BRB No. 03-0743 BLA

KATHRYN J. KALIST (Widow of JOSEPH KALIST) Claimant-Respondent v. BUCKEYE COAL COMPANY/ NEMACOLIN MINES CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/23/2004 DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

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

Helen H. Cox (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (02-BLA-5170) of Administrative Law Judge Fletcher E. Campbell, Jr. awarding benefits 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).[1] This case involves a survivor's claim filed on March 19, 2001.[2] After noting that employer stipulated that the miner suffered from coal workers' pneumoconiosis arising out of his coal mine employment, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in admitting the report and deposition testimony of Dr. Perper. Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant[3] responds in support of the award of benefits. Claimant also contends that the administrative law judge properly admitted Dr. Perper's report and deposition testimony into evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, contending that the administrative law judge properly admitted Dr. Perper's report and deposition testimony into evidence. In separate reply briefs, employer reiterates its previous 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).

Employer asserts that 20 C.F.R. §725.414 is inconsistent with the Administrative Procedure Act (APA). *See* Employer's Brief at 14 n.2. Employer, however, fails to explain the basis for its position. Moreover, in a recent decision, the Board rejected an

---

[1] The Department of Labor (DOL) 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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The miner filed a claim for benefits on January 31, 1978. Director's Exhibit 1. In a Decision and Order dated April 20, 1983, Administrative Law Judge Daniel L. Leland denied benefits. *Id.* There is no indication that the miner took any further action in regard to his 1978 claim.

[3] Claimant is the surviving spouse of the deceased miner who died on March 2, 2001. Director's Exhibit 11.

employer's argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the APA. *See Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*) (published). Thus, we reject employer's contention that Section 725.414 is invalid.

Employer argues that the administrative law judge erred in admitting Dr. Perper's report into the record because it constitutes a second autopsy report submitted by claimant. Because claimant had already submitted Dr. Wecht's autopsy report, and because Section 725.414 limits the parties to the submission of one autopsy report, employer contends that the administrative law judge should have excluded Dr. Perper's report. The Director contends that the administrative law judge correctly determined that Dr. Wecht's report was the only autopsy report of record and that Dr. Perper's report was admissible as one of claimant's two medical reports pursuant to 20 C.F.R. §725.414(a)(1).

Section 718.106(a) provides that:

> A report of an autopsy or biopsy submitted in connection with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung. If a surgical procedure has been performed to obtain a portion of a lung, the evidence shall include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

20 C.F.R. §718.106(a).

Because Dr. Wecht was the only physician to examine the miner's body after his death, his report constitutes the only autopsy report of record. Because Dr. Perper only reviewed medical records and autopsy slides, his report is that of a reviewing physician, not an autopsy prosector.

Employer contends that if the report of the autopsy prosector is the only autopsy report intended by Section 725.414, the limitation on autopsy evidence is rendered "entirely superfluous." Employer's Brief at 19. Because there will only be one autopsy and one prosector, employer contends that "there would be no need to limit the parties to one report of an autopsy." *Id.* The Director responds to this argument, stating that:

> While highly unlikely in the context of black lung litigation, it is possible that more than one physician may conduct an examination of a body post-mortem; therefore, it is possible that more than one report of an autopsy may be prepared. In fact, the regulation clearly allows for the possibility of

> two autopsy reports: one from the claimant and one from the deceased miner's employer. Again, it is unlikely that the employer would have notice of the miner's death in time to arrange for its doctor to be present at, and participate in, the autopsy; however, the evidentiary limitations provide for that possibility by permitting each party to submit one report of an autopsy. Consequently, the regulatory language is not superfluous.

Director's Brief at 8.

We agree with the Director that Section 725.414's limitation on autopsy evidence is not superfluous.

In this case, the administrative law judge properly admitted Dr. Wecht's autopsy report as claimant's one "report of autopsy" pursuant to 20 C.F.R. §725.414(a). Section 725.414 also permits each party to submit two medical reports as part of its affirmative case. Section 725.414(a)(a) provides that a medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence. 20 C.F.R. §725.414(a)(1). Dr. Perper reviewed the medical evidence and prepared a report. Consequently, the administrative law judge properly admitted Dr. Perper's August 1, 2001 report as one of claimant's two medical reports permitted under 20 C.F.R. 725.414(2)(i) and properly admitted Dr. Perper's December 6, 2002 deposition testimony pursuant to 20 C.F.R. §725.414(c).[4]

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[5] *See* 20 C.F.R. §§718.1, 718.202,

[4] Employer contends that its due process rights were violated because the administrative law judge did not rule on the admissibility of Dr. Perper's report until the administrative law judge issued his actual decision. Employer argues that it was entitled to be informed as to claimant's evidence at a time when it could meaningfully respond to it. We disagree. Because the administrative law judge provisionally admitted Dr. Perper's August 1, 2001 report into evidence at the November 19, 2002 hearing, employer was put on notice that Dr Perper's report was likely to be admitted into evidence. Transcript at 12, 35, 36. Moreover, subsequent to Dr. Perper's December 6, 2002 deposition testimony, employer was allowed to submit Dr. Oesterling's February 7, 2003 report. *See* Employer's Exhibit 3.

[5] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the opinions of Drs. Wecht, Perper and Oesterling. While Drs. Wecht and Perper opined that the miner's death was due to his pneumoconiosis, Claimant's Exhibits 1, 3, 4, Dr. Oesterling opined that the miner's death was not attributable to the disease. Employer's Exhibits 1, 3. The administrative law judge found that Dr. Oesterling's opinion that the miner's death was not due to pneumoconiosis was "contradicted by his own findings and admissions." Decision and Order at 14. Based upon the opinions of Drs. Wecht and Perper, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* at 14-15.

Employer agues that the administrative law judge erred in his consideration of Dr. Oesterling's opinion. Employer specifically contends that the administrative law judge mischaracterized Dr. Oesterling's opinion. Drs. Wecht, Perper and Oesterling agreed that the miner suffered from coal workers' pneumoconiosis. While these physicians also

---

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) 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).

agreed that the miner's severe emphysema contributed to his death, they disagreed as to the etiology of the emphysema that was responsible for the miner's death. While Drs. Wecht and Perper opined that the miner suffered from cenrilobular emphysema attributable to his coal dust exposure, Dr. Oesterling opined that the miner's emphysema was predominantly of the panlobular type and was attributable to the miner's cigarette smoking, not his coal dust exposure.

The administrative law judge questioned Dr. Oesterling's conclusions because Dr. Oesterling acknowledged that coal workers' pneumoconiosis played a role in the development of centrilobular emphysema. Decision and Order at 14. Because Dr Oesterling acknowledged that centrilobular emphysema could evolve into the panlobular form of the disease, the administrative law judge found that "the distinction between the two types of emphysema becomes blurred if not meaningless." *Id.* at 15. In this case, Dr. Oesterling opined that the miner suffered from severe panlobular and bullous emphysema. Employer's Exhibit 2 at 21. Dr. Oesterling opined that these two types of emphysema are most commonly associated with cigarette smoking. *Id.* Dr. Oesterling further explained that this type of emphysema was not typically seen in coal miners unless they also suffered from progressive massive fibrosis. *Id.* at 23-24. Dr. Oesterling, therefore, opined that the miner's cigarette smoking was the major cause of his emphysema. *Id.* at 27. Although Dr. Oesterling conceded that some of the miner's focal emphysema (a form of centrilobular emphysema) was attributable to his coal dust exposure, Dr. Oesterling explained that this accounted for a "very small component of [the miner's] total emphysematous process." *Id.* at 27-28. Moreover, Dr. Oesterling opined that the miner's other areas of underlying centrilobular emphysema could not be attributed to the miner's coal dust exposure. *Id.* Dr. Oesterling further opined that the miner's panlobular emphysema was not related at all to his coal dust exposure. *Id.* Dr. Oesterling stated that neither coal dust exposure nor coal workers' pneumoconiosis was a substantially contributing factor in the development of his emphysema. *Id.* at 28. Thus, contrary to the administrative law judge's characterization, Dr. Oesterling provided a clear explanation for his findings.

The administrative law judge also accorded less weight to Dr. Oesterling's opinion because the literature establishes that centrilobular emphysema can evolve into the panlobular form of the disease. Decision and Order at 5. However, in this case, Dr. Oesterling opined that only a very small percentage of claimant's centrilobular emphysema could be attributable to his coal dust exposure. Moreover, the medical literature passage cited by the administrative law judge (and admitted into evidence at Claimant's Exhibit 5) merely indicates that centrilobular emphysema is quite often accompanied by panlobular emphysema; not that it evolves into panlobular emphysema.

Because the administrative law judge mischaracterized Dr. Oesterling's opinion, we vacate the administrative law judge's finding that the evidence is sufficient to

establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.

Citing *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001), employer also contends that the administrative law judge erred in not discrediting Dr. Perper's opinion because the doctor relied upon the fact that pneumoconiosis is a latent and progressive disease. During his December 16, 2002 deposition, Dr. Perper characterized coal workers' pneumoconiosis as a disease that progresses after the cessation of coal dust exposure. *See* Claimant's Exhibit 4 at 50. In his decision, the administrative law judge rejected employer's contention that Dr. Perper's opinion should be discredited on this basis, noting that the regulations clearly recognize pneumoconiosis as a "latent and progressive disease." Decision and Order at 11 n.5 (citing 20 C.F.R. §718.201(c)).

The Department of Labor (DOL) recently published comments regarding the implementation of the revised regulations. The DOL addressed the holding set out in *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001), noting that the court upheld 20 C.F.R. §718.201(c) because it has sufficient support in the rulemaking record. The DOL further commented that:

> The court cited scientific evidence in the rulemaking record indicating that pneumoconiosis can be latent and progressive. The court cited two studies, one "indicating that pneumoconiosis is latent and progressive in – at most – eight percent of cases," and the other "indicating that pneumoconiosis is latent and progressive as much as 24% of the time." 292 F.3d at 869. Consistent with the Department's argument, the court therefore interpreted the regulation to mean that pneumoconiosis can be a latent and progressive disease, not that pneumoconiosis is always or typically a latent and progressive disease. *Id.* There is no irrebuttable presumption that each miner's pneumoconiosis is latent or progressive. The burden of proving the existence of pneumoconiosis is always on the miner. As the Department explained in the preamble to the final rule, "the miner continues to bear the burden of establishing all of the statutory elements of entitlement." 65 FR at 79972 (Dec. 20, 2000).

68 FR at 69931-69932 (Dec. 15, 2003).

In this case, claimant was not provided with an "irrebuttable presumption" that the miner's pneumoconiosis was progressive. Dr. Perper merely based his opinion, in part, on that fact that the miner's pneumoconiosis was progressive. Because employer does

not cite any evidence undermining Dr. Perper's assessment, we reject employer's contention that the administrative law judge erred in his consideration of Dr. Perper's opinion.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge