

BRB No. 07-0949 BLA

M.S.)
(Widow of J.S.))
)
Claimant-Respondent)
)
v.)
)
MCCOY ELKHORN COAL COMPANY)
)
and)
) DATE ISSUED: 08/25/2008
JAMES RIVER COAL COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (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 and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the July 31, 2007 Decision and Order–Award of Benefits (2007-BLA-5007) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), 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). The administrative law judge credited the miner with 12.78 years of qualifying coal mine employment, and found that the weight of the evidence established the existence of both simple and complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (3), 718.203(b). Finding that the irrebuttable presumption at 20 C.F.R. §718.304 was applicable, the administrative law judge found that claimant, the miner’s widow, had established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erroneously excluded Dr. Caffrey’s report from consideration in finding complicated pneumoconiosis established at Section 718.304. Additionally, employer contends that the administrative law judge failed to consider all evidence relevant to the cause of the miner’s death pursuant to Section 718.205(c). Claimant has not filed a response. The Director, Office of Workers’ Compensation Programs (the Director), responds, arguing that Dr. Caffrey’s report was admissible in its entirety pursuant to 20 C.F.R. §725.414.

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.¹ 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 and the Director both challenge the administrative law judge’s finding that Dr. Caffrey’s opinion exceeded the scope of autopsy rebuttal evidence, and thus was entitled to no weight on the issues of the existence of simple and complicated pneumoconiosis and death due to pneumoconiosis. The administrative law judge determined that Dr. Caffrey had reviewed the miner’s autopsy slides, but had also considered numerous medical records and other evidence. Decision and Order at 16. Noting that in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007), the Board held that a report by a pathologist who has reviewed the autopsy tissue slides can constitute a report of an autopsy for the purposes of 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), but that rebuttal of a report of an autopsy must be limited to consideration of the pathological evidence, the administrative law judge found that Dr. Caffrey’s opinion exceeded the

¹ The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202(1989)(*en banc*); Director’s Exhibit 3.

scope of *Keener*. Decision and Order at 15-16. While Dr. Caffrey relied upon the autopsy slides, the administrative law judge determined that Dr. Caffrey's conclusions were inextricably tied to his review of other medical evidence, and thus were entitled to no weight despite the physician's advanced credentials. *Id.* The Director maintains, however, that this case is distinguishable from *Keener*. We agree.

The pertinent regulation provides that each party may submit two medical reports in support of its affirmative case and one physician's interpretation of each autopsy submitted by the opposing party, in rebuttal of the opposing party's case. 20 C.F.R. §725.414. In *Keener*, the Board determined that a pathologist's report submitted by the employer constituted both an autopsy rebuttal opinion and a medical opinion because the pathologist reviewed the autopsy slides as well as other medical evidence. Because the employer had already submitted its two affirmative case medical opinions pursuant to Section 725.414(a)(3)(i), its pathologist's report exceeded the evidentiary limitations on affirmative case medical reports. *Keener*, 23 BLR at 1-237 n.13. In the present case, however, employer submitted no other medical reports. Thus, while Dr. Caffrey's opinion constitutes both an autopsy rebuttal report and a medical report, the opinion is fully consistent with the evidentiary limitations. Consequently, we vacate the administrative law judge's findings pursuant to Sections 718.202, 718.304 and 718.205(c), and remand this case for the administrative law judge to reassess and weigh all relevant evidence, including Dr. Caffrey's opinion, on the issues of the existence of pneumoconiosis and death due to pneumoconiosis. See *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge