

BRB No. 05-0859 BLA

MARGARET DICK)
(Survivor of RICHARD J. DICK))
)
 Claimant-Respondent)
)
 v.)
)
 HAYS RUN COAL COMPANY) DATE ISSUED: 07/26/2006
)
 and)
)
 AMERICAN MINING INSURANCE)
 COMPANY)
)
 Employer/Carrier-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 Administrative Law Judge Daniel L. Leland, United States Department of Labor.

Blair V. Pelosi (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Michael J. Rutledge (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor), 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 (04-BLA-6393) of Administrative Law Judge Daniel L. Leland 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). Claimant filed her claim for survivor benefits on July 22, 2002. Director’s Exhibit 2. On March 9, 2004, the district director issued a Proposed Decision and Order – Awarding Benefits. Director’s Exhibit 25. Employer requested a hearing, which was held on June 9, 2004. At the hearing, employer proffered medical evidence prepared by Dr. Bush, a pathologist. The administrative law judge excluded this evidence because he found that it exceeded the limits on affirmative autopsy reports imposed by 20 C.F.R. §725.414(a)(3)(i). The administrative law judge further found that Dr. Bush’s opinion did not serve as rebuttal to any other medical opinion and thus could not be admitted under 20 C.F.R. §725.414(a)(3)(ii).¹ Hearing Transcript at 9-11. The administrative law judge subsequently issued his decision awarding benefits on July 15, 2005.²

On appeal, employer argues that the administrative law judge erred in excluding the collective medical reports and deposition testimony of Dr. Bush. Employer asserts that the administrative law judge mischaracterized Dr. Bush’s opinion as “a report of autopsy” and maintains that Dr. Bush’s opinion constitutes a “medical report” as that term is defined at Section 725.414(a)(1). Because employer had not submitted any affirmative medical opinion evidence, employer argues that the administrative law judge erred by not admitting Dr. Bush’s opinion as one of employer’s two permitted medical reports under Section 725.414(a)(3)(i). Claimant responds, urging affirmance of the denial. The Director, Office of Workers’ Compensation Programs, (the Director) has filed a brief agreeing with employer that the administrative law judge improperly excluded Dr. Bush’s opinion. The Director, however, maintains that Dr. Bush’s opinion was admissible as rebuttal autopsy evidence.

¹ In dismissing Dr. Bush’s opinion as not constituting rebuttal evidence, the administrative law judge stated, “...the rebuttal evidence has to be refuted to the contingents made by the Claimant’s pathologist.” Hearing Transcript at 9.

² The administrative law judge found that a preponderance of the evidence established that the miner’s death was due to pneumoconiosis. He specifically found that the opinion of the autopsy prosector, Dr. Ashcraft, proffered by claimant as an affirmative autopsy report, and the opinion of Dr. Schaaf, proffered by claimant as an affirmative medical report, outweighed employer’s evidence, consisting of the report of Dr. Oesterling, a reviewing pathologist.

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).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we are compelled to vacate the award of benefits and remand this case for further consideration based on the administrative law judge's evidentiary error with respect to Dr. Bush's opinion. Although employer and the Director advance arguments pertaining to whether Dr. Bush's opinion should be properly categorized as a "report of autopsy" or a "medical report," we need not address that issue in order to resolve the matter at hand.

Section 725.414(a)(3)(ii) provides that "[t]he responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each [c]hest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the claimant...." 20 C.F.R. §725.414(a)(3)(ii). In this case, we conclude that the administrative law judge did not properly consider whether Dr. Bush's opinion was admissible as rebuttal evidence pursuant to Section 725.414(a)(3)(ii).

We note that claimant proffered, as part of her affirmative case, the results of an autopsy conducted by Drs. Ashcraft and Harshan on January 23, 2002, which identified simple nodular coal workers' pneumoconiosis with a nodule of 1.0 centimeter in diameter, bilateral diffuse acute bronchopneumonia, emphysema, severe atherosclerotic coronary artery disease, myocardial ischemia, and a clinical history of hypertension and renal failure. Director's Exhibit 10; Hearing Transcript 5. Claimant further proffered the deposition testimony of Dr. Ashcraft, wherein the doctor opined that the one centimeter module identified on autopsy would be consistent with Category A, complicated pneumoconiosis, under the ILO classification. Dr. Ashcraft also opined that pneumoconiosis hastened the miner's death from bronchopneumonia because his coal-dust related respiratory disease predisposed him to respiratory infections. Claimant's Exhibit 4.

In response to the autopsy evidence submitted by claimant, employer proffered Dr. Bush's deposition testimony, with attached medical reports dated January 17 and February 11, 2003. Employer's Exhibit 2 for identification; Hearing Transcript at 8. Dr. Bush specifically reviewed the autopsy slides and disagreed with the autopsy prosecutors that the miner had severe pneumoconiosis or that the miner's death was hastened by pneumoconiosis. Dr. Bush opined that the miner's pneumoconiosis was too mild to have either directly contributed to his death or predisposed him to the lung infection that

ultimately caused his death. Dr. Bush specifically pointed out that while the autopsy report only listed “a history of renal failure,” the miner was admitted to the hospital as a result of a respiratory infection caused by medication he took to control an autoimmune kidney disorder that reduced his resistance to infection. Dr. Bush testified that the autopsy prosecutors underestimated the importance of the miner’s renal disorder by failing to report that the miner was actually in the last stages of renal failure during his fatal hospitalization for bronchopneumonia. Thus, based on our review of Dr. Bush’s testimony, we are unable to affirm the administrative law judge’s finding that Dr. Bush’s opinion is not rebuttal evidence because it did not “refute the contingents” of claimant’s pathologists. Hearing Transcript at 9; Decision and Order at 2, n.3.

We further note the Director’s position in this appeal regarding rebuttal evidence:

In this case, Dr. Bush’s slide review should constitute autopsy rebuttal evidence. The rebuttal provision allows review of the slides and other autopsy material upon which the doctor submitting the affirmative report relied. Access to those materials is logically necessary in order for the rebutting doctor to provide a full and reasoned opinion. The rebutting doctor may draw his own conclusions on the miner’s condition based on this evidence. In addition, the rebutting doctor may, but is not required to, analyze or critique the conclusions and reasoning of the physician who prepared the affirmative report. Because Dr. Bush’s slide review meets these criteria, it could be characterized as rebuttal to Dr. Ashcroft’s autopsy report as well as affirmative autopsy evidence.

Director’s Brief at 6.

Because the administrative law judge does not appear to have considered the rationale presented by Dr. Bush for his opinion, which directly refutes the autopsy report proffered by claimant, we vacate the administrative law judge’s award of benefits and remand this case for further consideration as to whether Dr. Bush’s opinion is admissible as rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). We further direct the administrative law judge to consider the Director’s position regarding the admissibility of Dr. Bush’s opinion and what may constitute rebuttal evidence.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is vacated and the 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