BRB No. 07-0202 BLA

M.D. (Widow of G.D.) Claimant-Respondent v. DOTCO ENERGY COMPANY, INCORPORATED and A.T. MASSEY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/30/2007 DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 – Award of Benefits (05-BLA-5676) of Administrative Law Judge Larry S. Merck on a survivor's claim[1] 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). After the formal hearing in this case, and before he issued his decision, the administrative law judge addressed whether the evidence submitted by the parties complied with the evidentiary limitations at 20 C.F.R. §725.414. By Order dated September 20, 2006 (Order), the administrative law judge found that the evidence submitted by employer was in excess of the limitations. Specifically, the administrative law judge found that employer had designated Dr. Caffrey's autopsy report, in which Dr. Caffrey reviewed the autopsy prosector's report, autopsy slides, and other medical records, as its affirmative-case autopsy evidence. In reliance on the Board's holding in *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.), the administrative law judge excluded Dr. Caffrey's report on the ground that it could not serve as affirmative-case autopsy evidence under 20 C.F.R. §725.414(a)(3)(i), as the report of Dr. Dennis, the autopsy prosector, which was submitted by claimant, was the only autopsy report allowed at Section 725.414(a)(3)(i). The administrative law judge, therefore, concluded that Dr. Caffrey's report constituted a medical report, Order at 2, but that since employer had already submitted two affirmative-case medical reports; specifically, the reports of Drs. Ghio and Repsher, Dr. Caffrey's report was in excess of the evidentiary limitations. Order at 1-2. Consequently, the administrative law judge accorded employer the opportunity to redesignate the evidence it had already submitted.[2] In response, employer withdrew Dr. Caffrey's report as its affirmative-case autopsy report. Instead, employer designated Dr. Caffrey's opinion as its autopsy rebuttal evidence, and designated the opinions of Drs. Roggli and Repsher as its affirmative-case medical opinions. Employer's Exhibits 1, 8, 10. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with 27.94 years of qualifying coal mine employment, found the

[1] Claimant is the surviving spouse of the miner, who died on November 5, 2003. Director's Exhibit 9. The miner had filed a claim for benefits on August 28, 2000, which was denied by the district director on December 26, 2000. Director's Exhibit 1. That claim was not pursued. Claimant filed a survivor's claim for benefits on February 4, 2004. Director's Exhibit 2.

[2] Employer had also designated a report by Dr. Ghio as affirmative-case medical opinion evidence at 20 C.F.R. §725.414(a)(3)(i), but subsequently admitted that Dr. Ghio's report exceeded the evidentiary limitations and withdrew the report.

existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(2) based on the autopsy report of Dr. Dennis, found that pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) based on the opinion of Dr. Abad and the autopsy report of Dr. Dennis, found that claimant was entitled to the rebuttable presumption at 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment, based on his length of coal mine employment, and found that the miner's pneumoconiosis hastened his death at 20 C.F.R. §718.205(c). Benefits were, accordingly, awarded.

On appeal, employer argues that the administrative law judge erred in prohibiting employer from submitting an affirmative-case autopsy report pursuant to Section 725.414(a)(3)(i). Employer also argues that the administrative law judge erred in excluding Dr. Caffrey's report as employer's autopsy rebuttal report pursuant to 20 C.F.R. §725.414(a)(3)(ii). Employer argues, therefore, that the administrative law judge erred in finding pneumoconiosis established based on autopsy evidence at Section 718.202(a)(2).[3] Employer further argues that the administrative law judge erred in finding that the medical opinion evidence established that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in response, agrees with employer that the administrative law judge erred in refusing to allow employer to submit an affirmative-case autopsy report, in excluding Dr. Caffrey's opinion from consideration as autopsy rebuttal evidence, and in not adequately

[3] Although employer does not directly challenge the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4), because we are remanding this case in light of the administrative law judge's errors regarding the admissibility of evidence pursuant to 20 C.F.R. §725.414 to allow employer to redesignate its evidence, we also vacate the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4) and remand the case for reconsideration of the medical opinion evidence thereunder, if reached. Moreover, we note that employer does challenge the administrative law judge's findings regarding the opinions of Drs. Roggli and Repsher on death causation, which the administrative law judge considered and rejected at Section 718.202(a)(4) for the same reasons he did at Section 718.205(c).

Because Section 718.202(a)(1)-(4) provides alternative methods of establishing pneumoconiosis, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), however, the administrative law judge need not consider whether pneumoconiosis is established at Section 718.202(a)(4) by medical opinion evidence, if he finds pneumoconiosis established at Section 718.202(a)(2) by autopsy evidence. Further, if reached, the administrative law judge should consider only medical opinion evidence at Section 718.202(a)(4).

considering the report of Dr. Dennis, the autopsy prosecutor, on the issue of whether the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c).[4]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge erred in failing to provide employer with an opportunity to submit an affirmative-case autopsy report when he applied the Board's decision in *Kalist*. Employer argues that *Kalist* is not controlling because the Director no longer subscribes to a reading of Section 725.414 that prohibits the opposing party from submitting its own affirmative-case autopsy report. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*). The Director agrees that in *Keener*, the Board held that an autopsy tissue slide review qualifies as an autopsy report under Section 725.414(a)(3)(i). Consequently, the Director argues in the instant case that the reports of Drs. Caffrey and Roggli, pathologists who reviewed the autopsy slides, which were submitted by employer, could be admissible as affirmative-case autopsy reports.[5] We agree with employer and the Director.

Subsequent to the issuance of the administrative law judge's Decision and Order in this case, the Board held that the regulations set forth in Section 725.414 permit both claimant and employer to each submit, as affirmative-case autopsy evidence pursuant to Sections 725.414(a)(2)(i), (a)(3)(i), a report by a pathologist who has reviewed the autopsy tissue slides in accordance with 20 C.F.R. §718.106. *See Keener*, 23 BLR at 1-237-238. In addition, the Board held that where a party submits an affirmative-case autopsy report, such as here, the opposing party is permitted to submit an additional report in rebuttal under Sections 725.414(a)(2)(ii), (a)(3)(ii). Thus, in effect, employer, in this case, should have been permitted to submit two autopsy reports; specifically, one

[4] We affirm the administrative law judge's finding of 27.94 years of coal mine employment and his finding that pneumoconiosis, if established, arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4-5, 15.

[5] The Director, Office of Workers' Compensation Programs, also notes that the opinions by Drs. Caffrey and Roggli could; instead, be submitted as medical reports pursuant to 20 C.F.R. §725.414(a)(3)(i), since both physicians reviewed medical evidence beyond the autopsy slides. Director's Letter Brief at 4; Employer's Exhibits 1, 10.

affirmative-case report and one rebuttal report. *See Keener*, 23 BLR at 1-240. Because employer was not given an opportunity to submit an affirmative-case autopsy report pursuant to Section 725.414(a)(3)(i), we vacate the administrative law judge's findings under Section 725.414 and Section 718.202(a)(2), and his award of benefits. This case is, accordingly, remanded for the administrative law judge to afford employer the opportunity to redesignate its evidence in accordance with *Keener*. *See Keener*, 23 BLR at 1-236-240.

Employer also argues that the administrative law judge erred in excluding Dr. Caffrey's report as an autopsy rebuttal report because it went beyond the scope of the autopsy prosector's report and because the administrative law judge could not tell what information Dr. Caffrey relied on in forming his opinion. Decision and Order at 8.[6] Employer asserts that, notwithstanding Dr. Caffrey's review of additional evidence, his opinion is based primarily on the autopsy prosecutor's report and his own assessment of the tissue slides, and that the administrative law judge should have redacted those portions of Dr. Caffrey's report that went beyond the scope of Dr. Dennis's autopsy report. In response, the Director asserts that the administrative law judge correctly found that Dr. Caffrey's opinion was a combined autopsy report and medical opinion for purposes of the evidentiary limitations, but that the administrative law judge's decision to exclude Dr. Caffrey's opinion in its entirety was not warranted.

In *Keener*, the Board addressed the scope of autopsy rebuttal evidence, as contemplated by the evidentiary limitations and held that the regulations contemplate that an opinion offered in rebuttal of the case will analyze or interpret that evidence to which it is responsive. In the event that the autopsy rebuttal physician bases his conclusions on materials beyond the scope of that evidence, the administrative law judge must review and redact those portions of the rebuttal physician's conclusions that exceed the scope of the evidence to which it responds. *Keener*, 23 BLR at 1-240. In light of *Keener*, therefore, the administrative law judge should, if reached, again consider Dr. Caffrey's entire autopsy rebuttal report and determine whether those portions that exceeded the scope of Dr. Dennis's autopsy report can be redacted.

Employer next argues that the administrative law judge failed to adequately consider and address the opinion of Dr. Dennis, the autopsy prosector, when assessing whether pneumoconiosis hastened the miner's death at Section 718.205(c). Employer contends that while Dr. Dennis diagnosed the existence of pneumoconiosis, the physician did not, in fact, render an opinion that pneumoconiosis hastened the miner's demise and should therefore, be considered evidence that pneumoconiosis did not hasten the miner's death. The Director

[6] In his report, Dr. Caffrey, not only examined Dr. Dennis's autopsy report, but also reviewed the miner's employment history, multiple medical records, copies of x-ray reports, copy of the death certificate, and eighteen autopsy slides. Employer's Exhibit 1.

contends that Dr. Dennis's report could be construed in one of two ways: (1) that the miner's pneumoconiosis did not hasten his death since Dr. Dennis did not list that condition in addressing cause of death, or (2) that Dr. Dennis focused solely on the immediate or direct causes of death and did not consider whether other factors, such as coal workers' pneumoconiosis, had a hastening effect. The Director contends, therefore, that the administrative law judge's assessment of Dr. Dennis's report was inadequate under Section 718.205(c) and should be reconsidered on remand. We agree.

While the administrative law judge found that the opinion of Dr. Dennis, who diagnosed the miner with simple pneumoconiosis and anthracosilicosis, was well-reasoned and well-documented on the issue of pneumoconiosis, the administrative law judge did not address that part of Dr. Dennis's opinion dealing with the cause of the miner's death, *i.e.*, Dr. Dennis found that the miner died as a result of pulmonary congestion and edema along with acute myocardial infarction and focal bronchopneumonia, in his discussion of the evidence. Decision and Order at 8, 15-17. Hence, on remand, the administrative law judge must reexamine Dr. Dennis's opinion and assess the probative value, if any, of this opinion on the issue of whether pneumoconiosis hastened the miner's demise. *See Director, OWCP v. Congleton*, 743 F.2d 428, 429, 7 BLR 2-12, 2-15 (6th Cir. 1984); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); Director's Exhibit 9.

Employer also argues that the administrative law judge erred in according less weight to the opinion of Dr. Roggli, that pneumoconiosis did not hasten the miner's death, because it was vague and equivocal. Employer avers that a review of Dr. Roggli's deposition testimony demonstrates that the physician unequivocally testified that the severity of the miner's coal workers' pneumoconiosis was so minimal as to make even a diagnosis of the disease questionable. Likewise, employer contends that the administrative law judge erred in discrediting the opinion of Dr. Repsher, that pneumoconiosis did not hasten the miner's death, because Dr. Repsher did not diagnose pneumoconiosis when, in fact Dr. Repsher found that the miner suffered from coal workers' pneumoconiosis. Decision and Order at 17.

A review of Dr. Roggli's deposition testimony, reveals that Dr. Roggli stated that he gave the miner "the benefit of the doubt" to find pneumoconiosis, as the autopsy slides showed simple pneumoconiosis of a minimal degree. Employer's Exhibit 13 at 11. Dr. Repsher, after reviewing additional medical reports, diagnosed the miner with "equivocal, minimal, histologic" simple coal workers' pneumoconiosis, and opined that there was no relationship between the miner's minimal, histologic, simple coal workers' pneumoconiosis and his death. Employer's Exhibit 14 at 11, 12, 14. On remand, therefore, if employer resubmits the medical reports of Drs. Roggli and Repsher, the administrative law judge must reconsider the weight to accord them on the issue of death causation at Section 718.205(c).

Employer also argues that the administrative law judge erred in crediting the opinion of Dr. Abad, that pneumoconiosis hastened the miner's death, over the opinions of better qualified physicians.[7] Employer contends that the opinion of Dr. Abad on death causation is speculative and biased because the arterial blood gas studies and pulmonary function studies taken during the miner's lifetime were normal, and Dr. Abad never mentioned coal workers' pneumoconiosis in his treatment records and never treated the miner for a pulmonary condition.

Although there is no requirement that a treating physician be either a pulmonologist or pathologist specializing in lung disease for his opinion to be afforded deferential weight, 20 C.F.R. §718.104(a)-(d), the respective qualifications of the physicians are important indicators of the reliability of their opinions, *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In weighing doctors' opinions, the administrative law judge is also called upon to consider their quality, taking into account, among other things, the opinions' reasoning and detail of analysis. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997). Moreover, reports prepared in the course of litigation are probative and are not presumptively biased. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (*en banc*). Accordingly, we vacate the administrative law judge's finding pursuant to Section 718.205(c), and remand the case for a complete analysis and adequate discussion of all relevant evidence thereunder. On remand, the administrative law judge must discuss the basis for his credibility findings.

In sum, we vacate the administrative law judge's evidentiary determinations pursuant to Section 725.414 and remand the case for the administrative law judge to permit employer to redesignate its affirmative-case autopsy evidence, rebuttal autopsy evidence, and medical opinion evidence pursuant to Section 725.414. We, therefore, vacate the administrative law judge's findings of pneumoconiosis at Sections 718.202(a)(2) and (a)(4). In addition, we vacate the administrative law judge's determination that the medical opinion evidence established that the miner's pneumoconiosis hastened his death. On remand, the administrative law judge must reevaluate the medical evidence to determine whether it is sufficient to establish pneumoconiosis and that the miner's death was hastened by pneumoconiosis. *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Dillon v.*

[7] Dr. Abad is not Board-certified in any specialty, while Drs. Roggli, Caffrey and Dennis are Board-certified pathologists and Dr. Repsher is a Board-certified pulmonologist.

Peabody Coal Co., 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). If, on remand, the administrative law judge finds that claimant is entitled to benefits, he must determine the commencement date of the survivor's benefits pursuant to Section 725.503(c), which states that benefits awarded on a survivor's claim begin from the month of the miner's demise. 20 C.F.R. §725.503(c).

Accordingly, the Decision and Order – Award of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge