

BRB No. 11-0358 BLA

JUANITA ROBERTS)	
(Widow of ADAM ROBERTS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
TRI-STAR CONSTRUCTION COMPANY)	DATE ISSUED: 02/24/2012
)	
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 Awarding Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2008-BLA-05124) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or

after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4). As claimant¹ filed her survivor's claim on February 21, 2007, the administrative law judge issued an Order on April 30, 2010, allowing the parties to submit additional evidence or argument concerning the applicability of amended Section 411(c)(4) to this case. Following the parties' responses, the administrative law judge admitted supplemental reports from Drs. Oesterling and Rosenberg into the record.

The administrative law judge credited the miner with thirty-one years of coal mine employment, and accepted the parties' stipulation to the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge found that the weight of the evidence was sufficient to establish complicated pneumoconiosis, and that claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded survivor's benefits, without reaching the issue of the applicability of amended Section 411(c)(4).

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding complicated pneumoconiosis established at Section 718.304. Employer also contends that the administrative law judge erred in "disregarding" the deposition testimony of Drs. Oesterling and Rosenberg *sua sponte*, with no notice to employer prior to the issuance of her Decision and Order, on the ground that the record contained no evidence that adequate notice of the depositions was given to claimant. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.²

¹ Claimant is the widow of the miner, who died on October 28, 2006. Director's Exhibit 2.

² We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of the miner's coal mine employment and her acceptance of the parties' stipulation to the existence of simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.³ 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).

Turning to the procedural issue, employer contends that the administrative law judge erred in "disregarding" the deposition testimony of Drs. Oesterling and Rosenberg,⁴ based on her findings that claimant was unrepresented by counsel at the time of the depositions, and that there was no evidence in the record to show that claimant was provided notice of the depositions. *See* Decision and Order at 7 n.10, 8 n. 13. Employer asserts that claimant was duly notified of the depositions, and that the applicable regulations do not require that notices of the taking of depositions be included in the record. As claimant was represented by counsel at the hearing, employer maintains that counsel's failure to object to the admission of these depositions into the record constitutes a waiver of any objection. Claimant, responding in support of the administrative law judge's exclusion of the deposition testimony from consideration, has not indicated whether she received due notice of the depositions. Claimant's Brief at 6-7.

Deposition testimony may be taken "according to the rules of practice of the Federal district court for the judicial district in which the case is pending . . . except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived." 20 C.F.R. §725.458. Under 29 C.F.R. §18.23(a), referenced by the administrative law judge, depositions may be used against any party "who was present or represented at the taking of the deposition or who had due notice thereof . . . unless the administrative law judge rules that such use would be unfair or a violation of due process." 29 C.F.R. §18.23(a)(2). Under 29 C.F.R. §18.22, "[a] copy of the notice *shall not be filed with the Office of the Administrative Law Judges unless* the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or

³ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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*).

⁴ With regard to Dr. Rosenberg's deposition, the administrative law judge found that "[e]mployer's counsel's statement at the deposition that the Claimant 'has not contacted me to participate in the deposition today' does not establish that the Claimant was provided adequate advance notice, as defined in [29 C.F.R. §18.23(a)]." Decision and Order at 7 n.10, 8 n.13; Employer's Exhibit 11 at 3.

there is some other compelling reason for its submission.” 29 C.F.R §18.22(c)(emphasis added).⁵ Lastly, under the Federal Rules of Civil Procedure, any “objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.” Fed.R.Civ.P. 32(d)(1).

Upon consideration of the administrative law judge’s findings and the arguments raised on appeal, we conclude that, on the present record, the administrative law judge’s determination to “disregard” the deposition testimony of Drs. Oesterling and Rosenberg cannot be affirmed. The plain language of 29 C.F.R. §18.22(c), referenced by the administrative law judge, does not require that a notice of deposition be made a part of the record. Further, the administrative law judge made no inquiry into whether claimant actually received adequate notice of the depositions, nor did she determine that “use [of the depositions] would be unfair or a violation of due process.” 20 C.F.R. §18.23(a)(2). As claimant was represented by counsel at the hearing, and counsel agreed to the admission into the record of the depositions without objection, the administrative law judge should have also considered whether counsel’s failure to object to any deficiency in employer’s notices to claimant of the taking of these depositions constituted a waiver of the issue. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995); Hearing Transcript at 10, 21.

In light of the foregoing, and as employer was afforded no prior notice, we conclude that the administrative law judge’s exclusion of the depositions of Drs. Oesterling and Rosenberg from consideration constituted an abuse of discretion, which may have materially affected her evaluation of the medical opinions of Drs. Oesterling and Rosenberg. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). We therefore vacate the award of benefits and remand the case for further findings. On remand, the administrative law judge must reconsider the admissibility of the deposition testimony of Drs. Oesterling and Rosenberg, and determine whether claimant actually received adequate notice of the depositions and/or whether the notice issue was waived. Thereafter, the administrative law judge must reassess the evidence relevant to the issue of complicated pneumoconiosis at Section 718.305. *See* 30 U.S.C. §921(c)(3); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). If, on remand, the administrative law judge finds that the evidence is insufficient to establish complicated pneumoconiosis, she must determine whether claimant is entitled to invocation of the

⁵ It appears that the “document” denoted in the wording of the regulation is the notice of deposition, and not the deposition itself. *See* 29 C.F.R. §18.22.

presumption at amended Section 411(c)(4) and, if so, whether employer has successfully rebutted the presumption.

Accordingly, the Decision and Order Awarding Survivor's Benefits is affirmed in part, 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