No. 09-4462

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BARNES AND TUCKER COMPANY,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR;

ELIZABETH KLINE, WIDOW/EARL,

Respondents

On Petition for Review of an Order of the Benefits Review Board,
United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Barnes and Tucker Company (the employer) petitions this Court for review of a final order of the Benefits Review Board, which affirmed a Department of Labor administrative law judge's (ALJ's) decision awarding federal black lung benefits to Elizabeth Kline (Mrs. Kline or the claimant), the widow of coal miner Earl Kline (Mr. Kline or the miner). This Court has jurisdiction over the

employer's petition under Section 21(c) of the Longshore and Harbor Workers' Compensation Act (the Longshore Act), 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act (the Act or the BLBA), 30 U.S.C. § 932(a). The injury contemplated by section 21(c) – the miner's exposure to coal mine dust – occurred in Pennsylvania, within the jurisdictional boundaries of this Court.

The petition also meets section 21(c)'s timeliness requirements. The ALJ issued her decision awarding benefits on May 31, 2007, and her order denying the employer's motion for reconsideration on July 25, 2007. Appendix (App.) 122, 136. Barnes and Tucker filed a notice of appeal of both decisions with the Board on August 3, 2007, within the statutorily mandated thirty-day period. 33 U.S.C. § 921(a); 20 C.F.R. § 725.479(c) ("After the administrative law judge has issued and filed a denial of the request for reconsideration . . . any dissatisfied party shall have 30 days within which to institute proceedings to set aside the decision and order on reconsideration.").[1]

The Board issued a decision affirming the ALJ's decision on September 25, 2008. App. 37. The employer timely moved for reconsideration. 20 C.F.R.

[1] Throughout this brief, we refer to the Secretary of Labor's black lung benefits program regulations, 20 C.F.R. Parts 718, 725 and 726. Unless otherwise indicated, all citations to the Code of Federal Regulations are to the current (2009) version.

§ 802.407. The Board denied reconsideration on September 30, 2009. App. 21. Barnes and Tucker petitioned this Court for review on November 27, 2009, within the statutorily mandated sixty-day period. App. 16. 33 U.S.C. § 921(c); *Felton v. Director, OWCP*, 339 Fed.Appx. 187, 188 n.2 (3d Cir. 2009) ("following a BRB's decision on a timely motion for reconsideration, an appellant has sixty days to file a petition for review in the appropriate United States Court of Appeals"). Thus, this Court has both subject-matter and appellate jurisdiction to review the Board's order. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)).

STATEMENT OF THE ISSUE

The Black Lung Benefits Act's implementing regulations impose limits on the amount of medical evidence each party may submit. One limitation is that a party is permitted to submit one "report of an autopsy" in support of its affirmative case and a second as rebuttal evidence. 20 C.F.R. § 725.414. The ALJ, relying on the Director's interpretation of this regulation as adopted by the Benefits Review Board, excluded portions of three autopsy reports (one submitted by Mrs. Kline and two by Barnes and Tucker) that were based on medical evidence beyond the clinical autopsy data. Was this reversible error?

STATEMENT OF THE CASE

Earl Kline, who worked as a coal miner for over 40 years, passed away in 2004. App. 123-124. Elizabeth Kline, his widow, filed this application for federal black lung survivor's benefits in 2005. *Id*. Barnes and Tucker was notified of, and accepted, its designation as the coal mine operator responsible for the payment of any benefits awarded to Mrs. Kline. App. 124. A district director in the Department of Labor's Office of Workers' Compensation Programs – an official who processes claims and makes initial eligibility determinations – awarded benefits. Barnes and Tucker objected and requested and received a hearing before ALJ Bullard. App. 123.

On May 31, 2007, ALJ Bullard issued a decision awarding survivor's benefits to Mrs. Kline. App. 122. She also made several evidentiary rulings, excluding certain evidence under the federal black lung program's evidentiary limitations regulation, 20 C.F.R. § 725.414. App. 127, 130-31. Barnes and Tucker moved for reconsideration challenging the ALJ's evidentiary rulings. App. 79-81. ALJ Bullard denied the motion on July 25, 2007.[2] App. 136-37.

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[2] The ALJ mistakenly characterized the employer's motion for reconsideration as untimely, stating that such motions must be filed within ten days after an order is entered. App. 136. This is true under the Federal Rules of Civil Procedure, which apply to ALJ proceedings in the absence of a specific regulation. *Id.* (citing 20 C.F.R. § 18.1(a)). However, the black lung benefits program regulations specifically state that "[a]ny party may, within 30 days after the filing

(continued…)

Barnes and Tucker timely appealed to the Benefits Review Board. App. 117. The Board affirmed the ALJ's evidentiary rulings and her award of benefits. App. 117, 37. The employer timely moved the Board to reconsider its decision. App. 31. The Board summarily denied that motion. App. 21. Barnes and Tucker then petitioned for review. App. 16-18.

STATEMENT OF FACTS

1. Regulatory background.

Mrs. Kline's claim, filed in 2005, was processed and adjudicated under the revised black lung program regulations that became effective January 19, 2001. 65 Fed. Reg. 79920-80107 (Dec. 20, 2000), as codified at 20 C.F.R. Parts 718, 725 and 726. The revised regulations impose limits on the amount of medical evidence each party may submit. 20 C.F.R. § 725.414.[3]

(…continued)
of a decision and order . . . request a reconsideration of such decision and order by the administrative law judge." 20 C.F.R. § 725.479(b). Barnes and Tucker filed its motion for reconsideration with the ALJ on June 21, 2007, within 30 days of the May 31, 2007, decision. This error is harmless because ALJ Bullard went on to deny the request for reconsideration on its merits. App. 137.

[3] Barnes and Tucker does not challenge the legitimacy of 20 C.F.R. § 725.414, which has been affirmed by the two Courts of Appeals that have considered the issue. *See National Mining Ass'n v. Chao*, 292 F.3d 849, 874 (D.C. Cir. 2002) (rejecting argument that section 725.414 is arbitrary and capricious); *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 297 (4th Cir. 2007) (holding that evidence-limiting rules "are a reasonable and valid exercise of the Secretary's authority to regulate evidentiary development in Black Lung Act proceedings").
(continued…)

The evidence-limiting rules were proposed and adopted "in order to ensure that eligibility determinations are based on the best quality evidence submitted rather than on the quantity of evidence submitted by each side." 62 Fed. Reg. 3338 (Jan. 22, 1997). The Department noted that claimants must confront "the vastly superior economic resources of their adversaries[,] . . . who often generate medical evidence in such volume that it overwhelms the evidence supporting entitlement that claimants can procure." *Id*. In addition to emphasizing the quality of the evidence over its quantity, the Department intended to make the adjudication of claims "more equitable" and to "reduce the costs associated with these cases." *Id*. *See also* 62 Fed. Reg. 3356-57 (initial proposal preamble); 65 Fed. Reg. 79920, 79989-93 (final rule preamble).

In support of its affirmative case, each party is permitted to submit two chest X-ray interpretations, two pulmonary function tests, two arterial blood gas studies, one report of an autopsy, one report of each biopsy, and two medical reports as its affirmative case. 20 C.F.R. § 725.414(a)(2)(i), (a)(3)(i). Each party may also submit, in rebuttal, "a physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted" by

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(…continued)
It argues only that the ALJ improperly interpreted section 725.414 in making her evidentiary rulings.

the opposing party. 20 C.F.R. § 725.414(a)(2)(ii), (a)(3)(ii). Finally, where rebuttal evidence has been submitted, the party that originally proffered the evidence which has been the subject of rebuttal may submit one additional statement to rehabilitate it.[4] *Id*. Medical evidence in excess of these limits may be admitted upon a showing of good cause. 20 C.F.R. § 725.456(b)(1).

2. Proceedings before ALJ Bullard.

At the hearing, the parties stipulated that Earl Kline worked as a coal miner for 40 years and that he suffered from coal workers' pneumoconiosis as a result of that work. App. 151. The only issue that remained in dispute was whether Mr. Kline's death was caused or hastened by the disease. App. 151

The Notice of Hearing instructed both Mrs. Kline and Barnes and Tucker that they would be required to identify their medical evidence and explain how each submission complied with the evidence-limiting rules. At the hearing, counsel for the employer stated, "in compliance with the regulations," that its evidence consisted of two medical reports regarding the cause of Mr. Kline's death from Dr. Gregory Fino and Dr. Larry Hurwitz, one autopsy review from Dr.

[4] Notwithstanding these limitations, "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).

Stephen Bush, and a rebuttal of Dr. Joshua Perper's autopsy report from Dr. Everett Oesterling. App. 159.

Claimant submitted, in support of her affirmative case, the original report of the autopsy performed by Dr. Curtis Goldblatt, a medical report by Dr. Goldblatt dated September 7, 2006, and a medical report in the form of Dr. Brian Lieb's August 8, 2006, deposition testimony. App. 151-52, 155-56, 126. In rebuttal, claimant submitted Dr. Perper's autopsy report. App. 153, 127.

The miner's death certificate and hospitalization and treatment records were also admitted. App. 152, 126. The miner's death certificate was signed by Dr. Brian Lieb, the miner's treating physician. He listed the causes of death as "CAD" (coronary artery disease), "CHF" (congestive heart failure), "COPD" (chronic obstructive pulmonary disease), and cardiomyopathy. App. 126; Director's Exhibit 16.

a. Claimant's medical evidence.

Dr. Lieb provided his medical report through deposition testimony. 20 C.F.R. § 725.414(c). Dr. Lieb treated the miner during the four years prior to his death for COPD and emphysema related to his occupational coal dust exposure. Claimant's Exhibit 5 at 16-17. He testified that Mr. Kline suffered from coal workers' pneumoconiosis. *Id.* at 28. Dr. Lieb attributed the miner's death to

coronary artery disease, which was exacerbated by COPD and hypoxemia. *Id.* at 16, 29-31.

Dr. Curtis Goldblatt conducted an autopsy within 12 hours of the miner's death. App. 182. Dr. Goldblatt provided a gross description of the body based on his external and internal examinations. App. 184. On microscopic examination of the lungs, Dr. Goldblatt found "collections of anthrasilicotic pigment laden macrophages." App. 185. Dr. Goldblatt listed the final anatomic diagnoses as including severe atherosclerotic coronary artery disease, "Status Post Coronary Bypass Graft with Acute Thrombotic Occlusion and Severe Atherosclerosis," cor pulmonale[5], acute bronchopneumonia, "Micronodular Simple Coal Worker[s'] Pneumoconiosis," and pulmonary emphysema. App. 182. Dr. Goldblatt summarized his findings:

> This 88-year-old white male died from acute thrombotic occlusion of the coronary bypass graft. The contributing causes of death are simple worker [sic] pneumoconiosis, pulmonary emphysema, acute bronchopneumonia, and cor pulmonale. The manner of death is natural.

Id.

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[5] Cor pulmonale is a heart disease characterized by "[r]ight ventricular (RV) enlargement secondary to malfunction of the lungs" commonly caused by "chronic obstructive pulmonary disease (chronic bronchitis, emphysema)." *Mancia v. Director, OWCP*, 130 F.3d 579, 585 (3d Cir. 1997) (quoting THE MERK MANUAL, CARDIOVASCULAR DISORDERS (16th ed. 1992)). "[C]or pulmonale is . . . commonly associated with pneumoconiosis." *Id.* at 586.

Dr. Goldblatt also provided a medical report, based on his review of Drs. Bush's and Hurwitz's reports. App. 263. Dr. Goldblatt reiterated his earlier findings and disagreed with Drs. Bush's and Hurwitz's statements that cor pulmonale could not be "diagnosed by the microscopic finding of pulmonary arteriolar hypertrophy." App. 264. Dr. Goldblatt concluded that "coal workers' pneumoconiosis was a significant factor in the cause of death of Mr. Kline." *Id*.

Dr. Joshua Perper's opinion, submitted by Mrs. Kline as a rebuttal autopsy report, was based on his review of the death certificate, autopsy protocol and slides, the miner's medical records from Dr. Lieb, available medical records from 1986 through 2004, and the reports and depositions of Drs. Bush and Hurwitz. App. 197-224. Dr. Perper noted that Mr. Kline had worked as a coal miner for at least 34 years and had a minimal smoking history of two years during World War II. App. 198-99. Dr. Perper concluded that the miner suffered from simple coal workers' pneumoconiosis, *i.e.*, clinical pneumoconiosis, and emphysema due to coal dust exposure, *i.e.*, legal pneumoconiosis.[6] App. 225-26. Dr. Perper opined

[6] Pneumoconiosis includes both "clinical" pneumoconiosis and "legal" pneumoconiosis. 20 C.F.R. § 718.201(a). "Clinical pneumoconiosis" refers to those diseases recognized by the medical community as a fibrotic reaction of lung tissue caused by the permanent deposition of particulate matter in the lungs, so long as that deposition was caused by dust exposure in coal mine employment. 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" refers to any chronic pulmonary disease or impairment that is significantly related to, or substantially (continued…)

that coal workers' pneumoconiosis was a substantial contributing cause of the miner's death because pneumoconiosis was a substantial cause of the miner's pulmonary impairment and "ultimately contributed to and hastened his death." App. 231-32.

b. Employer's medical evidence.

Dr. Larry Hurwitz provided a medical opinion based on his review of the miner's medical records, including Dr. Lieb's deposition, Dr. Goldblatt's September 7, 2006, medical report, and Dr. Perper's August 20, 2006, autopsy report. He agreed that the autopsy demonstrated the presence of simple coal workers' pneumoconiosis but disagreed with Dr. Goldblatt's diagnosis of cor pulmonale. App. 266. Dr. Hurwitz concluded that the miner "died from an acute cardiac ischemic event" (*i.e.*, a heart attack) due to underlying severe coronary artery disease. App. 265. He stated that simple coal workers' pneumoconiosis was not a factor in the miner's death. App. 266.

Dr. Gregory Fino provided his opinion after reviewing the miner's available medical records. App. 272-86. He determined there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis or cor

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(…continued)
aggravated by, dust exposure in coal mine employment. 20 C.F.R. § 718.201(a)(2).

pulmonale. App. 287. Dr. Fino concluded that the miner's death was due to severe coronary artery disease and that coal dust inhalation did not contribute to or hasten the miner's death. *Id*.

At the employer's request, Dr. Stephen Bush, a pathologist, examined 36 tissue slides from the autopsy and reviewed Dr. Goldblatt's autopsy report. App. 186. In addition, Dr. Bush reviewed the miner's medical records from 1978 through 2004, which included reports of pulmonary evaluations from 1978, 1980, 1982 and 1987 as well as hospitalizations during 1986, 1993, 2001, 2002 and 2004. App. 186-88. Dr. Bush concluded there was "sufficient objective data" upon which to diagnose a mild degree of simple coal workers' pneumoconiosis and centrilobular emphysema. App. 189. He stated that the autopsy evidence was not consistent with cor pulmonale; therefore, the miner's lung disease was not sufficient to produce right ventricular hypertrophy. App. 190. Because the degree of pneumoconiosis was "so limited" and the emphysema in the lungs so mild, Dr. Bush did not agree with Dr. Goldblatt's conclusion that these conditions were "contributing causes of death." App. 191.

Dr. Everett Oesterling, a pathologist, reviewed the miner's medical records dating from 1978 to 2004, and the reports by pathologists Drs. Goldblatt and Perper. App. 308. Dr. Oesterling also microscopically examined the 36 tissues slides prepared at the autopsy. App. 309-13. He found evidence of mild simple

coal workers' pneumoconiosis and emphysema. App. 313. Dr. Oesterling stated that the amount of pneumoconiosis seen was too mild to have caused any disability and that coal mine "dust exposure was in no way a factor in this gentleman's cardiac death." App. 314-15.

3. ALJ Bullard's decisions awarding benefits.

a. Evidentiary rulings.

The ALJ admitted all four of the medical opinions identified by the parties as their affirmative medical reports. The ALJ explained that a "medical report" is defined as "a physician's written assessment of the miner's respiratory or pulmonary condition," while "a physician's written assessment of a single objective test . . . shall not be considered a medical report for the purposes" of section 725.414. App. 130. Applying these guidelines, the ALJ admitted claimant's submissions of Drs. Goldblatt's and Lieb's reports as her two medical reports and the employer's submissions of Drs. Hurwitz's and Fino's opinions as its two medical reports.[7]

ALJ Bullard excluded substantial portions of three of the four autopsy reports submitted by the parties on the ground that they violated the evidentiary

[7] Although the ALJ did not specifically state this, it is clear from the record that Dr. Goldblatt's initial autopsy report was admitted as claimant's "one report of an autopsy." App. 182; Claimant's September 21, 2006 Pre-Hearing Statement. The admissibility of Dr. Goldblatt's reports has not been challenged.

limitations imposed by 20 C.F.R. § 725.414. The ALJ ruled that these three reports exceeded the scope of a "report of an autopsy" because they were not based on the physicians' review of only the clinical autopsy data but rather a wide range of medical evidence. App. 128, 130-31. The reports were not admissible as "medical reports" because each party had already submitted the two reports allowed by the regulation. *Id*.

The ALJ admitted those sections of Dr. Perper's report (submitted by Mrs. Kline as her rebuttal autopsy report) that responded to the employer's autopsy evidence as required by 20 C.F.R. § 725.414(a)(2)(ii). App. 128. The remainder of Dr. Perper's report, including his opinion on the cause of the miner's death, was excluded by the ALJ as a third medical report in excess of the two-report limit. *Id.*

The ALJ treated the employer's evidence similarly. She noted that Barnes and Tucker had designated Dr. Bush's report as its affirmative autopsy report and Dr. Oesterling's opinion as rebuttal to claimant's autopsy evidence. App. 129-30. The ALJ determined, however, that portions of Dr. Bush's report went beyond the "purely objective findings on autopsy" and constituted a third medical report within the meaning of the evidence-limiting rules. App. 130. Therefore, the ALJ admitted Dr. Bush's assessment of the clinical autopsy data but excluded the rest of his report as a medical report in excess of the regulatory limits. *Id*. Likewise,

the ALJ excluded Dr. Bush's deposition testimony since his testimony constituted a medical report exceeding the employer's two-report limit. *Id*.; *see* 20 C.F.R. § 725.414(c).

Relying on the Board's decision in *Keener v. Peerless Coal Co*, 2007 WL 1644032, 23 Black Lung Rep. (MB) 1-229 (Ben. Rev. Bd. 2007), the ALJ determined that Dr. Oesterling's report went beyond rebutting the claimant's autopsy report because it included his review of an extensive array of medical evidence in addition to the clinical autopsy data. App. 130-31. Therefore, the ALJ excluded those portions of Dr. Oesterling's opinion exceeding the scope of a "report of an autopsy" as a third medical report. App. 130.

b. Decision on the merits.

Having established the evidentiary record, the ALJ weighed that evidence to determine if Mrs. Kline had proved that her husband's death was caused or hastened by pneumoconiosis, the only element of her claim disputed by Barnes and Tucker. App. 131. She accorded the greatest weight to the opinions of Dr. Lieb as the miner's treating physician and Dr. Goldblatt as the autopsy prosector. These doctors both found that the miner's death was hastened by coal-dust-related pulmonary emphysema and COPD with cor pulmonale. App. 131-132.

The ALJ found that neither Dr. Fino nor Dr. Hurwitz provided persuasive opinions because, contrary to her findings and the weight of the evidence, Dr.

Fino did not accept that the miner had pneumoconiosis, COPD and pulmonary emphysema due to coal dust exposure and Dr. Hurwitz failed to acknowledge Dr. Goldblatt's diagnosis of cor pulmonale. *Id.* She also found that Dr. Goldblatt's diagnosis of cor pulmonale was not discredited by Dr. Bush (who rejected it) or Dr. Oesterling (who "loosely supported" it), and was supported by Dr. Perper's autopsy report. App. 132. Therefore, the ALJ concluded that the weight of the most reliable evidence established that the miner's death had been hastened by pneumoconiosis and awarded survivor's benefits to Mrs. Kline. *Id.*

Barnes and Tucker moved for reconsideration, arguing that the ALJ had erred in excluding portions of Drs. Oesterling's and Bush's reports. The employer asserted that the Board had erred in *Keener* by interpreting an autopsy report under section 725.414 to mean only a review of the macroscopic and microscopic evaluation of the decedent.[8] App. 80. The ALJ considered and

[8] *Keener* was issued after the hearing in this case, but before ALJ Bullard's decision. On reconsideration, Barnes and Tucker only asked that the ALJ reconsider her decision on the ground that the Board had erred in *Keener* in accepting the Director's interpretation of a "report of an autopsy" as reasonable. It did not ask that the ALJ reopen the record in light of *Keener*, to substitute one or both of its pathologists' global medical reports for either of the physicians' reports it initially designated as its two affirmative medical report, or that good cause existed to exceed the two-report limit. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621 (4th Cir. 2006) (holding that the ALJ did not abuse his discretion by permitting claimant to redesignate his medical report evidence and substitute a new submission for a previously designated medical report to bring his evidence into compliance with section 725.414's two-report limit). Nor

(continued…)

rejected the employer's motion on its merits, finding no reason to modify her decision. App. 136.

4. The Board's decisions affirming ALJ Bullard's award.

On appeal, Barnes and Tucker argued that the ALJ had erred in excluding those portions of Drs. Bush's and Oesterling's reports that were based on their review of medical evidence beyond the objective results of the autopsy. The employer also challenged the award on the merits, arguing that the ALJ had improperly credited the opinions of Drs. Lieb and Goldblatt.

The Board observed that, in *Keener*, it had accepted the Director's interpretation of section 725.414 that "a report of a pathologist who prepares a written assessment of the miner's respiratory or pulmonary condition based on a review of both pathological and clinical evidence, may be seen to have prepared both a report of autopsy (or autopsy rebuttal report) and a medical report, for purposes of the evidentiary limitations." App. 41; *see Keener*, 23 Black Lung Rep. at 1-239-240. Consequently, because both Dr. Bush and Dr. Oesterling

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did it make such arguments to the Board. Throughout this litigation, Barnes and Tucker has challenged only the reasonableness of the Director's interpretation of the 20 C.F.R. § 725.414, thereby waiving any other arguments that the excluded evidence should have been admitted. *See Webb v. City of Philadelphia*, 562 F.3d 256, 263 (3d Cir. 2009) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.") (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).

"reviewed an extensive array of medical evidence aside from [their microscopic review of] the autopsy slides," the ALJ properly determined that, under Board precedent, these opinions qualified as both a report of autopsy and a medical report for the purposes of the evidence limitations. App. 40-41 (alteration in original).

The Board rejected the employer's contention that *Keener*'s interpretation of "report of an autopsy" was at odds with the truth-seeking goal of litigation and contrary to the practice of medicine. App. 41. The Board agreed with the Director that the evidence-limiting rules do not preclude a party from submitting a "global" report from a pathologist that encompasses a doctor's review of medical records in addition to autopsy evidence. Such a report, however, would be considered both a "medical report" and a "report of an autopsy" for the purposes of section 725.414. *Id.*

Since the employer had already designated Drs. Hurwitz's and Fino's opinions as its two medical reports while identifying Dr. Bush's as its affirmative "report of an autopsy," the Board held that the ALJ properly limited Dr. Bush's report to his analysis of the clinical autopsy data, excluding the rest as a "medical

report" in excess of the two-report limit. App. 41.[9] The Board held that the ALJ acted within her discretion in excluding Dr. Bush's opinion on the cause of the miner's death because she was unable to discern whether Dr. Bush based that conclusion only on the clinical autopsy data. App. 42-43 and n.9.

Likewise, the Board affirmed the ALJ's admission of only those portions of Dr. Oesterling's report that constituted a rebuttal of claimant's autopsy report. The Board affirmed the ALJ's exclusion of the rest of Dr. Oesterling's report as an additional medical report in excess of the limitations, and his opinion on the cause of Mr. Kline's death as it was based on that inadmissible evidence. *Id*. Noting that the employer never asserted to the ALJ that good cause existed to exceed the two-report limit, or requested that it be allowed to re-designate its evidence in light of *Keener*, *see supra* note 8, the Board rejected Barnes and Tucker's claim of error and affirmed the ALJ's evidentiary rulings. App. 43.

The Board reviewed the ALJ's assessment of the admitted evidence and determined that substantial evidence supported the ALJ's finding that, based on the credible opinions by Drs. Goldblatt and Lieb, pneumoconiosis hastened the miner's death. App. 45-46. Therefore, the Board affirmed the award of

[9] The Board also affirmed the ALJ's exclusion of Dr. Bush's deposition testimony pursuant to section 725.414(c), which treats a physician's testimony as a medical report subject to the two-report limit. App. 41 n.8.

survivor's benefits. App. 47. Barnes and Tucker moved for reconsideration, challenging the Board's decision to defer to the Director's interpretation of "report of an autopsy." App. 31-35. The Board summarily denied the motion. App. 21.

SUMMARY OF THE ARGUMENT

The Director interprets "report of an autopsy," as used in 20 C.F.R. § 725.414, to mean a medical analysis based only on clinical autopsy data, and "medical report," as used in the same regulation, to mean a medical analysis based on multiple sources, which may include autopsy reports. The Board properly deferred to this interpretation, which is consistent with the text and purpose of the regulation. This Court should do so as well. The ALJ fairly and properly applied this standard by excluding those portions of the purported "report[s] of an autopsy" submitted by both parties that were based on an evaluation of non-autopsy evidence as "medical report[s]" in excess of the regulatory limits. ALJ Bullard's evidentiary rulings and award of benefits to Mrs. Kline should be affirmed.

STANDARD OF REVIEW

The Board's rulings on questions of law are subject to plenary review by this Court. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313 (3d Cir. 1995). The Director's reasonable interpretation of the Act and the Secretary of Labor's

black lung regulations, however, is entitled to substantial deference. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991).[10] The Director's interpretation of the BLBA's implementing regulations is "controlling unless plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quotation omitted); *accord Bethlehem Mines Corp. v. Director, OWCP [Simila]*, 766 F.2d 128, 130 (3d Cir. 1985) ("because the Director is the Secretary's delegate with respect to the Black Lung Act, we will generally defer to his interpretation of the Secretary's regulations under it unless it is plainly erroneous or inconsistent with the regulation.") (quotation omitted). The Supreme Court has found deference to be particularly appropriate in the "complex and highly technical regulatory program" produced by the Black Lung Benefits Act. *Pauley*, 501 U.S. at 697.

An ALJ's rulings on the admissibility of evidence are reviewed for abuse of discretion. *See Elm Grove Coal Corp. v. Director, OWCP*, 480 F.3d 278, 288

[10] Section 422(k) of the Act, 30 U.S.C. § 932(k), makes the Secretary a party "in any proceeding relative to a claim for benefits[.]" Congress enacted section 422(k) "to afford the Secretary the right to advance [her] views in the formal claims litigation context. . . . This participation is especially significant . . . where significant issues relating to the interpretation of the Act are to be determined." S.Rep. No. 95-209, at 21-22 (1977). The Secretary has given the Director the authority to appear and present argument on her behalf in all proceedings conducted under the Act. 20 C.F.R. § 725.482(b).

(4th Cir. 2007); *cf. Moyer v. United Dominion Industries, Inc.*, 473 F.3d 532, 542 (3d Cir. 2007).

ARGUMENT

1. The Director's interpretation of section 725.414 is reasonable and should be affirmed.

The crux of this case is the distinction between a "medical report" and a "report of an autopsy" as those terms are used in section 725.414. The Director interprets "report of an autopsy" to mean a medical analysis based only on clinical autopsy data. In contrast, a "medical report" may be based on any admissible medical evidence. Barnes and Tucker disagrees, arguing that a "report of an autopsy" can and should, like a medical report, be based on "all available clinical evidence." Pet. br. at 12. Only the Director's interpretation is consonant with both the text and the purpose of the evidence-limiting regulation.

Section 725.414(a) provides that "a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence."[11] 20 C.F.R. § 725.414(a). The

[11] Even though a "medical report" is defined as a "written assessment," the regulation provides that a party may offer a physician's testimony, in lieu of a written medical report, as one of its two allowable medical reports. 20 C.F.R. § 725.414(c). Dr. Lieb's testimony was admitted as a medical report pursuant to this rule. App. 126.

regulation clarifies that "[a] physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section." *Id*.

While the employer correctly states that the term "report of an autopsy" is not explicitly defined in 20 C.F.R. § 725.414, its meaning is illuminated by the program's evidentiary quality standards regulations, which describe the contents of an autopsy report.[12] "A report of an autopsy or biopsy . . . shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung." 20 C.F.R. § 718.106(a).

The Director's view, accepted by the Board in *Keener* and again by the ALJ and Board below, is that a "report of an autopsy" is limited to a physician's interpretation of only the clinical autopsy data. A report of an autopsy may be written by the autopsy prosector who dissects the cadaver, or by another physician who reviews autopsy tissue slides and other clinical data generated during the autopsy. Whether it is an affirmative report or a rebuttal, a physician who provides a written assessment based only on clinical autopsy data – including any conclusion on the miner's cause of death that is based only on that

[12] The quality standards are intended to insure that evidence submitted in a black lung claim is reliable and probative. Evidence not in substantial compliance with a controlling standard "is insufficient to establish the fact for which it is proffered." 20 C.F.R. § 718.101(b).

data – has provided a full "report of an autopsy" and not a "medical report" for the purposes of section 725.414. 20 C.F.R. §§ 725.414(a), 718.106(a).

The issue here, and the distinction that the employer fails to appreciate, is that when a pathologist provides a written assessment based on his or her review of medical evidence *in addition to* the clinical autopsy data, that assessment is no longer merely an autopsy report. It is now also a "medical report" within the meaning of section 725.414. Such a report can be admissible, but it counts as both a "report of an autopsy" and a "medical report" for purposes of the evidence-limiting regulation.

Barnes and Tucker's interpretation of section 725.414 would allow parties to circumvent the two-medical-report limit by submitting a third medical report in the guise of a "report of an autopsy" – and a fourth in the guise of a rebuttal autopsy report. In so doing, it effectively obliterates any distinction between a "medical report" and a "report of an autopsy." It also undermines the purposes of the evidence-limiting regulation, which are to place the parties on a more level playing field, reduce the costs of adjudicating federal black lung claims, and to ensure that decisions are not based on the quantity of evidence submitted by one party. *Supra* at pp. 5-6. In contrast, the Director's interpretation of section

725.414 gives independent meaning to both "report of an autopsy" and "medical report" and furthers the purposes of the Secretary's evidence-limiting rules.[13]

Barnes and Tucker argues that "[t]o suggest that a pathologist cannot give an opinion regarding the cause of death if they look to the clinical record is contrary to both logic and the practice of medicine." Pet. br. at 12. But the Director makes no such suggestion. A pathologist is free to analyze both the clinical autopsy data and all other admissible medical evidence in determining whether a miner's death was hastened by pneumoconiosis. However, if she does so, her report counts as both a "medical report" and a "report of an autopsy."

Alternately, the pathologist could prepare an autopsy report based solely on the clinical autopsy data, which then becomes part of the medical evidence that another physician (or the pathologist herself) relies on in drafting a medical report.[14] In either case, a party is permitted to submit two comprehensive medical

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[13] The Director's interpretation also treats autopsy reports consistently with the other categories of objective medical evidence listed in section 725.414 (*i.e.* X-rays, pulmonary function tests, arterial blood gas studies and biopsy reports). For example, if a physician provides an opinion based only on her assessment of the clinical data from a biopsy, her opinion counts only as a biopsy report. If her opinion is based on the other admissible evidence as well as the clinical biopsy data, her opinion counts as both a biopsy report and a medical report.

[14] The fact that Dr. Goldblatt did just that in this case, preparing both an autopsy report and a medical report without apparent difficulty, goes far toward undermining Barnes and Tucker's claim that the exercise is contrary to medical practice.

reports based on all the admissible evidence. Barnes and Tucker did so, in the form of Drs. Hurwitz's and Fino's written reports. The ALJ simply found Mrs. Kline's evidence to be more persuasive.[15]

The employer falls far short of demonstrating that the Director's interpretation of section 725.414 is either plainly erroneous or inconsistent with the regulation's text. *See Auer*, 519 U.S. at 461; *Swarrow*, 72 F.3d at 318. As a result, this Court should defer to the Director's reasonable construction of it, as adopted by the ALJ and Board below, and deny Barnes and Tucker's petition for review.

[15] Barnes and Tucker also argues that the Director's definition of "report of an autopsy" makes the term redundant with "report of [a] biopsy" – another category of evidence discussed in section 725.414(a). Pet. br. at 12-13. This is not so. There are important similarities between biopsy and autopsy reports; for example, both must "include a detailed gross macroscopic and microscopic description of the lung or a visualized portion of the lung." 20 C.F.R. § 725.106(a). However, the terms are not interchangeable because they refer to different clinical procedures. *Compare* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (30th ed. 2003) at 182-83 (defining "autopsy" as "the postmortem examination of a body") *with id.* at 220 (defining "biopsy" as "the removal and examination, usually microscopic, of tissue from the living body"). Moreover, an autopsy (where the miner's entire lungs are examined) is generally more probative than a biopsy (where only a small portion of the miner's lung tissue is extracted and examined). This difference is reflected in the regulations, which specifically provide that a negative biopsy – but not a negative autopsy – "is not conclusive evidence that the miner does not have pneumoconiosis." 20 C.F.R. § 718.106(c).

2. The ALJ properly applied the Director's interpretation of section 725.414.

The ALJ did not abuse her discretion in applying the Director's interpretation of section 725.414, as enunciated by the Board in *Keener*, to the employer's medical evidence. Barnes and Tucker submitted the opinions of Drs. Hurwitz and Fino as its two affirmative medical reports, the report and deposition testimony of Dr. Bush as its affirmative autopsy report, and the report of Dr. Oesterling as its rebuttal autopsy evidence. App. 40, 128-30. ALJ Bullard correctly determined that Dr. Bush not only reviewed clinical autopsy data but also reviewed other medical tests and reports before providing his written opinion and deposition testimony on the cause of the miner's death. App. 130. The ALJ permissibly concluded that Dr. Bush's opinion exceeded the scope of an autopsy report and constituted an additional medical report. Since the employer had already designated Drs. Hurwitz's and Fino's opinions as its two affirmative medical reports permitted by section 725.414(a)(3)(i), and it did not argue that good cause existed to exceed that limit, the ALJ acted within her discretion in excluding those portions of Dr. Bush's written opinion and deposition testimony that were not directly related to his review of the clinical autopsy data. *See Harris v. Old Ben Coal Co.*, 2006 WL 290209, 23 Black Lung Rep. (MB) 1-98, 1-108 (Ben. Rev. Bd. 2006) ("because the amended regulations do not contain a provision regarding the appropriate treatment of admissible evidence that contains

references to evidence excluded because it exceeds the limitations set forth in Section 725.414, the disposition of this issue was committed to the [the ALJ's] discretion.").

Because the ALJ was unable to discern whether Dr. Bush's conclusion on the cause of the miner's death was drawn solely from his review of the clinical autopsy data or also from his review of the other medical records, the ALJ acted within her discretion in excluding Dr. Bush's conclusion as based on inadmissible evidence. *Id.*; *see also Dempsey v. Sewell Coal Co.*, 2004 WL 3252297, 23 Black Lung Rep. (MB) 1-47, 1-87 (Ben. Rev. Bd. 2004) (ALJ did not abuse his discretion in declining to consider doctor's opinion that was "inextricably tied" to an inadmissible X-ray reading).

Likewise, the ALJ properly found that Dr. Oesterling's report, which the employer had submitted as rebuttal autopsy evidence, extended well beyond the scope of an autopsy review. App. 130. Again, since the employer had designated two other physicians' opinions as its two permitted medical reports, the ALJ permissibly excluded all portions of Dr. Oesterling's except for his objective findings based only on his review of the clinical autopsy data. *Id.* Because the ALJ was unable to discern whether Dr. Oesterling's conclusion on Mr. Kline's cause of death was drawn from his review of only the clinical autopsy data or

from his review of the other medical records, the ALJ again reasonably acted within her discretion in excluding that conclusion from the record.

In sum, ALJ Bullard correctly applied the Director's construction of section 725.414 to the evidence submitted before her. That she applied the rule even-handedly is evident from the fact that she excluded much of Dr. Perper's report for the same reasons. App. 128. Consequently, her evidentiary rulings should be affirmed. Since Barnes and Tucker has not challenged her conclusion that Mrs. Kline's claim is supported by the current record, her ruling on the merits should be affirmed as well.[16]

[16] If the Court overturns the ALJ's evidentiary rulings, the case should be remanded for further consideration on a corrected record. Mrs. Kline could prevail by proving, as she did below, that her husband's death was caused or hastened by pneumoconiosis. A newly-applicable statutory presumption may aid her in this task. If Mrs. Kline proves (a) that her husband worked for at least 15 years as an underground coal miner or in substantially similar employment, and (b) that he suffered from a totally disabling respiratory or pulmonary impairment, it is rebuttably presumed that his death was due to pneumoconiosis. 30 U.S.C. § 921(c)(4), *amended by* the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(a) (2010). This amendment applies to this claim because it was filed after January 1, 2005 and was pending on and after March 23, 2005. Pub. L. No. 111-148, § 1556(c) (2010).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Third Circuit Local Rule 32.1(c), I hereby certify that this Brief for the Director, Office of Workers' Compensation Programs, was prepared using proportionally spaced, Times New Roman 14-point typeface, and contains 6,873 words, as counted by the Microsoft Office Word 2003 software used to prepare this brief.

Furthermore, I certify that the text of the brief transmitted to the Court through the CM/ECF Document Filing System as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using McAfee Security VirusScan Enterprise 8.0.0. The scan indicated there are no viruses present.

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2010, copies of the Director's brief were served electronically and by mail, postage prepaid, on the following:

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ATTACHMENT

20 C.F.R. § 725.414 Development of evidence.

(a) Medical evidence.

(1) For purposes of this section, a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence. A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section.

(2)(i) The claimant shall be entitled to submit, in support of his 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. 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 this paragraph or paragraph (a)(4) of this section.

(ii) The claimant shall be entitled to submit, in rebuttal of the case presented by the party opposing entitlement, 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 designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and by the Director pursuant to § 725.406. In any case in which the party opposing entitlement has submitted the results of other testing pursuant to § 718.107, the claimant shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the responsible operator or fund has submitted rebuttal evidence under paragraph (a)(3)(ii) or (a)(3)(iii) of this section with respect to medical testing submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

(3)(i) The responsible operator designated pursuant to § 725.410 shall be entitled to obtain and 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. 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 this paragraph or paragraph (a)(4) of this section. In obtaining such evidence, the responsible operator may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by § 725.406 of this part, whichever is greater, unless a trip of greater distance is authorized in writing by the

district director. If a miner unreasonably refuses—

(A) To provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records, or

(B) To submit to an evaluation or test requested by the district director or the designated responsible operator, the miner's claim may be denied by reason of abandonment. (See § 725.409 of this part).

(ii) The responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, 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 claimant under paragraph (a)(2)(i) of this section and by the Director pursuant to § 725.406. In any case in which the claimant has submitted the results of other testing pursuant to § 718.107, the responsible operator shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the claimant has submitted rebuttal evidence under paragraph (a)(2)(ii) of this section, the responsible operator shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the responsible operator, the responsible operator shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

(iii) In a case in which the district director has not identified any potentially liable operators, or has dismissed all potentially liable operators under § 725.410(a)(3), the district director shall be entitled to exercise the rights of a responsible operator under this section, except that the evidence obtained in connection with the complete pulmonary evaluation performed pursuant to § 725.406 shall be considered evidence obtained and submitted by the Director, OWCP, for purposes of paragraph (a)(3)(i) of this section. In a case involving a dispute concerning medical benefits under § 725.708 of this part, the district director shall be entitled to develop medical evidence to determine whether the medical bill is compensable under the standard set forth in § 725.701 of this part.

(4) Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section, 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.

(5) A copy of any documentary evidence submitted by a party must be served on all other parties to the claim. If the claimant is not represented by an attorney, the district director shall mail a copy of all documentary evidence submitted by the claimant to all other parties to the claim. Following the development and submission of affirmative medical evidence, the parties may submit rebuttal evidence in accordance with the schedule issued by the district director.

(b) Evidence pertaining to liability.

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(c) Testimony. A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this section. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of § 725.456 of this part. In accordance with the schedule issued by the district director, all parties shall notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances.

(d) Except to the extent permitted by § 725.456 and § 725.310(b), the limitations set forth in this section shall apply to all proceedings conducted with respect to a claim, and no documentary evidence pertaining to liability shall be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director in accordance with this section.

20 C.F.R. § 725.414(a), (c), (d).

20 C.F.R. § 718.106 Autopsy; biopsy.

(a) 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.

(b) In the case of a miner who died prior to March 31, 1980, an autopsy or biopsy report shall be considered even when the report does not substantially comply with the requirements of this section. A noncomplying report concerning a miner who died prior to March 31, 1980, shall be accorded the appropriate weight in light of all relevant evidence.

(c) A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis.

20 C.F.R. § 718.106.