

BRB No. 11-0374 BLA

KATHLEEN DURIEZ	)	
(Widow of WILLIAM M. DURIEZ)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREENWICH COLLIERIES COMPANY	)	
	)	DATE ISSUED: 01/26/2012
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05713) of Administrative Law Judge Michael P. Lesniak rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

*amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).*

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 411(c)(4) of the Act, which establishes a rebuttable presumption that a miner's death was due to pneumoconiosis if the evidence establishes that the miner had at least fifteen years of qualifying coal mine employment and had a totally disabling respiratory or pulmonary impairment. *See* 30 U.S.C. §921(c)(4), *amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4); Keene v. Consolidation Coal Co., 645 F.3d. 844, 847 (7th Cir. 2011).* If the presumption is invoked, the burden shifts to the employer to rebut the presumption.

Because claimant filed her survivor's claim on June 30, 2008, the administrative law judge applied amended Section 411(c)(4) to her claim.<sup>1</sup> Director's Exhibit 2. The parties stipulated that the miner had twenty-three years of coal mine employment, of which at least fifteen were underground, and that he had pneumoconiosis arising from that employment. Decision and Order at 2. In a decision issued on January 27, 2011, the administrative law judge found that the miner was totally disabled by a respiratory impairment at the time of his death. *See* 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Furthermore, the administrative law judge found that employer failed to rebut the presumption. Decision and Order at 9-10. The administrative law judge therefore awarded survivor's benefits to claimant. *Id.* at 11.

On appeal, employer asserts that the administrative law judge erred in excluding portions of an autopsy report and a rehabilitative statement from Dr. Bush, and portions of an autopsy rebuttal report from Dr. Tomashefski, submitted by employer pursuant to 20 C.F.R. §725.414. Employer also contends that amended Section 411(c)(4) is unconstitutional or, alternatively, that any award based on the amendments to the Act is premature until the constitutionality of Public Law No. 111-148 is settled. In response,

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<sup>1</sup> Claimant is the widow of the miner, who died on September 10, 2007. Director's Exhibit 9. Because the miner never filed a claim for benefits under the Act, amended 30 U.S.C. §932(l), which automatically entitles a survivor to benefits if a miner was determined to be eligible for benefits at the time of his death, does not apply to this case. *See* 30 U.S.C. §932(l), *amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).*

claimant and the Director, Office of Workers' Compensation Programs, urge affirmance of the award of benefits.<sup>2</sup>

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.<sup>3</sup> 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). The Board reviews the administrative law judge's procedural rulings for an abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

Employer initially argues that the administrative law judge erred in refusing to consider the reports from Drs. Bush and Tomashefski in their entirety. Employer's contention lacks merit. The administrative law judge found that, pursuant to *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239 (2006)(*en banc*), to the extent that the reports designated by employer as Dr. Bush's autopsy report and Dr. Bush's rehabilitative statement contained both reviews of the autopsy protocol and autopsy tissue slides, as well as reviews of additional medical records, they constituted both autopsy report and medical report evidence for the purposes of the evidentiary limitations. Decision and Order at 2; Hearing Transcript at 6-8. The administrative law judge further found that, to the extent the report designated by employer as Dr. Tomashefski's autopsy rebuttal report contained both a review of the autopsy report and slides, as well as Dr. Tomashefski's consideration of additional medical records that were unrelated to the autopsy, it was both an autopsy rebuttal report and a medical report. Decision and Order at 2; Hearing Transcript at 8-10. As employer had already designated two affirmative medical reports, namely those of Drs. Hurwitz and Fino, the administrative law judge concluded that, pursuant to *Keener*, Dr. Bush's autopsy report and rehabilitative statement, and Dr. Tomashefski's autopsy rebuttal report, would be considered only to

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<sup>2</sup> We affirm the administrative law judge's unchallenged findings that claimant is the surviving spouse of the miner, that employer is the responsible operator, that the miner had twenty-three years of coal mine employment, of which at least fifteen were underground, and that the miner suffered from pneumoconiosis arising from that employment, pursuant to 20 C.F.R. §§718.202, 718.203. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>3</sup> The miner's coal mine employment was in Pennsylvania. Director's Exhibits 3, 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

the extent they related to the autopsy report and autopsy slide evidence. Decision and Order at 2, *citing Keener*, 23 BLR at 1-239; Hearing Transcript at 6-10.

Employer does not contend that the administrative law judge misapplied the holdings in *Keener*. Rather, employer asserts that the Board should overrule its decision in *Keener*, and that the administrative law judge should be permitted to consider the reports of Drs. Bush and Tomashefski in their entirety. Specifically, employer contends that *Keener* inhibits “truth seeking” and is inconsistent with the actual practice of pathologists to look at both the clinical record and autopsy evidence before offering their opinions. Employer’s Brief at 11.

Contrary to employer’s contention, the mere assertion that the excess evidence considered by its physicians was relevant, and would assist the physicians in rendering their opinions, is not a sufficient basis to allow the parties to circumvent the evidentiary limitations. *See Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 294-97, 23 BLR 2-430, 2-454-60 (4th Cir. 2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*). Moreover, employer could have either designated the reports of Drs. Bush and Tomashefski as its two affirmative medical reports, *see* 20 C.F.R. §725.414(a)(3)(i), or argued to the administrative law judge that “good cause” existed to admit the reports in their entirety, in excess of the evidentiary limitations, pursuant to 20 C.F.R. §725.456(b)(1). Director’s Brief at 5 n.2. As a review of the record reveals that employer did neither, we hold that the administrative law judge did not abuse his discretion in excluding those portions of Dr. Bush’s autopsy report and rehabilitative statement, and Dr. Tomashefski’s autopsy rebuttal report, that were based on reviews of the miner’s additional medical records. *See* 20 C.F.R. §725.414(a)(1); *Blake*, 480 F.3d at 294-7, 23 BLR at 2-454-60; *Keener*, 23 BLR at 1-239; *Dempsey*, 23 BLR at 1-58; *Clark*, 12 BLR at 1-153.

Employer also argues that an award of benefits based on the recent amendments to the Act is unconstitutional, and requests that this case be held in abeyance pending the resolution of the challenges to Public Law No. 111-148 in federal court. We have routinely rejected such arguments, and do so again here. *W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510, at \*3 n.2 (4th Cir. Dec. 21, 2011), *petition for reh’g filed* Jan. 20, 2012; *Keene*, 645 F.3d. at 849-51; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

Because employer raises no additional challenges to the administrative law judge’s findings that claimant invoked the Section 411(c)(4) presumption that the miner’s death was due to pneumoconiosis, and that employer failed to rebut the presumption, we affirm

the administrative law judge's award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge