BRB No. 08-0139 BLA

V.F. (Widow of A.F.)	)	
Claimant-Respondent	)	
v.	)	
KENTLAND ELKHORN COAL CORPORATION	)	DATE ISSUED: 10/28/2008
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 – Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits (05-BLA-5790) of Administrative Law Judge Joseph E. Kane on a 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). This case involves a survivor's claim filed on January 30, 2002.[1]

[1] The miner filed six claims during his lifetime, all of which were denied. Director's Exhibits 1-5. The miner's sixth and final claim, filed on January 20, 2001,

After crediting the miner with forty-one years of coal mine employment,[2] the administrative law judge found that the autopsy and medical opinion evidence established the existence of both simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b), (c). The administrative law judge further found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). Thus, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3), through invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in excluding the portions of Dr. Caffrey's February 2, 2004 report pertaining to the autopsy report of Dr. Dennis and the death certificate, and erred in excluding Dr. Caffrey's October 7, 2004 supplemental report in its entirety. Employer also argues that the administrative law judge erred in admitting the May 21, 2007 deposition testimony of Dr. Perper. Employer argues, therefore, that the administrative law judge erred in finding that the autopsy evidence established invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer further challenges the administrative law judge's finding, on the merits, that the autopsy evidence established the existence of complicated pneumoconiosis, thus entitling claimant to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.205(c), 718.304. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's allegations of error regarding the administrative law judge's admission of Dr. Perper's deposition testimony, and his exclusion of portions of Dr.

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was denied by the district director on February 4, 2002 for failure to establish any element of entitlement. Director's Exhibit 5. There is no indication that the miner took any further action in regard to his 2001 claim.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Claimant is the widow of the deceased miner, who died on December 22, 2001. Director's Exhibit 19.

Caffrey's February 2, 2004 opinion.[4] Employer has filed reply briefs reiterating its contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

We first address employer's arguments regarding the admissibility of the evidence. At the October 24, 2006 hearing, both parties submitted autopsy and medical opinion evidence. Claimant submitted the December 22, 2001 report of Dr. Dennis, the autopsy prosector, as her affirmative autopsy report, and submitted Dr. Perper's July 14, 2004 report as one of her affirmative medical reports.[5] Employer submitted Dr. Caffrey's February 2, 2004 autopsy tissue slide review, April 12, 2004 deposition testimony, and October 7, 2004 supplemental opinion as its affirmative autopsy evidence. Employer submitted reports from Drs. Dahhan and Fino as its affirmative medical opinion evidence. As discussed *infra*, following the hearing, the administrative law judge excluded Dr. Perper's July 14, 2004 report from evidence, finding it to be in violation of the evidentiary limitations. Claimant then deposed Dr. Perper, and submitted Dr. Perper's testimony as one of her affirmative medical opinions, pursuant to 20 C.F.R. §725.414(c).

Employer asserts that the administrative law judge erred in excluding the parts of Dr. Caffrey's affirmative autopsy report and supplemental report that referred to Dr. Dennis' autopsy opinion. In the September 27, 2007 Decision and Order, the

[4] At the time the Director, Office of Workers' Compensation Programs (the Director) submitted its response brief, employer had not yet specifically challenged the exclusion of Dr. Caffrey's October 7, 2004 supplemental opinion; employer raised that issue in its reply brief. Thus, the Director's response brief does not address this aspect of the administrative law judge's decision. Director's Brief at 2 n.1.

[5] The applicable provisions of 20 C.F.R. §725.414 permit claimant and employer to submit, in support of their affirmative cases, "no more than . . . one report of an autopsy . . . and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (3)(i). The regulation further provides that any x-rays, pulmonary function studies, blood gas studies, autopsy or biopsy reports, or physicians' opinions "that appear in a medical report must each be admissible under" either the 20 C.F.R. §725.414(a) limits, or under 20 C.F.R. §725.414(a)(4) as a hospitalization or treatment record. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i).

administrative law judge excluded, as in excess of the limitations, the portions of Dr. Caffrey's February 2, 2004 autopsy report that pertained to Dr. Dennis' autopsy report, and excluded Dr. Caffrey's October 7, 2004 supplemental report in its entirety.[6] Decision and Order at 5. Employer contends that in excluding this evidence, the administrative law judge failed to recognize that employer is entitled to rebut claimant's affirmative autopsy evidence.

Employer's contention has merit. Employer is entitled to rebut the affirmative autopsy report of Dr. Dennis.[7] 20 C.F.R. §725.414(a)(3)(ii). In excluding the references to Dr. Dennis' opinion contained in Dr. Caffrey's February 2, 2004 report, the administrative law judge did not consider that the report could constitute both an affirmative autopsy opinion and a rebuttal autopsy opinion. Further, the administrative law judge did not consider that, in addition to responding to a previously excluded report from Dr. Perper, portions of Dr. Caffrey's October 7, 2004 supplemental report also referred to Dr. Dennis' autopsy findings, and thus could constitute rebuttal autopsy opinion. Therefore, to the extent that Dr. Caffrey reviewed and commented on Dr. Dennis' autopsy opinion, the administrative law judge must consider, on remand, whether portions of Dr. Caffrey's February 2, 2004 and October 7, 2004 reports are admissible as rebuttal autopsy evidence.

We reject, however, employer's additional contention that the administrative law judge erred in excluding those portions of Dr. Caffrey's October 7, 2004 supplemental report that "rebutted the findings of claimant's autopsy report[] from . . . Dr. Perper." Employer's Reply to claimant at 5; Employer's Reply to the Director at 8. As noted, Dr. Dennis' report was admitted as claimant's affirmative autopsy. For the reasons set forth below, Dr. Perper's opinion does not constitute an affirmative autopsy report, and thus employer is not entitled to rebut it as such.

Employer contends that the administrative law judge erred in admitting Dr. Perper's May 21, 2007 deposition as one of claimant's affirmative medical opinions. As noted above, at the hearing employer objected to the admission of Dr. Perper's July 14,

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[6] The administrative law judge excluded Dr. Caffrey's October 7, 2004 supplemental report because he found that "the entire report" simply reflected Dr. Caffrey's disagreement with Dr. Perper's July 14, 2004 written report, which, as discussed *infra*, had also been excluded. Decision and Order at 5.

[7] Both claimant and employer are entitled to submit, "in rebuttal of the case presented by" the opposing party, "no more than one physician's interpretation of each . . . autopsy . . . submitted by" the opposing party in its affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (3)(ii).

2004 written report, asserting that it violated the evidentiary limitations in two respects. Employer contended that Dr. Perper improperly reviewed medical evidence submitted with the living miner's claim that had not been admitted into evidence in the survivor's claim, and thus had based his opinion on inadmissible evidence. Employer also contended that, because Dr. Perper had personally reviewed the autopsy tissue slides in forming his opinion, Dr. Perper's report constituted a second autopsy report for claimant, in excess of the limitation on affirmative autopsy evidence.

Subsequent to the hearing, the administrative law judge issued an Order dated February 22, 2007, finding that Dr. Perper's July 14, 2004 report was inadmissible for the reasons set forth by employer. Specifically, the administrative law judge found that, in addition to being based on inadmissible evidence contained in the miner's claim, Dr. Perper's report contained an autopsy tissue slide review, and therefore had to be considered either an autopsy report or an autopsy rebuttal report. The administrative law judge stated that if claimant wished to rely on Dr. Perper's opinion as a medical report, claimant needed to resubmit a report that did not include a review of the autopsy slides or any other evidence in excess of the evidentiary limitations. Administrative Law Judge's February 22, 2007 Order at 2.

In response to the administrative law judge's Order, claimant deposed Dr. Perper.[8] Claimant specifically asked Dr. Perper to offer his opinion based on the miner's death certificate, Dr. Dennis' autopsy report, a May 16, 1984 x-ray reading by Dr. Penman, and Dr. Perper's own review of the autopsy tissue slides. Claimant submitted Dr. Perper's testimony into the record, in lieu of Dr. Perper's excluded written report.

Employer asserts that, while Dr. Perper's deposition testimony cured his prior reliance on the inadmissible miner's claim evidence, because Dr. Perper continued to rely on his own interpretation of the autopsy tissue slides, his opinion still constitutes both a medical opinion and an inadmissible second autopsy opinion, pursuant to the limitations on affirmative autopsy evidence at §725.414(a)(3)(i). Employer further asserts that because Dr. Perper's "medical opinion" is inseparable from his inadmissible, second "autopsy opinion," Dr. Perper's deposition testimony must be excluded from the record in its entirety. The Director urges the Board to reject this argument, on the ground that each party is entitled to submit one affirmative-case autopsy report, and one rebuttal autopsy report. Thus, the Director contends, Dr. Dennis' report is admissible as

[8] By letter dated April 16, 2007, employer objected to the taking of Dr. Perper's deposition, asserting, without elaboration, that deposing the doctor would not cure the defects in his written report. By Order dated June 4, 2007, the administrative law judge found that good cause had been shown for deposing Dr. Perper, and allowed the deposition to go forward.

claimant's one affirmative autopsy report, and Dr. Perper's testimony could be admissible as claimant's one rebuttal autopsy report.

We agree with employer that the administrative law judge erred in considering Dr. Perper's deposition testimony solely as one of claimant's affirmative medical opinion reports. In excluding Dr. Perper's initial written report, the administrative law judge properly applied the Board's holdings in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2006) (*en banc*), that medical evidence submitted in a living miner's claim is not automatically admissible in the survivor's claim, and that a report by a pathologist who has reviewed the autopsy tissue slides can constitute autopsy evidence pursuant to 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). *See Keener*, 23 BLR at 1-237-38, 1-241-42. Thus, the administrative law judge instructed that "if claimant wishes to rely upon Dr. Perper's opinion as an ordinary medical report, she must resubmit a report which does not include a review of the autopsy slides or any other evidence in excess of the evidentiary limitations." Administrative Law Judge's February 22, 2007 Order at 2.

However, as employer asserts, in evaluating the medical opinion evidence in his Decision and Order, the administrative law judge did not recognize that Dr. Perper's deposition testimony did not cure both of the defects in his excluded written report because Dr. Perper continued to rely on his own review of the autopsy tissue slides. Dr. Perper's Deposition at 6-7. The Board has held that where a physician reviews not only the autopsy report and slides, but also reviews additional medical records, and then bases his or her findings and conclusions on both the pathological and clinical evidence, the report constitutes both an autopsy report and a medical report for the purposes of the evidentiary limitations. *Keener*, 23 BLR at 1-239. Thus, because Dr. Perper considered both the clinical evidence and the tissue slides, his testimony constitutes both a medical opinion and an autopsy opinion.

We disagree, however, with employer's assertion that, because claimant designated Dr. Dennis' opinion as her one affirmative autopsy opinion, Dr. Perper's slide review necessarily constitutes an inadmissible second affirmative autopsy report. Employer's Brief at 12-13. The regulations provide that a party is permitted to submit both an affirmative case autopsy report and, where the opposing party has also submitted affirmative autopsy evidence, a rebuttal autopsy report. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii); *Keener*, 23 BLR at 1-240. Thus, as the Director contends, Dr. Dennis' report is admissible as claimant's one affirmative autopsy report, and Dr. Perper's slide review could be admissible as claimant's rebuttal autopsy report to Dr. Caffrey's affirmative autopsy report, submitted by employer. Director's Brief at 2. In addition, contrary to employer's contention, in *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, BLR , BRB No. 07-0812 BLA/A, slip op. at 4 (July 30, 2008)(published), the Board agreed with the Director's position that "rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it

is responsive, but rather, need only refute 'the case' presented by the opposing party." Thus, the fact that Dr. Perper did not comment on Dr. Caffrey's opinion does not preclude Dr. Perper's opinion from being considered as a rebuttal autopsy opinion. Employer's Reply to Director at 5-6.

Nor does the fact that there may be "no reasonable way" to separate Dr. Perper's testimony into a "medical opinion," based on the clinical evidence, and a "rebuttal autopsy opinion," based on his slide review, necessarily render Dr. Perper's opinion inadmissible in either form. Employer's Brief at 13. The regulations require that any x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report that appears in a medical report must be admissible under either the 20 C.F.R. §725.414(a) limits, or under 20 C.F.R. §725.414(a)(4) as a hospitalization or treatment record. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). If Dr. Perper's "medical opinion" and his "rebuttal autopsy opinion" both fall within the limitations on evidence, *i.e.*, if claimant has "slots" for both types of evidence, as it appears that claimant does, it is not necessary that the administrative law judge attempt to artificially separate one portion of Dr. Perper's opinion from the other. *See* 20 C.F.R. §725.414(a)(2)(i).

In this case, the administrative law judge did not consider that Dr. Perper's deposition testimony could constitute both an affirmative medical report and a rebuttal autopsy report for the purposes of the evidentiary limitations. As discussed above, and as the Director contends, the administrative law judge's error may be harmless under the facts of this case. However, in light of the fact that we must remand this case to the administrative law judge for further evaluation of the admissibility of Dr. Caffrey's opinion, on remand, the administrative law judge should also reconsider the admissibility of Dr. Perper's deposition testimony. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Consequently, we vacate the administrative law judge's evidentiary findings under 20 C.F.R. §725.414, and his finding of entitlement pursuant to 20 C.F.R. §§718.304, 718.205(c), and remand the case so that the administrative law judge can afford claimant and employer the opportunity to redesignate their evidence in accordance with *Keener*.[9] *See Keener*, 23 BLR at 1-236-40. The administrative law judge should then reconsider whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

[9] On remand, claimant and employer should each designate which reports constitute the party's affirmative-case medical reports and which report constitutes the party's affirmative-case autopsy report. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Depending upon these designations, claimant and employer, if appropriate, should also designate which report constitutes the party's rebuttal autopsy report. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

Finally, in order to avoid any repetition of error on remand, we will address employer's contention that, in considering the merits of entitlement, the administrative law judge erred in according greater weight to the opinion of Dr. Dennis, than to the conflicting opinion of Dr. Caffrey, because Dr. Dennis was the autopsy prosector.

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

In evaluating the autopsy evidence, the administrative law judge found, correctly, that Dr. Dennis' conclusion that the miner suffered from "black lung disease with progressive fibrosis" with "Macules greater than 1.5 [centimeters] in diameter," constitutes a diagnosis of complicated pneumoconiosis. Decision and Order at 9; Director's Exhibit 18. By contrast, Dr. Caffrey reviewed the eleven autopsy tissue slides, labeled A-K, and diagnosed simple coal workers' pneumoconiosis, stating that "The microscopic findings which qualify for a diagnosis of progressive massive fibrosis are definitely not present on the slides I have reviewed." Director's Exhibit 39. In both his report and his deposition testimony, Dr. Caffrey indicted that the macules he observed were smaller than those described by Dr. Dennis. Director's Exhibit 39; Dr. Caffrey's Deposition at 14. In addition, Dr. Caffrey stated that the largest macule he saw, a lesion on slide I measuring 9 millimeters, was located in the lymph tissue, not the lung tissue, and thus did not constitute a lesion of complicated coal workers pneumoconiosis. Director's Exhibit 39 (Dr. Caffrey's Deposition at 14-15).

The administrative law judge found that both Dr. Dennis and Dr. Caffrey had offered well-reasoned and well-documented opinions, but he accorded greater weight to the opinion of Dr. Dennis, stating:

> However, Dr. Caffrey specifically states that the slides he reviewed did not contain lesions in excess of one centimeter in the lungs. Dr. Dennis found the opposite when performing the autopsy. The fact that the lesions were not present on the slides does not mean that they were not present. The slides may not have contained that cross section of the lungs, thereby affecting Dr. Caffrey's opinion. Therefore, I give more weight to Dr. Dennis's opinion on the issue of complicated pneumoconiosis.

Decision and Order at 9.

As employer contends, the administrative law judge's conclusion, that the slides Dr. Caffrey reviewed "may not have contained" the cross section of the lungs in which Dr. Dennis observed the large macules, amounts to speculation. In addition, a review of the record reveals that the administrative law judge has mischaracterized the evidence. The "microscopic description" portion of Dr. Dennis' autopsy report specifically describes the character and size of the lesions identified by him on each of the slides, A-K, and it is these same slides that Dr. Caffrey reviewed. Moreover, is these descriptions with which Dr. Caffrey disagreed. Thus, the administrative law judge's conclusion that the slides seen by Dr. Caffrey may not have contained the lesions of complicated pneumoconiosis identified by Dr. Dennis does not comport with the Administrative Procedure Act. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the case is remanded to the administrative law judge 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