

BRB No. 07-0183 BLA

L.P.)	
(Widow of C.P.))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 07/23/2008
)	
AMHERST COAL COMPANY, C/O)	
ACORDIA EMPLOYERS SERVICE)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	DECISION and ORDER on
)	RECONSIDERATION <i>EN</i>
Party-in-Interest)	<i>BANC</i>

Appeal of the Decision and Order on Remand – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

This case involves employer's Motion for Reconsideration *En Banc* of the Board's Decision and Order in *L.P. v. Amherst Coal Co.*, BRB No. 07-0183 BLA (Nov. 30, 2007) (unpub.) (Hall, J., concurring and dissenting).¹ In that Decision and Order, the Board considered employer's appeal of an award of survivor's benefits by Administrative Law Judge Thomas F. Phalen (the administrative law judge). Employer argued that the administrative law judge erred in determining that the doctrine of collateral estoppel precluded relitigation of the issue of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer further contended that the administrative law judge erred in finding that the opinion of Dr. Sundaram, the miner's treating physician, was sufficient to establish that pneumoconiosis was a contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2), (5).² Employer also stated that the administrative law judge should have admitted into evidence the transcript of the deposition in which employer

¹ In a Decision and Order issued on July 31, 1990, Administrative Law Judge Ralph W. Musgrave awarded the miner, C.P., benefits on a claim filed on March 14, 1985. Director's Exhibit 1. The miner died on March 4, 2001. Director's Exhibit 3. Claimant, L.P., the miner's widow, filed a survivor's claim on March 26, 2001. *Id.* In a Decision and Order dated March 18, 2005, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), denied benefits on the ground that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Upon consideration of claimant's appeal, the Board vacated the denial of benefits and remanded the case for consideration of whether the doctrine of collateral estoppel foreclosed relitigation of the issue of the existence of pneumoconiosis in the survivor's claim. [*L.P.*] *v. Amherst Coal Co.*, BRB Nos. 05-0576 BLA and 05-0576 BLA-A, slip op. at 3 (Jan. 30, 2006) (unpub.). In his Decision and Order on Remand, the administrative law judge determined that collateral estoppel applied to bar employer from relitigating the issue of the existence of pneumoconiosis. The administrative law judge further found that claimant established that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), (5). Accordingly, benefits were awarded. *Id.* Employer's appeal followed.

² Dr. Sundaram identified bronchopneumonia, respiratory failure, chronic obstructive pulmonary disease (COPD) with exacerbation, coal workers' pneumoconiosis, and metastatic carcinoma of the lung as the diagnoses rendered during the miner's final hospitalization. Director's Exhibits 15, 17. Dr. Sundaram also prepared the death certificate and listed respiratory failure, coal workers' pneumoconiosis, COPD, and metastatic carcinoma of the lung as the causes of the miner's death. Director's Exhibit 11.

cross-examined Dr. Sundaram.³ Claimant responded, urging affirmance of the administrative law judge's evidentiary ruling and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response in which he asked the Board to affirm the administrative law judge's determination that collateral estoppel applied to the finding of pneumoconiosis in the award of benefits on the claim filed by the miner. The Director took no position concerning the administrative law judge's finding that employer was not entitled to admit Dr. Sundaram's cross-examination testimony.

A majority of the three-judge panel held that there was merit in employer's allegation of error regarding the administrative law judge's application of collateral estoppel. The entire panel agreed to vacate the administrative law judge's finding that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c)(2), (5). Accordingly, the case was remanded to the administrative law judge for reconsideration of these issues. *L.P. v. Amherst Coal Co.*, BRB No. 07-0183 BLA, slip op. at 6-7 (Nov. 30, 2007) (unpub.) (Hall, J., concurring and dissenting). The panel affirmed, however, the administrative law judge's exclusion of the cross-examination testimony of Dr. Sundaram, holding that the administrative law judge properly found that 20 C.F.R. §725.414(a)(4) does not contain a provision allowing a party to respond to evidence that appears in treatment records.⁴ *Id.*, slip op. at 4.

Employer filed a timely Motion for Reconsideration *En Banc*, arguing that the Board erred in holding that the administrative law judge properly found that employer was not entitled to procure the cross-examination testimony of Dr. Sundaram. Employer subsequently filed a Request for Oral Argument on this issue, which the Board granted. *L.P. v. Amherst Coal Co.*, BRB No. 07-0183 BLA (Mar.12, 2008) (unpub. Order). Oral

³ This document will hereinafter be referred to as Dr. Sundaram's cross-examination testimony.

⁴ Dr. Sundaram's report summarizing the miner's terminal hospitalization appeared in hospital records admitted into the record pursuant to 20 C.F.R. §725.414(a)(4). The terms of 20 C.F.R. §725.414(a)(4) provide:

Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section, 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).

argument was held in Lexington, Kentucky on May 13, 2008.⁵ Employer contended that the evidentiary limitations set forth in Section 725.414 do not restrict a party's right to cross-examine an adverse witness. Employer argues that the right to cross-examine is a fundamental component of due process that cannot be abrogated. Employer cited the revised regulations and the Administrative Procedure Act (APA), 5 U.S.C. §551 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a) and 33 U.S.C. §919(d), in support of its position.⁶ Employer also emphasized that Dr. Sundaram's cross-examination testimony was crucial to assessing whether Dr. Sundaram's opinion was entitled to additional weight, pursuant to 20 C.F.R. §718.104(d), based upon his status as the miner's treating physician. Employer urged that a party's right to rebut evidence appearing in treatment and/or hospital records cannot be denied by the application of the evidentiary limitations.

Claimant asserted that the right to cross-examination of an adverse witness is not absolute, maintaining that the Department of Labor exercised its authority to limit evidence by omitting from Section 725.414(a)(4) any provisions allowing a party to respond to treatment and hospital records. Claimant disputed employer's allegation that its right to due process has been violated, maintaining that employer was granted a full opportunity to develop evidence, including the opportunity to develop additional evidence when the Board first remanded the case to the administrative law judge.

The Director essentially concurred with employer's position, arguing that under the regulations, the APA, and federal constitutional principles of due process, employer has the right to cross-examine a treating physician whose report appears in treatment and/or hospital records. The Director distinguished between cross-examination and rebuttal, however, emphasizing that the right to cross-examine does not constitute a general right to respond to evidence in a miner's treatment and/or hospital records.

After considering the parties' arguments and the particular facts of this case, we are persuaded that the position now advanced by the Director represents the proper resolution of the issue addressed at oral argument. We base our holding upon United States Supreme Court precedent, the APA, and the revised regulations concerning the

⁵ The issue presented for oral argument was: "Notwithstanding the provisions of 20 C.F.R. §725.414, do the parties have a right to cross-examine a treating physician whose treatment records have been admitted, or to otherwise rebut material contained in treatment records?" *L.P. v. Amherst Coal Co.*, BRB No. 07-0183 BLA (Mar. 12, 2008) (unpub. Order).

⁶ The Department of Labor revised the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

development and submission of evidence in black lung claims. In *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court accepted the proposition that the right to due process applies to administrative proceedings.⁷ The Court further held that this right includes the opportunity to cross-examine a physician who provides a written medical report in an administrative hearing regarding entitlement to disability benefits, observing:

The matter comes down to the question of the procedure's integrity and fundamental fairness. We see nothing that works in derogation of that integrity and of that fairness in the admission of consultants' reports, subject as they are to being material and to the use of the subpoena and consequent cross-examination.

Perales, 408 U.S. at 410. The Court also indicated that allowing cross-examination under these circumstances was consistent with the APA, which sets forth the general rules governing administrative hearings conducted by federal agencies. *Id.* Section 556(d) of the APA provides that “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. §556(d).

Thus, we hold that a party has a right to cross-examine a physician whose report is admissible under Section 718.104(d). In this case, based on the administrative law judge's weighing of the evidence, Dr. Sundaram's report was material to the survivor's claim. Employer's cross-examination of Dr. Sundaram was necessary, therefore, to ensure the integrity and fundamental fairness of the adjudication of the survivor's claim *and* for a full and true disclosure of the facts. The administrative law judge's crediting of Dr. Sundaram's opinion in his Decision and Order on Remand awarding benefits was primarily based upon Dr. Sundaram's status as the miner's treating physician. Under Section 718.104(d), “the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.” 20 C.F.R. §718.104(d). The relationship between the miner and his treating physician is assessed based upon the application of four criteria – the nature of the relationship, the duration of the relationship, the frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Pursuant to Section 718.104(d)(5):

⁷ In *Richardson v. Perales*, 402 U.S. 389 (1971), a claimant appealed the denial of his application for disability benefits. The Social Security Administration relied upon written medical reports to determine that the claimant was not disabled. The United States Supreme Court held that such reports could constitute substantial evidence in support of a non-disability finding, despite the lack of cross-examination, as the claimant had failed to exercise his subpoena rights. *Richardson*, 402 U.S. at 409-10.

In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

20 C.F.R. §718.104(d)(5).

In the administrative law judge's first Decision and Order, in which he denied survivor's benefits, the administrative law judge admitted Dr. Sundaram's cross-examination testimony and determined that it undermined the credibility of the conclusions expressed in the hospital discharge reports and the death certificate that Dr. Sundaram prepared. Specifically, the administrative law judge stated:

In his deposition, Dr. Sundaram stated that Miner smoked up to a pack of cigarettes per day for several years. (EX 9:5-6). In opposition, Dr. Repsher contends that Dr. Sundaram attributed far fewer years of cigarette smoking than the actual amount. I find that Dr. Sundaram's ambiguous statement does not present enough information for the undersigned to determine the smoking history relied upon to make his diagnosis. Also, Dr. Sundaram's deposition admission that it was hard to separate how much of Miner's condition was the result of smoking and how much was the result of coal dust exposure, makes more important an accurate determination of Miner's history of smoking Dr. Sundaram's failure to consider the significance of a 60 pack-year history of cigarette smoking in the determination of whether Miner suffered from pneumoconiosis, fatally undermines his diagnosis.

2005 ALJ Decision and Order at 16-17. This decision was vacated by the Board. On remand, the administrative law judge reconsidered the admissibility of the evidence designated by the parties and excluded Dr. Sundaram's cross-examination testimony. Without Dr. Sundaram's cross-examination testimony in the record, the administrative law judge had no basis upon which to discredit the physician's opinion. Accordingly, the administrative law judge determined, pursuant to Section 718.104(d), that Dr. Sundaram's opinion was entitled to great weight based upon his status as the miner's treating physician. 2006 Decision and Order at 17. The administrative law judge then

relied upon Dr. Sundaram's opinion to find that claimant established that the miner's death was due to pneumoconiosis under Section 718.205(c). *Id.* at 11, 13.

The administrative law judge's reliance upon Dr. Sundaram's opinion under Section 718.205(c) establishes that Dr. Sundaram's opinion was material to the administrative law judge's adjudication of the survivor's claim. In addition, the administrative law judge's conflicting findings with respect to Dr. Sundaram's opinion demonstrate that the cross-examination of Dr. Sundaram was necessary to fully ascertain whether Dr. Sundaram's opinion was entitled to "controlling weight ... based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). Thus, in accordance with the requirements of procedural due process and the APA, employer had the right to cross-examine Dr. Sundaram and the transcript of his cross-examination testimony should have been admitted into the record in this case.⁸ We vacate, therefore, the administrative law judge's decision excluding Dr. Sundaram's cross-examination testimony and direct the administrative law judge to admit Dr. Sundaram's cross-examination testimony. On remand, the administrative law judge must consider Dr. Sundaram's cross-examination testimony when addressing the relevant elements of entitlement in this survivor's claim.

In rendering this holding, we have recognized only a right to cross-examine a physician whose report is admissible under Section 725.414(a)(4), if the physician's report is material and cross-examination is necessary to ensure the integrity and fundamental fairness of the adjudication of the claim and for a full and true disclosure of

⁸ The revised regulations and the Department of Labor's response to the comments thereto also support this conclusion. The regulation set forth in 20 C.F.R. §725.459(b) provides that if a witness for a party is not going to appear at the hearing, "any other party may subpoena the witness for cross-examination." 20 C.F.R. §725.459(b). In response to comments regarding the revised version of 20 C.F.R. §725.456, the Department stated that "[i]n cases where the documentary medical evidence stands on its own, the opposing party may question the author of the report under conditions determined by the administrative law judge." 65 Fed. Reg. 80,000 (Dec. 20, 2000), *citing* 20 C.F.R. §725.459. Similarly, the comments to revised Section 725.459(b) indicate that because the resolution of the issues regarding entitlement in black lung claims depends heavily upon written medical reports, "the Department must ensure that parties are permitted access to their opposing party's witnesses for the purpose of cross-examination." *Id.* at 80,003. The comments also state that "[s]ubsection (b) of [Section 725.459] meets the APA standard by permitting the [administrative law judge] to determine the level of cross-examination that is required for a full and true disclosure of the facts." *Id.* at 80,004, *citing* 5 U.S.C. §556(d).

the facts. We decline to address the question of whether there is a general right to rebut evidence admitted under Section 725.414(a)(4) because the circumstances of this case do not squarely present the issue.

Nevertheless, the circumstances of this case implicate another important matter that we will address. The adoption of the evidentiary limitations set forth in Section 725.414 represented a shift from a system that favored the admission of all relevant evidence to a system that balanced this preference with a concern for fairness and the need for administrative efficiency. *See* 64 Fed. Reg. 54994-96 (Oct. 8, 1999); 62 Fed. Reg. 3358-9 (Jan. 22, 1997). Under the revised regulations, the role of the administrative law judge as gatekeeper of the record has gained even greater importance because the administrative law judge must now regularly determine, in the exercise of his or her discretion, whether the evidence proffered by the parties complies with the limitations or, if not, is admissible for good cause. *See* 20 C.F.R. §§725.414(a)(2), (3), 725.456(b)(1). The administrative law judge's rulings, in turn, establish the contents of the record upon which the Decision and Order will be based. Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations, therefore, if the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

In summary, we grant employer's Motion for Reconsideration *En Banc* and direct the administrative law judge to admit Dr. Sundaram's cross-examination testimony into the record. The administrative law judge must consider Dr. Sundaram's testimony in conjunction with his medical opinion when addressing the elements of entitlement reached on remand. In all other respects, our Decision and Order in *L.P. v. Amherst Coal*

Co., BRB No. 07-0183 BLA (Nov. 30, 2007) (unpub.) (Hall, J., concurring and dissenting), remains in effect.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge