10 at the hearing, claimant concedes that Employer's Exhibit 4, the deposition of Dr. Jarboe taken on April 10, 2008, was not subject to the twenty-day rule, and that Employer's Exhibits 7 and 9, consisting of various treatment records for the miner and a CT scan interpretation, were duplicative of Director's Exhibits 14, 16, and Claimant's Exhibit 1. Claimant's Brief at 6 n.4.

[6] Section 725.414, in conjunction with 20 C.F.R. §725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit for admission into the record. 20 C.F.R. §725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than 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), (a)(3)(iii).

Claimant's Brief at 6-8. Employer counters on cross-appeal that the administrative law judge should have admitted into the record all evidence from the miner's claims in accordance with 20 C.F.R. §725.405(c) and the APA, on the ground that all relevant evidence should have been considered. The arguments of both claimant and employer are without merit.

At the hearing, the administrative law judge initially ruled on employer's motion to submit evidence beyond the twenty-day rule, specifically re-readings of two x-rays and a CT scan taken during the miner's last hospitalization. Employer asserted that it had requested the films from the hospital, but had not received them in time to obtain re-readings in compliance with the twenty-day rule. Hearing Transcript at 5. The administrative law judge found that good cause was established to admit this evidence into the record, designated as Employer's Exhibits 1-3, and allowed claimant sixty days post-hearing within which to obtain additional re-readings. Hearing Transcript at 5-6. As the administrative law judge has broad discretion in procedural matters, and claimant subsequently withdrew her objection to the admission of this evidence after she was granted the opportunity to respond, *see* Hearing Transcript at 19, we affirm the administrative law judge's ruling in this regard. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

The administrative law judge next denied employer's motion to include all evidence from the living miner's claims as part of the Director's exhibits or, in the alternative, to permit evidence in excess of the limitations. Hearing Transcript at 6-10. The Director correctly notes that the Board has held that evidence from the living miner's claim must be designated by one of the parties in accordance with the evidentiary limitations at Section 725.414 in order to be admitted into the record of the survivor's claim. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240-242 (2007)(*en banc*). Additionally, the D.C. Circuit Court of Appeals, the Fourth Circuit, and the Board have considered and rejected employer's argument that the evidentiary limitations violate the APA and Section 413 of the Act, which provide that all relevant evidence be considered. *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001); *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). While the district director is required to "obtain whatever medical evidence is necessary and available for the development and evaluation" of a survivor's claim pursuant to Section 725.405(c), the regulation does not require that all of this evidence be admitted into the record. *See Keener*, 23 BLR at 1-240-242. Furthermore, employer failed to make a "good cause" argument before the administrative law judge. *See Dempsey*, 23 BLR at 1-61. Consequently, employer has demonstrated no abuse of discretion in the

administrative law judge's refusal to admit all evidence of record in the miner's claims into the record of the survivor's claim.

Next, the administrative law judge allowed employer to designate evidence from the living miner's claims for admission into the record in the survivor's claim, subject to the evidentiary limitations. Employer submitted an x-ray re-reading by Dr. Wiot, designated as Employer's Exhibit 5, in rebuttal to Dr. Baker's x-ray reading of November 16, 2002, and claimant agreed to its admission into the record. Hearing Transcript at 20-21. Employer's Exhibit 6 consisted of a report by Dr. Jarboe regarding his June 30, 2003 pulmonary evaluation of the miner, submitted by employer for a limited purpose as rehabilitative evidence, with corresponding pulmonary function and blood gas studies, submitted by employer as initial evidence in support of its affirmative case, and claimant did not object to this admission of this evidence. Hearing Transcript at 21-22. Employer's Exhibit 8, consisting of Dr. Jarboe's report dated November 8, 2005 and addendum dated November 10, 2005, which reviewed the deposition of Dr. Baker and the report of Dr. Alam, was submitted by employer as initial evidence in support of its affirmative case, and claimant offered no objection to the admission of this evidence. Hearing Transcript at 25. As claimant raised no due process argument, did not request the opportunity to respond to employer's late designations, and withdrew her objection to the submission of Employer's Exhibits 5, 6 and 8 at the hearing, claimant has waived any objection to the admission of this evidence into the record.

Lastly, the administrative law judge admitted Employer's Exhibit 10, the deposition of Dr. Jarboe taken on August 28, 2003, into the record "for the limited purpose of rehabilitating any statements that Dr. Baker may have made [that tended] to undermine Dr. Jarboe's opinion." Hearing Transcript at 26. Claimant asserts that Dr. Jarboe relied, in part, on inadmissible evidence from the miner's claim, and contends that the administrative law judge erred in considering Dr. Jarboe's multiple opinions because they exceed the evidentiary limitations pursuant to Section 725.414. Claimant's Brief at 8-11. Claimant's arguments lack merit. As the Director correctly notes, a physician's medical opinion need not be contained in a single document, and the administrative law judge could properly consider Dr. Jarboe's June 30, 2003 examination report, his November 8, 2005 supplemental report, and his August 28, 2003 deposition, Employer's Exhibits 6, 8, 10, together as constituting one medical report, and could properly consider Dr. Jarboe's April 10, 2007 report and April 10, 2008 deposition, Director's Exhibit 19, Employer's Exhibit 4, together as constituting employer's second affirmative medical report. Director's Brief at 3; *see* 20 C.F.R. §§725.414(a)(3)(i), (c), 725.457(d). Furthermore, when a medical report is based, in whole or in part, on inadmissible evidence, the administrative law judge may, in her discretion, exclude that report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the opinion is entitled. *Keener*, 23 BLR 1-229. In the instant case, the administrative law

judge permissibly declined to consider that portion of Dr. Jarboe's reports and deposition testimony dealing with evidence contained in the miner's claims that was not admitted into the record in the survivor's claim. *See* Decision and Order at 8. Thus, we reject claimant's arguments, and affirm the administrative law judge's evidentiary rulings.

Turning to the merits, in order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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 also Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the evidence of record insufficient to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death pursuant to Section 718.205(c), the administrative law judge correctly determined that Dr. Baker did not express an opinion regarding the cause of the miner's death. Claimant's Exhibit 3; Decision and Order at 18. The administrative law judge accurately summarized Dr. Alam's opinion, that the miner's chronic pulmonary problems were caused by coal dust exposure as well as "tobacco abuse causing him to have severe emphysema," resulting in pulmonary hypertension and pulmonary edema, which strained his heart and, in turn, caused the cardiac event that culminated in death. Claimant's Exhibit 2; Decision and Order at 7-8. Acknowledging that Dr. Alam was the miner's treating physician, the administrative law judge applied the factors at 20 C.F.R. §718.104(d), but permissibly found that Dr. Alam's opinion as to the cause of death was inadequately reasoned and not fully explained, in light of the evidence of record documenting that the miner suffered from, and was hospitalized for, other pulmonary and non-pulmonary problems. Director's Exhibits 17, 18. Specifically, the administrative law judge determined that Dr. Alam failed to explicitly relate the miner's emphysema to coal dust exposure; failed to provide a reasoned explanation as to how pneumoconiosis caused or contributed to the miner's pulmonary hypertension; and failed to fully discuss the miner's other impairments and explain whether they contributed to his pulmonary condition and/or cardiac condition. Decision and Order at 18. Thus, the administrative

law judge acted within her discretion in declining to accord substantial weight to Dr. Alam's opinion, and in finding that Dr. Jarboe provided a better reasoned opinion, that the miner's death was unrelated to pneumoconiosis but was due to acute pulmonary edema, likely precipitated by a combination of coronary artery disease, diastolic dysfunction of the left ventricle, and the misuse of opiates. *See Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 19. In this regard, the administrative law judge determined that Dr. Jarboe provided a well-documented rationale regarding the miner's multiple medical conditions and repeated hospitalizations due to heart failure and non-responsiveness from overuse of pain medication, and persuasively explained why the miner's death would have occurred when it did regardless of the presence of pneumoconiosis. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) citing *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 19.

Lastly, we note that the status of a treating physician is but one factor to be considered by the administrative law judge in weighing medical evidence. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). In the instant case, the administrative law judge permissibly determined that, given the lack of reasoning underlying Dr. Alam's opinion, she could not give it controlling weight under 20 C.F.R. §718.204(d), despite his status as the miner's treating physician. Decision and Order at 18; *Williams*, 338 F.3d 501, 22 BLR 2-625; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22. Furthermore, the administrative law judge permissibly determined that the death certificate, listing the immediate cause of death as "respiratory failure due to black lung disease (pneumoconiosis)," was entitled to no probative weight, as the coroner's credentials were not of record. Decision and Order at 19; Director's Exhibit 12; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-21 (3d Cir. 1997); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

As we have found no reversible error in the administrative law judge's weighing of the conflicting evidence of record, we affirm her finding that claimant failed to meet her burden of establishing death due to pneumoconiosis under Section 718.205(c), as supported by substantial evidence, and we affirm her denial of survivor's benefits. *Trumbo*, 17 BLR at 1-87.

In light of the foregoing, and in view of employer's concession, *see* n. 2, *supra*, we need not reach employer's arguments on cross-appeal regarding the issue of legal pneumoconiosis at Section 718.202(a)(4).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge