BRB No. 06-0890 BLA

B.S. (Widow of C.S.) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/30/2007 DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy 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:

Employer appeals the Decision and Order - Awarding Benefits (04-BLA-6518) of Administrative Law Judge Michael P. Lesniak 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). Based on the filing date of September 3, 2002, the administrative law judge adjudicated the claim pursuant to 20 C.F.R Part 718.[1] In addition, the administrative law judge accepted the parties' stipulations to forty years of coal mine employment, the existence of simple pneumoconiosis arising out of coal mine employment, that employer is the properly named responsible operator, and that claimant is an eligible survivor. Decision and Order at 2; Hearing Transcript at 7, 8. The administrative law judge found the medical evidence sufficient to establish that pneumoconiosis hastened the miner's death and, therefore, found that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's decision to strike evidence, *sua sponte*, based on the evidentiary limitations set forth in 20 C.F.R. §725.414. In addition, employer contends that the administrative law judge erred in designating which medical evidence made up employer's affirmative evidence under Section 725.414. With regard to the merits of entitlement, employer argues that the administrative law judge erred in finding the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in a letter brief, urging the Board to reject employer's contentions regarding the administrative law judge's findings on the evidentiary issues. The Director has stated that he will not respond on the merits of entitlement.

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).

[1] Claimant is the widow of the miner who died on March 24, 2002. Director's Exhibit 9. Decision and Order at 2; Director's Exhibit 3.

In his Decision and Order, the administrative law judge first addressed whether the evidence proffered by the parties was admissible under Section 725.414. The administrative law judge found that employer submitted the medical reports of Drs. Tomashefski and Renn as its affirmative medical opinion evidence, as well as having submitted the medical report of Dr. Naeye, while the case was before the district director. Decision and Order at 5. Finding that this evidence exceeded the limitations set forth in Section 725.414, the administrative law judge noted that since Dr. Naeye's report was submitted before the district director and employer did not seek to withdraw it prior to submitting the reports of Drs. Tomashefski and Renn, Dr. Naeye's report would be considered one of employer's two affirmative reports and Dr. Renn's report and deposition testimony, the last medical report submitted in this case, would be excluded as excessive.[2] *Id*. at 5 and n.4. The administrative law judge further found that Dr. Bush's report and deposition would be admitted as autopsy evidence, and only those portions relevant to the autopsy would be considered. *Id*. at 5. The administrative law judge then determined that because no good cause existed for the admission of the excess evidence, he was required to exclude it from consideration. *Id*.

Initially, employer contends that the administrative law judge erred in excluding medical opinion evidence that he accepted into the record at the hearing and to which claimant did not object. Employer further alleges that the administrative law judge erred in excluding medical evidence in his Decision and Order, without providing employer the opportunity to offer a good cause argument for its admission. Employer's Brief at 9. Employer also argues that the administrative law judge's action was inconsistent with fundamental fairness and the requirements of the Administrative Procedure Act (APA), 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), and the regulations. *Id*. In addition, employer maintains that it was error for the administrative law judge to choose which evidence offered by employer should be used as its affirmative evidence, without giving employer the opportunity to select its own evidence.

The Director responds, arguing that whether claimant chose to waive reliance on the evidentiary limitations by not objecting to employer's submission of excessive evidence is irrelevant because the limitations are mandatory and cannot be waived by the parties. Director's Letter at 5. Moreover, the Director argues that because the

[2] The administrative law judge also excluded the medical reports of Drs. Morgan and Bellotte, Employer's Exhibits 1-4, because employer submitted these reports as rehabilitative evidence and they do not meet the requirements of such evidence. Decision and Order at 5. Because employer does not challenge this determination, it is affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983); 20 C.F.R. §725.414(a)(3)(ii).

evidentiary limitations are a "known standard," all parties are on notice that these limitations are applicable to all black lung claims filed after January 20, 2001 and, therefore, no party can legitimately claim surprise if its evidence is excluded under the limitations. *Id*.

Upon consideration of the administrative law judge's findings and the arguments raised by the parties, we hold that the administrative law judge did not err in determining that employer submitted evidence in excess of the evidentiary limitations that he was required to exclude. The evidentiary limitations set forth at Section 725.414 are mandatory and, therefore, the administrative law judge is required to apply the limitations even if the parties have waived them. *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004). Consequently, contrary to employer's contention that the administrative law judge erred in excluding the evidence he deemed in excess of the evidentiary limitations even though claimant did not object to its admission at the hearing, the administrative law judge acted properly in applying the evidentiary limitations in his Decision and Order. *See Smith*, 23 BLR at 1-74.

We also reject employer's contention that the administrative law judge erred in failing to give it the opportunity to argue that good cause existed for the admission of all of its evidence and that such failure deprived employer of its right to due process. The comments to the regulations provide that:

> A showing of "good cause" is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony.

65 Fed. Reg. 80000 (Dec. 20, 2000). Thus, if employer wanted to submit evidence in excess of the Section 725.414 evidentiary limitations, employer was required to make an affirmative showing of "good cause" for its admission. In this case, employer made no attempt at the hearing to argue that good cause existed for the admission of the excessive evidence. We hold, therefore, that employer waived its right to assert that the administrative law judge erred in failing to consider whether good cause was established for admitting employer's excessive evidence. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006). In addition, we agree with the Director that the evidentiary limitations are a "known standard," such that the parties are on notice of the evidentiary limitations and can not legitimately claim surprise if evidence is excluded thereunder. Director's Letter at 5, *citing Jordan v. Director, OWCP*, 892 F.2d 482, 487-88 (6th Cir. 1989)(parties are deemed to have constructive knowledge of published federal regulations). Based on the facts of this case, we hold that the administrative law judge correctly applied the evidentiary limitations set forth at Section 725.414, and properly

determined that he was required to exclude the excessive medical evidence submitted in this case. 20 C.F.R. §725.414; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *see Brasher*, 23 BLR at 1-145; *Smith*, 23 BLR at 1-74.

We find merit, however, in employer's contention that the administrative law judge erred in choosing which evidence was in support of employer's affirmative case pursuant to 20 C.F.R. §725.414(a)(3)(i). The administrative law judge noted that while employer designated the medical reports of Drs. Tomashefski and Renn as its affirmative evidence on the Black Lung Benefits Act Evidence Summary Form (Evidence Summary Form), Dr. Naeye's report was submitted prior to Dr. Renn's report and was not withdrawn by employer. Decision and Order at 5. On the basis of this chronology, the administrative law judge designated the reports of Drs. Tomashefski and Naeye as employer's affirmative evidence, and excluded Dr. Renn's report and deposition testimony as excessive.

Section 725.414 sets limits on the amount of specific types of medical evidence that the parties can submit into the record, and provides that each party may "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). Herein, while employer submitted more than two medical reports, it, nonetheless, clearly designated the reports of Drs. Tomashefski and Renn as its affirmative evidence on the Evidence Summary Form submitted on October 25, 2005. Therefore, we hold that, contrary to the Director's position, the administrative law judge did not provide an adequate rationale for ignoring employer's designation of its affirmative case evidence and relying solely upon the order in which employer submitted its evidence to identify the evidence admissible under Section 725.414(a)(3)(i). Consequently, we vacate the administrative law judge's decision to exclude Dr. Renn's report and deposition testimony as the evidence deemed to be excessive and remand the case for the administrative law judge to consider the evidence specifically designated by employer as its affirmative evidence, in determining whether claimant has established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). 20 C.F.R. §725.414(a)(3)(i).[3]

[3] We note that in his Decision and Order, the administrative law judge allocated some of the earlier received evidence designated as Director's Exhibits into available evidentiary categories, *e.g.*, the treatment notes and the biopsy report of Dr. de la Mata associated as exhibits with Dr. Abrahams's deposition testimony. Decision and Order at 4; Director's Exhibit 27. Consequently, in the interest of equitable treatment, the administrative law judge should consider whether the excluded evidence may be admitted within the limitations, *e.g.*, Dr. Naeye's report as autopsy rebuttal evidence pursuant to 20

In light of this holding, we must also vacate the administrative law judge's Section 718.205(c) findings, as they were based upon a consideration of evidence other than that designated by employer as part of its affirmative case. In addition, in order to avoid a repetition of error on remand, in weighing the evidence under Section 718.205(c), the administrative law judge must fully set forth his findings with respect to each relevant medical opinion in detail, including the underlying rationales, in accordance with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

C.F.R. §725.414(a)(3)(ii). *Keener v. Peerless Eagle Coal Corp*., 23 BLR 1-229, 1-237-238 (2007) (*en banc)*(a physician's review of a miner's autopsy slides could constitute an affirmative report of an autopsy); *see also Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 298 23 BLR 2-430, 2-462-463 (4th Cir. 2007)(Section 725.414(a)(2)(ii) and (a)(3)(ii) authorizes the submission of one piece of rebuttal evidence for each piece of affirmative evidence submitted by the other party); *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155-156(2006).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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