

BRB No. 08-0128 BLA

I.C.)
(Widow of R.C.))
)
Claimant-Respondent)
)
v.)
)
KENTUCKY MAY COAL COMPANY) DATE ISSUED: 10/06/2008
)
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 Award of Benefits of Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, 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:

Employer appeals the Decision and Order Award of Benefits (06-BLA-5959) of Administrative Law Judge Daniel F. Solomon on a survivor's claim¹ 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). Adjudicating this survivor's claim pursuant to Part 718, the administrative law judge found that the medical opinion evidence, as well as the autopsy reports, established that the miner suffered from clinical coal workers' pneumoconiosis under 20 C.F.R. 718.202(a). Next, the administrative law judge found that the miner suffered from complicated pneumoconiosis based upon the autopsy and medical opinion evidence of record, and consequently, concluded that claimant established invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. After finding the presence of complicated pneumoconiosis, the administrative law judge found that because the miner had worked in qualifying coal mine employment for "at least" twenty years,² claimant was entitled to invocation of the rebuttable presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. Lastly, the administrative law judge found that pneumoconiosis hastened the miner's death under 20 C.F.R. §718.205(c)(5). Accordingly, the administrative law judge awarded benefits commencing as of December 2001, the month in which the miner died.

On appeal, employer argues that the administrative law judge erred in permitting claimant to submit the medical report of Dr. Perper into the case record because Dr. Perper's report exceeds the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(2)(i). Employer also argues that the administrative law judge erred in finding that claimant established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(5). Claimant has not filed a response brief in this case. The Director, Office Workers' Compensation Programs (the Director) has filed a limited response letter, disagreeing with employer's contention that the administrative law judge erred in admitting Dr. Perper's report into the evidence of record. The Director declines to take a position with regard to the remaining issues employer raises on appeal. Employer responds to the Director's letter, urging the Board to reject the Director's argument that the administrative law judge's admission of Dr. Perper's report was proper.³

¹ Claimant is the surviving spouse of the miner, who died on December 3, 2001. Director's Exhibits 8, 9. Claimant filed a survivor's claim for benefits on March 14, 2002. Director's Exhibit 2.

² The administrative law judge noted employer's stipulation that the miner worked "at least" twenty years in qualifying coal mine employment. Decision and Order at 4, 17.

³ We affirm the administrative law judge's finding that the miner worked "at least" twenty years in qualifying coal mine employment, that claimant established

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in admitting the report of Dr. Perper into the evidence of record because this report exceeds the evidentiary limitations pursuant to Section 725.414(a)(2)(i). Employer asserts that Dr. Perper's report should be construed as an autopsy report, rather than a medical report, as Dr. Perper conducted his own review of the autopsy tissue slides as well as the report of Dr. Dennis, the autopsy prosector. Employer contends that because the evidentiary limitations set forth in Section 725.414(a)(2)(i) permit claimant to submit only one affirmative-case autopsy report, and claimant has submitted the autopsy report of Dr. Dennis, claimant's submission of Dr. Perper's report constitutes a second autopsy report and, as such, exceeds the evidentiary limitations. The Director responds, arguing that employer not only stipulated to claimant's designation of Dr. Perper's report as a medical report in the document entitled Joint Stipulations as to Medical Evidence, dated August 13, 2007, but employer also failed to object to claimant's submission during the formal hearing. Nevertheless, the Director admits that Dr. Perper's report could be construed as both an autopsy report and a medical report since Dr. Perper, during his deposition, reviewed and responded to the autopsy report of Dr. Caffrey, which was employer's autopsy rebuttal evidence. *See* 20 C.F.R. §725.414(a)(2)(ii).

A review of the record reveals that, in her Black Lung Benefits Act evidence summary form dated August 28, 2001, claimant designated the January 3, 2002 report of Dr. Dennis as her autopsy report evidence and designated the May 16, 2004 report of Dr. Perper as her medical report evidence.⁵ At the formal hearing conducted on March 14,

pneumoconiosis at 20 C.F.R. §718.202(a), and that complicated pneumoconiosis, if established, arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 13-14, 16-17.

⁴ The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁵ In his report dated May 16, 2004, Dr. Perper conducted a review of the pathological evidence, including the autopsy tissue slides and prosector's report, the

2007, the administrative law judge noted that, at that time, the record file contained forty-five Director's Exhibits and the administrative law judge inquired whether the parties had objections to their admission. Hearing Transcript at 6. The administrative law judge then stated that, pursuant to a discussion off the record between the parties, the record would remain open for further development of the evidence and that at a subsequent telephone conference, the parties would identify the evidence they wanted admitted into the record. Hearing Transcript at 5-6. Hence, the administrative law judge admitted into the record for purposes of identification only, all of the exhibits contained in the file, specifically Director's Exhibits 1-45.⁶ Hearing Transcript at 6-7. In a subsequent telephone conference on July 12, 2007, the administrative law judge granted the parties' request to leave the record open for further development and moved the forty-five Director's Exhibits into evidence. Telephone Conference Transcript at 5. Because additional time to develop the evidence further was needed, the administrative law judge permitted the record to remain open for thirty days and instructed the parties that, at the expiration of the thirty-day period, they were to submit a joint stipulation as to the proffered evidence, two sets of evidence summaries, and briefs. Telephone Conference Transcript at 6.⁷ Although the administrative law judge summarized in his decision the various items of medical evidence designated by the parties, the administrative law judge did not determine whether the parties' submissions complied with the evidentiary limitations pursuant to Section 725.414(a)(2) and (a)(3). The administrative law judge issued his Decision and Order without ruling on the admissibility of the evidence submitted.

original death certificate, the amended death certificate, and a plethora of hospital and treatment records. Director's Exhibit 42 at 324-371.

⁶ A review of the record reveals that Dr. Perper's report was designated as Director's Exhibit 42, specifically Director's Exhibit 42 at 324-371.

⁷ A review of the record reveals that it contains a document entitled Joint Stipulations as to Medical Evidence, dated August 13, 2007, identifying evidence previously offered by both parties; however, it was not signed by both claimant's counsel and employer's counsel. By cover letter dated August 13, 2007, employer sent the Joint Stipulations as to Medical Evidence to claimant's attorney for signing and filing with the administrative law judge. However, it appears that claimant's counsel neither signed nor filed the document and, instead, employer's counsel signed and filed the document with the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director) contends that employer did not contest the admission of Dr. Perper's report as it was listed and summarized in both the Joint Stipulations as to Medical Evidence and in employer's post-hearing brief. In addition, employer filed its Black Lung Benefits Summary Form dated August 13, 2007 and claimant submitted her Black Lung Benefits Summary Form dated August 28, 2007.

In a published decision issued subsequent to the issuance of the administrative law judge's decision in this case, the Board explained that fundamental fairness requires that prior to issuing his decision on the merits, the administrative law judge must rule on the admissibility of the evidence designated by the parties and provide them with an opportunity to respond to his rulings by submitting legal arguments and, where appropriate, additional evidence:

The adoption of the evidentiary limitations set forth in Section 725.414 represented a shift from a system that favored the admission of all relevant evidence to a system that balanced this preference with a concern for fairness and the need for administrative efficiency. ... Under the revised regulations, the role of the administrative law judge as gatekeeper of the record has gained even greater importance because the administrative law judge must now regularly determine, in the exercise of his or her discretion, whether the evidence proffered by the parties complies with the limitations or, if not, is admissible for good cause. *See* 20 C.F.R. §§725.414(a)(2), (3), 725.456(b)(1). The administrative law judge's rulings, in turn, establish the contents of the record upon which the Decision and Order will be based. Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations, therefore, if the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

L.P. v. Amherst Coal Co., BLR , BRB No. 07-0183 BLA, *slip op.* at 8 (Jul. 23, 2008) (*en banc recon*). Accordingly, we must vacate the administrative law judge's Decision and Order and direct that on remand, prior to issuing his decision on the merits, the administrative law judge must rule on the admissibility of the evidence submitted, advise the parties of his rulings, and provide them with an opportunity to respond appropriately.

We will now address employer's specific arguments. Employer argues that the administrative law judge erred in admitting Dr. Perper's report into the record, contending first, that Dr. Perper reviewed inadmissible evidence, and therefore, his report contravenes Board precedent and second, that it was, in fact, an autopsy report submitted in excess of the evidentiary limitations pursuant to Section 725.414(a)(2)(i). Specifically, employer avers that Dr. Perper considered three sets of medical records that were not

contained in the evidentiary record, namely those from Jenkins Community Hospital, Whitesburg Medical Clinic, and Southern Medical Partners. Employer contends, that consideration of this evidence contravenes the Board's holdings in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*) and *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*), that a physician's medical opinion must be based on evidence that is "properly admitted" into the record. In response, the Director contends that employer's argument lacks merit because the Whitesburg Medical Clinic records, Director's Exhibit 14, and the Southern Medical Partners records, Director's Exhibit 16, were admitted into the evidentiary record without objection at the March 14, 2007 formal hearing. Hearing Transcript at 6-7. The Director acknowledges, however, that the Jenkins Community Hospital records documenting a hospitalization from May 22-27, 1988 are not contained in the record, but the Director states that according to Dr. Perper, these records did not contain a diagnosis of pneumoconiosis and the miner continued to work after this hospitalization. Accordingly, the Director asserts that because Dr. Perper did not rely on these records in rendering his diagnosis of pneumoconiosis or in concluding that pneumoconiosis contributed to the miner's death, any error on the part of the administrative law judge in failing to recognize that Dr. Perper reviewed evidence not contained in the record is harmless. In reply, employer argues that permitting an administrative law judge to fully credit an opinion that is based on any inadmissible evidence constitutes an evasion of the evidentiary limitations by the proffering party, and, as such, cannot be deemed harmless error.

The record reflects that, in a report dated May 16, 2004, Dr. Perper reviewed the miner's two death certificates, autopsy tissue slides, autopsy prosector's report, and medical records from the following hospitals: Whitesburg Medical Clinic, Southern Medical Partners, Jenkins Community Hospital, Mountain Comprehensive Health Corporation, Appalachian Regional Healthcare, and Methodist Hospital of Kentucky. A review of the file reveals that the Whitesburg Medical Clinic records appear at Director's Exhibit 14 and the Southern Medical Partners records are at Director's Exhibit 16, while the records from the miner's hospitalization at Jenkins Community Hospital from May 22 to May 27, 1988 are not contained in the file. In light of our decision to remand this case for the administrative law judge to render evidentiary rulings, the administrative law judge should also consider the arguments of the parties and Dr. Perper's report in accordance with *Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-18 (2007) (*en banc recon.*) (McGranery and Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting).⁸

⁸ In *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting), the Board held that it is within the discretion of the administrative law judge to determine the appropriate treatment of admissible evidence which contains references to evidence excluded because it exceeds the evidentiary limitations set forth in Section 725.414. In addition, the Board emphasized that exclusion

Second, employer contends that Dr. Perper's report was, in fact, an autopsy report and because claimant had designated Dr. Dennis's report as her autopsy report admissible pursuant to Section 725.414(a)(2)(i), Dr. Perper's report exceeded the evidentiary limitations; hence, the administrative law judge was precluded from considering it. The Director responds, stating that Dr. Perper's report was both a medical report and an autopsy report and the administrative law judge did not err in considering that part which constituted an autopsy report because it was admissible pursuant to Section 725.414(a)(2)(ii) as rebuttal evidence to Dr. Caffrey's autopsy report, submitted by employer. Employer counters that Dr. Perper's report cannot be considered rebuttal evidence for two reasons: it was not designated as rebuttal autopsy evidence and it does not specifically address Dr. Caffrey's report. In this regard, we note that the Board has held that rebuttal evidence is evidence which rebuts the opponent's case; it need not address the opponent's specific evidence. *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, BLR , BRB No. 07-0812 BLA (July 30, 2008). In any event, on remand, the administrative law judge should consider all of employer's objections to the admission of Dr. Perper's report and the Director's responses, prior to ruling on its admission.

We note that employer also raises arguments regarding the administrative law judge's decision on the merits which we will not address in this decision because they are premised on the record as currently constituted. On remand, the administrative law judge will decide the merits of the case on the basis of the record before him, which could well be different from the current record.

In sum, we vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to determine whether the evidence submitted is in accordance with the evidentiary limitations set forth in Section 725.414. We, therefore, vacate the administrative law judge's findings of complicated pneumoconiosis and that the medical opinion evidence established that the miner's pneumoconiosis hastened his death. On remand, the administrative law judge must determine, in accordance with the evidentiary limitations, the admissibility of the evidence designated by the parties and provide them with an opportunity to respond to his rulings prior to issuing a decision on the merits. In his decision on the merits, the administrative law judge should reevaluate the medical evidence to determine whether it is sufficient to establish the presence of complicated pneumoconiosis, and thereby, whether claimant is entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304. In the event that the administrative law

is not a favored option as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Harris*, 23 BLR at 1-108-109; *see Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-18 (2007) (*en banc recon.*) (McGranery and Hall, JJ., concurring and dissenting).

judge finds the evidence insufficient to establish the presence of complicated pneumoconiosis, he must determine whether claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). If, on remand, the administrative law judge awards benefits, the award of benefits should commence as of December 2001, as he previously determined.

Accordingly, the Decision and Order Award of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge