BRB No. 06-0553 BLA

DEBRA L. PATTERSON (Widow of and o/b/o the Estate of ALVIE PATTERSON)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 04/30/2007
WEST KEN COMPANY, INCORPORATED c/o ANDALEX RESOURCES	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Miner's Benefits on Remand and Denial of Survivor's Benefits of Daniel J. Roketenetz,[1] Administrative Law Judge, United States Department of Labor.

Thomas M. Rhoads (Rhoads & Rhoads, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

[1] The hearing in this case was conducted by Administrative Law Judge Robert L. Hillyard on April 20, 2005. However, due to Judge Hillyard's retirement, the case was transferred to Administrative Law Judge Daniel J. Roketenetz (the administrative law judge), who issued the decision currently on appeal to the Board.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[2] appeals the Decision and Order – Denial of Miner's Benefits on Remand and Denial of Survivor's Benefits (04-BLA-5939) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on a miner's claim[3] and a survivor's

[2] Claimant is the miner's widow. This case originally involved both a miner's claim and a survivor's claim, which were consolidated for the purposes of the hearing. The administrative law judge designated the record evidence as follows: Miner's Director's Exhibits, filed in the miner's claim; Widow's Director's Exhibits, filed in the survivor's claim; and Claimant's Exhibits and Employer's Exhibits, filed by the parties after the claims were consolidated for hearing. Decision and Order at 2.

[3] The miner's claim, filed on August 26, 1998, was denied by Administrative Law Judge Donald W. Mosser on October 4, 2000. Miner's Director's Exhibits 1, 56. On appeal, the Board affirmed in part, and vacated in part, and remanded the claim for further consideration. Miner's Director's Exhibit 65. On remand, the case was reassigned to Administrative Law Judge Thomas F. Phalen, who re-opened the record and remanded the case to the district director for further development on March 25, 2002. Miner's Director's Exhibit 70. While the miner's claim was pending, the miner passed away on February 17, 2002. Miner's Director's Exhibit 74. The miner's death certificate listed pulmonary fibrosis as the cause of death. Widow's Director's Exhibit 9. In addition to pursuing the miner's claim, on June 2, 2002, claimant filed her own claim for survivor's benefits. Widow's Director's Exhibit 2. The district director denied the miner's claim on July 11, 2002. Miner's Director's Exhibit 77. At claimant's request, the miner's claim was forwarded to the Office of Administrative Law Judges for a hearing, where it was assigned to Administrative Law Judge Joseph E. Kane, who continued the claim for further development. Following the district director's denial of the survivor's claim on October 30, 2003, the survivor's claim was forwarded, at claimant's request, to the Office of Administrative Law Judges for a hearing, where it was assigned to Judge Hillyard. Widow's Director's Exhibits 20, 21, 27. The miner's claim was consolidated with the survivor's claim for purposes of the hearing, which was

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).[4]

In the miner's claim, the administrative law judge evaluated the evidence pursuant to the prior regulations and found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), a critical element of entitlement. With respect to the survivor's claim, to which the revised regulations are applicable, the administrative law judge found the evidence sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge further found, however, that claimant failed to establish that the miner's pulmonary fibrosis was related to coal dust exposure, and, therefore, failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Finally, the administrative law judge found that claimant failed to establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant challenges only the administrative law judge's denial of benefits in the survivor's claim. Specifically, claimant asserts that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issues of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Claimant further asserts that the administrative law judge erred in excluding from consideration certain evidence submitted by claimant at the hearing. Employer responds, urging affirmance of the administrative law judge's denial of benefits. In the event that the administrative law judge's denial of benefits is not affirmed, however, employer contends that the administrative law judge erred in adjudicating the issue of the existence of pneumoconiosis in the survivor's claim. Employer's Reply Brief at 1; Employer's Response Brief at 12. Employer further contends that the administrative law judge erred in his application of 20 C.F.R. §725.414 by excluding the autopsy and medical opinion evidence submitted by employer, and mischaracterized the autopsy opinion of Dr. Naeye pursuant to 20 C.F.R. §718.202(a)(2). Employer's Response Brief at 12-13 and n. 14. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief responding to several of employer's arguments. Employer has filed a reply brief to the Director's response.

---

conducted by Judge Hillyard on April 20, 2005. Due to Judge Hillyard's retirement, the case was transferred to Judge Roketenetz, who issued the decision.

[4] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, and 726 (2002).

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. 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or if death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).[5] Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR at 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant initially contends that in evaluating the merits of entitlement pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge erred in failing to credit the opinion of Dr. Canonico, the miner's treating physician, that the miner's pulmonary fibrosis was causally related to his coal mine dust exposure. Claimant's Brief at 2.

In evaluating the medical evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge considered, among other evidence, the treatment notes from St. Thomas Medical Group, Dr. Canonico's hospital records dating from December 7, 2001 through December 10, 2001, and Dr. Canonico's April 23, 2003 medical report. Decision and Order at 22-24; Claimant's Exhibit 2; Widow's Director's Exhibits 11, 13. The administrative law judge found that the diagnoses of occupationally related pulmonary fibrosis contained in the St. Thomas Medical Group treatment records were unreasoned, because "[t]he physicians who made diagnoses listed in these treatment notes did not expressly state the medical evidence that they relied on in making their determinations."

[5] The record indicates that the miner's coal mine employment occurred in Kentucky. Widow's Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

Decision and Order at 22; Widow's Director's Exhibit 11. In evaluating Dr. Canonico's April 23, 2003 medical opinion, the administrative law judge stated:

> . . . Dr. Canonico opined [that] the [m]iner suffered from a chronic lung disease primarily caused by his fifteen years of [coal mine dust] exposure, and he was able to reach this conclusion with an autopsy report showing clinical pneumoconiosis. However, Dr. Canonico did not state which autopsy report he relied on . . . [and] failed to expressly list or attach the x-rays, breathing tests, and CT scans that he referred to in his report. As no additional treatment records from Dr. Canonico outside of St. Thomas Hospital records were offered in the widow's claim, I find Dr. Canonico's April 23, 2003 letter is undocumented and entitled to less weight . . . .

Decision and Order at 24; Claimant's Exhibit 9.

We find merit in claimant's argument that the administrative law judge erred in discrediting Dr. Canonico's opinion as undocumented. First, as claimant correctly asserts, contrary to the administrative law judge's finding, Dr. Canonico did not rely on an autopsy report showing clinical pneumoconiosis. Rather, Dr. Canonico expressly stated that "the autopsy report does not indicate the presence of pneumoconiosis." Claimant's Exhibit 2. In addition, it is unclear, and the administrative law judge did not explain, how Dr. Canonico's failure to expressly identify the autopsy report he reviewed impacts the credibility of his opinion, especially in light of the fact that Dr. Canonico did not rely on the autopsy results in formulating his opinion that the miner's pulmonary fibrosis was due to coal mine dust exposure. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55, 5 BLR 2-99, 2-102 (6th Cir. 1983); Decision and Order at 24; Claimant's Exhibit 9. Moreover, claimant is correct in contending that the treatment records from St. Thomas Medical Group, which were submitted into evidence at the hearing, are nearly all from Dr. Canonico, and they contain the results of x-rays, pulmonary function studies, and CT scans. Widow's Director's Exhibit 11. Therefore, as the administrative law judge did not appear to be aware that the St. Thomas Medical Group treatment notes are almost entirely authored by Dr. Canonico, it appears that the administrative law judge may have selectively analyzed the evidence in this case. *See Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). We, therefore, vacate the administrative law judge's evaluation of the evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.205(c), and remand this case to him for further consideration. *See Rowe*, 710 F.2d at 254-55, 5 BLR at 2-102. The administrative law judge's analysis of the evidence must be supported by sufficient and correct rationale. We reject, however, claimant's argument that the administrative law judge is required to accord controlling weight to Dr. Canonico on the ground that he was the miner's treating physician. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir.

2003); Claimant's Brief at 5-7. Rather, the administrative law judge should take into consideration the factors set forth at 20 C.F.R. §718.104(d) in weighing Dr. Canonico's opinion. 20 C.F.R. §718.104(d).

Claimant next contends that the administrative law judge erred in excluding from consideration Dr. Canonico's August 21, 2003 deposition. Claimant's Brief at 8. In his decision, the administrative law judge initially acknowledged that the evidentiary limitations set forth at 20 C.F.R. §725.414 are applicable to the survivor's claim, and stated that he would "review the evidence indicated on the parties' summary forms" that complied with the limitations. Decision and Order at 19. Subsequently, however, the administrative law judge found that, while claimant indicated on her black lung evidence summary form that Dr. Canonico's August 21, 2003 deposition was to be considered, because the deposition was not submitted into the record at any of the hearings conducted in this case, it would not be considered. Decision and Order at 24 n.13.

A review of the hearing transcript reflects that, at the April 20, 2005 hearing, which was conducted by Administrative Law Judge Robert L. Hillyard prior to his retirement, claimant's counsel stated that he had prepared an evidence summary form for the miner's claim and for the survivor's claim "which identifies the evidence that I want to be considered . . . ." Hearing Tr. at 8. This form listed Dr. Canonico's August 21, 2003 deposition as Claimant's Exhibit 1. Claimant's counsel then handed a copy of the form to Judge Hillyard and to employer's counsel. Hearing Tr. at 8-9. Subsequently, a March 22, 2005 medical report of Dr. Canonico, with cover letter of March 25, 2005, was also identified as Claimant's Exhibit 1. Hearing Tr. at 11. Later, after admitting the Director's exhibits in both the miner's and survivor's claims, Judge Hillyard asked claimant's counsel whether he had any other evidence to submit, to which he responded: "No other evidence except the two summary forms that we've submitted to you, Judge." Hearing Tr. at 12. Sometime thereafter in the hearing, however, claimant's counsel introduced into evidence a sheet of paper entitled "14 visits with Dr. Canonico," with the dates listed. Hearing Tr. at 20. This document was also designated Claimant's Exhibit 1. Immediately following that designation, Judge Hillyard admitted Claimant's Exhibit 1. Hearing Tr. at 20.

Initially, we note that because Dr. Canonico's April 23, 2003 report was admitted into the record as one of claimant's affirmative-case medical reports, Dr. Canonico's deposition testimony constitutes admissible evidence pursuant to 20 C.F.R. §725.414(c).[6]

[6] We further note that, pursuant to 20 C.F.R. §725.414(c), claimant was not required to designate Dr. Canonico's deposition as one of her affirmative-case medical reports. The pertinent regulation provides that "a physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing . . . or by deposition." 20 C.F.R. §725.414(c); *see Dempsey v. Sewell Coal Co.*,

As discussed above, the facts of this case reflect that claimant's evidence summary form listed Dr. Canonico's deposition as Claimant's Exhibit 1, and claimant's counsel stated at the hearing that this form identified the evidence claimant wanted considered by the administrative law judge. Additionally, the transcript indicates that Judge Hillyard admitted Claimant's Exhibit 1; however more than one document was designated as Claimant's Exhibit 1. Accordingly, the exact disposition of Dr. Canonico's deposition remains unclear. Therefore, on remand, the administrative law judge should reconsider whether Dr. Canonico's deposition was admitted into evidence at the hearing.

Claimant next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.205(c), that the medical evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis. As set forth above, we have vacated the administrative law judge's evaluation of the evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.205(c). Following his re-evaluation of the evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should reweigh the evidence relevant to 20 C.F.R. §718.205(c).

As we are remanding this case for further consideration of the evidence, in the interest of judicial economy we will also address employer's arguments regarding the administrative law judge's adjudication of the issue of the existence of pneumoconiosis in the survivor's claim, and his application of 20 C.F.R. §725.414 to exclude evidence submitted by employer. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991); *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983).

First, we reject, as without merit, employer's contention that "having found that the proof did not establish the existence of pneumoconiosis in the miner's claim, the [administrative law judge] was precluded from finding the existence of the disease in the survivor's claim given that the denial of the miner's claim was final." Employer's Reply Brief at 1; Employer's Response Brief at 12. Under the doctrine of collateral estoppel, once the determination of facts litigated between two parties in a proceeding becomes final, that determination is binding upon those parties in all future proceedings against each other. *See N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n*, 821 F.2d 328, 330 (6th Cir. 1989). Because the administrative law judge adjudicated the miner's claim and the survivor's claim in the same proceeding, the administrative law judge's determination as to the existence of pneumoconiosis in the miner's claim was not final when the administrative law judge decided the issue in the survivor's claim. Therefore,

---

23 BLR 1-47, 1-64 (2004)(*en banc*). Thus, claimant could have submitted Dr. Canonico's April 23, 2003 report, together with his supporting deposition, as *one* of her affirmative-case medical reports.

the administrative law judge was not collaterally estopped from adjudicating the existence of pneumoconiosis in the survivor's claim. *Id.*

We also reject employer's argument that the administrative law judge erred in applying the evidentiary limitations at 20 C.F.R. §725.414 to the survivor's claim, where the parties had not objected at the hearing to the admission of any evidence based on the evidentiary limitations. Employer's Response Brief at 13-14 n.14; Employer's Reply Brief at 1-2. Contrary to employer's argument, as the Director asserts in his response brief, the evidentiary limitations are mandatory and may not be waived. *Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-74 (2004); Director's Brief at 2-3.

We find merit, however, in employer's contention that the administrative law judge erred in excluding the entire autopsy opinion of Dr. Naeye, and the entire medical opinions of Drs. Branscomb and Fino, on the ground that the physicians considered evidence in excess of the evidentiary limitations in the survivor's claim.[7] We also find merit in employer's assertion that the administrative law judge mischaracterized the opinion of Dr. Naeye when considering the autopsy evidence of record pursuant to 20 C.F. R. §718.202(a)(2). Employer's Response Brief at 13 n.14; Employer's Exhibits 5, 9, 11.

The applicable regulation provides that any chest x-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under 20 C.F.R.

[7] Employer also contends that the administrative law judge similarly excluded the opinions of Drs. Broudy, Caffrey, and Dahhan because the physicians considered inadmissible evidence. Employer's Response Brief at 13 n. 14. Contrary to employer's argument, however, the administrative law judge permissibly excluded the opinions of Drs. Broudy, Caffrey, and Dahhan because they were in excess of the limitations. Employer attempted to submit two affirmative autopsy opinions and four affirmative medical opinions. *See* 20 C.F.R. §725.414(a)(3)(i); Decision and Order at 21, 24. In a miner's claim and survivor's claim consolidated for purposes of the hearing pursuant to 20 C.F.R. §725.460, the parties are entitled to submit separate affirmative case, rebuttal, and rehabilitative evidence, in accordance with 20 C.F.R. §725.414, in support of the miner's claim and in support of the survivor's claim. However, absent application of an exception or other authority, an administrative law judge may not aggregate the limitations for purposes of considering the evidence, *e.g.*, two autopsy reports and four affirmative medical reports, when adjudicating each claim. Rather, each party must designate the evidence intended to support each claim, and such evidence must be separately considered as to the elements of entitlement in each claim. *Keener v. Peerless Eagle Coal Co.*, BLR , BRB No. 05-1008 BLA (Jan. 26, 2007)(*en banc*).

§725.414(a), or for good cause, as set forth at 20 C.F.R. §725.456(b)(1). 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). While the regulations are silent as to what an administrative law judge should do when evidence exceeding the limitations is referenced in an otherwise admissible medical opinion, if an administrative law judge determines that a physician's medical opinion relied upon inadmissible evidence, he has several available options including: redacting the objectionable content, asking the physician to submit a new report, factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled, or excluding the report. Exclusion of a report is disfavored. *See Keener v. Peerless Eagle Coal Co.*, BLR , BRB No. 05-1008 BLA (Jan. 26, 2007)(*en banc*); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); Employer's Brief at 13-14 n.14; Employer's Reply Brief at 2.

Reviewing the reports of Drs. Fino and Branscomb, the administrative law judge found that, because "the majority of records that Drs. Branscomb and Fino reviewed in their medical reports were not indicated on either parties' Black Lung Evidence Summary Forms, these reports consider evidence in excess of the evidentiary limitations in the widow's claim." Decision and Order at 27. Therefore, the administrative law judge declined to consider the physicians' reports at 20 C.F.R. §718.202(a)(4), because they did not comply with the evidentiary limitations. Decision and Order at 27. In reviewing the autopsy report of Dr. Naeye at 20 C.F.R. §718.202(a)(2), the administrative law judge found that because the physician's "final conclusion included reference to the autopsy slides and objective medical reports . . . Dr. Naeye's opinion cannot be divided into autopsy and clinical findings." Decision and Order at 21. Consequently, the administrative law judge determined that Dr. Naeye's opinion qualified as a medical report, not as an autopsy report, and thus declined to consider Dr. Naeye's opinion as he found it in excess of employer's limitation on affirmative medical reports pursuant to 20 C.F.R. §725.414(a)(3)(i). Decision and Order at 21 and n.11.

As employer asserts, the administrative law judge did not attempt to determine whether Drs. Fino and Branscomb actually relied upon any of the inadmissible evidence, nor did he attempt to ascertain whether any of the less severe options for dealing with such over-inclusive medical opinions were feasible. In addition, contrary to the administrative law judge's finding, Dr. Naeye's final conclusion does not appear to contain any reference to "objective medical reports." Employer's Exhibit 9. Therefore, as we are remanding this case on other grounds, for further consideration, we also vacate the administrative law judge's evaluation of the autopsy evidence at 20 C.F.R. §718.202(a)(2). On remand, the administrative law judge should reconsider the admissibility of the opinions of Drs. Fino, Branscomb, and Naeye, consistent with

Keener, *Brasher*, and *Harris*, and, if appropriate, reevaluate their opinions pursuant to 20 C.F.R. §§718.202(a)(2), (4); 718.205(c).[8]

Accordingly, the administrative law judge's denial of miner's benefits on remand is affirmed as unchallenged on appeal. The denial of survivor's benefits is affirmed in part and vacated in part, and the survivor's claim is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[8] Since we have vacated the administrative law judge's evidentiary rulings and remanded this case for further consideration, we need not address employer's additional contention that the administrative law judge's delay in issuing his evidentiary rulings deprived employer of its due process right to defend the claim. Employer's Response Brief at 13-14 n.14.