

BRB No. 14-0157 BLA

SHERRY LYNN ADAMS )  
(Widow of DENNY RAY ADAMS) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 LONE MOUNTAIN PROCESSING, ) DATE ISSUED: 09/24/2014  
 INCORPORATED )  
 )  
 and )  
 )  
 ARCH COAL, INCORPORATED )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor's Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge,  
McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Survivor's Benefits (2010-BLA-5496) of Administrative Law Judge Stephen M. Reilly rendered on

a survivor's claim filed on September 18, 2009,<sup>1</sup> pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time.

In his initial decision, after crediting the miner with twenty-three years of underground coal mine employment, the administrative law judge found that claimant established the existence of complicated pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.304 and 718.203(b).<sup>2</sup> Consequently, the administrative law judge found that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(3) of the Act,<sup>3</sup> 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to consider whether the evidence regarding the surrender of Dr. Dennis's medical license should be admitted into the record. *Adams v. Lone Mountain Processing, Inc.*, BRB No. 13-0045 BLA (Sept. 25, 2013)(unpub.). The Board then instructed the administrative law judge that, if he admitted the evidence regarding the surrender, he must then determine whether it alters the weight to which Dr. Dennis's autopsy report is entitled. *Id.* The Board also instructed the administrative law judge that, if he finds that complicated pneumoconiosis is not established, he must then determine whether claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to

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<sup>1</sup> Claimant is the widow of the miner, who died on October 16, 2008. Director's Exhibit 12. There is no evidence in the record that the miner filed a claim.

<sup>2</sup> The administrative law judge also found that the evidence established that the miner had clinical, but not legal, simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203.

<sup>3</sup> Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1990).

amended Section 411(c)(4),<sup>4</sup> or whether claimant has established entitlement to benefits under 20 C.F.R. Part 718.<sup>5</sup> *Id.*

On remand, the administrative law judge declined to admit the evidence, proffered by employer, relevant to the surrender of Dr. Dennis's medical license. The administrative law judge found that, because the documentation regarding the surrender of Dr. Dennis's medical license was available prior to the issuance of his 2013 Decision and Order, it was not new evidence and employer had had the opportunity to submit it earlier but declined to do so.<sup>6</sup> Alternatively, the administrative law judge found that, even if the evidence of the surrender of Dr. Dennis's medical license was admitted, it would not have impacted his weighing of the medical evidence because Dr. Dennis was a duly licensed physician at the time he authored the autopsy report in question. *Id.* Addressing the merits of the case, the administrative law judge re-instated his 2013 Decision and Order awarding benefits, which was based on his finding that claimant established the existence of complicated pneumoconiosis arising out of the miner's coal mine employment pursuant to Section 718.304 and Section 718.203(b), and, therefore, that claimant was entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge again awarded benefits.

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<sup>4</sup> Amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground coal mine employment or employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4)(2012).

<sup>5</sup> In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

<sup>6</sup> The administrative law judge referred to the evidence of the surrender of Dr. Dennis's medical license as being dated August 17, 2012. This date corresponds to the date of the filing of the original complaint against Dr. Dennis with the Kentucky Board of Medical Licensure and that board's filing of an Emergency Order of Suspension against Dr. Dennis. However, the evidence employer seeks to have admitted into the record is the Agreed Order of Surrender between Dr. Dennis and the Kentucky Board of Medical Licensure, dated January 17, 2013. Therein, Dr. Dennis agreed to surrender his medical license for a period of not less than two years.

On appeal, employer contends that the administrative law judge erred in excluding the Agreed Order of Surrender (of Dr. Dennis's medical license), dated January 17, 2013, as impeachment evidence of Dr. Dennis's autopsy report. Employer also contends that the administrative law judge erred in according greater weight to Dr. Dennis's opinion based solely on his status as an autopsy prosector. Additionally, employer contends that the administrative law judge erred in according little weight to Dr. Oesterling's autopsy review and to Dr. Jarboe's report. In response to employer's appeal, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to employer's appeal. In a Reply Brief, employer reiterates its arguments regarding its disagreement with the administrative law judge's decision not to admit the Agreed Order of Surrender (of Dr. Dennis's medical license), as well as his weighing of the remainder of the medical 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>7</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 employer's challenge to the administrative law judge's decision to exclude the evidence regarding the surrender of Dr. Dennis's medical license. The administrative law judge found that the emergency license suspension and complaint were issued on August 17, 2012, over a month before he issued his decision on October 1, 2012. Decision and Order at 3. The administrative law judge noted that employer should have sought leave to file evidence regarding the surrender of Drs. Dennis's medical license prior to the issuance of his October 2012 Decision and Order or, should have filed a motion for reconsideration within 30 days of the October 2012 Decision and Order, seeking admission and consideration of new evidence regarding the surrender of Dr. Dennis's medical license. *Id.* Specifically, the administrative law judge found:

It is well established that issues should not be raised for the first time on appeal. Reconsideration would have been the appropriate avenue to have the new evidence before me. Therefore, I do not admit the evidence at this time.

Decision and Order at 3. Alternatively, the administrative law judge found that, even if

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<sup>7</sup> Because the miner's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 4, 5.

he were to admit the evidence of the surrender of Dr. Dennis's medical license, it would have no bearing on cases, such as this, where Dr. Dennis's opinion was rendered while he was still licensed to practice medicine. *Id.* Specifically, the administrative law judge found:

While Dr. Dennis' actions are abhorrent, there is no evidence that these actions impacted his medical ability. I have concluded that if Dr. Dennis was licensed at the time he reviewed the medical evidence and rendered his opinion, I will give the appropriate weight to the evidence as the facts of the case warrant.

Decision and Order at 3.

Employer argues that the administrative law judge's determination that any new evidence regarding the surrender of Dr. Dennis's medical license should have been submitted in a motion for reconsideration of the administrative law judge's October 1, 2012 Decision and Order (2012 Decision and Order) is not supported by the record. Employer argues that, contrary to the administrative law judge's recitation of the facts, the Agreed Order of Surrender, the document employer sought to admit, was not issued until January 17, 2013,<sup>8</sup> after the administrative law judge's 2012 Decision and Order, and also after the 30-day time limitation for filing a motion for reconsideration. Employer's Brief at 8. Employer also contends that the regulations do not mandate that a motion for reconsideration be filed and, thus, argues that the administrative law judge's reasoning is not rational. *Id.* at 9. Employer further argues that the administrative law judge's rationale for excluding the evidence is not in accordance with law and is not supported by the facts of this case. *Id.*

Additionally, employer challenges the administrative law judge's alternative finding that, even if admitted, the evidence of the surrender of Dr. Dennis's medical license would not impact his weighing of the medical evidence. Employer argues that this finding is not rational, as evidence of the surrender of Dr. Dennis's license, due to

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<sup>8</sup> Pursuant to the Board's Decision and Order remanding the case, on November 11, 2013, employer filed a motion with the administrative law judge seeking to admit the evidence of the surrender of Dr. Dennis's medical license into the record. In association with this motion, employer submitted the Agreed Order of Surrender of the medical license of Dr. James A. Dennis to practice medicine within the Commonwealth of Kentucky, filed by the Kentucky Board of Medical Licensure on January 17, 2013. In addition, employer attached a copy of the complaint and the Emergency Order of Suspension of the medical license of Dr. James A. Dennis, issued by the Kentucky Board of Medical Licensure on August 17, 2012.

acts that would likely deceive, defraud or harm the public,<sup>9</sup> would affect the credibility of Dr. Dennis's opinion. *Id.* at 10-11.

There is merit, in part, in employer's challenge to the administrative law judge's exclusion of the evidence regarding the surrender of Dr. Dennis's medical license. As employer notes, the administrative law judge made his decision to exclude the evidence on an incorrect factual basis, namely, that the document employer sought to admit, and rely upon, was dated prior to the issuance of the administrative law judge's 2012 Decision and Order. In fact, employer was relying upon the January 17, 2013 Agreed Order of Surrender, filed after the administrative law judge's 2012 Decision and Order. However, the administrative law judge alternatively found that, even if admitted, the evidence of the surrender of Dr. Dennis's medical license would not impact his weighing of the medical evidence. Because the administrative law judge acted within his discretion in determining, alternatively, to credit Dr. Dennis's medical opinion despite the evidence of license surrender, we need not address the administrative law judge's error, if any, in excluding this evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

The administrative law judge found that Dr. Dennis's 2008 autopsy report was rendered at a time in which he was licensed to practice medicine and that, "[w]hile Dr. Dennis'[s] actions are abhorrent, there is no evidence that his actions impacted his medical ability." Decision and Order at 3. Further, employer does not specify what evidence supports its allegation that Dr. Dennis's actions necessarily impacted his medical ability as an autopsy prosector at the time in question, which includes his rendering of a medical opinion. Consequently, we affirm the administrative law judge's discretionary finding that admitting the surrender of Dr. Dennis's medical license into evidence would have no impact on his decision. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (en banc); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977).

Employer next challenges the administrative law judge's finding that the evidence of record, as a whole, is sufficient to establish the existence of complicated pneumoconiosis. Pursuant to Section 718.304, the administrative law judge considered

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<sup>9</sup> Employer notes that the Kentucky Board of Medical Licensure suspended Dr. Dennis from the practice of medicine for violating Ky. Rev. Stat. §311.595(9), for "dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public."

all the relevant evidence, namely, the miner's death certificate,<sup>10</sup> Dr. Dennis's October 17, 2008 autopsy report; Dr. Oesterling's January 21, 2010 autopsy slides review report, as well as his February 21, 2010 supplemental report; Dr. Jarboe's September 13, 2011 record review and opinion, and his October 6, 2011 deposition testimony; as well as various treatment records. Decision and Order at 4-8; Director's Exhibits 12, 13, 15, 16, 17, 18, 19; Employer's Exhibits 1, 2, 3, 4.

In weighing this evidence, the administrative law judge found that it established the existence of complicated pneumoconiosis, by crediting the autopsy report of Dr. Dennis,<sup>11</sup> the autopsy prosector, over the contrary opinions of Drs. Oesterling and Jarboe.<sup>12</sup> Decision and Order at 10-11. Specifically, the administrative law judge gave greater weight to the opinion of Dr. Dennis, the autopsy prosector, because his diagnosis was based in great part on his gross findings of the macular development on the surface of the lungs, an identified two [centimeter] macule along with other macules in the upper lobes, and an identification of the color and texture of the pleural surface. The administrative law judge determined that these findings "aided Dr. Dennis in his diagnosis of progressive massive fibrosis because he could describe the macular development as seen grossly in the lungs." Decision and Order at 10; Director's Exhibit 13. The administrative law judge found that, although Dr. Oesterling diagnosed micronodular and macular pneumoconiosis, he "excluded [a diagnosis of] progressive massive fibrosis because," he did not find lesions measuring at least two [centimeters]." Decision and Order at 10. The administrative law judge permissibly accorded less weight to Dr. Oesterling's opinion because he required lesions measuring at least two

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<sup>10</sup> The miner's death certificate signed by Dr. Hudson, the medical examiner, listed the immediate cause of the miner's death as ventricle fibrillation due to, or as a consequence of, atherosclerotic heart disease. Director's Exhibit 12.

<sup>11</sup> Dr. Dennis set forth a diagnosis of complicated pneumoconiosis in his October 17, 2008 autopsy report, stating in the "Final Anatomical Diagnosis" the presence of "Pulmonary congestion moderate to severe with progressive massive fibrosis, anthracosilicosis with progressive massive fibrosis, macular development 0.5 - 0.7 cms and macules 0.1 - 0.9 cms. One macule is 2 cms diameter." Director's Exhibit 13.

<sup>12</sup> In addition to the autopsy report of Dr. Dennis, the autopsy prosector, the autopsy evidence consists of the reports of Drs. Oesterling and Jarboe. Dr. Oesterling, on reviewing the slides prepared by Dr. Dennis, opined, *inter alia*, that "[t]his case lacked the necessary coalescence of nodules within the subpleural tissue for ... a diagnosis [of progressive massive fibrosis]." Director's Exhibit 19. Dr. Jarboe opined, *inter alia*, after reviewing the miner's medical records, including Dr. Oesterling's report, that the miner did not have progressive massive fibrosis. Employer's Exhibit 3.

centimeters for the diagnosis of progressive massive fibrosis, which the administrative law judge found is not required by the regulations. 65 Fed. Reg. 79,936 (Dec. 20, 2000); *Clark*, 12 BLR at 1-155; Decision and Order at 10. Instead, the administrative law judge determined that Dr. Dennis, as the autopsy prosector, had an advantage over Dr. Oesterling in determining the size of the macules on gross examination, and, therefore, he permissibly accorded Dr. Dennis's opinion greater weight. See *Gruller v. BethEnergy Mines, Inc.*, 16 BLR 1-3 (1991); Decision and Order at 10. Thus, the administrative law judge reasonably concluded that Dr. Dennis's autopsy descriptions were sufficient to support a finding of complicated pneumoconiosis. See 20 C.F.R. §718.304(b); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365-6, 23 BLR 2-374, 2-385-6 (4th Cir. 2006); *Gray v. SLC Coal Co.*, 176 F.3d 382, 390, 21 BLR 2-615, 2-630 (6th Cir. 1999).

Moreover, the administrative law judge permissibly accorded less weight to the opinion of Dr. Jarboe because he did not adequately explain why macules could not develop on the pleural surfaces of the miner's lung, which was inconsistent with Dr. Dennis's findings on gross examination. See *Clark*, 12 BLR at 1-155. The administrative law judge also found that Dr. Jarboe relied heavily on the autopsy slide review by Dr. Oesterling, which the administrative law judge gave little weight, see discussion, *supra*. Consequently, the administrative law judge properly found that the autopsy report by Dr. Dennis, diagnosing progressive massive fibrosis, was entitled to greater weight than the contrary reports of Drs. Oesterling and Jarboe. Based on his weighing of all relevant evidence together, the administrative law judge permissibly concluded that claimant established the existence of complicated pneumoconiosis at Section 718.304.<sup>13</sup> See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Perry*, 469 F.3d at 365-6, 23 BLR at 2-385-6; *Gray*, 176 F.3d at 389, 21 BLR at 2-628.

The administrative law judge, in his role as finder-of-fact, is charged with evaluating the conflicting medical evidence and assessing the credibility of the medical experts. *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's finding that the weight of the evidence of record is sufficient to establish the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to Section 718.304 and Section 718.203(b), it is affirmed. Consequently, we affirm the administrative law judge's award of benefits.

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<sup>13</sup> The administrative law judge further found that, although Dr. Scott's x-ray reading of the December 4, 2007 x-ray film is not positive for the existence of complicated pneumoconiosis, it showed a significant profusion of simple pneumoconiosis, ILO reading of 2/2, and therefore is supportive of Dr. Dennis's autopsy findings. 20 C.F.R. §718.304; Decision and Order at 10-11.





Accordingly, the administrative law judge's Decision and Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge