No. 12-3136

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CUMBERLAND RIVER COAL COMPANY,

Petitioner

v.

BETTY JENT,
On Behalf of the Estate of ROY R. JENT;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
GARY K. STEARMAN
Counsel for Appellate Litigation
SARAH M. HURLEY
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of
Workers' Compensation Programs

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

CASES: Page:

CASES: Page:

STATUTES

REGULATIONS

Title 20, Code of Federal Regulations (2011)

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

The Director believes oral argument is unnecessary to decide this case but requests an opportunity to participate in the event the Court schedules it.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-3136

CUMBERLAND RIVER COAL COMPANY,

Petitioner

v.

BETTY JENT,
On Behalf of the Estate of Roy R. Jent

and

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

Respondents

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

---

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Cumberland River Coal Company petitions this Court for review of a Benefits Review Board decision affirming the award of benefits to Roy R. Jent (the miner) on a claim for benefits under the

Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944. Mr. Jent died in 2006, and his widow, Betty Jent, now pursues his claim.

This Court has both appellate and subject matter jurisdiction over Cumberland's petition for review pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(c), as incorporated by section 422(a) of the BLBA, 30 U.S.C. § 932(a).

On February 3, 2012, Cumberland petitioned this Court for review of the Board's December 21, 2011 Order on Motion for Reconsideration and its April 28, 2011 Decision and Order, within the sixty-day time limit set forth in section 21(c). 33 U.S.C. § 921(c). *See Peabody Coal Co. v. Abner*, 118 F.3d 1106, 1108 (6th Cir. 1997) (petition for review under section 21(c) is timely if filed within sixty days of Board's denial of timely reconsideration motion). The injury contemplated by section 21(c) - the miner's exposure to coal mine dust - occurred in Kentucky, within the jurisdictional boundaries of this Court. 33 U.S.C. § 921(c).

The Board had jurisdiction to review the Department of Labor (DOL) administrative law judge's (ALJ) decision pursuant to section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), as incorporated

by 30 U.S.C. § 932(a). Cumberland appealed the ALJ's March 30, 2010, decision to the Board on April 23, 2010, within the thirty-day period prescribed by section 21(a) of the Longshore Act. 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a).

STATEMENT OF THE ISSUE

Absent good cause, DOL's black lung regulations allow a party to submit no more than two medical reports. They also require medical reports to be based on evidence that is itself admissible. The question presented is: Did the ALJ abuse his discretion in excluding Cumberland's excessive evidence and the evidence that relied on it?

STATEMENT OF THE CASE

The miner filed the instant claim for black lung benefits on October 3, 2002.[1] Director's Exhibit (DX) 4. The district director

[1] This claim is the miner's second. His first claim was denied on October 7, 1996. DX 1, A.112. He filed another claim that was withdrawn on November 29, 2001. *See* 20 C.F.R. § 725.306(b) (providing that a withdrawn claim is "considered not to have been filed").

denied the claim.[2] DX 28. The miner requested a hearing, which was held before ALJ Thomas F. Phalen on November 30, 2005. ALJ Phalen subsequently issued a decision awarding benefits. A.75. Cumberland appealed, and the Board affirmed and vacated in part, and remanded the case for further consideration. A.59. On remand, the case was initially assigned to ALJ Phalen but, upon ALJ Phalen's retirement, the case was reassigned to ALJ Alice M. Craft, who awarded benefits. A.28. Cumberland appealed, but the Board affirmed the ALJ's award and denied Cumberland's subsequent motion for reconsideration. A.10,12. Cumberland then petitioned this Court for review.

STATEMENT OF THE FACTS

Cumberland makes three arguments on appeal. The Director is responding only to Cumberland's challenge to the ALJ's application of DOL's evidence limiting rules. This statement summarizes the facts relevant to this issue.

---

[2] District directors are authorized by DOL "to develop and adjudicate claims," and administer the initial stage of a claim for black lung benefits under the BLBA. 20 C.F.R. §§ 725.101(a)(16), 725.401.

A. Statutory and Regulatory Background

DOL's regulations place limits on the amount of medical evidence a party may submit in claims under the BLBA. 20 C.F.R. § 725.414; *see Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 283-85 (4th Cir. 2007) (upholding the evidence limits). Evidence in excess of the limitations must be excluded unless the offering party establishes "good cause" for its admission. 20 C.F.R. § 725.456(b)(1); *see Elm Grove*, 480 F.3d at 285. In relevant part, the evidence-limiting rules permit both the claimant and the responsible operator in a living miner's claim to submit as affirmative-case evidence two chest x-ray readings, two pulmonary function tests, two arterial blood gas studies, and two medical

reports.[3] 20 C.F.R. § 725.414(a)(2)(i), (3)(i).

In addition, a medical report and testing from a DOL-sponsored pulmonary evaluation is admissible and does not count against the limitations applicable to the miner and the responsible operator. *See* 20 C.F.R. § 725.406(b). This evaluation includes the results of a chest x-ray interpretation, pulmonary function test and an arterial blood gas study, which are separate from the medical report. *See* 20 C.F.R. § 725.406(a).

Each party may also submit one piece of rebuttal evidence for each piece of objective evidence submitted by the opposing party. 20 C.F.R. § 725.414(a)(2)(ii), (3)(ii). Where rebuttal evidence has

---

[3] A "responsible operator" is defined as "an operator which has been determined to be liable for the payment of benefits to a claimant." 20 C.F.R. § 725.101(a)(26). The Department determined that Cumberland was the responsible operator in this case (A.77) and that determination is not in dispute.

"Pulmonary function tests measure the degree to which breathing is obstructed." *Yauk v. Director, OWCP*, 912 F.2d 192, 196 n.2 (8th Cir. 1989).

Arterial blood-gas studies measure the efficiency of gas exchanges in the lungs. The Merck Manual of Diagnosis and Therapy at 528 (17th ed. 1999).

been submitted, the party who originally proffered the evidence that has been the subject of rebuttal may submit one additional statement to rehabilitate its evidence. *Id.* In addition, a miner's hospital and treatment records (insofar as they relate to the treatment of a pulmonary condition) are admissible without limitation. 20 C.F.R. § 725.414(a)(4).

For purposes of section 725.414, a medical report consists of "a physician's written assessment of the miner's respiratory or pulmonary condition" and "may be prepared by a physician who examined the miner *and/or* reviewed the available admissible evidence." 20 C.F.R. § 725.414(a)(1) (emphasis added). Where a medical opinion relies upon x-ray readings, pulmonary-function and blood-gas studies, or physician's opinions, the underlying evidence must itself be admissible. 20 C.F.R. § 725.414(a)(2)(i), (3)(i); *see also* 20 C.F.R. § 725.457(d) (physician's hearing testimony limited to admissible evidence); 20 C.F.R. § 725.458 (physician's deposition testimony limited to admissible evidence). As explained by DOL, this requirement prevents parties from evading the evidence-limiting rules by including assessments of otherwise-

inadmissible evidence in medical reports. 65 Fed. Reg. 80001-02 (Dec. 20, 2000).

Section 725.456(a) provides that "[a]ll documents transmitted to the Office of Administrative Law Judges under § 725.421 shall be placed into evidence by the administrative law judge, subject to the objection of any party." Section 725.421(b)(4), in turn, provides that medical evidence transmitted to the OALJ is subject to the evidentiary limitations at section 725.414.[4] *See* 65 Fed. Reg. 799991 (Dec. 20, 2000) (observing that the Department revised section 725.421(b)(4) to ensure that the claimant and the party opposing entitlement are bound by the same evidentiary limitations). Likewise, section 725.456(b)(1), which addresses the admission of documentary evidence at the hearing, states that "[m]edical evidence in excess of the limitations contained in § 725.414 shall not be admitted into the record in the absence of good cause."

---

[4] Section 725.421(b)(4) provides that in any case referred to OALJ, the district director shall transmit to OALJ all medical evidence submitted to the district director by the parties "subject to the limitations of § 725.414 of this part." 20 C.F.R. § 725.421(b)(4).

The regulations do not specify what action an ALJ should take when confronted with medical reports that are based on inadmissible evidence. Section 725.455(c), 20 C.F.R., however, reiterates the general rule that "[t]he conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the [ALJ] and shall afford the parties an opportunity for a fair hearing." *See also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620 (4th Cir. 2006) ("considerable discretion afforded to [ALJs] in conducting hearings"). Accordingly, the Board has held that fashioning an appropriate remedy is a matter within an ALJ's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (BRB 2006), *aff'd on recon.*, 24 BLR 1-13 (BRB 2007). A medical opinion that is inextricably tied to inadmissible evidence may be excluded. *Id.*

B. Evidence Relevant to Cumberland's Evidentiary Argument.

Cumberland had the miner examined by Dr. Jarboe on June 30, 2003. Dr. Jarboe administered a chest x-ray, pulmonary function test and a blood gas study, and provided a written opinion based on his examination on July 14, 2003. A.201.

Dr. Jarboe was deposed on August 28, 2003. A.227. He stated that he had examined the miner twice - on June 30, 2003, and on May 25, 2001.[5] A.233. The doctor's report of the May 25, 2001 examination, which included the results of a chest x-ray, pulmonary function test and a blood gas study, was appended to the deposition. A.233-34. Throughout the deposition, the doctor referred to the findings of both examinations, and their underlying objective studies, to support his diagnoses. *See, e.g.*, A.234, 235, 237, 238, 253.

Dr. Jarboe also prepared a report dated November 8, 2005, in which he reviewed "in their entirety" various medical evidence including evidence submitted by the miner, as well as his prior reports of May 25, 2001, July 14, 2003 and his deposition of August 28, 2003. A.272.

Finally, the employer submitted the results of a pulmonary function study and arterial blood gas test administered by Dr.

---

[5] The May 25, 2001 examination occurred in connection with the miner's withdrawn claim.

Alam, the miner's treating physician, dated October 5, 2005. A.282-285.

C. Proceedings Below

1. Pre-Hearing and Hearing Proceedings

ALJ Phalen issued a Notice of Hearing that set forth the hearing's procedural rules. ALJ Exhibit (ALJ EX)1. He instructed the parties to designate their medical evidence in advance by completing the "Black Lung Benefits Act Evidence Summary Form" and submitting the form to him not later than ten days prior to the hearing.[6] The ALJ advised the parties that the failure to designate their evidence on the form might result in its rejection. The ALJ also reminded the parties of the numerical limits on the evidence they could offer at the hearing. With regard to a reviewing doctor's opinion, the ALJ cautioned that only designated, admissible

---

[6] DOL's Office of Administrative Law Judges (OALJ) has developed a standardized pre-hearing evidence-summary form which requires parties to designate their evidence in advance. This form is now routinely used in the great majority of black lung cases. It can be viewed at the OALJ website on http://www.oalj.dol.gov/public/black_lung/references/forms/usdol_oalj_blba_evidence_summary_form_01_2003[1].pdf.

evidence may be included for a doctor's review, including their own tests and medical reports. Finally, the ALJ emphasized that "**[s]ubmissions in excess of those numbers or limits, absent a 'good cause' justification, or showing of some other exception, will not be admitted into evidence, and if inadvertently admitted, will not be given any weight**." ALJ EX 1 (emphases in original).

Cumberland submitted its Evidence Summary Form on November 17, 2005.[7] EX 4. As affirmative-case x-ray evidence, Cumberland designated Dr. Jarboe's and Dr. Spitz's readings of the June 30, 2003 x-ray. As rebuttal x-ray evidence, Cumberland submitted Dr. Wiot's reading of the November 16, 2002 x-ray. As affirmative-case pulmonary function test evidence, Cumberland designated the June 30, 2003 test of Dr. Jarboe and the October 5, 2005 test of Dr. Alam; and Dr. Jarboe's July 14, 2003 review of Dr. Baker's November 16, 2002 pulmonary function test (which the miner submitted as part of his affirmative case) as rebuttal

[7] Because the miner's designation of evidence is not at issue, the Director will not describe it.

evidence. As affirmative-case blood gas study evidence, Cumberland submitted Dr. Jarboe's June 30, 2003 study and Dr. Alam's October 5, 2005 study. As its two affirmative-case medical reports, Cumberland designated Dr. Jarboe's July 14, 2003 opinion and the doctor's November 8, 2005 medical evidence review. As rehabilitative medical report evidence, Cumberland designated the November 8, 2005 opinion of Dr. Jarboe. Critically, Cumberland did not designate Dr. Jarboe's 2001 medical report, the test results it relied on, or Dr. Jarboe's 2003 deposition. Finally, Cumberland designated Dr. Alam's records as medical treatment notes.

At the November 30, 2005 hearing, the ALJ admitted the parties' evidence, including their Evidence Summary Forms, into the record without objection. A.287-289.

2. ALJ Phalen's Decision Awarding Benefits

ALJ Phalen subsequently issued a decision awarding benefits. A.75. He found that the parties' designated evidence complied with the regulatory limits and admitted the evidence into the record. A.78, 79. He noted, however, that Cumberland had not designated Dr. Jarboe's 2003 deposition testimony and, although ordinarily he would consider this evidence, he found that the deposition could

not be considered in this case because it contained a review of the doctor's 2001 opinion, as well as his 2003 opinion. A.79 n.6. The ALJ noted that the 2001 opinion was not included in the admissible record and, even if included, would exceed the limitations on employer's evidence. Finding Dr. Jarboe's deposition conclusions "inexorably entwined" with the two reports, the ALJ determined that he could not consider Dr. Jarboe's 2003 deposition at all. *Id.*

Similarly, the ALJ determined that he could not consider "a majority" of Dr. Jarboe's conclusions contained in his November 8, 2005 report because the doctor based these conclusions on his inadmissible 2001 opinion as well as his 2003 admissible one, and it was not possible to separate or redact the objectionable content that relied solely on the 2001 report. A.87 n.20.

The ALJ then found that the miner had established all elements of entitlement and awarded benefits.[8]

---

[8] To obtain benefits, the miner must prove that 1) he suffers from pneumoconiosis; 2) his pneumoconiosis arose out of coal mine employment; 3) he has a totally disabling respiratory condition; and 4) his pneumoconiosis contributed to his totally disabling respiratory condition. 30 U.S.C. § 901(a); 20 C.F.R. § 718.1(a).

3. The Board's July 31, 2007 Decision Affirming The ALJ's Evidentiary Rulings But Vacating The Award.

Cumberland appealed, challenging, *inter alia*, the ALJ's evidentiary rulings and his findings on the merits. The Board affirmed the ALJ's evidentiary rulings, although it remanded the case for further consideration of the merits and for a determination regarding the timeliness of the claim.

The Board first rejected Cumberland's argument that the ALJ erred in excluding Dr. Jarboe's 2001 report. The Board disagreed that the report was already part of the record because it was contained in the miner's withdrawn 2001 claim at Director's Exhibit 2. The Board reasoned that, because a withdrawn claim is considered never to have been filed, *see* 20 C.F.R. § 725.306(b); the employer must designate evidence from the withdrawn claim to have it considered. Because the employer had not done so, the Board upheld the ALJ's determination that admitting the 2001 report would permit Cumberland to exceed its two-medical report limit. A.62.

The Board also rejected Cumberland's argument that the 2001 opinion was admissible because employer had obtained only one

new examining opinion in this claim (Dr. Jarboe's 2003 opinion). The Board held that - because Cumberland had not designated the 2001 opinion as one of its medical opinions, but had designated two other opinions - the ALJ did not abuse his discretion in honoring Cumberland's designations of Dr. Jarboe's 2003 and 2005 opinions as its affirmative-case evidence. A.63; EX 4.

Relying on its own precedent, the Board also rejected Cumberland's argument that section 413(b) of the BLBA, 30 U.S.C. § 923(b), mandates that all relevant evidence, even excessive evidence such as Dr. Jarboe's 2001 report, must be considered by the ALJ. A.63 (citing *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (BRB 2004) (*en banc*)). And the Board rejected Cumberland's argument that the 2001 report was admissible as a medical treatment record. A.63.

Finally, the Board held that the ALJ acted within his discretion in not considering a majority of Dr. Jarboe's conclusions in his November 8, 2005 report because the ALJ could not separate the conclusions based on the admissible 2003 report from those based on the inadmissible 2001 report. A.64. Similarly, the Board held that the ALJ acted within his discretion in excluding Dr.

Jarboe's 2003 deposition from the record because the doctor's conclusions therein were "inexorably entwined" with the inadmissible 2001 report. *Id.*

4. ALJ Phalen's (Pre-Retirement) Orders on Remand

On remand, Cumberland filed a motion to amend its evidence designations and substitute Dr. Jarboe's 2001 report and underlying 2001 objective studies for other previously designated evidence, and to include Dr. Jarboe's 2003 deposition as part of its affirmative-case evidence. *See* Employer's Motion to Amend Evidence Designations and Brief on Remand filed on February 4, 2008. The miner objected to Cumberland's motion, stating that the evidentiary issues were not before the ALJ on remand and that Cumberland was attempting an "end-run" around the Board's decision. *See* Claimant's Response to Employer's Motion to Amend Evidence filed February 6, 2008. The ALJ denied Cumberland's motion in an Order issued on February 19, 2008. The ALJ held that the admissibility of the 2001 report "has already been ruled on by the undersigned and affirmed by the Board." A.55.

Cumberland renewed its motion to amend its evidentiary designations, which ALJ Phalen denied. A.52. The ALJ reiterated

that the Board had affirmed his evidentiary rulings and added that employer had waived its right to exceed the evidentiary limits by failing to allege good cause at the time of the hearing. The ALJ reasoned that to permit Cumberland to submit Dr. Jarboe's three reports now would not only violate the evidence limits but also undermine the Board's decision. *Id*.

5. ALJ Craft's March 30, 2010 Decision Awarding Benefits

ALJ Craft found that the claim was timely filed. A.32. She also reviewed ALJ Phalen's evidentiary determinations and stated that

> I agree with Judge Phalen's determinations regarding Dr. Jarboe's evidence as affirmed by the Board. Thus, I too exclude Dr. Jarboe's 2001 report and 2003 deposition testimony and find that redaction of the inadmissible content from his 2005 report, for the most part, is not possible.

A.35. The ALJ then weighed the conflicting evidence on the merits and found that the miner had established entitlement.

6. The Board's April 28, 2011 Affirmance

Cumberland appealed, but the Board affirmed the ALJ's award of benefits. A.12. The Board upheld the ALJs' evidentiary rulings, rejecting Cumberland's argument that Dr. Jarboe's 2001 report was

admissible because it was attached to the transcript of the doctor's 2003 deposition which had been admitted into the record at Director's Exhibit 19. *See* 20 C.F.R. § 725.456(a). The Board examined the interplay of sections 725.414, 725.421 and 725.456 and concluded that "the admission of evidence into the hearing record is ultimately controlled by the extent to which the evidence complies with the evidentiary limitations." A.18. The Board also rejected Cumberland's argument that the 2001 report did not constitute excess evidence because Dr. Jarboe's 2003 and 2005 opinions should be considered one medical report. The Board held it was within the ALJ's discretion in relying on Cumberland's initial designations treating the 2003 and 2005 reports separately. A.17. Finally, citing *Dempsey*, the Board rejected Cumberland's argument that the Administrative Procedure Act (APA), 5 U.S.C. § 557(c)(3)(A), and section 413(b) of the BLBA mandated consideration of the 2001 medical report. A.18-19.

The Board then reviewed and upheld the ALJ's weighing of the evidence on the merits. Thereafter, the Board summarily denied Cumberland's motion for reconsideration.

SUMMARY OF THE ARGUMENT

The Department's evidence-limiting rules do not violate the BLBA or the APA and two courts of appeals and the Board have correctly so held.

The ALJ's application of the evidence-limiting rules was likewise correct. The ALJ did not abuse his discretion in excluding, as excessive, Dr. Jarboe's 2001 report and other evidence based on it. Cumberland failed to designate this report at the hearing, instead designating other evidence up to the permissible regulatory maximum.

ARGUMENT

A. Standard of Review

Cumberland's claim that the evidence-limiting regulations violate the BLBA and Administrative Procedure Act is a question of law that is reviewed *de novo*. *Elm Grove Coal Co. v. Director, OWCP,* 480 F.3d 278, 288 (4th Cir. 2007); *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). In deciding this issue, the Court applies the well-established *Chevron* framework and accords deference to the Director's interpretation of the BLBA and its implementing regulations. *Elm Grove*, 480 F.3d at 292;

Gray v. SLC Coal Co., 176 F.3d 382, 386-87 (6th Cir. 1999); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994).

Cumberland's claim that the ALJ improperly applied the evidence-limiting regulations in excluding some of its medical opinion evidence is reviewed for an abuse for discretion. *Elm Grove*, 480 F.3d at 288; *Goble v. Aztec Mine Co., Inc.*, 454 Fed.App. 500, 2012 WL 29211 (6th Cir. 2012).

B. The ALJ Properly Excluded Dr. Jarboe's 2001 Report and the Evidence Based on It.

Cumberland argues that the BLBA and the black lung regulations prohibited the ALJ from excluding from the record Dr. Jarboe's May 25, 2001 report and other evidence based on it. Cumberland first asserts that section 413(b) of the BLBA and the Administrative Procedure Act require consideration of "all relevant evidence," and the ALJ therefore wrongly excluded Dr. Jarboe's relevant 2001 report.[9] Cumberland next argues that the ALJ

---

[9] Section 413(b), 30 U.S.C. 923(b), provides in relevant part: "[N]o claim for benefits . . . shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims. . . , all relevant evidence shall be considered, including, (cont'd . . .)

wrongly applied the evidence-limiting regulations in excluding Dr. Jarboe's 2001 report and the evidence based on it. Neither argument has merit.

1. Cumberland's first contention that the evidence limitations violate section 413(b)'s all relevant evidence provision is not supported by thorough statutory analysis and, as such, has been properly rejected by two federal courts of appeals and the Benefits Review Board.

The all relevant evidence provision was added to section 413(b) by the 1972 amendments to the BLBA. Pub. L. No. 92-303, 4(f), 86 Stat. 154 (1972). The section is contained in Part B of the BLBA (Part B governs claims filed with the Social Security Administration before 1974). The amendments made to Part B, however, apply to the adjudication of claims filed under Part C (that is, claims filed with the Department after 1973) only "to the extent appropriate." 30 U.S.C. § 940. Thus, the Department has "the explicit authority to determine which aspects of Part B should be adopted, and to

---

(. . . cont'd)
where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies."

what extent." 62 Fed. Reg. 3358 (Jan. 22, 1997). The regulations limiting the amount of documentary medical evidence each party may submit "represents the Secretary's judgment as to the appropriate extent to which 'all relevant evidence' should be admitted for consideration by the factfinder." *Id.* Cumberland's argument ignores this important qualification regarding the applicability of the all relevant evidence provision.

Cumberland's argument also ignores the remainder of section 413(b). In addition to adding the all relevant evidence provision, the 1972 statutory amendments incorporated into section 413(b) the provisions of 42 U.S.C. § 405(a). Section 405(a) provides the Department with "full power and authority to . . . adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits." 30 U.S.C. § 923(b) (incorporating 42 U.S.C. § 405(a)). Section 405(a) is "exceptionally broad authority to prescribe standards" for proofs and evidence in Social Security Act disability claims. *Heckler v. Campbell*, 461 U.S. 458, 466 (1983) (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981)).

The D.C. Circuit, the Fourth Circuit and the Board have found section 405(a) sufficient authority, through its incorporation into section 413(b), for the Department's reasonable regulation providing for the extent of the proofs and evidence in black lung benefits claims. *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002) (holding that the BLBA's incorporation of 42 U.S.C. §405(a) and 5 U.S.C. § 556(d) – which allows agencies to exclude "unduly repetitious evidence" as "a matter of policy" – constituted sufficient authority for the evidentiary limitations); *Elm Grove*, 480 F.3d at 295 (holding that BLBA gives the Secretary broad powers to "regulate the extent of proofs and evidence in Black Lung Act proceedings" and that such grant was "simply inconsistent with [the employer's] contention that all relevant evidence can be submitted, without exception, in such proceedings."); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (BRB 2004).[10]

---

[10] Without even identifying a particular statutory provision, Cumberland asserts that the "the APA does not envision application of strict evidentiary rules and the administrative law judge in a black lung proceeding should err on the side of inclusion of (cont'd . . .)

2. Cumberland next wrongly asserts that the ALJ misapplied the evidence-limiting regulations in excluding as excessive evidence Dr. Jarboe's 2001 report as well as the evidence relying on it. Pet. Bf. at 27-33. The ALJ, however, properly interpreted and applied the regulations.

Section 725.414(a)(2)(ii) allows a party to submit two medical reports. The report may be based on the doctor's own examination, his review of admissible evidence, or both. 20 C.F.R. § 725.414(a)(1). But a medical report can only rely on x-ray readings, pulmonary-function and blood-gas studies, or other physicians' opinions that are themselves admissible. 20 C.F.R. § 725.414(a)(2)(i), (3)(i). As DOL explained, this requirement prevents

---

(. . . cont'd)
evidence, rather than exclusion of evidence. *U.S. Steel Mining Company, Inc. v. Director, OWCP*, 187 F.3d 384 (4th Cir. 1999). " Pet. Br. at 28. Cumberland overlooks the fact that, in upholding DOL's evidence-limiting regulations, the D.C. Circuit held that the APA, 5 U.S.C. § 556(d), gives agencies the discretion to exclude repetitious evidence "as a matter of policy." *National Mining Association*, 292 F.3d at 873-74. Similarly, the Fourth Circuit observed that "[[t]he APA provides for such evidentiary exclusions '[b]ecause the wholesale admission of all evidence would unnecessarily prolong and burden the process.'" *Elm Grove*, 480 F.3d at 293 (citing *U.S. Steel Mining Company, Inc.*, 187 F.3d at 388).

parties from evading the evidence-limiting rules by including assessments of otherwise-inadmissible evidence in medical reports. 65 Fed. Reg. 80001-02 (Dec. 20, 2000) ("Because the Department has now limited the amount of evidence in the record, it cannot allow parties to avoid that limitation by presenting an expert witness who will be free to examine additional material that may not be admitted into the record.").

Dr. Jarboe's impermissible reliance on an inadmissible x-ray, pulmonary function study and arterial blood gas test is a fundamental problem with his 2001 report. Cumberland used its affirmative-case evidence allotment to submit and designate more recent studies from Dr. Jarboe and other doctors, not the 2001 test data that formed the basis of his 2001 report. *Supra* at 12-13 (detailing Cumberland's designation of x-ray readings, pulmonary function studies, and arterial blood gas tests from 2003 and 2005); EX 4. Thus, the ALJ was clearly correct in determining that Dr. Jarboe's 2001 report was excessive: it was itself a third affirmative

medical report *and* it relied on inadmissible excessive evidence.[11] The 2001 report was, simply put, doubly excessive.

Cumberland argues, however, that the 2001 report was not excessive because section 724.414(a)(3)(i) permits the submission of two medical examination reports and it submitted only one (Dr. Jarboe's 2003 report). This contention is entirely beside the point. Pet. Bf. at 27, 29. Even *if* the 2001 report was just one part of a greater medical assessment (namely, Dr. Jarboe's 2001 report, his 2003 deposition, and his 2005 supplemental report) as Cumberland alleges, the "one" report is nonetheless based on excessive and inadmissible underlying studies and was therefore properly

---

[11] Impermissible reliance on excessive evidence is the same reason the ALJ gave for properly excluding the 2003 deposition and portions of the 2005 report. During his 2003 deposition, Dr. Jarboe referred not only to his 2001 medical report, but also to the report's underlying objective studies. Similarly, in his 2005 report, Dr. Jarboe indicated that he reviewed his 2001 report in its entirety in making his conclusions. A.272. Cumberland has not challenged the ALJ's determination and Board's affirmance that Dr. Jarboe's deposition and portions of his 2005 report impermissibly relied on the excluded 2001 report. A.63-64, 79 n.6, 87 n.20. Rather, it rests its entire case on the claim that the ALJ erred in excluding the 2001 report in the first instance.

excluded.[12] (Ironically, acceptance of Cumberland's "one report" argument could lead to excluding *all* of Dr. Jarboe's opinions, since that "one report," not just the 2001 report, is based on too many tests.)

In any event, Cumberland's argument conveniently ignores the facts of this case -- while submitting one *examination* report, it also submitted a medical review as its second opinion.[13] Section 725.414(a)(1), by its plain terms, counts as a separate medical opinion a reviewing physician's report: "a medical report may be

---

[12] As explained above, *supra* at 9, the regulations do not mandate the automatic exclusion of a doctor's report that relies on inadmissible evidence, but rather, leaves to the ALJ's discretion the appropriate response based on the particular facts of each case. One possible response (which the ALJ employed regarding Dr. Jarboe's 2005 report) may be to divorce the diagnoses based on admissible evidence from those that are not. Another response may be to find good cause to exceed the evidentiary limits applicable to the underlying documentation and therefore admit the doctor's opinion as well. Cumberland, however, has not challenged the ALJ's finding of no good cause. Pet. Br. at 30 ("there was no need for employer to show 'good cause'"); A.52; *see* 20 C.F.R. § 725.456(b)(1) (evidence in excess of the limitations must be excluded unless the offering party establishes good cause for its admission).

[13] Cumberland designated Dr. Jarboe's 2003 report *and* his 2005 reviewing opinion as its two affirmative-case medical reports. EX 4.

prepared by a physician who examined the miner and/*or* reviewed the available admissible evidence. 20 C.F.R. § 725.414(a)(emphasis added).[14] Thus, it was again within ALJ Phalen's discretion to conclude that the 2001 report, in conjunction with Cumberland's designation of two other medical opinions, was excessive, as were the chest x-ray, pulmonary function test, and arterial blood gas study that were included in the 2001 report. A.79 n.6.

That said, the Director agrees with Cumberland (Pet. Br. at 31) as a general proposition that a medical opinion need not be contained in a single document and a that a party may therefore designate a supplemental report as part of the original opinion (provided the reports *in toto* do not rely on an excessive number of underlying tests).[15] But that simply is not what happened here.

---

[14] The Director agrees with Cumberland that a report may consist of the doctor's own examination, his review of admissible evidence, or both. But under section 725.414(a)(1), a doctor's examination report and his reviewing report may also be treated separately.

[15] Cumberland relies on *Hamilton v. Blackfield Coal Co., Inc.*, 2010 WL 1849812, BRB No. 09-0545 BLA (BRB Apr. 28, 2010) (unpub.), to support its argument that evidence submitted to the district director and transmitted to OALJ must be placed into the record by the ALJ. Pet. Br. at 32. In *Hamilton*, however, the claimant's (cont'd . . .)

Cumberland designated Dr. Jarboe's 2003 and 2005 reports as two separate opinions. And it entirely failed to designate Dr. Jarboe's 2001 report and his deposition testimony as required. EX 4.

The ALJ and miner were entitled to rely on that designation. Permitting Cumberland to retract its evidence designations would be unfair in these circumstances.[16] Redesignation would also thwart the intent of the evidence-limiting rules. As DOL explained, the evidence-limiting rules "impose a known standard of conduct . . ., which enables [the parties] to plan their litigation strategies accordingly." 62 Fed. Reg. 3357 (Jan. 22, 1997).

(. . . cont'd)
submission of an autopsy report, which was included in the record by the district director on remand and then transmitted to the ALJ, did not contravene the evidentiary limitations because the parties had not previously submitted any autopsy evidence when the case was first before the ALJ. Accordingly, *Hamilton* never confronted the issue of excessive evidence.

[16] To cure the problems that would have resulted from allowing Cumberland to switch its evidence (or to do "an end run" as perceived by the miner), the ALJ would have had to reopen the record to give the miner the opportunity to develop rebuttal evidence based on Cumberland's revised designations. 20 C.F.R. § 725.414(a)(2)(ii) (claimant is entitled to submit rebuttal evidence to operator's affirmative case evidence). This would have delayed adjudication of the claim, and increased the cost of the litigation, (cont'd . . .)

Indeed, the ALJ made crystal clear to the parties at the outset their obligation to comply with the designation form and the evidence limiting rules: "Failure to provide the designations set forth in this form, may result in the rejection of all medical evidence in the category of the required designation." And further **"Submissions in excess of those numbers or limits, absent a 'good cause' justification, or showing of some other exception, will not be admitted into evidence, and if inadvertently admitted, will not be given any weight.** ALJ EX 1 (emphases in original). Accordingly, the ALJ did not abuse his discretion in holding Cumberland to its evidentiary filing. *See Dempsey*, 23 BLR at 1-62/63 (ALJ did not abuse his discretion in refusing to permit employer to withdraw medical report and substitute another given claimant's objection that he had relied on employer's designation of its two medical reports in developing his medical evidence).

Finally, Cumberland suggests that Dr. Jarboe's 2003 deposition and his 2001 report, which was attached to it as an

---

(. . . cont'd)
particularly as Cumberland would have sought to respond to any new evidence submitted by the miner.

exhibit, were admitted into the record as Director's Exhibit 19 at the hearing without objection, and that the ALJ was therefore obliged consider it pursuant 20 C.F.R. § 725.456(a).[17] Once again, Cumberland's legal analysis is incomplete. As detailed in our statutory and regulatory statement, *supra* at 8, medical evidence transmitted from the district director to the OALJ is subject to the evidentiary limitations.

Section 725.456(a) calls for the introduction of documents into the hearing record that are transmitted from the district director to ALJ pursuant to section 725.421.[18] Section 725.421(a), in turn, makes clear that medical evidence so transmitted is subject to the section 725.414 evidentiary limitations. *Accord* 20 C.F.R. §

---

[17] The 2001 report was also a part of DX 2, which was the record from the miner's withdrawn claim. As the Board found, A.62; a withdrawn claim is considered never to have been filed, and thus, Cumberland cannot rely on the report's inclusion in DX 2. *See* 20 C.F.R. § 725.306(b).

[18] Section 725.456(a) provides that "[a]ll documents transmitted to the Office of Administrative Law Judges under § 725.421 shall be placed into evidence by the administrative law judge, subject to the objection of any party." Section 725.421(b)(4) provides that in any case referred to OALJ, the district director shall transmit to OALJ (cont'd . . .)

725.456(b)(1) ("[m]edical evidence in excess of the limitations contained in § 725.414 shall not be admitted into the [ALJ hearing] record in the absence of good cause"). Thus, the Board correctly recognized that the Department's regulations at sections 725.414, 725.421 and 725.456, operate together to ensure that admission of evidence before the ALJ is "ultimately controlled by the extent to which the evidence complies with the evidentiary limitations." A.18. *See also Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240/242 (2007) (*en banc*) (when claims are consolidated for hearing, section 725.414 evidentiary limitations apply to each claim).

(. . . cont'd)
all medical evidence submitted to the district director by the parties "subject to the limitations of § 725.414 of this part."

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the ALJ's application of DOL's evidence-limiting rules to exclude Dr. Jarboe's May 25, 2001 report and to deny Cumberland's request to redesignate its evidence on remand.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/Sarah M. Hurley
SARAH M. HURLEY
Attorney
U.S. Department of Labor
Office of the Solicitor
Frances Perkins Building
Suite N-2117
200 Constitution Ave, N.W.
Washington, D.C. 20210
(202) 693-5650

Attorneys for the Director, Office of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) because it contains 7,070 words and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (14-point Bookman Old Style) using Microsoft Office Word 2007.

/s/Sarah M. Hurley
Sarah M. Hurley
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2012, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and on the following:

Ronald E. Gilbertson, Esq.
Husch Blackwell
750 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006

James D. Holiday, Esq.
Law Offices
P.O. Box 29
Hazard, KY 41702

/s/Sarah M. Hurley
SARAH M. HURLEY
Attorney
U.S. Department of Labor