BRB Nos. 09-0189 BLA
and 09-0189 BLA-A

L.A. (Widow of G.A.) Claimant-Petitioner v. APPLETON & RATLIFF COAL CORPORATION and KNOX CREEK COAL CORPORATION c/o UNDERWRITERS SAFETY & CLAIMS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/02/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, 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: SMITH, HALL and BOGGS Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, and employer cross-appeals, the Decision and Order on Remand – Denial of Benefits (03-BLA-6139) of Administrative Law Judge Joseph E. Kane 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). This is the second time this case is before the Board.[2] Previously, pursuant to employer's appeal of the award of benefits, the Board held that the administrative law judge erred in excluding Dr. Caffrey's autopsy report on the grounds that the pathologist's review of autopsy slides could not constitute employer's autopsy report under the evidentiary limitations of 20 C.F.R. §725.414. The Board therefore vacated the award of benefits and remanded the case for the administrative law judge to reconsider which evidence was admissible under the evidentiary limitations and to reassess the merits of entitlement.[3] [*L.A.*] *v. Appleton & Ratliff Coal Corp*., BRB No. 06-0754 BLA, slip op. at 5 (Apr. 26, 2007)(unpub.).

On remand, the administrative law judge found that the reports of Drs. Caffrey and Tomashefski, submitted by employer, and the report of Dr. DeLara, submitted by claimant, constituted both autopsy and medical reports, because each physician reviewed clinical evidence, in addition to the miner's autopsy slides. Decision and Order on Remand at 4-5, *citing Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241-42 (2007). Noting that claimant and employer submitted two affirmative medical reports each, the administrative law judge found if the reports of Drs. Caffrey, Tomashefski, and DeLara were admitted and considered in full, each party would exceed, by one, the

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[1] Claimant is the widow of the miner, G.A., who died on October 30, 2001. Director's Exhibit 10. Claimant filed this survivor's claim on January 15, 2002. Director's Exhibit 3.

[2] The Board set forth previously this claim's full procedural history. [*L.A.*] *v. Appleton & Ratliff Coal Corp*., BRB No. 06-0754 BLA, slip op. at 2 (Apr. 26, 2007)(unpub.). The Board's prior discussion of the procedural history is incorporated by reference.

[3] In remanding the case, the Board instructed the administrative law judge to consider the argument of the Director, Office of Workers' Compensation Programs, that Dr. Caffrey's report constituted both an autopsy report and a medical report within the meaning of 20 C.F.R. §725.414(a)(3)(i), since Dr. Caffrey reviewed the medical evidence as well as the miner's autopsy slides. [*L.A.*], slip op. at 5.

evidentiary limitation for medical reports. To remedy this situation, the administrative law judge resolved not to exclude any evidence; rather, he indicated that he would factor a doctor's reliance on inadmissible evidence into his consideration of the doctor's report. Considering the merits of the claim, the administrative law judge determined that claimant established that the miner suffered from clinical pneumoconiosis arising out of coal mine employment[4] pursuant to 20 C.F.R. §§718.202(a), 718.203, but did not establish that his death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that claimant's evidence exceeds the evidentiary limitations, and in finding that claimant did not establish that the miner's death was due to pneumoconiosis. Employer responds in support of the denial of benefits. Employer has also filed a cross-appeal, arguing that the administrative law judge erred in his application of the evidentiary limitations to exclude any of employer's evidence. The Director, Office of Workers' Compensation Programs (the Director) responds, urging the Board to reject employer's arguments on cross-appeal. Employer has filed a reply brief, reiterating its contentions on cross-appeal.[5]

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. 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 Issues

Claimant initially asserts that the administrative law judge erred in finding that Dr. DeLara's report exceeded the limit of two affirmative medical reports. Specifically, claimant asserts that she submitted the reports of Drs. Dennis and DeLara as her affirmative medical opinion evidence, and that Dr. Gibson's medical report is admissible

[4] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a), 718.203. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

as a treatment record under 20 C.F.R. §725.414(a)(4).[6] We disagree. The record reflects that claimant designated the reports of Drs. Gibson and Dennis as her two affirmative medical reports and the report of Dr. DeLara as autopsy rebuttal evidence. Claimant's Exhibit 7. Contrary to claimant's assertion, Dr. Gibson's report, designated as a medical report by claimant, is not admissible as a treatment record. Following the miner's death, Dr. Gibson completed questionnaires on March 29, 2003 and September 13, 2005, and submitted a letter dated March 15, 2005, each of which addressed whether the miner had pneumoconiosis that hastened his death.[7] Decision and Order on Remand at 5; Claimant's Exhibit 5. As such, Dr. Gibson's reports cannot constitute a record of the miner's "medical treatment for a respiratory or pulmonary or related disease," as contemplated by Section 725.414(a)(4). The administrative law judge found that Dr. DeLara's autopsy report constituted both an autopsy report and a medical report because Dr. DeLara reviewed clinical evidence in addition to the miner's autopsy slides. *See Keener*, 23 BLR at 1-241-42. He did not make a finding as to whether Dr. DeLara relied on the clinical evidence in reaching his conclusion. Any error with respect to the administrative law judge's characterization of the report was harmless since, as discussed *infra*, the administrative law judge fully considered Dr. DeLara's opinion and discounted it because it was not adequately explained, not because it exceeded the scope of an autopsy or the evidentiary limitations. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Turning to employer's cross-appeal, we reject employer's assertion that the administrative law judge's application of the evidentiary limitations to exclude any of employer's evidence violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires the consideration of all relevant evidence. The Board rejected the identical argument in the previous appeal, [*L.A.*], slip op. at 4, *citing Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 296, 23 BLR 2-430, 2-457 (4th Cir. 2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004)(*en banc*), *vacated on other grounds*, *Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008), and employer has demonstrated no exception to the law of

[6] Section 725.414(a)(4) states in relevant part that, "notwithstanding the limitations" of 20 C.F.R. §725.414(a)(2),(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

[7] The administrative law judge considered these three documents from Dr. Gibson to count as "a single 'medical report'" for purposes of the evidentiary limitations. Decision and Order at 5-6 n.3.

the case. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

We additionally reject employer's assertion that the administrative law judge erred in finding that, in submitting the reports of Drs. Caffrey, Tomashefski, and Fino, employer submitted three medical reports. The administrative law judge considered employer's argument that the reports of Drs. Caffrey and Tomashefski constituted autopsy and autopsy rebuttal reports, but reasonably determined that they also constituted medical reports, because both physicians relied on the miner's medical treatment records and other clinical information as the basis for their opinions, in addition to the miner's autopsy evidence. *See Keener*, 23 BLR at 1-239. Because Dr. Fino's report also constituted a medical report, the administrative law judge properly found that employer's medical opinions would exceed the evidentiary limits on medical reports if they were considered in their entirety. *See* 20 C.F.R. §725.414(a)(3)(i).

Based on the foregoing, we affirm the administrative law judge's evidentiary rulings. Further, we hold that the administrative law judge reasonably exercised his discretion to factor the doctors' reliance on clinical data beyond the autopsy into his consideration of the doctors' reports. *See Harris v. Old Ben Coal Co*., 23 BLR 1-104, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

Merits of Entitlement

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. §§718.3, 718.202, 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 if the evidence establishes that the miner's death was due to pneumoconiosis, the irrebuttable presumption at 20 C.F.R. §718.205(c)(3) is applicable, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 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). 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).

Relevant to 20 C.F.R. §718.205(c), the record contains the miner's death certificate and the reports of Drs. Gibson, Dennis, DeLara, Caffrey, Tomashefski, and Fino. The death certificate listed carcinoma of the lung with metastasis, hypoxia, and myocardial infarction as the primary causes of the miner's death, and chronic obstructive

pulmonary disease (COPD) and "coal pneumoconiosis" as other significant conditions contributing to death but not resulting in the underlying cause of death. Director's Exhibit 10. Drs. Gibson, Dennis, and DeLara opined that pneumoconiosis hastened the miner's death due to lung cancer. Director's Exhibit 11; Claimant's Exhibits 1, 2, 4, 5, 6. Drs. Tomashefski and Fino opined that the miner's pneumoconiosis was too mild to have affected his lung function or to have hastened the miner's death due to lung cancer. Employer's Exhibits 1, 3, 5, 6. Dr. Caffrey opined that the miner did not have pneumoconiosis, and stated further that if he had pneumoconiosis, the disease was too mild to affect his lung function or hasten his death due to lung cancer. Director's Exhibit 21.

Considering this evidence, the administrative law judge discounted the opinions of Drs. Gibson and DeLara as insufficiently reasoned "because both physicians failed to explain the basis for their opinions."[8] Decision and Order on Remand at 16. The administrative law judge further found that the death certificate failed to establish that pneumoconiosis hastened the miner's death because it lacked explanation and supporting documentation. Further finding that Dr. Dennis's opinion "amounts to little more than a statement that silica is harmful to the lungs, and that it weakens the lungs and leaves the patient more vulnerable to a pulmonary death," the administrative law judge discounted Dr. Dennis's opinion for failing to specify how any weakness due to pneumoconiosis reduced the miner's life by an estimable time. *Id*. at 17. By contrast, the administrative law judge found the reports of employer's experts to be well-reasoned and entitled to greater weight. Specifically, the administrative law judge found Dr. Tomashefski's opinion entitled to great weight because he fully explained the basis for his conclusions in light of the underlying documentation. Further, the administrative law judge found Dr. Fino's consultative opinion also entitled to great weight because Dr. Fino explained the basis for his conclusion in light of the miner's medical history. The administrative law judge found Dr. Caffrey's opinion entitled to "some probative weight" because, although his opinion was reasoned and documented, his failure to diagnose pneumoconiosis was inconsistent with the administrative law judge's finding under 20 C.F.R. §718.202(a)(2). Based on the foregoing, the administrative law judge concluded that the evidence did not establish that pneumoconiosis hastened the miner's death.[9]

[8] Because the administrative law judge found that Dr. DeLara did not adequately explain his opinion, the administrative law judge determined that it was unnecessary to "further discount" the doctor's report to the extent that it also constituted a third medical report for claimant. Decision and Order on Remand at 16 n.6.

[9] The administrative law judge noted that, although one of employer's expert opinions would need to be redacted or stricken to comply with the evidentiary limitations, because the administrative law judge found claimant's evidence insufficient to meet her

Claimant argues that the administrative law judge erred in finding that the death certificate and the opinions of Drs. DeLara, Dennis, and Gibson do not establish that the miner's death was hastened by pneumoconiosis. Claimant's arguments lack merit.

Contrary to claimant's assertion, the administrative law judge rationally discounted the statement on the miner's death certificate that pneumoconiosis was a significant contributing condition to the miner's death. As the administrative law judge permissibly determined, "a statement on a death certificate without explanation or underlying documentation is entitled to little weight." Decision and Order on Remand at 16; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

Further, substantial evidence supports the administrative law judge's finding that Drs. DeLara and Gibson failed to explain their rationale for concluding that pneumoconiosis hastened the miner's death. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). The administrative law judge therefore permissibly discounted the opinions of Drs. DeLara and Gibson. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Consequently, we reject claimant's assertion that the administrative law judge erred in declining to accord Dr. Gibson's opinion increased weight based on his status as the miner's treating physician. *See* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003).

Further, although Dr. Dennis opined that pneumoconiosis weakened the miner, thereby making him more susceptible to a pulmonary death, substantial evidence supports the administrative law judge's permissible finding that Dr. Dennis did not explain the specifically defined process by which pneumoconiosis hastened the miner's death. *See Williams*, 338 F.3d at 518, 22 BLR at 2-655. The administrative law judge therefore rationally determined that Dr. Dennis's opinion was not sufficiently explained to support a finding that pneumoconiosis hastened the miner's death. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Therefore, we affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

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burden of proof and two of employer's medical reports to be entitled to significant weight, claimant could not prevail regardless of how employer's evidence was treated. Therefore, the administrative law judge found that even if he excluded any one of employer's reports in its entirety, the remaining evidence would still outweigh claimant's evidence. Decision and Order on Remand at 17 n.8.

Because claimant failed to establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-114; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge