BRB No. 06-0907 BLA

E. P. (Widow of D.P.) Claimant-Respondent v. D & K COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/29/2007 DECISION and ORDER

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

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (03-BLA-5477) of Administrative Law Judge Stuart A. Levin (the administrative law judge) awarding benefits on a 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 case involves a survivor's claim filed on March 2, 2001 and is before the Board for the second time. In the initial decision, the administrative law judge applied the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis arising out of coal mine employment.[1] The administrative law judge also found that the evidence 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.

In its initial appeal to the Board, employer did not allege that any of the elements of collateral estoppel had not been satisfied. Rather, employer argued that it had not had a financial incentive to vigorously defend the miner's claim because any benefits awarded therein would have been offset by benefits awarded to the miner in a 1984 state claim. Citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979),[2] employer argued that it was entitled to an exception to the application of the doctrine of collateral estoppel. By Decision and Order dated May 27, 2005, the Board agreed with employer that the issue was not whether offensive collateral estoppel was available, but rather, whether its application was fair under the facts of this case. [*E.P]. v. D & K Coal Co*., 23 BLR 1-77 (2005). Because the administrative law judge had not adequately discussed whether the use of collateral estoppel would be fair in this case, the Board vacated the administrative law judge's Decision and Order and remanded the case to the administrative law judge for further consideration.[3] *Id.*

On remand, the administrative law judge found that the application of collateral estoppel was not unfair to employer within the meaning of the United States Supreme

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[1] The miner filed a claim on July 22, 1983. Director's Exhibit 1. In a Decision and Order dated September 16, 1987, Administrative Law Judge Daniel Lee Stewart awarded benefits. *Id.* Although employer filed an appeal with the Board, employer subsequently requested that its appeal be dismissed. By Order dated January 29, 1988, the Board dismissed employer's appeal with prejudice. [*D.P.*] *v. D & K Coal Co.*, BRB No. 87-2991 BLA (Jan. 29, 1988) (unpub.) (Order).

[2] In *Parklane Hosiery Co.*, the United States Supreme Court found that the use of offensive non-mutual collateral estoppel may be unfair in certain circumstances. One such example is where a defendant may have little incentive to defend vigorously a claim in which the amount in controversy is nominal, and future suits are not foreseeable. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

[3] The Board rejected employer's argument that the regulations limiting the admission of evidence should not be applied in this case. [*E.P.*] *v. D & K Coal Co*., 23 BLR 1-77 (2005).

Court's decision in *Parklane Hosiery Co.*. The administrative law judge, therefore, incorporated by reference his previous Decision and Order dated June 7, 2004, and awarded benefits.

On appeal, employer argues that the administrative law judge erred in excluding evidence pursuant to the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant[4] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that employer waived its argument that the administrative law judge misapplied 20 C.F.R. §725.414, and alternatively, that the administrative law judge acted in accordance with the evidentiary limitations set forth at 20 C.F.R. §725.414 in excluding employer's evidence from the record. In a reply brief, employer reiterates its position that the administrative law judge erred in excluding evidence pursuant to 20 C.F.R. §725.414.[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).

Employer initially argues that the administrative law judge, in his initial decision and order, erred in excluding certain medical reports from the record because they exceeded the limitations of 20 C.F.R. §725.414. The evidentiary limitations set forth at 20 C.F.R. §725.414 apply to the instant survivor's claim.[6] Section 725.414, in

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[4] Claimant is the surviving spouse of the deceased miner, who died on January 30, 2001. Director's Exhibit 12.

[5] Because no party challenges the administrative law judge's determination that the application of collateral estoppel was not unfair to employer in this case, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Employer argues that the newly promulgated regulations, which impose limitations on the evidence each party is permitted to submit, violate both Section 923(b) of the Act, 30 U.S.C. §923(b), and the Administrative Procedure Act (APA), 5 U.S.C. §556(d), 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). The Board has held that the regulation at Section 725.414, placing limits on the evidence to be submitted by each party, is valid and does

conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The applicable provision limited employer to "no more than two medical reports" in support of its affirmative case. 20 C.F.R. §725.414(a)(2)(i). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

We agree with the Director that employer waived its right to contest the administrative law judge's ruling regarding the admission of its submitted evidence. In its initial 2004 appeal to the Board, employer did not challenge the administrative law judge's exclusion of the reports of Drs. Fino, Repsher and Branscomb or the initial reports of Drs. Rosenberg and Jarboe.[7] Consequently, we hold that employer waived its right to challenge the administrative law judge's evidentiary rulings. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991).

Employer also argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[8] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v.*

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not contravene the Act or controlling precedent. *Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*); *see also Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007). Consequently, we reject employer's contention that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid.

[7] In its initial appeal to the Board, employer argued that, in the event that the doctrine of collateral estoppel was not applicable to the facts of this case, the record must be reopened to allow employer to submit evidence regarding the issue of the existence of pneumoconiosis. Employer's Sept. 3, 2004 Brief at 12 n.2. The Board held that employer's contention, that the record should be reopened if the administrative law judge determined that collateral estoppel did not apply, was properly addressed to the administrative law judge. [*E.P.*], 23 BLR at 1-84. On remand, the administrative law judge found that application of collateral estoppel was not unfair to employer. Decision and Order on Remand at 11. Because the administrative law judge held that employer was collaterally estopped from challenging the existence of pneumoconiosis, employer's request for an opportunity to admit additional medical evidence on remand was rendered moot.

[8] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

Director, OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Dr. Breeding, the miner's treating physician, opined that the miner's death was due to pneumoconiosis. [9] Dr. Rosenberg attributed the miner's death to smoking-related

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> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) 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).

[9] Dr. Breeding completed the miner's death certificate. Dr. Breeding attributed the miner's death to emphysema due to "Pneumoconiosis (Black lung)." Director's Exhibit 12. In a report dated April 11, 2001, Dr. Breeding opined that the miner's death was "solely due to pneumoconiosis and complications from pneumoconiosis." Director's Exhibit 15. Dr. Breeding further opined that the miner's "life was shortened by 10% to 20% due to his pneumoconiosis." *Id.* During a July 7, 2003 deposition, Dr. Breeding testified that the miner suffered from pneumoconiosis, emphysema, chronic bronchitis, and chronic obstructive pulmonary disease, all of which he found to be significantly contributed to, or aggravated by, coal dust exposure. Claimant's Exhibit 1 at 6-7. *Id.* Dr. Breeding opined that during the miner's final hospitalization, he suffered from pneumonia, a condition that Dr. Breeding noted was "seen more commonly in people who have coal workers' pneumoconiosis and [the miner's] condition." *Id.* at 9. During his deposition, Dr. Breeding also reiterated that the miner's pneumoconiosis contributed to, or hastened, his death. *Id.*

chronic obstructive pulmonary disease.[10] Employer's Exhibit 6. Dr. Jarboe attributed the miner's death to severe bilateral Pseudomonas pneumonia, a hospital-acquired infection, and severe cardiomyopathy. Employer's Exhibit 7. Dr. Jarboe also opined that the miner's severe bronchial asthma was also a likely contributing factor to his death.[11] *Id.*

In considering whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge noted that Drs. Breeding, Rosenberg, and Jarboe[12] agreed that the miner's death was due to his compromised and deteriorating pulmonary condition. Decision and Order at 5. The administrative law judge, however, found that Dr. Breeding's opinion, that the miner's death was due to pneumoconiosis, was entitled to greater weight based upon his status as the miner's treating physician. *Id.* at 5-7. The administrative law judge found that the opinions of Drs. Rosenberg and Jarboe were insufficient to outweigh Dr. Breeding's opinion that pneumoconiosis contributed to the miner's death. *Id.* The administrative law judge, therefore, found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer argues that the administrative law judge erred in according greater weight to Dr. Breeding's opinion based upon his status as the miner's treating physician. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "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); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).[13] Employer argues that the administrative law judge erred in finding that Dr.

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[10] Dr. Rosenberg opined that the miner's chronic obstructive pulmonary disease was not caused by coal dust exposure or the presence of coal workers' pneumoconiosis. Employer's Exhibit 6.

[11] Dr. Jarboe opined that the miner's death was not due to, caused by, or hastened by coal worker's pneumoconiosis and/or the inhalation of coal mine dust. Employer's Exhibit 7.

[12] The administrative law judge mistakenly identified Dr. Jarboe's August 11, 2003 report as that of Dr. Broudy. *See* Employer's Exhibit 7.

[13] In *Williams*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The court held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Williams*, 338 F.3d at 513, 22 BLR at 2-647. The court explained that the

Breeding's opinion was sufficiently reasoned. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Although the administrative law judge found that Dr. Breeding's opinion was "well supported by the evidence" and "credible in light of…its own reasoning," *see* Decision and Order at 7, the administrative law judge did not address the validity of the specific reasoning that Dr. Breeding provided for his opinions. For example, the administrative law judge did not address Dr. Breeding's basis for attributing the miner's emphysema, chronic bronchitis, and chronic obstructive pulmonary disease to his coal dust exposure. The administrative law judge also did not address Dr. Breeding's reason for attributing the miner's death to pneumoconiosis.[14] The administrative law judge also failed to explain how Dr. Breeding's "unique status" as the miner's treating physician provided him with an advantage over Drs. Rosenberg and Jarboe. Decision and Order at 6. Consequently, we remand the case for further consideration. Before according additional weight to Dr. Breeding's opinion based upon his status as the miner's treating physician, the administrative law judge, on remand, should initially address whether the opinion is sufficiently reasoned, and then should weigh Dr. Breeding's opinion, consistent with 20 C.F.R. §718.104(d) and *Williams*.

On remand, the administrative law judge should also consider the respective qualifications of Drs. Breeding, Rosenberg, and Jarboe. The Sixth Circuit has noted that "a treating physician without the right pulmonary certifications should have his opinions appropriately discounted."[15] *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

Employer also argues that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. Dr. Rosenberg opined that the miner's "type of disabling [chronic obstructive pulmonary disease] would only occur in relationship to coal dust exposure if the complicated form of [coal workers' pneumoconiosis] was present." Employer's Exhibit 6. The administrative law judge found that Dr. Rosenberg's reliance

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"case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts." *Id.*

[14] Dr. Breeding opined that the miner's "life was shortened by 10% to 20% due to his pneumoconiosis." Director's Exhibit 15. The administrative law judge did not address Dr. Breeding's basis for rendering this opinion.

[15] Dr. Breeding is Board-certified in Family Practice. Claimant's Exhibit 1 at 4. Dr. Rosenberg is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 4. Dr. Jarboe's qualifications are not found in the record.

upon the absence of complicated pneumoconiosis to rule out coal dust exposure as a cause of the miner's pulmonary impairment is inconsistent with the regulations. Decision and Order at 6. We agree. The regulations do not require a finding of complicated pneumoconiosis before a miner's disabling or fatal chronic obstructive pulmonary disease can be found to be attributable to coal dust exposure.[16] *See* 65 Fed. Reg. 79,951 (2000) ("The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute (which encompasses simple pneumoconiosis), and not just upon proof of complicated pneumoconiosis."). Consequently, the administrative law judge properly accorded less weight to Dr. Rosenberg's opinion, that the miner's chronic obstructive pulmonary was not attributable to coal dust exposure, because the doctor's opinion was premised upon the absence of complicated pneumoconiosis.[17]

Employer also argues that the administrative law judge erred in discounting Dr. Jarboe's opinion because he failed to diagnose legal pneumoconiosis. *See* Employer's Brief at 14. Contrary to employer's contention, the administrative law judge did not discredit Dr. Jarboe's opinion because the doctor failed to diagnose legal pneumoconiosis. The administrative law judge found that Dr. Jarboe's opinion, that pneumoconiosis was not a substantially contributing cause of the miner's total disabling pulmonary impairment, was contrary to the finding in the miner's claim. *See* Decision and Order at 6. Accordingly, employer's argument is without merit.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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[16] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[17] Judge Stewart, in his adjudication of the miner's claim, found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Director's Exhibit 1. However, Judge Stewart did not address whether the medical opinion evidence established the existence of "legal pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.*

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge