BRB No. 08-0768 BLA

M.W. (Widow of B.W.)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 07/28/2009
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2006-BLA-05443) of Administrative Law Judge Joseph E. Kane on a survivor's claim filed on April 5, 2005,[1] pursuant to the provisions of Title IV of the Federal Coal Mine Health and

[1] Claimant is the widow of the miner, B.W., who died on March 7, 2005. Director's Exhibit 9.

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Initially, the administrative law judge noted that the miner was receiving benefits at the time of his death pursuant to an award by Administrative Law Judge James L. Guill, which was affirmed by the Board. [*B.W.*] v. *Westmoreland Coal Co.*, BRB No. 89-4052 BLA (June 25, 1992)(unpub.). Based on the doctrine of collateral estoppel, the administrative law judge found that the miner had thirty-five years of coal mine employment and that the existence of clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a), based on findings made in the miner's claim.[2] The administrative law judge then found that the medical evidence of record in the survivor's claim was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found the medical evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in admitting, into the record, the medical opinion of Dr. Cohen, the opinion relied upon by the administrative law judge in awarding survivor's benefits. Employer contends that the administrative law judge erred in admitting Dr. Cohen's opinion because Dr. Cohen relied on inadmissible medical evidence in formulating his opinion. In addition, employer contends that the administrative law judge erred in according little weight to the medical opinion of Dr. Hippensteel that the miner's death was not due to coal workers' pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a substantive response unless requested to do so.[3]

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,

[2] Collateral estoppel forecloses the relitigation of issues of fact or law that are identical to issues that have been actually determined and necessarily decided in prior litigation and in which the parties had a full and fair opportunity to litigate. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

[3] Since the parties do not challenge the administrative law judge's application of the doctrine of collateral estoppel in crediting the miner with thirty-five years of coal mine employment and finding that clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a), we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[4] 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).

In challenging the administrative law judge's award of benefits, employer contends that the administrative law judge erred in admitting the medical opinion of Dr. Cohen, Claimant's Exhibit 9. Employer argues that because the opinion is based on inadmissible evidence, *i.e.*, evidence from the miner's claim that was not made a part of the record in the survivor's claim, and that does not comply with the evidentiary limitations, the administrative law judge should have excluded the opinion. In support of its contention, employer notes that the current regulations do not provide for the automatic inclusion of all of the evidence from the miner's claim in a survivor's claim. Rather, employer notes that the evidence from the miner's claim must be specifically designated for inclusion in the survivor's claim and that any evidence so submitted must comply with the evidentiary limitations set forth at 20 C.F.R. §725.414. Further, employer notes that if a medical report is based on evidence that was not properly admitted into the record, then "the ALJ is required to address the impact of §725.414(a)(2)(i), (a)(3)(i)," *i.e.*, the evidentiary limitations, pursuant to *Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229 (2007)(*en banc*). Employer's Brief at 8.

Citing the four options set forth in *Keener* that are available to the administrative law judge to address the impact of inadmissible evidence on a medical opinion,[5] employer acknowledges that total exclusion is not the favored option. Employer's Brief at 8-9. However, employer argues that, based on the facts of this case, exclusion of Dr.

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mining employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

[5] The Board has held:

> If an administrative law judge determines that a physician's medical opinion relied upon inadmissible evidence, he has several available options including: excluding the report, redacting the objectionable content, asking the physician to submit a new report, or factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled.

Keener v. Peerless Eagle Coal Co., 23 BLR 1-229, 1-242 n.15 (2007)(*en banc*), *citing Brasher v. Pleasant View Mining Co., Inc*., 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

Cohen's opinion is warranted because Dr. Cohen relied on evidence that was not developed in compliance with the regulations and employer's experts were not given the opportunity to review Dr. Cohen's opinion. Employer's Brief at 9. Specifically, employer argues that it did not provide Dr. Cohen's opinion to its experts, Drs. Hippensteel and Rosenberg, because employer did not want their opinions to be "tainted," based on consideration of the inadmissible evidence reviewed by Dr. Cohen. Employer's Brief at 10. In addition, employer argues that it was not given the opportunity to respond to Dr. Cohen's opinion, pursuant to its request at the hearing and in its post-hearing brief, despite the administrative law judge's statement, at the hearing, that it would be provided that opportunity. Employer's Brief at 10, 14, 15. There is merit, in part, to employer's contentions.

In deciding whether to admit evidence in an administrative proceeding, an administrative law judge is granted broad discretion in resolving procedural issues and determining the weight to be assigned the evidence of record. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *see also Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985). The administrative law judge, in addressing employer's objections to the inclusion of Dr. Cohen's medical opinion at the hearing, stated that, while he would not exclude the opinion, he would consider "Dr. Cohen's reliance on inadmissible evidence in deciding the weight to which the opinion is entitled." Decision and Order at 9.

However, employer correctly contends that the administrative law judge stated at the hearing that, if Dr. Cohen's opinion were admitted, employer would be provided the opportunity to respond to the opinion with post-hearing evidence. Hearing Transcript at 10, lines 18-24. In admitting Dr. Cohen's opinion, the administrative law judge did not provide employer the opportunity to respond to the opinion. We, therefore, vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to provide employer the opportunity to respond to Dr. Cohen's opinion, as agreed to at the hearing. *See Lee v. Drummond Coal Co.*, 6 BLR 1-544 (1983); *Pendleton v. United States Steel Corp.*, 6 BLR 1-815 (1984).

Moreover, because remand of this case is necessary for the consideration of additional medical evidence responsive to Dr. Cohen's opinion, we vacate the administrative law judge's weighing of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.205(c). On remand, the administrative law judge must weigh any properly admitted relevant evidence to determine whether claimant has established legal pneumoconiosis pursuant to Section 718.202(a)(4) and whether that pneumoconiosis is a substantially contributing cause of the miner's death pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge