

BRB No. 07-0515 BLA

D.G.	)	
(Widow of E.G.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 03/31/2008
	)	
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 – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Deputy 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:

Claimant appeals the Decision and Order – Denying Benefits (2003-BLA-6715) of Administrative Law Judge Michael P. Lesniak rendered 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 survivor's claim on May 20, 2002, following the death of her husband (the miner) on March 26, 2002. Director's Exhibit 3. On April 13, 2006, claimant requested that the administrative law judge issue a decision on the record, and accordingly, the parties were instructed to submit all medical evidence by May 18, 2006. By Order dated June 8, 2006, the administrative law judge determined, *inter alia*, that Dr. Castle's 2006 report was admissible as a supplemental report, and the administrative law judge granted claimant thirty days to obtain an additional statement from Dr. Imbing pursuant to 20 C.F.R. §725.414(a)(2)(ii). In response to claimant's motion for reconsideration of the June 8, 2006 Order, the administrative law judge, by Order dated June 23, 2006, denied claimant's motion to strike Dr. Castle's 2006 report, again finding that the report was admissible into evidence as supplemental and rehabilitative. However, the administrative law judge determined that the portion of Dr. Castle's report that criticized Dr. Green's opinion constituted inadmissible rebuttal evidence that would be disregarded when reviewing the medical evidence. Accordingly, the administrative law judge denied claimant's alternative request for a rehabilitative report from Dr. Green as unnecessary. ALJ Order (June 23, 2006).

The administrative law judge subsequently issued his Decision and Order on February 13, 2007. The administrative law judge credited the miner with approximately forty years of qualifying coal mine employment, and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish that the miner suffered from simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but insufficient to establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the evidence was insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304 and death due to pneumoconiosis at 20 C.F.R. §718.205(c). Additionally, claimant contends that the administrative law judge erred in failing to admit Dr. Scott's 1973 x-ray interpretation into the record as claimant's affirmative x-ray evidence pursuant to 20 C.F.R. §725.414(a)(2)(i). Claimant also argues that the administrative law judge should have either excluded Dr. Castle's 2006 report from the record, or allowed claimant to obtain a rehabilitative opinion from Dr. Green. Further, claimant contends that, because Dr. Castle's opinion was based in large part upon his review of inadmissible evidence, the administrative law judge erred by not excluding or discrediting the opinion. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge's failure to admit Dr. Scott's x-ray interpretation into the record was harmless error; that the administrative law judge correctly categorized Dr.

Castle's 2006 report as supplemental to his 2003 report; and that the administrative law judge was not required to exclude or discredit Dr. Castle's opinion despite the physician's consideration of inadmissible evidence.

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>1</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).

Initially, we address claimant's evidentiary challenges. Claimant asserts that the administrative law judge erred in failing to consider Dr. Scott's 1973 x-ray interpretation after stating that "[a]ny evidence submitted in claims filed by the miner during his lifetime is not considered and not subject to adjudication in the present claim," Decision and Order at 3, even though this evidence was submitted without objection and designated as claimant's sole affirmative chest x-ray under Section 725.414(a)(2)(i). Claimant's Brief at 4-5. The Director agrees with claimant's argument that Dr. Scott's x-ray interpretation was admissible and should have been addressed, but maintains that the reading is of limited probative value because it does not conform to ILO standards, and is positive for simple pneumoconiosis but not complicated pneumoconiosis. Director's Brief at 2; Director's Exhibit 1. As the administrative law judge found that the existence of simple pneumoconiosis was established at Section 718.202(a) by the autopsy and medical opinion evidence, Decision and Order at 8, and Dr. Scott's 1973 x-ray interpretation of simple pneumoconiosis cannot establish the cause of the miner's death under Section 718.205(c), we hold that the administrative law judge's failure to consider this evidence constitutes harmless error that would not affect the outcome of this claim. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant next contends that the administrative law judge erred in admitting Dr. Castle's 2006 report into the record as a supplemental opinion, arguing that the report constitutes inadmissible rebuttal evidence that should have been excluded pursuant to Section 725.414(a)<sup>2</sup> because it responded to, and disagreed with, Dr. Green's report, and

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<sup>1</sup> The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 5.

<sup>2</sup> Section 725.414, in conjunction with 20 C.F.R. §725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no

there is no provision in the regulation for rebuttal of medical reports. Alternatively, claimant maintains that she should have been allowed the opportunity to obtain a rehabilitative report from Dr. Green. Claimant's Brief at 5-6. Claimant's arguments are without merit. The administrative law judge properly characterized Dr. Castle's 2006 report as a supplemental opinion, in that it simply expounded on Dr. Castle's 2003 opinion, which was admitted as one of employer's affirmative medical reports pursuant to Section 725.414(a)(3)(i). *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 146-147 (2006). Moreover, because Section 725.414(a) provides that "[a] medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence," *see* 20 C.F.R. §725.414(a), Dr. Castle's supplemental report could properly address Dr. Green's report. However, as the administrative law judge redacted the portion of Dr. Castle's report that criticized Dr. Green's conclusions, the administrative law judge reasonably found that it was not necessary for claimant to obtain a rehabilitative report from Dr. Green.<sup>3</sup> As claimant has demonstrated no abuse of the administrative law judge's broad discretion in procedural matters, we hold that the administrative law judge's admission of Dr. Castle's 2006 report into the record and his denial of claimant's request to obtain a rehabilitative report from Dr. Green was proper. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Claimant also contends that the administrative law judge erred in considering Dr. Castle's 2003 opinion because it was based largely on the physician's review of inadmissible evidence. Claimant argues that because Dr. Castle reviewed the medical

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more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.*

<sup>3</sup> A review of the record and the administrative law judge's Decision and Order reveals no support for claimant's assertions that "the ALJ was still influenced by and considered the excluded portion of [Dr. Castle's 2006] report when he addressed Dr. Green's diagnosis of complicated pneumoconiosis," Claimant's Brief at 5 n. 1, and that "[t]he ALJ indicated that he would not consider Dr. Castle's review of excluded evidence, but he did not follow through on that promise," Claimant's Brief at 6.

data in the closed miner's file, the administrative law judge was required either to exclude the report from the record or to discredit Dr. Castle's opinion. Claimant's Brief at 6-7. We disagree. The Director correctly notes that when a medical report is based, in whole or in part, on inadmissible evidence, the administrative law judge may, in his discretion, exclude that report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. Director's Brief at 3; *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*). Exclusion is not the favored option. *Id.* In the instant case, the administrative law judge permissibly declined to consider that portion of Dr. Castle's report dealing with evidence in the miner's claim that was not admitted into evidence, *see* Decision and Order at 5. Thus, claimant's arguments are rejected.

Turning to the merits, in order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), 718.304. Specifically, claimant asserts that Dr. Green's opinion was not speculative and that the administrative law judge erred in failing to credit Dr. Green's diagnosis of "moderately severe to severe simple coal workers' pneumoconiosis, including silicosis, and in my view at least one lesion consistent with progressive massive fibrosis,"<sup>4</sup> Claimant's Exhibit 1, based on his review of the autopsy slides. Claimant's

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<sup>4</sup> The Fourth Circuit has held that 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, requires that an equivalency determination be made. The statute requires, if diagnosis is by biopsy, that a miner have "massive lesions," which are lesions that would show on an x-ray as opacities of at least one centimeter. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). The Court further noted that the statute requires a diagnosis of "massive lesions" rather than a diagnosis of "massive fibrosis." *Id.*

Brief at 7-9. Claimant's arguments lack merit. Noting that there must be evidence of massive lesions or nodules in the lung that would equate to a one centimeter (cm) or greater opacity on chest x-ray for a diagnosis of complicated pneumoconiosis, the administrative law judge determined that Dr. Green measured a nodule at 0.8 cm and concluded that it was only part of a larger lesion that would probably measure at least 1.5 cm across, based on the shape of the nodule as bisected in comparison with the other nodules present on the autopsy slides. Decision and Order at 4, 8-9; Claimant's Exhibit 1. Because the administrative law judge accurately determined that Dr. Green could provide no definitive evidence that any lesion would measure over 1.0 cm; the autopsy prosector who prepared the slides described the lesions as measuring from 0.3 to 0.5 cm; and no other physician diagnosed complicated pneumoconiosis, the administrative law judge acted within his discretion in finding that claimant failed to prove by a preponderance of the evidence that the miner had complicated pneumoconiosis. Decision and Order at 8-9; see *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); see generally *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Accordingly, the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis at Section 718.304 is affirmed, as supported by substantial evidence.

Regarding Section 718.205(c), claimant challenges the administrative law judge's weighing of the evidence and the adequacy of his rationale in finding that the medical opinion evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Claimant contends that the administrative law judge failed to provide a rational explanation that comports with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), for his weighing of the conflicting medical opinions of record. Claimant further maintains that the autopsy report and supplemental opinions of Drs. Anderson and Green are well-reasoned and sufficient to establish that the miner's pneumoconiosis was a substantially contributing cause of and/or hastened the miner's death at Section 718.205(c), and that the administrative law judge erred in failing to credit this evidence over the contrary opinions of Drs. Naeye, Castle, and Caffrey. Claimant essentially seeks a reweighing of the evidence, which is beyond the Board's scope of review. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

The administrative law judge considered the report of the autopsy by Dr. Imbing, which stated a final diagnosis of simple coal worker's [sic] pneumoconiosis and myocardial infarct, recent, and determined that Dr. Imbing's report supported a finding of pneumoconiosis, but did not indicate that the pneumoconiosis caused the miner's death. Decision and Order at 7, 9; Director's Exhibit 14. The administrative law judge further

noted that Dr. Anderson, the miner's treating physician,<sup>5</sup> signed the death certificate, listing the immediate cause of death as cardiopulmonary arrest due to Alzheimer's disease and coal workers' pneumoconiosis, and prepared a one-paragraph letter in which she opined that "[on] the day of [the miner's] death, he had shortness of breath followed by a cardiopulmonary arrest. . . . [t]he Coal Workers' Pneumoconiosis played a significant factor in his death. . . . [t]his lung disease caused him to be oxygen dependant for many years and also caused his respiratory arrest." Director's Exhibits 13, 16. The administrative law judge permissibly found that Dr. Anderson's opinion merited little weight because the physician did not explain how pneumoconiosis caused the miner's shortness of breath or contributed to the miner's cardiopulmonary arrest, and Dr. Anderson provided no treatment record to support her conclusions. Decision and Order at 10; see *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge also acted within his discretion in discounting Dr. Green's opinion, that pneumoconiosis contributed to the miner's cardiac death, because he found that it was not well supported by the objective evidence of record, in that the physician relied in part upon his diagnosis of complicated pneumoconiosis, contrary to the administrative law judge's finding of simple pneumoconiosis. Decision and Order at 10; see *Clark*, 12 BLR at 1-155. The administrative law judge determined that Drs. Naeye, Castle, and Caffrey all stated that pneumoconiosis did not cause, contribute to or hasten the miner's death from a myocardial infarction, and that Drs. Naeye and Castle persuasively explained that the shortness of breath preceding the miner's death was cardiac in nature. Thus, the administrative law judge permissibly concluded that the opinions of Drs. Naeye, Castle and Caffrey were well reasoned, better supported by the objective evidence of record, and entitled to greater weight than the opinions of Drs. Green and Anderson. Decision and Order at 10-11; Director's Exhibit 18; Employer's Exhibits 3, 4, 5, 6, 7; see *Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fields*, 10 BLR 1-19; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). We, therefore, affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and affirm the denial of survivor's benefits.

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<sup>5</sup> The administrative law judge noted that none of the treatment records admitted into evidence were authored by Dr. Anderson, nor was there any evidence to indicate what conditions she treated the miner for during his lifetime. Decision and Order at 10; Director's Exhibit 15; Employer's Exhibit 1. Dr. Anderson's letterhead identified her as being in family practice and the claimant identified her in the interrogatories as the miner's treating physician for the past year. Director's Exhibits 16, 17 at 8.

Accordingly, the administrative law judge's Decision and Order – Denying 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