U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0305 BLA

H. DARLENE TAYLOR (Widow of KEITH TAYLOR)	)	
Claimant-Respondent	)	
v.	)	
KING KNOB COAL COMPANY	)	
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/11/2015
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

William S. Mattingly and Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

Hall, Acting Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-5998) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to

the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on September 2, 2010.[1]

After crediting the miner with 19.08 years of coal mine employment,[2] the administrative law judge found that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414. Employer also argues that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer further contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Claimant responds in support of the administrative law judge's evidentiary rulings and his award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

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

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[1] Claimant is the widow of the miner, who died on June 23, 2007. Director's Exhibit 14. The miner's three previous claims for benefits were denied. Director's Exhibits 1-3.

[2] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 7, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Although the administrative law judge credited the miner with a total of 19.08 years of coal mine employment, he determined that claimant failed to establish that the miner's 8.06 years of aboveground coal mine employment with employer exposed him to dust conditions substantially similar to those existing underground. The administrative law judge, therefore, found that the evidence did not establish the requisite fifteen years of qualifying coal mine employment necessary for claimant to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

(1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis set forth at 20 C.F.R. §718.304, is applicable, or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(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(b)(6).

Employer contends that the administrative law judge erred in excluding Dr. Swedarsky's June 26, 2012 medical report and Dr. Wonsettler's August 20, 2013 deposition testimony as exceeding the evidentiary limitations set forth at 20 C.F.R. §§725.414.[4] Employer also argues that it was prejudiced because the administrative law judge rendered his rulings concerning the admissibility of the evidence in his Decision and Order.

[4] Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Prior to the hearing, claimant designated Dr. Abraham's October 4, 2012 report as her affirmative autopsy report. Claimant's Exhibit 5. Claimant further designated Dr. Perper's July 12, 2013 report and Dr. Houser's July 19, 2013 report as her affirmative medical reports. Claimant's Exhibits 2, 3. Employer designated Dr. Oesterling's April 25, 2012 report as its affirmative autopsy report. Employer's Exhibit 1. Employer further designated Dr. Castle's October 30, 2012 report as one of its affirmative medical reports. Employer's Exhibit 5. Employer also designated Dr. Swedarsky's June 26, 2012 report as rebuttal evidence to Dr. Wonsettler's autopsy report.[5] Employer's Exhibit 2. Employer also sought to submit Dr. Wonsettler's August 20, 2013 deposition testimony, and Dr. Oesterling's scheduled post-hearing deposition testimony. Employer's Exhibit 9.

At the hearing, claimant requested that Dr. Wonsettler's autopsy report be excluded because neither claimant nor employer designated it as evidence in the case. Hearing Transcript at 8-9. The administrative law judge noted claimant's objection, but overruled the objection, and admitted Dr. Wonsettler's autopsy report.[6] *Id*. at 9. The administrative law judge also admitted Dr. Wonsettler's deposition testimony, submitted by employer. *Id.* at 19-20; Employer's Exhibit 9.

Claimant also objected to the admission of Dr. Swedarsky's June 26, 2012 report, submitted by employer, as rebuttal to Dr. Wonsettler's autopsy report, stating:

> I would object to [Dr. Swedarsky's June 26, 2012 report] as a rebuttal to [Dr. Wonsettler's] autopsy report. Again, there is no regulatory authority for the Director to be a proponent of that medical evidence so they can't be the proponent of the initial autopsy report from [Dr. Wonsettler] and as such, one of the parties has to adopt that exhibit as its affirmative autopsy report or it needs to be excluded. No party in this case has adopted that exhibit as their affirmative autopsy report.

Hearing Transcript at 19.

In response, the administrative law judge stated:

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[5] Dr. Wonsettler performed the miner's autopsy, and her autopsy report was submitted into the record as Director's Exhibit 16. The record does not disclose which party submitted Dr. Wonsettler's autopsy report. However, neither claimant nor employer designated it as evidence.

[6] In her post-hearing brief, claimant again argued that Dr. Wonsettler's deposition testimony should be excluded since the doctor's autopsy report was not designated as evidence by either claimant or employer. Claimant's Post Hearing Brief at 13.

> I'd be happy to note your objection for the record. What I'm going to do is go through and figure out how I can fit things in and if I can't, I won't and if I can, I will, but I'm not going to do so at this moment.

Id.

At the hearing, the administrative law judge also granted employer's request to submit supplemental reports from Drs. Castle and Swedarsky.[7]

In his Decision and Order, the administrative law judge admitted the autopsy review portion of Dr. Perper's report as claimant's rebuttal evidence to Dr. Oesterling's autopsy report. Decision and Order at 12 n.8. The administrative law judge next considered claimant's argument that Dr. Wonsettler's autopsy report, Director's Exhibit 16, and her deposition testimony, Employer's Exhibit 9, should be excluded because "neither party designated her report or deposition testimony as affirmative autopsy or medical opinion evidence and the Director is not permitted to submit autopsy evidence in this matter." Decision and Order at 12 n.9 (citations omitted). The administrative law judge noted that employer designated Dr. Oesterling's April 25, 2012 report as its affirmative autopsy report, and designated Dr. Castle's October 30, 2012 report and Dr. Oesterling's September 10, 2013 deposition testimony as its affirmative medical reports. The administrative law judge, therefore, excluded Dr. Wonsettler's deposition testimony because it exceeded the evidentiary limitations. However, the administrative law judge admitted Dr. Wonsettler's autopsy report, finding that it was admissible as a medical treatment record pursuant to 20 C.F.R. §725.414(a). *Id.*

The administrative law judge further noted that employer designated Dr. Swedarsky's initial report and his supplemental report as evidence rebutting Dr. Wonsettler's autopsy report. However, the administrative law judge noted that Dr. Wonsettler's autopsy report was admitted solely as a medical treatment record. Because there is "no provision in the [r]egulations for rebuttal of treatment records," the administrative law judge excluded Dr. Swedarsky's reports.[8] Decision and Order at 12 n.9.

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[7] After the hearing, employer submitted a revised evidence summary form, in which it designated Dr. Oesterling's September 10, 2013 deposition testimony as one of its affirmative medical reports. Claimant withdrew her previous request to submit Dr. Houser's post-hearing deposition testimony. However, by Order dated October 18, 2013, the administrative law judge granted employer's request to depose the doctor.

[8] The administrative law judge also found that Dr. Swedarsky's reports could not be considered as rebuttal of Dr. Abraham's report, because Dr. Swedarsky "very clearly asserts that he was provided and considered only the report of Doctor Wonsettler in his

Employer asserts that the administrative law judge erred in not rendering his evidentiary rulings before the issuance of his decision. Specifically, employer notes that the administrative law judge, at the hearing, rejected claimant's objection to the admissibility of Dr. Wonsettler's autopsy report. Hearing Transcript at 9. In reliance upon this ruling, the administrative law judge admitted Dr. Wonsettler's deposition testimony, and Dr. Swedarsky's medical report (as employer's autopsy rebuttal evidence). *Id.* at 18-20; Employer's Exhibits 2, 9. Based upon these evidentiary rulings, employer asserts that it relied upon this evidence in developing its arguments in support of its defense of the claim. Employer's Brief at 9, 13 n.5. Employer argues that the administrative law judge, by waiting to make his rulings, deprived employer of an opportunity to redesignate its evidence to conform to the evidentiary limitations, or to present a good cause argument for exceeding those limitations. *Id.* at 9-10. We agree with employer.

Consistent with principles of fairness and administrative efficiency, the administrative law judge should have issued his evidentiary rulings before he issued his decision. *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). The administrative law judge's failure to render preliminary evidentiary rulings precluded employer from redesignating its evidence to conform to the evidentiary limitations, or from presenting a good cause argument for exceeding those limitations. *Id.* Consequently, we vacate the administrative law judge's evidentiary rulings excluding Dr. Swedarsky's June 26, 2012 medical report and Dr. Wonsettler's August 20, 2013 deposition testimony.[9] Therefore, we also vacate the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). On remand, prior to issuing his decision on the merits of entitlement, 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.[10] We also instruct the administrative law judge to provide an

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initial report," and that he "reviewed only the report of Doctor Perper in his supplemental report. . . ." Decision and Order at 12, n.9.

[9] Dr. Swedarsky opined that the autopsy evidence does not support a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 2 (excluded exhibit). Dr. Wonsettler testified that there is insufficient evidence to diagnose a "coal mine dust-induced lung disease or coal workers' pneumoconiosis." Employer's Exhibit 9 at 18 (excluded exhibit).

[10] We reject employer's contention that the administrative law judge erred by admitting Dr. Perper's autopsy report as claimant's rebuttal evidence to Dr. Oesterling's autopsy report. In her August 6, 2013 Evidence Summary Form, claimant identified Dr.

explanation for his determination that Dr. Wonsettler's autopsy report is admissible as "a medical treatment record." Decision and Order at 12 n.9. We note that neither claimant nor employer designated Dr. Wonsettler's autopsy report as "a medical treatment record." Director's Exhibit 16.

In the interest of judicial economy, we will also address the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis, and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

Employer argues that the administrative law judge erred in relying solely upon the autopsy evidence in finding that claimant suffers from clinical pneumoconiosis.[11] Employer contends that the administrative law judge erred in failing to consider the medical opinion evidence. Employer's Brief at 15. We agree. On remand, should the administrative law judge again find that the autopsy evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), consistent with the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer also contends that the administrative law judge, in finding that the evidence established that the miner's death was due to clinical pneumoconiosis, erred in crediting Dr. Perper's opinion. In opining that the miner's death was due to clinical pneumoconiosis, Dr. Perper characterized the severity of the miner's clinical pneumoconiosis as "mild to moderate," and opined that it "resulted in [a] progressively worsening respiratory impairment." Claimant's Exhibit 2. However, employer asserts that "Dr. Perper overinflated the severity of the disease," noting that "Dr. Perper was the only reviewing pathologist to find anything more than very mild clinical

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Perper's July 12, 2013 medical report as one of her two permissible affirmative medical reports. Administrative Law Judge's Exhibit 2; *see* 20 C.F.R. §725.414(a)(2)(i). When employer objected to the admissibility of the autopsy portion of Dr. Perper's report, claimant indicated her intention to submit Dr. Perper's review of the autopsy evidence as rebuttal to Dr. Oesterling's autopsy report. Hearing Transcript at 13; *see* 20 C.F.R. §725.414(a)(2)(ii). Consequently, the administrative law judge permissibly admitted the autopsy portion of Dr. Perper's report as claimant's rebuttal evidence. Decision and Order at 12 n.8.

[11] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

pneumoconiosis."[12] Employer's Brief at 33. Because there is conflicting evidence regarding the severity of the miner's clinical pneumoconiosis,[13] the administrative law judge should resolve the conflict, and explain how his determination affects the credibility of the physicians' opinions addressing whether the miner's clinical pneumoconiosis hastened his death.

Employer also contends that the administrative law judge erred in his consideration of the opinions of Drs. Oesterling and Castle that the miner's death was not related to pneumoconiosis. In addressing whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge discounted the opinions of Drs. Oesterling and Castle because he found their opinions, that the miner's emphysema was caused by smoking alone, to be contrary to the Department of Labor's determination in the Preamble to the 2001 regulatory revisions that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms. Decision and Order at 21-22. A review of the administrative law judge's decision, however, reflects that the administrative law judge did not address whether claimant satisfied her burden to establish that the miner's emphysema was legal pneumoconiosis.[14] *See* 20 C.F.R. §718.201(a)(2). Consequently, on remand, should the administrative law judge find that the evidence does not establish that the miner's death was due to clinical pneumoconiosis, he must address whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and, if so, whether the evidence establishes that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

[12] Drs. Abraham and Oesterling diagnosed "mild" and "minimal" coal workers' pneumoconiosis, respectively. Claimant's Exhibit 5; Employer's Exhibit 1. Although Dr. Wonsettler diagnosed anthrasilicosis of the lymph nodes in her autopsy report, Director's Exhibit 16, she subsequently testified that she found insufficient evidence to diagnose coal workers' pneumoconiosis. Employer's Exhibit 9 (excluded) at 18. Dr. Swedarsky similarly opined that the autopsy findings did not support a finding of coal workers' pneumoconiosis. Employer's Exhibit 2 (excluded).

[13] In finding that the autopsy evidence established the existence of clinical pneumoconiosis, the administrative law judge acknowledged that the physicians differed as to the severity of the disease. Decision and Order at 14.

[14] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

To the extent that the preamble discusses specific types of emphysema that may be caused by coal dust exposure, I note that the preamble identifies centrilobular emphysema, centriacinar emphysema, and focal emphysema, but not panlobular and bullous emphysema. *See* 65 Fed. Reg. 79,941-42 (Dec. 20, 2000). Consequently, contrary to the administrative law judge's finding, the scientific evidence cited in the preamble does not supply a basis for discounting the opinions of Drs. Oesterling and Castle on the grounds that coal dust exposure causes panlobular and bullous emphysema.

I concur in all other respects with the majority's decision.

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JUDITH S. BOGGS
Administrative Appeals Judge