



BRB No. 16-0352 BLA

JOAN HARMON (on behalf of ROBERT W. HARMON))

Claimant-Respondent)

v.)

CONSOLIDATION COAL COMPANY)

and)

CONSOL ENERGY, INCORPORATED)

Employer/Carrier-
Petitioners)

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 05/25/2017

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05520) of Administrative Law Judge Natalie A. Appetta, rendered on a miner's claim filed on April 7, 2011, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). In her Decision and Order, the administrative law judge initially addressed employer's objection to the admission of Dr. Perper's autopsy report because it exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414. The administrative law judge found that employer's objection was unfounded, after she redesignated employer's rebuttal autopsy report, prepared by Dr. Oesterling, as employer's affirmative-case autopsy report, and redesignated Dr. Perper's report as claimant's¹ rebuttal autopsy report. In the alternative, the administrative law judge determined, *sua sponte*, that there was good cause for the admission of Dr. Perper's report.

On the merits, the administrative law judge credited the miner with at least twenty-four years of underground coal mine employment or employment in similar conditions. The administrative law judge found that the evidence was sufficient to establish total respiratory or pulmonary disability pursuant 20 C.F.R. §718.204(b), thereby also establishing invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).² The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in changing the parties' evidentiary designations of the reports of Drs. Perper and Oesterling, and in admitting Dr. Perper's report as claimant's rebuttal autopsy report. Employer further contends that the administrative law judge erred in finding, in the alternative, that good cause existed for the admission of Dr. Perper's report. Employer also alleges that the award of benefits must be vacated because the administrative law judge's erroneous

¹ Claimant is the surviving spouse of the miner, who died on November 22, 2014. Director's Exhibit 34. She is pursuing this claim on the miner's behalf. Decision and Order at 2. Although the administrative law judge referred to both the miner and his surviving spouse as "claimant," we will refer solely to the miner's surviving spouse as "claimant" for the purposes of our Decision and Order.

² Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if she establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

evidentiary rulings tainted the weighing of the medical opinion evidence relevant to total disability under 20 C.F.R. §718.204(b)(2), invocation of the Section 411(c)(4) presumption, and rebuttal of the presumption. Claimant responds, urging affirmance of the administrative law judge's evidentiary ruling and the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response to employer's appeal.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, 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). The Board reviews the administrative law judge's procedural and evidentiary rulings for abuse of discretion. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620, 23 BLR 2-345, 2-358 (4th Cir. 2006); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

I. Factual Background

During the evidentiary development phase of this case, claimant submitted a report by Dr. Adams, the autopsy prosector, dated December 16, 2014. Claimant's Exhibit 4. Claimant subsequently obtained and submitted a report by Dr. Perper, dated May 15, 2015, and based on his review of Dr. Adams's autopsy report, the slides Dr. Adams prepared, and the miner's death certificate. Claimant's Exhibit 3. Dr. Perper diagnosed both clinical and legal pneumoconiosis, and opined that both diseases substantially contributed to the miner's death. *Id.* On a pre-hearing Evidence Summary Form, claimant designated Dr. Adams's report as affirmative-case autopsy evidence and Dr. Perper's report as an affirmative-case medical report.

Employer obtained and submitted a report from Dr. Oesterling, dated December 2, 2015, in which he reviewed Dr. Adams's report, the autopsy slides Dr. Adams prepared, and the miner's death certificate. Employer's Exhibit 19. Employer designated Dr.

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least twenty-four years of qualifying coal mine employment for purposes of Section 411(c)(4). 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 7, 15; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6.

Oesterling's report as a rebuttal-case autopsy report on its pre-hearing Evidence Summary Form, and did not designate an affirmative-case autopsy report.

II. The Administrative Law Judge's Evidentiary Rulings

A. The Hearing

When reviewing the evidence submitted by the parties, the administrative law judge asked whether employer objected to the admission of any of claimant's evidence. Hearing Transcript at 10. Employer's counsel replied that Dr. Perper's report was an autopsy report and, as such, it exceeded the evidentiary limitations in light of the designation of Dr. Adams's report as claimant's affirmative-case autopsy report. *Id.* at 11. Claimant's counsel responded that Dr. Perper's report was a medical report because, in addition to reviewing autopsy slides, Dr. Perper "also reviewed medical evidence." *Id.* The administrative law judge commented, "if indeed there are two reviews of the autopsy slides, I do believe you would be over the evidentiary limits." *Id.* at 14. Claimant's counsel replied: "[T]he autopsy prosecutor does not review the slides. He cuts the slides; he's the one who makes them. When he does an autopsy protocol, that's not a medical legal document for litigation, that's a medical legal document that's his job to do." *Id.* Claimant's counsel added, "[h]e wasn't doing that for us. He cut the slides as part of his autopsy. All that is in the medical record." *Id.* The discussion concluded as follows:

Administrative Law Judge: And then it's the summary of the findings?

Claimant's Counsel: Correct. Nothing more.

Administrative Law Judge: And that's [employer's] concern is that there's two bites, but it doesn't sound to me like it's in any – I don't know that explained that way where he's simply giving his – basically, it's like performing a test and giving his results and not putting it in any other context is going to put him over the evidentiary limits. I'm going to go ahead and allow it.

Id. at 14.

B. The Decision and Order

The administrative law judge revisited the admissibility of Dr. Perper's report in her Decision and Order, noting that employer had renewed its objection to the admission of Dr. Perper's report in its closing brief. The administrative law judge reasoned that because Dr. Oesterling did not "merely address[] or as employer contends, 'rebut[]' the specific findings of the prosector," his report "provide[d] employer's affirmative position with regard to its pathologic review of the autopsy slides." Decision and Order at 4, *citing Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007) (en banc). The administrative law judge further found that although Dr. Adams's submission technically constituted an autopsy report under 20 C.F.R. §725.414, Dr. Adams did not assist in making claimant's affirmative case because he reported only "factual findings" and "summary conclusions." Decision and Order at 4. The administrative law judge determined:

Regardless of the parties' designation on the evidence forms, they are entitled to affirmative and rebuttal (and in some cases rehabilitative) evidence, as long as they do not exceed the evidentiary limits of [20 C.F.R. §]725.414. Employer's purported "rebuttal" could be just as easily deemed affirmative evidence in light of the detailed substantive review and relevant opinions Dr. Oesterling provided, which is far more detailed than Dr. Adam's prosector autopsy report. Likewise, Dr. Perper's report could just as easily be deemed rebuttal to Dr. Oesterling's report and/or Dr. Adams' report since it too contains great detail and substantive findings relevant to this claim. Regardless of the parties['] designation, the parties in effect, can have two autopsy reports, one affirmative and one rebuttal and two medical reports, in accordance with the regulations. The admission of Dr. Perper's report does not exceed either limitation in this case.

Id. at 4-5 (internal citations omitted).

III. Arguments on Appeal

Employer contends that the administrative law judge abused her discretion in admitting Dr. Perper's report under 20 C.F.R. §725.414(a)(2)(ii) because Dr. Perper's submission is neither a medical report nor a rebuttal autopsy report, and Dr. Adams's report is claimant's affirmative-case autopsy report. Employer asserts that the administrative law judge also abused her discretion in redesignating, *sua sponte*, Dr. Oesterling's rebuttal autopsy report as its affirmative-case autopsy report, and in redesignating Dr. Perper's report as claimant's rebuttal autopsy report. Employer further contends that the administrative law judge erred in raising, *sua sponte*, the issue of

whether good cause existed for the admission of Dr. Perper's report under 20 C.F.R. §725.456(b)(1), and resolving it in claimant's favor.

Upon review of the arguments on appeal and the administrative law judge's findings, we conclude that the administrative law judge did not properly rule on employer's request at the hearing to exclude Dr. Perper's autopsy report as exceeding the evidentiary limitations. As the administrative law judge later determined in her Decision and Order, Dr. Adams's submission is not a treatment record that falls outside the scope of the evidentiary limitations under 20 C.F.R. §725.414(a)(4), but rather is an autopsy report subject to the limitations set forth in 20 C.F.R. §725.414(a)(2). *See Keener*, 23 BLR at 1-239; Decision and Order at 4; Hearing Transcript at 14. Thus, the administrative law judge's finding at the hearing that Dr. Perper's report was admissible, regardless of the designation of Dr. Adams's submission as claimant's affirmative-case autopsy report was in error. The administrative law judge also erred in suggesting that Dr. Perper's submission is admissible as either a medical report or an autopsy report, and that designating it as affirmative or rebuttal evidence was unnecessary because claimant had space available in more than one category under 20 C.F.R. §725.414(a)(2). Dr. Perper's submission is an autopsy report, rather than a medical report, because Dr. Perper based his diagnoses of clinical and legal pneumoconiosis on his review of Dr. Adams's autopsy report and the autopsy slides without referring to unrelated clinical evidence. *See Keener*, 23 BLR at 1-239-40. Dr. Perper's autopsy report cannot be admitted as claimant's rebuttal autopsy report because the evidentiary limitations provide that a party can only submit rebuttal evidence in response to affirmative evidence submitted by the other party, and employer did not submit an affirmative-case autopsy report. *See J.V.S. [Stowers] v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008).

The administrative law judge further erred in rendering her final evidentiary rulings in her Decision and Order. Consistent with principles of fairness and administrative efficiency, the administrative law judge should have issued her evidentiary rulings before she issued her decision. *See L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). Her failure to do so precluded claimant from redesignating her evidence to conform to the evidentiary limitations, or from presenting a good cause argument for exceeding the limitations. It also prevented employer from having the opportunity to respond to any permissible changes made by claimant. Accordingly, we vacate the administrative law judge's evidentiary rulings redesignating Dr. Oesterling's submission as employer's affirmative-case autopsy report evidence and Dr. Perper's report as claimant's autopsy rebuttal report, as well as her alternative finding of good cause for exceeding the evidentiary limitations.⁵

⁵ We agree with employer that in redesignating the submissions of Drs. Perper and Oesterling *sua sponte*, the administrative law judge abused her discretion because the

In light of the foregoing, we must also vacate the administrative law judge's findings on the merits that claimant established total disability at 20 C.F.R. §718.204(b)(2) and invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), as the administrative law judge relied, in part, upon Dr. Perper's report, which was improperly redesignated and admitted. For the same reason, we further vacate the administrative law judge's determination that employer failed to rebut the presumption. On remand, prior to issuing her Decision and Order on the merits of entitlement, the administrative law judge must resolve the parties' evidentiary designations; rule on the admissibility of the reports of Drs. Adams, Oesterling and Perper; advise the parties of her rulings; and provide them with an opportunity to respond appropriately.⁶ The administrative law judge must then reconsider her findings on the merits based on the evidence properly admitted into the record.

evidentiary limitations provide that it is the parties' obligation to develop and designate their evidence. 20 C.F.R. §§725.414(a)(2), (3), 725.456(b)(2). We further agree that the administrative law judge abused her discretion in raising the good cause issue *sua sponte* as an alternative ground for admitting Dr. Perper's report. It is the obligation of the party seeking the admission of evidence in excess of the evidentiary limitations to raise the issue of good cause and convince the administrative law judge that it exists. 20 C.F.R. §725.456(b)(1); *see Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006).

⁶ The administrative law judge may consider whether it is appropriate to reopen the record for the parties to redesignate their evidence and, if necessary, develop additional evidence.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge