

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 February 2009

CASE NO.: 2007-BLA-5984

In the Matter of:

G. F.

Claimant

v.

ELK RUN COAL COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

John Cline, Esq.
For the Claimant

Jackson Kelly PLLC
For the Employer

Before: THOMAS M. BURKE
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS, REOPENING PRIOR
CLAIM, AND SETTING ENTITLEMENT DATE**

Claimant moves in this claim for black lung disability benefits that a final judgment denying benefits in his prior claim filed in 1999 be set aside under Federal Rule of Civil Procedure 60(d)(3), and a date of entitlement of benefits of September, 1998, be adopted based on pathology evidence in that prior claim, because Employer misrepresented evidence to the administrative law judge thereby committing fraud on the court. Employer concedes that Claimant is entitled to benefits but argues that Claimant's motion to reopen the prior claim must

be denied because Claimant's allegations supporting the motion are factually unsupported and contrary to law.

Prior Claim

Claimant's prior claim was filed on October 18, 1999, while he was working as a coal miner. The pulmonary evaluation provided by the Department of Labor under 20 C.F.R. § 725.406 was performed by Dr. D. L. Rasmussen. Dr. Rasmussen examined Claimant and diagnosed complicated pneumoconiosis on the basis of a July 2, 1999, x-ray reading by Dr. Manu Patel of complicated pneumoconiosis, Category B. The claim also includes reports by Dr. D. Gaziano interpreting the same x-ray as showing complicated pneumoconiosis, Category A and by Dr. Ranavaya interpreting the x-ray as 1/2, ax, (right hilar mass can not be ruled out).

Claimant submitted to the office of the district director, a pathology report of a lobectomy of his right upper lung that had been performed on or about September 25, 1998, at Raleigh General Hospital in Beckley, West Virginia. The lobectomy was performed in response to an abnormal chest x-ray. A CT guided biopsy performed on September 2, 1998 revealed a right upper lobe mass, apparently benign. A lobectomy was performed for definitive resection and confirmation of the biopsy pathology. DX 1 (DX 30 in prior claim). The pathology of the lobectomy was interpreted by Dr. Gerald Koh, a pathologist at the Raleigh Pathology Resources of Beckley, West Virginia, as inflammatory pseudotumor, 5 cm in greatest dimension, with no evidence of malignancy. Dr. Koh's report states, in part:

Sections show storiform arrangement of fibroblastic proliferation with occasional macrophages alternated with partially hyalinized sclerotic or necrotic areas. Numerous anthroctic deposits are seen. Entrapped alveoli contain anthroctic pigment – containing macrophages in their lumina. No evidence of bronchogenic carcinoma is present.

DX 1 (DX 14 in prior claim).

Employer submitted to the district director a statement of contested issues, treatment records and a reading of the July 2, 1999, x-ray by Dr. James Castle showing no complicated pneumoconiosis and 0/1 simple pneumoconiosis. The district director found entitlement to benefits and Employer requested a hearing before the Office of Administrative Law Judges (OALJ).

Claimant pursued his claim before OALJ without the benefit of counsel.

Employer acquired the lobectomy lung tissue slides from the hospital and sent them to two Board-certified pathologists, Dr. Raphael Caffrey and Dr. Richard Naeye, for their interpretation.

Dr. Caffrey's report of the pathology slides, dated May 4, 2000, states:

It is my opinion, from a review of these documents, the Surgical Pathology Report and the surgical pathology slides, that the mass in the right upper lung is definitely not a carcinoma, as was originally suspected before surgery. The surgical pathologist, Gerald S. Koh, has made a diagnosis of benign mesenchymal lesion and certainly this is a benign lesion. He notes that it is an inflammatory pseudotumor and lists numerous synonyms. It is possible that this could be a fibrous histiocytoma, but in view of the histology of this lesion, the patient's history, and the x-ray findings, I believe that this lesion most likely represents complicated pneumoconiosis.

Dr. Naeye's report of his review of the pathology slides is dated April 20, 2000. The report summarized his findings:

The 4x5 cm lesion from this man's right lung has enough very tiny birefringent crystals and zones of irregular hyalinized collage in it to suggest at least a partial silicotic origin...This man's many years of working at the coal face and as a roof bolter increase the risk of such a lesion. There is no way of knowing if this man has smaller silicotic lesions in the other lobes of his lungs...If his pre-surgical findings met the legal definition of complicated CWP the surgeons have removed it. In short, it has had a surgical cure. Will findings that might meet the criteria of complicated CWP return? There is no way of knowing.

Drs. Caffrey and Naeye are Board-certified pathologists who have an expertise in the pathology of pneumoconiosis. Their reports evidenced complicated pneumoconiosis as Dr. Caffrey found that the lesions most likely represented complicated pneumoconiosis and Dr. Naeye opined that the mass had at least a partial silicotic origin. 20 C.F.R. § 718.304 provides an irrebutable presumption that a miner suffering from complicated pneumoconiosis is totally disabled. The reports of Drs. Caffrey and Naeye clearly contradicted Dr. Koh's finding of an inflammatory pseudotumor. Nevertheless, Employer withheld their reports. Instead, Employer obtained and offered into evidence at the September 19, 2000 hearing before Judge Miller negative readings of chest x-rays by Drs. Wheeler, Scott and Kim. Dr. Wheeler's negative readings are of chest x-rays dated July 2, 1999 and September 2, 1998. Dr. Scott's negative reading is of the July 2, 1999 x-ray. Dr. Kim's negative readings are of the July 2, 1999 x-ray, the September 2, 1998 x-ray, and a January 19, 2000 x-ray. Judge Miller admitted these x-rays into evidence as Exs. 3, 4 and 6.

Employer also offered into evidence medical reports by four pulmonologists, Drs. Castle, A. Dahhan, Gregory Fino and Kirk Hippensteel, as well as a deposition by Dr. Paul Wheeler, a Board-certified radiologist. Ex. 14.

Employer had Dr. Castle evaluate the Claimant's pulmonary condition. His evaluation included a physical examination, medical and occupational histories, arterial blood gas test, pulmonary function test and a chest x-ray. His evaluation also included a review of records

supplied by Employer including treatment records from Raleigh General Hospital, the pathology report of Dr. Koh, the report of Dr. Rasmussen, the chest x-rays interpreted by Drs. Patel and Ranavaya. However, Employer did not provide to him the reports of Drs. Caffrey and Naeye. Dr. Castle diagnosed simple pneumoconiosis but determined that the abnormalities in the upper lung zones did not represent complicated pneumoconiosis because “[t]hese changes were apparently not present in 1998 when he underwent resection of his right upper lobe.” Dr. Castle reasoned that the pathology showed a pseudotumor, not a large opacity of complicated pneumoconiosis.

Employer took the deposition of Dr. Castle on August 30, 2000. No one was present to represent Claimant. Dr. Castle was provided with the x-ray readings by Drs. Wheeler, Scott, Kim, Hippensteel and Fino. Dr. Castle was asked whether Claimant had pneumoconiosis. Dr. Castle replied that initially he had interpreted the radiographic evidence as consistent with pneumoconiosis, but changed his opinion based on the pathology, since the pathology report found evidence of anthracotic pigmentation but no coal workers’ pneumoconiosis. He concluded that, “based on the pathology from this case, there isn’t any evidence of coal workers’ pneumoconiosis there.”¹ The questioning subsequently turned to the report of Dr. Rasmussen and his diagnosis of complicated pneumoconiosis. In response to a question from Employer’s counsel, Dr. Castle testified that he disagreed with Dr. Rasmussen’s diagnosis of complicated pneumoconiosis because any abnormality would be related to the “documented pseudotumor.”² Employer’s attorney then asked the question that is probably the most telling: “Do you think that Dr. Rasmussen would have been aided by having all of the biopsy medical evidence at his hand when he reviewed this case?” Dr. Castle gave the obvious response as he answered in the affirmative: “I think that he would have, and I would certainly hope so, because all of the evidence, as I’ve outlined clearly indicates that this is not complicated disease. I believe that Dr. Rasmussen would have reviewed that data and come to the same conclusions that this is not pneumoconiosis.”³

However, Dr. Castle did not review the most relevant pathology evidence as it was withheld by Employer’s counsel. Counsel provided Dr. Castle with the report by Dr. Koh, but not the pathology interpretations by Drs. Naeye and Caffrey. Employer misrepresented the pathology evidence to Dr. Castle, and Dr. Castle relied on that pathology evidence when he testified that Claimant did not have complicated pneumoconiosis.

Employer also requested that Dr. A. Dahhan, Dr. Kirk Hippensteel and Dr. Gregory Fino evaluate Claimant’s pulmonary condition and provide an opinion on whether the Claimant was disabled from black lung disease based on medical records submitted to them by Employer. Dr. Hippensteel’s report states that he reviewed copies of “extensive medical records.” Dr. Gregory Fino described the records he reviewed as “all of the records that [Employer has] been able to develop regarding the [Claimant].” However, the records provided to the physicians by Employer relating to the existence of pneumoconiosis included the pathology report of Dr. Koh as well as chest x-ray interpretations, but not the more definitive evidence of the pathology

¹ Transcript of deposition of Dr. Castle, p. 25. lines 9, 10.

² *Id.* p. 26, lines. 4,5.

³ *Id.* p. 26 lines. 10 – 19.

reports of Drs. Caffrey and Naeye.⁴ As expected, all three pulmonologists found no complicated pneumoconiosis, as all three referred to Dr. Koh's report in support of their conclusions. Dr. Dahhan considered that "[t]he pathological examination of the resected tissue of his right lung showed no pathological evidence of complicated coal workers' pneumoconiosis." DX 1 (EX 9, p. 4 in prior claim). Dr. Hippensteel reasoned that "[t]here was no finding pathologically of coal workers' pneumoconiosis on this pathologic specimen. This means that chest x-ray findings interpreted by myself and others have been found to be secondary to benign pseudotumor formation in his lungs. The development of mass lesions has certainly not been referable to complicated pneumoconiosis in this case, as noted by pathology as well as by time course of development of these lesions." DX 1 (EX 12, p. 9 in prior claim). Dr. Gregory Fino's reasoning for finding that pneumoconiosis does not exist included his note that Dr. Koh's report of the pathology of "the resected right upper lobe did not show any changes consistent with coal workers' pneumoconiosis." DX 1 (EX 10, p. 13 in prior claim).

As it did with Dr. Castle's evaluation, Employer misrepresented the pathology evidence given to Drs. Dahhan, Hippensteel and Fino. Consequently, their opinions on the existence of pneumoconiosis were not reasoned because they never reviewed the most probative evidence.

The reports of Drs. Dahhan, Fino and Hippensteel are dated August 3, 2000, August 16, 2000, and August 22, 2000 respectively. The following month, on September 7, 2000, Employer took the deposition of Dr. Wheeler, a Board-certified radiologist. Dr. Wheeler reviewed four chest x-rays and Dr. Koh's pathology report.⁵

Dr. Wheeler concluded that the mass lesions were not caused by coal dust exposure. He responded to questions during his deposition:

- Q. Because [the biopsy report from Raleigh General Hospital] didn't mention the coal workers' pneumoconiosis, do you have any opinions as to what was causing those changes that you identified as 0/1 perfusion of primarily irregular-shaped opacities?
- A. I think they would be most likely inflammatory. Whatever caused the mass I think probably caused those little small opacities.
- Q. Is it fair to say that the presentation on the chest X-rays as you've interpreted them is very consistent with the pathology reports inasmuch as they rule out the presence of a coal mine dust-induced lung disease?
- A. Yes. I still would like to know what caused this, and I didn't see any mention of special stains they used to find, say, a fungal infection or tuberculosis, but that was their prerogative to either do this special procedure or study the stains or not. Their main responsibility was to exclude a cancer in this case, and they did that.

⁴ Dr. Fino lists twenty-nine x-ray readings received from Employer.

⁵ Deposition of Dr. Paul Wheeler, p. 26, 35. DX 1 (EX14 in prior claim).

Q. When you look at all the information in this case, would you classify these changes as large opacities using the ILO classification system?

A. No.

Q. Why?

A. Because I didn't find the background nodularity that I needed...

Q. Does knowledge of the pathology results also call into doubt any classification of this as a complicated pneumoconiosis or massive lesions consistent with exposure to coal mine dust?

A. Yes. The large opacities would be a series of small nodules merged together which would be quite typical on an X-ray – on a pathology slide, so it didn't have the whirled or the small nodular appearance of pneumoconiosis, otherwise they would have reported that. So it's neither on, in my opinion, on the X-ray due to the fact there were no background nodules, nor on the pathology slides, the fact that they didn't have the coalescent nodules, in no way is this pneumoconiosis.⁶

Dr. Wheeler's testimony shows that the pathology report of Dr. Koh was critical to his reasoning. Thus, the reports of Drs. Caffrey and Naeye would have been very relevant, if not essential, to a reasoned decision by Dr. Wheeler on the existence of complicated pneumoconiosis. In fact, testimony by Dr. Wheeler during the questioning of his qualifications reveals that he recognizes that pathology evidence is superior to radiographic evidence:

Q. Were you studying any particular area during [the time you were an intern]?

A. It was a straight surgical internship.

Q. And you later had a year residency in pathology?

A. Yes, that was immediately after the surgical internship. That was a preparation for doing radiology.

Q. Okay. Why does it help to study pathology if you want to become a Board-certified in...radiology?

A. Pathology is the final diagnosis of many disease conditions and the radiologist basically has to deal with indirect evidence in the form of X-rays, whereas the pathologist has the organs directly.⁷

⁶ *Id.* p. 37 – 40.

⁷ *Id.* p. 6.

Thus, Employer skewed the medical opinions of its own reviewing physicians by withholding from their review the most probative pathology evidence and instead providing them with numerous negative chest x-ray readings.

Judge Edward Terhune Miller denied Claimant's claim by Decision and Order dated January 11, 2001. Judge Miller found that the preponderance of the evidence did not establish the existence of pneumoconiosis. The only pathology report considered was that of Dr. Koh, as the pathology reports of Drs. Caffrey and Naeye were withheld from him. Judge Miller credited the reports of Drs. Dahhan, Hippensteel and Fino over the report of Dr. Rasmussen but, as previously explained, those opinions were skewed, as the physicians were not provided with the most probative medical information, the pathology reports of Drs. Caffrey and Naeye.

Present Claim

Claimant filed a second claim on November 8, 2006. In this claim he was represented by counsel. His attorney submitted to the district director an x-ray reading by Dr. Thomas Miller dated June 19, 2006, revealing complicated pneumoconiosis based on large opacities in the right upper lung and left upper lung, and the curriculum vitae of Dr. Miller showing him to be a Board-certified Radiologist and B-reader. He also submitted medical treatment notes by Dr. Maria Boustani diagnosing complicated pneumoconiosis, her curriculum vitae and a West Virginia Occupational Board Finding diagnosing pneumoconiosis. Dr. Rasmussen again provided the DOL pulmonary evaluation under 20 C.F.R. § 725.406, and he again diagnosed complicated pneumoconiosis. Consequently, the district director found entitlement to benefits.

Employer contested entitlement, denying the existence of pneumoconiosis, and requested a hearing before the Office of Administrative Law Judges. The case was transferred to the Office of Administrative Law Judges on August 3, 2007.

Dr. Crisalli prepared for Employer a report dated July 3, 2007 of a pulmonary evaluation of Claimant.⁸ Dr. Crisalli's report included a May 14, 2007 examination of Claimant, pulmonary function tests, an arterial blood gas test, as well as a review of Dr. Rasmussen's DOL sponsored evaluation. Dr. Crisalli's evaluation did not include a chest x-ray, but he was provided with Dr. Rasmussen's chest x-ray report of 1/0 and large opacity type B, and Dr. Gaziano's reading of the same x-ray for quality, to consider. Dr. Crisalli diagnosed a severe obstructive pulmonary impairment. He reported its cause to be unknown, although not caused by or related to coal dust exposure. He did not discuss Dr. Rasmussen's x-ray report finding a large opacity, instead offering that the data is not consistent with coal workers' pneumoconiosis. Dr. Crisalli did acknowledge that "[d]ata which is not known in this case, but which would be very helpful, include the pathology report of the right upper lung tissue that was removed in 1998." Again, Employer had in its custody the very reports that Dr. Crisalli would have found "very helpful" in addressing the cause of Claimant's pulmonary impairment - the pathology reports of Drs. Caffrey and Naeye - but did not provide them to Dr. Crisalli.

While the Claim was before the district director, Claimant's attorney served on Employer Interrogatories and Requests for Production of Documents, including a request to produce copies

⁸ See Attachment D to Claimant's Argument Regarding Entitlement Date.

of all interpretations of radiographs and pathology slides generated by Employer but not exchanged with the Claimant. See Claimant's Interrogatories to Employer and Requests for Production of Documents dated January 20, 2007, attached as Exhibit A to Claimant's Motion to Compel Discovery and Amend Pre-Hearing Order. Employer responded to the request:

The Employer and its attorneys are not in possession of any reports of x-ray readings, arterial blood gas studies, or other diagnostic tests of any kind generated by the Employer, which have not been previously submitted or provided to Claimant's counsel in his claim.

In federal black lung claims, the Employer regularly obtains medical records from sources identified by claimants in response to the Employer's Interrogatories. Such medical records have been procured in the instant case, but, since the records were not generated at the Employer's request and are readily obtainable by the Claimant, the Employer is not obliged to secure and forward the medical records to the Claimant. The Claimant may procure all of such information from his own medical providers as identified in his responses to the Employer's Interrogatories.

Medical evidence which consists of expert opinions requested by the Employer in evaluating a claim, and which was requested in the Employer's preparation of its defense but is not the opinion of any expert expected to "testify" (including the submission of a report in this matter) is a privileged information and is not subject to discovery under the Federal Rules of Civil Procedure or the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges. Such evidence includes reports of medical consultations and rereadings of x-rays or CT scans.⁹

Claimant's attorney, not being satisfied with Employer's response, and "[i]n order to fully explore the trustworthiness and reliability of any reviewing physician's opinion in the present case,"¹⁰ filed a motion on February 19, 2008, seeking an order to compel Employer to produce interpretations of any chest x-rays or pathology slides generated by Employer but not exchanged with Claimant. Employer responded to Claimant's discovery motion by letter received on March 17, 2008, arguing that the motion be denied because it asked for privileged materials.

Claimant's motion was granted by Order Granting Motion to Compel Discovery dated April 28, 2008. The Order required Employer to produce the documents requested by Claimant's discovery motion. The Order reasoned in part that Claimant has a substantial need to know all readings of x-rays and CT-scans of himself; that he has a substantial interest in the issuance of a decision on his claim that considers all available relevant evidence; and that he has an interest in receiving a decision on his claim that is based on a physician's report that is not skewed because the report did not consider evidence available but not presented to the physician.

⁹ Quoted by Claimant in his Motion to Compel Discovery Amend Pre-Hearing Order, p. 3, 4.

¹⁰ *Id.*, Motion to Compel Discovery Amend Pre-Hearing Order, p. 6.

Employer sought reconsideration of the order to compel arguing that the documents requested were privileged as attorney work product. On the same day Employer filed a Notification of Interlocutory Appeal with the Benefits Review Board.

The Board dismissed the interlocutory appeal in light of Employer’s pending motion for reconsideration. By Order Denying Reconsideration, dated July 14, 2008, Employer’s motion for reconsideration was denied, Employer was required to produce the requested documents, and the claim was rescheduled for hearing on September 24, 2008.

Employer submitted a letter dated August 4, 2008, accepting liability and requesting a remand to the District Director for the entry of an award of benefits order. Claimant responded by objecting to Employer’s request for remand, contending that jurisdiction should be retained to enforce the Order Granting Motion to Compel Discovery. Claimant argued that the information sought is relevant to Employer’s potential liability for the cost of a lung transplant, the date of onset of entitlement, and for a determination of whether Employer committed “fraud on the court” in Claimant’s prior claim. Employer and Claimant filed argument supporting their positions on August 11, 2008 and August 20, 2008 respectively. On August 28, 2008 an Order Granting Request to Retain Jurisdiction was issued retaining jurisdiction and requiring compliance with the July 14, 2008 discovery order. The Order reasoned that the response to the July 14, 2008 discovery order might very well support an earlier onset date by the reopening of the Order Denying Benefits by Judge Miller, or reconsideration of the denial of the prior claim.

Employer responded to the July 14, 2008 discovery order on September 19, 2008 by producing the pathology reports by Drs. Caffrey and Naeye, as well as chest x-ray interpretations by Drs. Bruce Stewart, Joseph Renn and Jerome Wiot. The report of Dr. Renn, a B-reader, showed readings progressing over time to complicated pneumoconiosis:

<u>Physician</u>	<u>Date Read</u>	<u>Date of Film</u>	<u>Reading</u>
Renn	9/7/07	8-7-04	Negative
Renn	9/7/07	10-6-93	p/p, 0/1
Renn	9/9/07	1/23/97 (2)	q/p, 1/0, Category A
Renn	9/9/07	3/13/01 (2)	q/p, 1/0, Category B
Renn	9/7/07	4/11/01	p/p, 1/0, Category B
Renn	9/9/07	10/30/03 (2)	q/p, 1/0, Category B
Renn	9/9/07	11/16/06	q/p, 1/0, Category C
Renn	9/9/07	12/12/06	q/p, 1/0, Category C

Dr. Wiot's report was an interpretation of a June 19, 2006 chest x-ray. He reported that the radiographic findings are not those of coal worker's pneumoconiosis. However, the cover letter to his radiographic interpretation stated: "In view of the fact that this patient has had previous surgery on the right, the pathology would give an answer as to whether there is any evidence of coal worker's pneumoconiosis."

Thus, Employer's defense of the subsequent claim continued to pursue the strategy of withholding Drs. Caffrey's and Naeye's pathology reports from Claimant and its own expert witnesses. It vigorously fought turning over the reports. It provided the reports to Claimant only after Claimant filed Interrogatories to Employer and Requests for Production of Documents, and followed the request with a Motion to Compel Discovery and Amend Pre-Hearing Order, and after the undersigned issued an Order Granting Motion to Compel Discovery, the Benefits Review Board issued an Order dismissing Employer's interlocutory appeal, and the undersigned issued an Order Denying Reconsideration, and an Order Granting Request to Retain Jurisdiction.

Pathology Slides

On August 11, 2008, Employer notified Claimant that it had custody of the pathology slides from the September 25, 1998 lobectomy at Raleigh General Hospital, and offered to send the slides to Claimant's attorney if he was available to sign a statement of receipt. Until then, Employer had never acknowledged having possession of the slides even though Complainant requested information on them. Complainant's January 20, 2007 Interrogatories and Requests for Production of Documents requested that Employer identify and provide copies of all interpretations of radiographs and pathology reports generated by employer but not exchanged with the Claimant. Employer's reply on April 5, 2007 stated that it was not yet in possession of Claimant's prior claim. Claimant's interrogatories advised that they were continuing in nature and were to be supplemented whenever Employer became aware of any additional information; however, Claimant received no further response.

Claimant sent to Employer a May 14, 2008 letter asking for information about the pathology slides. The letter stated:

To date, I have not been able to obtain the pathology slides from [Claimant's] lobectomy that was performed at Raleigh General Hospital on September 25, 1998. I am writing to ask if the employer has those slides. If so, could you please send them to me as soon as possible.¹¹

Employer did not respond to the May 14, 2008 letter, compelling Claimant to serve Employer with another set of interrogatories on May 31, 2008, requesting information on the pathology slides: The interrogatories requested:

Interrogatory #2: Did you, your attorney, your insurance carrier, or your agent ever obtain pathology slides from the claimant's lobectomy

¹¹ Claimant's August 5, 2008 letter to the undersigned and Claimant's Argument Regarding Entitlement Date, p. 14.

performed by Raleigh General Hospital in Beckley, West Virginia, on or about September 25, 1998? Yes _____ No _____.

Interrogatory #3: If the answer to Interrogatory #2 is yes, when did you, your attorney, your insurance carrier, or your agent obtain the pathology slides?

Interrogatory #4: If the answer to Interrogatory #2 is yes, are you, your attorney, your insurance carrier, or your agent still in possession of the slides? Yes _____ No _____.

If the answer to Interrogatory #4 is yes, the claimant renews his request that the slides be sent to his representative as soon as possible. (footnote to the interrogatory read, “To date, Claimant has been unable to obtain the pathology slides from Raleigh General Hospital because they have been either destroyed or lost.”)

Interrogatory #5: If the answer to Interrogatory #4 is no, when and where were the pathology slides last sent?

Claimant received no response from the interrogatories, which prompted his August 5, 2008 letter to the undersigned Administrative Law Judge to request that Employer be directed to respond to Claimant’s interrogatories and request for pathology slides “because they could have a bearing on his entitlement date and medical care.” In response to Claimant’s request for the order to produce, Employer’s August 11, 2008 letter acknowledged that it had possession of the pathology slides and agreed to produce them.

Employer has not offered any reason for its failure to turn over the pathology slides to Claimant, or even its failure to acknowledge possession. In its argument to justify withholding the reports of Drs. Caffrey and Naeye, Employer chides the *pro se* Claimant for not sending the slides to a pathology expert of his choice. Employer argues: “Claimant had the same option (sic) asking for a second opinion regarding the pathology slides or sending those slides to any expert of his choice. Simply because he chose not to have the slides reviewed does not mean that he is then entitled to the slide reviews by Elk Run.”¹² Employer’s brief appears to acknowledge that the *pro se* Claimant would have had to obtain those slides from Employer. Employer’s brief at p. 13 states: “Claimant never made a discovery request to [Respondent] for its experts’ opinions or the pathology slides in the prior claim.”¹³ However, the likelihood of Claimant obtaining the slides needs to be assessed against the difficulty that his attorney had in obtaining the slides from Employer’s counsel during this subsequent claim because of Employer’s failure to acknowledge their existence.

¹² Elk Run Coal Company’s Reply to Claimant’s Argument Regarding Entitlement Date, p. 12, footnote 12.

¹³ *Id.* p. 13

Reopening Prior Claim

Claimant argues that the pathology evidence diagnosed complicated pneumoconiosis on September 25, 1998, the date of the lobectomy. Thus, the date of onset of disability, and the date of entitlement to black lung payments, should be set on that date. Claimant recognizes that 20 C.F.R. § 725.309, which provides for the filing of the present subsequent claim, precludes benefits from being paid for any period prior to the date upon which the order denying the prior claim became final. § 725.309(d)(5). The order denying the prior claim was issued on January 11, 2001. However, Claimant argues that the earlier denied claim should be re-opened under Federal Rule of Civil Procedure 60(d)(3).¹⁴ Rule 60(d)(3) allows a court to set aside a judgment where there has been a fraud on the court.

Courts have narrowly construed Rule 60(d)(3) in the interest of finality. The Fourth Circuit Court of Appeals in *Great Costal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1355 (4th Cir. 1982), reasoned that the principal concern motivating narrow construction is that the otherwise nebulous concept of fraud on the court could easily overwhelm the specific provisions of 60(b)(3) and its time limitation of one year and thereby subvert the balancing of equities contained in 60(b)(3).

Claimant cites the cardinal case in this area of the law, *Hazel Atlas-Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). In *Hazel-Atlas*, the Supreme Court set aside a twelve year old judgment after finding evidence of a “deliberately planned and carefully executed scheme to defraud not only the Patent Office but [a] Circuit Court of Appeals.” 322 U.S. at 245-46. In *Hazel-Atlas*, Hartford used an article published in a trade publication, allegedly researched and authored by a noted expert in the field, to obtain a patent. The patent was awarded, and Hartford subsequently sued Hazel-Atlas in federal court for infringement. The district court dismissed the suit without reference to the article, finding that there had been no infringement. On appeal, however, Hartford emphasized the article and the court relied upon the same to find infringement. During the course of the litigation, it was revealed that the article was authored by Hartford’s patent attorney who had persuaded the expert to pass the article off as his own work. After the facts of the fraud were fully disclosed, Hazel-Atlas brought suit, and relief was denied by the court of appeals. The Supreme Court reversed, noting that the fraud was a carefully concocted scheme involving more than the parties concerned, but also “issues of great public moment” associated with the legal monopoly derived from a patent. 322 U.S. 245-46. The Court found fraud in *Hazel-Atlas* based on a clear cut scheme to defraud with the aid and complicity of Hartford’s attorneys. *Hazel-Atlas* has been consistently interpreted as requiring more than an injury to a single litigant for there to be fraud on the court. The fraud needs to threaten the integrity of the judiciary and the administration of justice. *Cleveland Demolition Co. v. Azcon Scraps Corp.*, 827 F.2d 984 (4th Cir. 1987).

Claimant argues that *Hazel-Atlas* supports a finding of fraud on the court here. Claimant reasons that once Employer learned that the pathology opinions of Drs. Caffrey and Naeye supported a finding of complicated pneumoconiosis, it “deliberately planned and carefully

¹⁴ 29 C.F.R. § 18.1 provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by the OALJ Rules of Practice and Procedure.

executed a scheme to defraud not only the Claimant but also the administrative law judge.” Claimant reasons that Employer developed a collection of evidence centered on Dr. Koh’s less probative pathology report, supplemented with twelve negative x-ray readings by Dr. Wheeler, Scott, Kim and Fino, which, without the benefit of the pathology reports of Drs. Caffrey and Naeye, created the radiographic impression that Claimant’s pulmonary condition was related, not to complicated pneumoconiosis, but to an inflammatory pseudotumor. Employer then presented the collection of evidence to four pulmonologists, Drs. Castle, Dahhan, Fino and Hippensteel, for their opinion, knowing that without the probative pathology reports they would deny the presence of complicated pneumoconiosis.

Claimant’s argument has merit. Employer withheld the opinions of two expert pathologists, Drs. Caffrey and Naeye, and skewed the evidence by disclosing to its experts the less probative pathology report of Dr. Koh. The opinions of Drs. Castle, Dahhan, Fino, Hippensteel, and Wheeler unequivocally demonstrate that Dr. Koh’s pathology report was crucial to their reasoning and the development of their opinions. Despite knowledge of the role pathology evidence played in the case, Employer continued to conceal the more probative reports of Drs. Caffrey and Naeye while emphasizing, and encouraging reliance upon, the report of Dr. Koh. When Claimant’s counsel attempted to bring evidence of Employer’s conduct to light, Employer engaged in a course of conduct designed to conceal its actions; first denying the presence of the reports, then conceding liability to prevent their disclosure. While perhaps initially not concocted as such, Employer’s knowledge and behavior is tantamount to a scheme intended to defraud its experts, the *pro se* Claimant, and the court.

Employer sought out the opinions of Drs. Caffrey and Naeye based on their expertise in the field of pathology, particularly their experience diagnosing pneumoconiosis. Both physicians provided pathology reports that clearly contradicted Dr. Koh’s finding of an inflammatory pseudotumor. Despite this contrary evidence from better qualified physicians, Employer relied on the pathology report of Dr. Koh and withheld the expert opinions of Drs. Caffrey and Naeye.¹⁵

Employer then built its case around Dr. Koh’s pathology report. Employer submitted the report of Dr. Castle, who opined that Claimant did not suffer from complicated pneumoconiosis. Dr. Castle explained that, initially, he interpreted the radiographic evidence as consistent with pneumoconiosis, but changed his opinion based on the pathology evidence. He stated, “*based on the pathology* from this case, there isn’t any evidence of coal workers’ pneumoconiosis there.” [Emphasis added]. Employer also used Dr. Castle’s testimony to discredit Dr. Rasmussen, who diagnosed Claimant with complicated pneumoconiosis. Dr. Castle cited to the “*documented pseudotumor*” as proof that Claimant did not have complicated pneumoconiosis. [Emphasis added]. Drs. Dahhan and Fino also found that Claimant did not have complicated pneumoconiosis based, in part, on Dr. Koh’s report. Dr. Dahhan stated, “[t]he pathological examination of the resected tissue of his right lung showed no pathological evidence of complicated pneumoconiosis.” Dr. Fino also noted that the resected portion of Claimant’s lung

15. It is noted that Employer often emphasizes the expert qualifications of its physicians as a litigation strategy.

did not show changes consistent with pneumoconiosis.¹⁶ Dr. Hippensteel, like Dr. Castle, changed his earlier opinion on the existence of pneumoconiosis based on Dr. Koh's report. After reviewing the opinions of Drs. Castle, Dahhan, Fino, and Hippensteel, it is evident that Employer was aware that its physicians based their opinion that Claimant did not have complicated pneumoconiosis on the subsequently discredited pathology report of Dr. Koh. Nonetheless, Employer presented the reports from Drs. Castle, Dahhan, Fino, and Hippensteel to Judge Miller, knowing that the reports were based on the false impression that the pathology was negative for pneumoconiosis.

Employer's questioning during the depositions of its physicians also reveals that it understood the importance of the pathology evidence. Dr. Castle was asked if Dr. Rasmussen's opinion would have been aided by having all of the biopsy evidence.¹⁷ Dr. Castle answered in the affirmative, stating that Dr. Rasmussen would have reached a different conclusion if he had reviewed the biopsy evidence. Employer's questioning prompted Dr. Castle to reiterate his opinion that the biopsy evidence clearly indicated that Claimant did not have complicated pneumoconiosis. Dr. Wheeler's testimony also recognized the importance of pathology evidence, not only to his own opinion, but in general, as he referred to it as the "final diagnosis."

The opinions of Employer's physicians clearly indicate that they relied heavily on Dr. Koh's pathology report. Thus, Employer knew of, and emphasized, the importance of Dr. Koh's pathology report throughout the proceedings. While the crux of Employer's case was pathology evidence, it knowingly withheld contradictory evidence by better qualified physicians because that evidence was detrimental to their position. As such, Employer deliberately misled each physician from whom it requested an expert opinion by failing to provide to them the more probative pathology reports of Drs. Caffrey and Naeye.

After building their case on skewed evidence, Employer then engaged in a course of conduct designed to obscure its actions and prevent the contrary opinions of Drs. Caffrey and Naeye from being disclosed. Initially, Employer denied that it was in possession of any additional medical reports. In response to Claimant's January 20, 2007 Interrogatories and Requests for the Production of Documents, Employer explicitly stated that it was not in possession of the results of any diagnostic tests that it had not already produced. However, when Claimant's counsel filed a Motion to Compel Discovery, Employer took the stance that any undisclosed materials were privileged. Thereafter, in response to a July 14, 2008 Order requiring Employer to produce the requested documents, Employer conceded liability and requested that the claim be remanded to the district director. Claimant objected to the remand, and on August 28, 2004 the undersigned issued an order retaining jurisdiction and requiring compliance with the July 14, 2008 discovery order. It was only then, on September 19, 2008, over a year and a half after Claimant's initial discovery request, that Employer produced the reports of Drs. Caffrey and Naeye as well as the numerous x-ray readings by Dr. Renn that were positive for complicated pneumoconiosis.

16. Dr. Fino stated in his report that he reviewed "all the records that [Employer has] been able to develop regarding [Claimant]." Thus, Employer led its physicians to believe that there was no other biopsy evidence.

17. Of course, the pathology evidence supported Dr. Rasmussen's opinion and it was, in fact, Dr. Castle who had not reviewed all the pathology evidence. Those pathology reports had been submitted to Employer's attorney's office months prior to the deposition.

In addition to failing to produce the reports of Drs. Caffrey and Naeye, Employer also failed to produce the biopsy slides. Claimant's counsel requested the slides in his January 20, 2007 Interrogatories. Having received no response, Claimant requested the slides again on May 14, 2008 and May 31, 2008. Only after sending a letter to the court, dated August 5, 2008, did Employer finally acknowledge possession of the slides and agree to produce the same.

Employer's conduct subsequent to the discovery of its failure to disclose the reports of Drs. Caffrey and Naeye demonstrates a continued attempt to prevent their disclosure. Even when ordered to disclose the reports, Employer elected to concede liability and have the case remanded in an attempt to prevent contrary probative evidence from being exposed.

Employer's actions, taken as a whole, constitute a scheme to defraud within the parameters of *Hazel-Atlas*. Employer's evidentiary development, subsequent denials of the existence of the pathology reports, and capitulation only when the evidence was to be revealed indicate a course of conduct designed to conceal contrary probative evidence. Of crucial importance in the instant case is the fact that Employer was in possession of two pathology reports by expertly qualified pathologists whose opinions directly contradicted the report of Dr. Koh. Employer's knowledge of the contrary probative evidence, combined with its understanding of the importance of the pathology in the development of the medical opinion evidence, demonstrates an intent to present false and misleading evidence to the court. Employer then pursued all steps possible to prevent disclosure of the contrary evidence. As such, Employer has misled not only its own physicians, but a *pro se* Claimant and the court.

Employer argues that it is under no legal or ethical duty to present its medical experts with the pathology reports of Drs. Naeye and Caffrey, or to turn over the pathology reports to Claimant. Initially, it argues that the Benefits Review Board decision in *Cline v. Westmoreland Coal Co*, 21 B.L.R. 1-69 (1997) holds that a prior claim can not be reopened because of an employer's withholding of a medical report. In *Cline*, the claimant filed his initial claim in 1980, which was finally denied in 1991. Claimant filed again in 1993. Pursuant to discovery requests, the employer produced Dr. Zaldivar's report, which he had written after examining claimant in 1989. After receiving the report, claimant argued that his initial claim should be reopened because the employer withheld the report rather than submitting it to the district director under 20 C.F.R. § 725.414 (2000). Section 725.414 (2000) requires that parties submit to the district director any examination report generated while the claim is pending before the district director. The Benefits Review Board disagreed with the claimant. It held that Dr. Zaldivar's report was generated while the claim was pending before the administrative law judge, and § 725.414 does not apply to reports generated while the claim is pending before the OALJ. *Cline* does not stand for the proposition asserted by Employer, that is, that Employer had no duty to disclose the pathology reports of Drs, Caffrey and Naeye.¹⁸ It stand solely for the proposition that reports

¹⁸ Employer asserts at footnote 2 of Elk Run Coal Company's Reply To Claimant's Argument Regarding Entitlement Date that the Benefits Review Board decision in *Cline v. Westmoreland Coal Co*, 21 B.L.R. 1-69 (1997), is binding legal precedent and that "Claimant's counsel's failure to notify this Court [of *Cline*] is evidence that he did not carefully research the applicable legal precedent as required before making these serious allegations." Employer suggests that Claimant's attorney could be subject to Rule 11 sanctions for bringing a motion under Fed. R. Civ. P. 60 without proper investigation. Employer's assertion is incorrect on two counts. As explained above, *Cline* does not stand for the proposition argued by Employer. Also, Claimant brought this Court's

generated while a claim is before OALJ do not have to be submitted to the district director, in that 20 C.F.R. § 725.414 (2000) requires that only reports generated while a claim is before the district director be submitted to the district director.

Employer also argues that the pathology reports are entitled to protection under the work-product doctrine. Employer references the Fourth Circuit Court decision in *Elm Coal Company v. Director, OWCP*, 480 F.3d 278, (4th Cir. 2007), as support. However, Employer's argument was rejected in the July 14, 2008 Order Denying Motion for Reconsideration. The Order denying reconsideration discussed *Elm Grove* and reasoned that the case did not support Employer's position. The Order referenced the Benefits Review Board decisions in *Huggins v. Windsor Coal Co.*, BRB No. 06-0710 (Aug. 15, 2007) and *Belcher v. Westmoreland Coal Company*, BRB No. 06-0653 (May 31, 2007) as directly opposite the Employer's interpretation of *Elm Grove*. The Order quoted the Board's reasoning as follows:

The facts in [*Elm Grove Coal Co. v. Director, OWCP* [*Blake*]] are distinguishable from the facts in the instant case. Although the Fourth Circuit court emphasized the importance of distinguishing between testifying and non-testifying experts with regard to determining whether the information sought was discoverable, the type of information that was sought in *Blake* is different from the type of information that is sought in the instant case. In *Blake*, the information that was sought consisted of draft reports and attorney-expert communications that counsel provided to its experts before they formed their medical opinions. However, in the instant case, the information that is sought consists of medical evidence prepared by non-testifying experts.

Order Denying Motion for Reconsideration, p. 2, 3, quoting *Belcher*, at p. 6.

When denying reconsideration, the Order noted the Board's reasoning in *Belcher* that the ALJ "reasonably found that the information sought by claimant is not protected work product because '[t]hese undisclosed medical reports do not represent the mental impression, conclusions, opinions, or legal theories of [employer's] counsel.'" Rather, the Order agreed with the Claimant's characterization of Employer's tactics here as "[i]nstead of 'consulting' with an expert, the employer actually may be just shopping for favorable evidence." *Id.* p. 4.

Employer's attorneys also justify their withholding of the pathology reports by reasoning that they have an ethical obligation to zealously represent their clients by developing and presenting evidence that supports their clients' positions. They argue that Congress created an adversarial system for determining entitlement to black lung claims and, since the proceedings are adversarial in nature, counsel for the parties have no duty to disclose all relevant evidence. Employer's argument that it had no duty to disclose the pathology reports evidencing complicated pneumoconiosis is rejected. Surely, Employer must recognize a duty to provide accurate evidence to its expert witnesses. An expert's report cannot be considered to be solely a reflection of the evidence selected and provided by a party. If such were the case, an expert medical opinion could never be accepted as a reliable diagnosis. Moreover, it is simplistic to

attention to *Cline* in Claimant's Motion to Compel Discovery Amend Pre-Hearing Order, albeit for a different purpose, and *Cline* was discussed by this court in its Order Granting Motion to Compel Discovery.

base such an argument on the characterization of black lung proceedings as adversarial. The proceeding, although adversarial, implements a workers compensation program, the intent of which is to remove the heavy cost of litigation from both parties. Workers compensation programs require that workers relinquish their rights to sue their employer for common law remedies in exchange for a measure of guaranteed compensation for work-related injuries. Employers in turn are provided with certainty of limited liability instead of the risk of unpredictable compensatory and punitive damages.¹⁹ The purpose of the Black Lung Benefits Act is remedial and it is to be liberally construed to assure benefits to miners disabled from black lung disease. *Cabral v. Eastern Associated Coal Corporation*, 18 BLR 1-25, 1993 WL 5445241. In fact, court decisions in the workers' compensation forum, rather than permitting an employer to withhold information of injury from an employee, have recognized a duty of disclosure and have found that a breach of that duty permits a worker to proceed with a tort recovery rather than the exclusive provisions of a workers' compensation complaint. The Supreme Court of California in *Foster v. Xerox Corp.*, 40 Cal.3d 306, 219 Cal.Rptr. 485 (Nov. 4, 1985), held that "[i]t is unassailable that an employer who knows that an employee has contacted a disease in the course of his employment has a duty to advise the employee of that fact," and a breach of that duty permits the employee to proceed with a common law action. In *Martin v. Lancaster Battery Company, Inc.*, 530 Pa. 11, 606 A.2d 444 (March 18, 1992), the Pennsylvania Supreme Court permitted an employee to bring a personal injury action, rather than be restricted to a workmens' compensation claim, where the employee alleged that the employer withheld results of blood tests from the employee resulting in an aggravation of a work place injury.²⁰

In sum, Employer breached a duty of notification to Claimant; breached a duty to its medical experts by requesting a medical opinion while withholding the most probative medical evidence; and breached a duty to the court by withholding the results of the pathology interpretations by Drs. Caffrey and Naeye and instead offering reports of medical experts that were not probative of Claimant's pulmonary condition because the experts were not provided with the most probative evidence. Thus, its actions resulted in a misrepresentation of the evidence thereby committing fraud on the court. Employer's "zealous" representation strategy instills uncertainty and cynicism into a program intended to compensate miners disabled from black lung disease, and thus mandates under Federal Rule of Civil Procedure 60(d)(3) a reopening of the decision denying benefits in Claimant's 1999 claim, to provide for the commencement of benefits from September, 1998.

Date of Onset of Benefits

30 U.S.C. § 921(c)(3) provides that if a miner establishes that he has complicated pneumoconiosis, the onset date is the month during which complicated pneumoconiosis was first diagnosed. Claimant asserts that the date of onset should be September 1, 1998, the first day of the month of Claimant's lobectomy, when the pathology revealed complicated pneumoconiosis. However, Dr. Renn interpreted two chest x-rays taken in January, 1997 as positive for complicated pneumoconiosis. It is obvious that the complicated pneumoconiosis did not

¹⁹ Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes, Harvard Law Review, 96 HVL 1641, May, 1983.

²⁰ As previously noted, Claimant was an employee of the Employer when Employer had the lobectomy tissue slides interpreted by the two pathologists.

commence on the date of the lobectomy. Accordingly, the date of onset is found to be January, 1997. In *Truitt v. North American Coal Corp.*, 2 B.L.R. 1-199, 1-203 to 1-204 (1979), the Board held that the miner was entitled to benefits from the date that the earliest x-ray study was interpreted as positive for complicated pneumoconiosis.

Attorney Fee

Claimant's counsel shall file within 30 days of the date of issuance of this Decision and Order with this Office and with opposing counsel, a petition for representative's fees and costs in accordance with the regulatory requirements set forth at 20 C.F.R. § 725.366 (2005). Counsel for Employer shall file any objections with this Office and with Claimant's counsel within 20 days of receipt of the petition for fees and costs. It is requested that the petition for services and costs clearly provide (1) counsel's hourly rate with supporting argument or documentation, (2) a clear itemization of the complexity and type of services rendered, and (3) that the petition contains a request for payment for services rendered and costs incurred before this Office only as the undersigned does not have authority to adjudicate fee petitions for work performed before the district director or appellate tribunals.

ORDER

It is hereby ORDERED that:

1. Claimant's motion that the final judgment denying benefits in his prior claim be set aside under Federal Rule of Civil Procedure 60(d)(3) because Employer misrepresented evidence to the administrative law judge, thereby committing fraud on the court, is granted, and a date of entitlement of benefits of January 1, 1997 is adopted based on chest x-ray interpretations by Dr. Renn; and
2. Claimant is awarded black lung disability benefits, including medical and hospital benefits, commencing January 1, 1997, the first day of the month that Dr. Renn interpreted Claimant's chest x-ray as positive for pneumoconiosis.

A
THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of**

the Board, P.O. Box 37601, Washington, D.C. 20013-7601.²¹ At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter to **Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210.** *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

E-FOIA Notice: Under e-FOIA, final agency decisions are required to be made available via telecommunications, which under current technology is accomplished by posting on an agency web site. *See* 5 U.S.C. § 552(a)(2)(E). *See also* Privacy Act of 1974; Publication of Routine Uses, 67 Fed. Reg. 16815 (2002) (DOL/OALJ-2). It is the policy of the Department of Labor to avoid use of the Claimant's name in case-related documents that are posted to a Department of Labor web site. Thus, the final ALJ decision will be referenced by the Claimant's initials in the caption and only refer to the Claimant by the term "Claimant" in the body of the decision. If an appeal is taken to the Benefits Review Board, it will follow the same policy. This policy does not mean that the Claimant's name or the fact that the Claimant has a case pending before an ALJ is a secret.

²¹ 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.

