

BRB No. 07-0892 BLA

B.E.	)	
(Widow of K.E.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GARDEN CREEK POCAHONTAS	)	DATE ISSUED: 07/23/2008
COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Kathy L. Snyder and Seth P. Hayes (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the surviving spouse of a miner who died on January 29, 2005,<sup>1</sup> appeals the Decision and Order (2006-BLA-5367) of Administrative Law Judge Edward Terhune Miller denying 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 7, 2005. The administrative law judge found that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but that it is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. Claimant also argues that the administrative law judge did not properly adhere to the evidentiary limits set forth in 20 C.F.R. §725.414, in addressing employer's submissions of its autopsy evidence. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, urging the Board to reject claimant's argument that the administrative law judge erred in admitting Dr. Roggli's autopsy report pursuant to 20 C.F.R. §725.414(a)(3)(ii).

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).

Claimant initially argues that the administrative law judge's admission of the reports of Drs. Caffrey and Roggli improperly allowed employer to exceed the evidentiary limitations imposed by Section 725.414. Claimant maintains that Dr. Caffrey's affirmative report presents his pathological findings based on his review of the autopsy slides, but also improperly provides an explanation for his disagreement with Dr. Abrenio's diagnosis that severe simple coal workers' pneumoconiosis contributed to the

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<sup>1</sup> The miner filed claims for disability benefits on June 3, 1991, and on October 6, 2003. Living Miner's Claim Exhibits 1, 2. The first claim was denied by Administrative Law Judge Eric Feirtag in a decision dated October 18, 1993, and the second claim was denied by the district director on November 30, 2004. In each instance, the adjudicators concluded that the evidence does not show that the miner was totally disabled by any respiratory disease. *Id.*

miner's death. Claimant contends that the autopsy report prepared by Dr. Roggli cannot serve as rebuttal evidence because it does not rebut or criticize the autopsy findings of Dr. Abrenio.<sup>2</sup> Employer responds that its affirmative autopsy report is not precluded from referencing the prosecutor's report. Employer and the Director also aver that rebuttal evidence need not be directly responsive to the claimant's affirmative evidence, but need only contradict the affirmative evidence.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1).<sup>3</sup> The claimant and the responsible operator may each "submit, in support of its affirmative case . . . *no more than one report of an autopsy . . .*" 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i) (emphasis added). In rebuttal of the case presented by the opposing party, each party may submit "*no more than one physician's interpretation of each . . . autopsy or biopsy submitted by*" the opposing party "and by the Director pursuant to Section 725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) (emphasis added). 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).

At the hearing in this case, claimant submitted the report of Dr. Abrenio, the autopsy prosecutor, as her report of an autopsy pursuant to Section 725.414(a)(2)(i). Director's Exhibit 9. Dr. Abrenio stated that the immediate cause of the miner's death was an acute myocardial infarction. He stated that contributing causes were severe coronary artery disease, cardiomegaly with left ventricular hypertrophy and severe simple coal workers' pneumoconiosis. *Id.* Employer submitted Dr. Caffrey's report as an affirmative autopsy report pursuant to Section 725.414(a)(3)(i), and Dr. Roggli's report in rebuttal to Dr. Abrenio's autopsy report pursuant to Section 725.414(a)(3)(ii). Director's Exhibit 10; Employer's Exhibit 8. Addressing the parties' submissions, the administrative law judge, citing *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229

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<sup>2</sup> Claimant's assertion that the administrative law judge erroneously relied on the Board's decision in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*), because it lacked precedential value as an unpublished decision is without merit, as the decision is published.

<sup>3</sup> Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on March 7, 2005, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

(2007)(*en banc*), admitted the autopsy reports of Drs. Caffrey and Roggli into the record as employer's affirmative evidence and rebuttal evidence respectively.<sup>4</sup>

Dr. Caffrey opined that the miner's simple coal workers' pneumoconiosis did not cause, contribute to, or hasten his death, which Dr. Caffrey opined was due to an acute myocardial infarction. This opinion is based on Dr. Caffrey's evaluation of the four autopsy slides. Dr. Caffrey also stated his disagreement with Dr. Abrenio's opinion that pneumoconiosis contributed to the miner's death.<sup>5</sup> Employer's Exhibit 9. Contrary to claimant's contention, the physician who provides employer's "affirmative" autopsy report is not precluded from commenting on claimant's evidence. We thus reject claimant's argument that the administrative law judge improperly admitted Dr. Caffrey's opinion as employer's affirmative autopsy evidence in this case. 20 C.F.R. §725.414(a)(3)(i); *see generally Keener*, 23 BLR at 1-234-236.

The rebuttal report of Dr. Roggli indicates that it was based on his examination of the "four glass slides . . . , prepared from lung and lymph node tissue samples obtained at time of autopsy" by Dr. Abrenio. Employer's Exhibit 8. Thus, Dr. Roggli's report analyzes and/or interprets the evidence to which it is responsive, namely the same tissue samples that form the basis of Dr. Abrenio's autopsy report. *Keener*, 23 BLR at 1-240. Moreover, while, as claimant suggests, Dr. Roggli's report does not criticize the findings of Dr. Abrenio, it nonetheless rebuts Dr. Abrenio's report in that after consideration of the same evidence, Dr. Roggli arrived at a conclusion contrary to the one reached by Dr. Abrenio with regard to the issue of whether the miner's pneumoconiosis substantially contributed to, or hastened, his death. Dr. Roggli opined that it is unlikely that the miner had any respiratory disability from his simple pneumoconiosis or that coal dust exposure contributed to, or hastened, the miner's death. Employer's Exhibit 8. We, therefore,

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<sup>4</sup> The administrative law judge, however, refused to admit Dr. Caffrey's deposition testimony, finding it was beyond the scope of the evidentiary limitations of Section 725.414 and that there was no showing of good cause as required under 20 C.F.R. §725.456(b)(1).

<sup>5</sup> Dr. Caffrey explained that he did not agree with Dr. Abrenio's diagnosis of severe simple coal workers' pneumoconiosis. Based on his own examination of the autopsy slides, Dr. Caffrey concluded there is no evidence of interstitial fibrosis or complicated coal workers' pneumoconiosis, but that there is evidence of simple coal workers' pneumoconiosis, which he estimated occupied approximately 20 percent of the lung tissue. Dr. Caffrey further stated that "it is my opinion that the simple coal workers' pneumoconiosis definitely did not cause, contribute to, or hasten the patient's death." Employer's Exhibit 9.

reject claimant's assertion that Dr. Roggli's opinion does not suffice as rebuttal evidence, as anticipated by Section 725.414(a)(3)(i), and we affirm the administrative law judge's admission of Dr. Roggli's opinion. *Keener*, 23 BLR 1-229.

Claimant next argues that the administrative law judge's assessment of the medical evidence is neither rational nor supported by substantial evidence. Specifically, claimant avers that the administrative law judge erred by finding that Dr. Abrenio's opinion is not well-reasoned or well-documented, and in finding that it is entitled to less weight than the contrary opinions of Drs. Roggli and Caffrey.

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).<sup>6</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. 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

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<sup>6</sup> 20 C.F.R. §718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (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.

miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).<sup>7</sup>

In considering the evidence relevant to the cause of the miner's death pursuant to Section 718.205(c), the administrative law judge noted that the miner's death certificate attributed his death to an acute myocardial infarction and that it listed "lung problem" as one of the significant conditions suffered by the miner at the time of death. Director's Exhibit 8. The administrative law judge properly found that the death certificate is legally insufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death as it did not specify the lung problem or support the conclusion with any reasoning. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4<sup>th</sup> Cir. 2000). The administrative law judge thus accurately found that the only evidence of record that would support a finding of death due to pneumoconiosis is the autopsy report of Dr. Abrenio. Director's Exhibit 9. Dr. Abrenio stated that the immediate cause of the miner's death was an acute myocardial infarction, and that contributing causes included the miner's severe coronary artery disease, cardiomegaly with left hypertrophy and severe coal workers' pneumoconiosis. *Id.* The administrative law judge found that Dr. Abrenio's opinion was neither well-reasoned nor well-documented, since he did not adequately explain how the miner's pneumoconiosis contributed to his death, which Dr. Abrenio attributed directly to an acute myocardial infarction.

We affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The United States Court of Appeals for the Fourth Circuit has held that a physician's statement that pneumoconiosis hastened a miner's death, without any additional support or explanation of that conclusion, is insufficient to support such a finding. *Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264. In this case, the administrative law judge properly found that Dr. Abrenio's opinion is insufficient to carry claimant's burden of proving that the miner's death was due to pneumoconiosis as Dr. Abrenio's assessment is conclusory and unsupported by any rationale. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4<sup>th</sup> Cir. 1999); *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence does not establish that the miner's death was due to pneumoconiosis at 20

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<sup>7</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit in this case, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3-5.

C.F.R. §718.205(c), and the consequent denial of benefits.<sup>8</sup> *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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

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<sup>8</sup> In light of our decision to affirm the administrative law judge's finding that Dr. Abrenio's opinion does not establish that the miner's death was due to pneumoconiosis, we decline to address claimant's arguments with regard to the administrative law judge's consideration of the opinions of Drs. Roggli and Caffrey.