BRB No. 07-0133 BLA

C.L.H. (Widow of E.T.H.) Claimant-Respondent v. ARCH ON THE GREEN, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 10/31/2007 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-6477) of Administrative Law Judge Joseph E. Kane 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. Claimant filed her survivor's claim on September 4, 2002, following the death of her husband (the miner) on June 8, 2001. Director's Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on May 8, 2003. Director's Exhibit 30. Employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges (OALJ) for a formal hearing. The record reflects that two hearings were scheduled in this matter by the OALJ, both of which were continued to allow claimant time to develop evidence. *See* OALJ Order of Continuance (Nov. 16, 2004); OALJ Order, Continue Case and Cancel Hearing (Mar. 31, 2005). A third hearing was scheduled by the administrative law judge for April 19, 2006. By letter postmarked March 30, 2006, twenty-one days prior to the hearing, claimant submitted a medical report from Dr. Houser. On April 7, 2006, employer filed a motion for a continuance of the hearing. As grounds for the motion, employer asserted that, because Dr. Houser's report was not received until April 4, 2007, employer did not have sufficient time to respond to Dr. Houser's report and submit its evidence in compliance with the twenty day rule and the administrative law judge's February 8, 2006 Notice of Hearing, advising of the time limits for the submission of evidence. On April 11, 2006, claimant's counsel responded in opposition to employer's motion, asserting that employer was not entitled to "rebut" Dr. Houser's opinion pursuant to 20 C.F.R. §725.414. By Order dated April 12, 2006, the administrative law judge denied employer's motion on the ground that the hearing had already been continued on two occasions. The administrative law judge also advised the parties that the hearing date was changed from April 19, 2006 to April 18, 2006. ALJ Order (Apr. 12, 2006) .

A hearing was held on April 18, 2006, at which time employer objected to the admission of Claimant's Exhibit 5, the report from Dr. Houser. Employer renewed its request to be given the opportunity to develop and submit responsive evidence post-hearing. Hearing Transcript (HT) at 6-7. Claimant objected to employer's request to respond to Dr. Houser's report, and also objected to the admission of a deposition transcript of Dr. Wheeler, which had been proffered as Employer's Exhibit 5. HT at 7-9, 16. The administrative law judge reserved a ruling on employer's request until the parties had the opportunity to brief the issue of whether Section 725.414 allowed for rebuttal of Dr. Houser's report, and whether Dr. Wheeler's deposition transcript exceeded the evidentiary limitations. HT at 10-12, 15. Following the submission of briefs, the administrative law judge issued an Order on June 14, 2006, denying employer's request

to respond to Dr. Houser's report[1] because he found the regulation at Section 725.414 permitted a party to rebut only affirmative objective medical studies (i.e., pulmonary function studies or arterial blood gas studies) submitted by the opposing party and not affirmative medical opinion evidence. The administrative law judge further ruled that employer was not entitled to respond to Dr. Houser's report by way of rehabilitative evidence, since Dr. Houser had not commented on the conclusions of either Dr. Fino or Dr. Jarboe. Lastly, the administrative law judge rejected employer's argument that it was entitled to respond to Dr. Houser's report, on the grounds that a medical opinion proffered as rebuttal evidence, if not admissible under Section 725.414, would still be admissible under the catch-all provision of 20 C.F.R. §718.107.

The administrative law judge subsequently issued his Decision and Order on September 28, 2006. The administrative law judge indicated in a footnote that Dr. Wheeler's deposition transcript was inadmissible. Reviewing the merits of survivor's claim, the administrative law judge considered the evidence that had been admitted into the record, and found that it was sufficient to establish that the miner suffered from coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge also found the evidence sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, claimant was awarded benefits.

Employer appeals, alleging that the administrative law judge erred by not allowing employer to respond to the report of Dr. Houser. Employer further contends that the administrative law judge erred in excluding Dr. Wheeler's deposition testimony. Employer also challenges the administrative law judge's findings as to the existence of pneumoconiosis and death causation, asserting that he erred in his consideration of the evidence under 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.205(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, addressing employer's evidentiary arguments. The Director contends that the administrative law judge "incorrectly concluded that the evidence limiting rules do not allow for rebuttal of medical opinion evidence." Director's Brief at 5. The Director maintains that employer is entitled to respond to Dr. Houser's report, submitted on the eve of the twenty-day rule, if the administrative law judge determines,

[1] The administrative law judge indicated that employer sought to have Dr. Jarboe prepare a supplemental report in response to Dr. Houser's opinion. We note, however, that employer did not specify at the hearing, or in its post-hearing brief on the evidentiary issues before the administrative law judge, the exact nature of the responsive evidence it intended to submit if allowed to do so. Employer did assert that Dr. Houser had reviewed the affirmative medical reports of both of its medical experts, Drs. Jarboe and Fino. Hearing Transcript at 8; Employer's Brief on the Evidentiary Issues at 5.

on remand, that a response to Dr. Houser's report is "necessary to the full presentation" of employer's case. *Id*. The Director, however, also asserts that the administrative law judge did not err in excluding Dr. Wheeler's deposition testimony, and urges the Board to affirm that ruling.

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.[2] 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).

Evidentiary Limitations:

Initially, we address employer's evidentiary challenges. Employer asserts that the administrative law judge erred in excluding Dr. Wheeler's deposition testimony. Section 725.414(c) provides, in relevant part, that:

> A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this subsection. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of §725.456 of this part.

20 C.F.R. §725.414(c). "Medical reports" as referenced in Section 725.414(c) are defined as: "A physician's written assessment. A medical report may be prepared by the physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1). However, "a physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of [Section 725.414]." *Id*.

In this case, the administrative law judge correctly determined that Dr. Wheeler's deposition testimony was inadmissible because employer had already designated the medical reports of Drs. Fino and Jarboe as its two affirmative medical reports, and

[2] Because the miner's last coal mine employment occurred in Illinois, we will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

therefore, the requirements of Section 725.414(c), allowing for the admission of Dr. Wheeler's deposition testimony, were not satisfied. Decision and Order at 5 n.4. We therefore affirm the administrative law judge's exclusion of Dr. Wheeler's deposition testimony.

Employer also asserts that the administrative law judge erred by not allowing employer the opportunity to respond to Dr. Houser's report. Citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987), employer maintains that it is well-established that a party should be permitted to respond to evidence submitted on the eve of the expiration of the twenty-day deadline. Furthermore, employer contends that, contrary to the administrative law judge's finding, the regulation at Section 718.414 does not preclude employer from responding to Dr. Houser's report, since any responsive report submitted by employer would qualify as either rebuttal and/or rehabilitation evidence within the scope of 20 C.F.R. §725.414(a).[3]

We agree with the Director that the salient question presented in this case is whether employer may submit a "supplemental report" in response to Dr. Houser's opinion. The Director asserts that administrative law judge has misinterpreted the evidentiary limitations to preclude employer from responding to Dr. Houser's opinion, by way of a supplemental opinion from one, or both, of its two affirmative medical experts. The Director specifically argues:

> The [administrative law judge] incorrectly concluded that the evidence limiting rules do not allow for rebuttal of medical opinion evidence. The

[3] 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 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*.

> [administrative law judge] focused too narrowly on those parts of the rules addressing objective evidence rebuttal. He failed to recognize that a separate provision allows a party to respond to medical opinion evidence by having one or both of the doctors who prepared its affirmative medical reports review and address the opinion evidence. Specifically, 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." 20 C.F.R. §725.414(a) (emphasis added); *see also* 64 Fed. Reg. 54995, (f) (October 8, 1999)(recognizing that a physician who prepares a medical report may address medical reports prepared by other physicians that are in the record and in conformance with the limitations). Consequently, if a party submits an admissible medical report, the opposing party, pursuant to section 725.414(a), may have its doctor(s) review and respond to that report. The only limitation, of course, is that the "response" of the opposing party must be within the party's "two medical report" limit, i.e., the party may not have a third physician provide the response in the absence of good cause.
>
> If, as in the instant case, the opposing party has already submitted medical reports by its two doctors when it receives the other party's medical report, the opposing party may have its doctors respond to the new report either by testifying at the hearing or by deposition, 20 C.F.R. §725.414(c), by preparing a new, comprehensive medical report (to be submitted in the place of the original report), or by preparing a supplemental medical report. Supplemental reports do not run afoul of the two medical report limit because there is nothing in the regulations requiring that an individual doctor's "medical report" be contained within one document. Further, to disallow supplemental reports would penalize a party for early submission of its medical reports. It would also elevate form over substance: the regulations specifically allow doctors who have completed admissible reports to testify at the hearing or by deposition, 20 C.F.R. §725.414(c), and oral testimony essentially performs the same function as a supplemental report (but at greater financial cost). In this case, then, the employer's request that it be allowed to submit a response to Dr. Houser's report was fully consistent with the evidentiary limitations.

Director's Brief at 5-7.

Since the Director is charged with the administration of the Act, special deference is generally given to the Director's reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20

BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). In this case, the Director's interpretation of Section 725.414(a) is at odds with the administrative law judge's determination that Section 725.414 precludes employer from submitting rebuttal evidence in the form of a supplemental opinion from one or both or its affirmative medical experts. Because the Director's interpretation of Section 725.414(a), to allow for the submission of supplemental reports, is reasonable, we accept it. Thus, we vacate his Decision and Order – Awarding Benefits, and remand this case for further consideration.

On remand, the administrative law must address whether employer is entitled to respond to Dr. Houser's opinion pursuant to 20 C.F.R. §725.456(b), since that evidence was submitted just prior to the twenty-day deadline for submission of evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); s*ee also North Am. Coal Co. v. Miller*, 870 F.2d 948, 952, 12 BLR 2-222, 2-228 (3d Cir. 1989) (holding that due process may require that the opposing party be afforded an opportunity to rebut evidence submitted on or just prior to the twenty-day deadline). Consequently the award of benefits in this matter is vacated, and the case is remanded for further evidentiary development as deemed necessary by the administrative law judge.

Merits of Entitlement:

Notwithstanding our decision to remand this case for further consideration of the evidentiary issues, in the interest of judicial economy, we address, where possible, employer's arguments on the merits of entitlement, although we recognize that a complete evidentiary record may not be currently before us.

Because the instant 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). *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 is sufficient to establish 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 miner's death. 20 C.F.R. §718.205(c)(5); *see Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Employer argues on appeal that the administrative law judge erred in finding that the miner suffered from pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of three x-rays taken on November 5, 2000, December 3, 2000 and January 4, 2001, in light of the readers' radiological

qualifications.[4] Decision and Order at 4-5, 9-10; Director's Exhibit 14; Claimant's Exhibits 1-3. The administrative law judge noted that Dr. Wheeler, who is a Board-certified radiologist and B reader, read the November 5, 2000 x-ray as negative for pneumoconiosis, but that Dr. Wheeler's reading was countered by the positive readings of that x-ray by Drs. Ahmed and Cappiello, both of whom are Board-certified radiologists and B readers. Decision and Order at 10; Director's Exhibit 14; Claimant's Exhibits 1-2. The December 3, 2000 x-ray was read as positive by Dr. Ahmed, while Dr. Wheeler read the January 4, 2001 x-ray as negative for pneumoconiosis. Decision and Order at 10; Director's Exhibit 14; Claimant's Exhibit 3.

Weighing the conflicting x-ray evidence in light of the qualifications of the readers, the administrative law judge found that there were "two positive x-rays and one negative x-ray." Decision and Order at 10. He thus found that a preponderance of the x-ray evidence was positive for pneumoconiosis pursuant to Section 718.202(a)(1). *Id*. Employer asserts, however, that the administrative law judge's finding at Section 718.202(a)(1) ignores numerous "negative" x-ray reports contained in the miner's treatment records. Employer's Brief at 13. We disagree. Contrary to employer's contention, the administrative law judge properly found that while "[n]one of the readings [contained in the miner's treatment records] made a finding of pneumoconiosis," he gave the readings little probative weight as those readings "fail[ed] to provide the qualifications of the interpreters and the quality of the chest x-rays." Decision and Order at 9. Because the administrative law judge properly accorded controlling weight to the x-ray readings that he determined were read in compliance with the quality standards, *see* 20 C.F.R. §718.202, and which were interpreted for the presence or absence of pneumoconiosis by physicians whose qualifications were discernable from the record, we affirm his finding that a preponderance of the x-ray evidence was positive for pneumoconiosis. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004).

Because we affirm the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section

[4] The administrative law judge noted that two x-ray readings identified by employer as evidentiary submissions, one by Dr. Scott of the November 5, 2000 x-ray and one by Dr. Wheeler of the December 3, 2000 x-ray, were not in the record and could not be considered. Decision and Order at 4 n.3; 5 n.4. Employer does not challenge this aspect of the administrative law judge's decision.

718.202(a)(1), employer's remaining arguments with respect to Sections 718.202(a)(2), and (4) are moot.[5] Notwithstanding, to the extent the administrative law judge's consideration of the autopsy evidence may have affected his weighing of the evidence relevant to the issue of whether the miner's death was hastened by pneumoconiosis, we will address employer's challenge of the administrative law judge's finding at Section 718.202(a)(2). In this regard, employer contends that the administrative law judge erred in crediting the opinion of Dr. LeVaughn, the autopsy prosector, that the miner suffered from pneumoconiosis. Employer asserts that because Dr. LeVaughn's original autopsy report did not include a specific diagnosis of pneumoconiosis, and noted only findings of black pigment in the miner's lungs, the administrative law judge erred in crediting Dr. LeVaughn's supplemental report, diagnosing the presence of pneumoconiosis, without first addressing the veracity of Dr. LeVaughn's conclusions. Employer suggests that Dr. LeVaughn prepared his supplemental opinion in anticipation of litigation, and that his original autopsy report is the best evidence that the miner did not suffer from the disease.

Contrary to employer's contention, the administrative law judge acknowledged that Dr. LeVaughn's original autopsy report did not specifically diagnosis pneumoconiosis; however, because Dr. LeVaughn performed a microscopic review of the miner's autopsy slides at the time he prepared his supplemental opinion, the administrative law judge had discretion to rely on Dr. LeVaughn's diagnosis of pneumoconiosis, as being reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also had discretion to assign Dr. LeVaughn's opinion, as to the existence of pneumoconiosis, controlling weight since Dr. LeVaughn was the only physician of record to review the miner's autopsy slides. Decision and Order at 12; *see Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). Thus, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Consequently, we affirm the administrative law judge's conclusion that the miner suffered from pneumoconiosis at the time of his death.

[5] Claimant may establish the existence of pneumoconiosis by a preponderance of the evidence at any one of the individual subsections at 20 C.F.R. §718.202(a)(1)-(4). *See Jones v. Badger Coal Co.*, 21 BLR 1-103 (1998) (*en banc*). Although employer contends that the administrative law judge erred in weighing Dr. LeVaughn's autopsy opinion at both sections 718.202(a)(2) and (a)(4), in light of our affirmance of the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis, we consider any error committed by the administrative law judge with respect to subsection 718.202(a)(4) to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We are unable to address employer's assertion that the administrative law judge erred in finding that the miner's death was hastened by pneumoconiosis, as the evidentiary record may not be complete. On remand, we direct the administrative law judge to consider whether employer is entitled to further evidentiary development pursuant to Section 725.456(b). If so, once the evidentiary record is complete, the administrative law judge must weigh the evidence of record as to whether pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). The administrative law judge must render appropriate findings of fact and conclusions of law under 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) and 30 U.S.C. §932(a), on all issues of material fact presented in the record. In so doing, he must explain why he finds an opinion by a particular medial expert to be reasoned and documented, and set forth the bases for his credibility determinations. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

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

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