

BRB No. 12-0193 BLA

MYRTLE HUNT)	
(Widow of HANSEL HUNT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ELKHORN COAL CORPORATION)	DATE ISSUED: 01/31/2013
)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (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 (09-BLA-5803) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on September 25, 2008. After crediting the miner with thirty-five years of coal mine employment,¹ the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant² to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting that the Board reject employer's contention that the administrative law judge was required to make equivalency determinations in regard to the autopsy findings of massive lesions. In a reply brief, employer reiterates its previous contentions.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After the briefing schedule in this case was complete, employer filed a Motion and Affidavit for Remand to Reopen the Record, premised upon an Emergency Order of Suspension of the medical license of Dr. James A. Dennis, issued by the Kentucky Board of Medical Licensure on August 17, 2012. Employer argues that, because the Emergency Order of Suspension, and the Complaint upon which it was based, contain information establishing that Dr. Dennis engaged in conduct "likely to deceive, defraud, or harm the public," the administrative law judge must reconsider her reliance upon Dr. Dennis's January 12, 2008 autopsy report and June 10, 2010 deposition testimony to find that claimant established the existence of complicated pneumoconiosis and invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis set forth at 20

¹ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² Claimant is the widow of the miner, who died on January 12, 2008. Director's Exhibit 15.

C.F.R. §718.304. Employer’s Motion and Affidavit for Remand to Reopen the Record at 4. Employer requests remand to “reopen the record to receive the . . . Order of Suspension . . . so the [administrative law judge] may determine whether to strike [Dr. Dennis’s] opinions from the formal record.” *Id.* Employer’s motion is unopposed.

Because employer’s new evidence, if admitted, could affect the administrative law judge’s weighing of the autopsy evidence pursuant to 20 C.F.R. §718.304, we remand the case to the administrative law judge for her to consider employer’s motion to reopen the record. *See* 20 C.F.R. §§725.455(c), 802.404(a), 802.405(a); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999) (en banc); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-46, 1-48 (1989) (en banc).

Accordingly, the administrative law judge’s Decision and Order awarding benefits is vacated, and the case is remanded to the administrative law judge 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