BRB No. 01-0388 BLA

LONNIE D. JOHNSON Claimant-Petitioner v. ROYAL COAL COMPANY and WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order--Denying Benefits and Decision on Motion for Reconsideration of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington and Lee University School of Law, Legal Practice Clinic), Lexington, Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order--Denying Benefits and Decision on Motion for Reconsideration (1999-BLA-1015) of Administrative Law Judge Robert J.

Lesnick rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Claimant filed his application for benefits on August 27, 1998. Director's Exhibit 1. The District Director of the Office of Workers' Compensation Programs denied benefits and claimant requested a hearing. Director's Exhibits 21, 22. The District Director then notified employer of the claim, and employer responded with a notice of controversion in which it contested all issues in the claim. Director's Exhibits 27-29. The claim was then referred to the Office of Administrative Law Judges (the OALJ) for a hearing on the contested issues identified by the District Director. Director's Exhibit 32. The District Director's hearing referral sheet indicated that all issues in the claim were contested by employer and the Director, Office of Workers' Compensation Programs (the Director). Director's Exhibit 32; *see* 20 C.F.R. §725.421(b)(2000).

While the claim was pending at the OALJ, the parties continued to develop and exchange medical evidence. During this time period, employer had claimant examined by Dr. George Zaldivar, who concluded that claimant is totally disabled by a pulmonary impairment but does not have pneumoconiosis. Employer's Exhibit 1. Dr. Zaldivar also concluded that even assuming claimant has pneumoconiosis, his total disability is unrelated to pneumoconiosis. Claimant had Dr. Zaldivar's report reviewed by Dr. D.L. Rasmussen, the physician who had initially examined claimant on behalf of the Department of Labor, and Dr. Rasmussen opined that claimant is totally disabled due to pneumoconiosis. Director's Exhibit 15; Claimant's Exhibit 5. The last of the parties' medical reports was submitted by December 21, 1999, Claimant's Exhibit 5, and a Notice of Hearing issued on February 16, 2000 advised that the hearing was scheduled for June 8, 2000 before Judge Lesnick.

On March 30, 2000, claimant served employer and the Director with "Requests for Admission," asking them to admit the truth of ten listed matters. The admissions sought were as follows:

1. The claim was timely filed on August 27, 1998.

2. [Claimant] was a miner within the meaning of 20 C.F.R. §725.202.

3. [Claimant] worked in or around coal mines for at least fifteen years.

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

4. [Claimant] has pneumoconiosis within the meaning of 20 C.F.R. §718.201.

5. [Claimant's] pneumoconiosis arose at least in part out of his coal mine employment within the meaning of 20 C.F.R. §718.203.

6. [Claimant] is totally disabled from a respiratory standpoint or a pulmonary standpoint from performing his last coal mine employment within the meaning of 20 C.F.R. §718.204.

7. [Claimant's] total respiratory disability is due at least in part to his pneumoconiosis within the meaning of 20 C.F.R. §718.204.

8. [Claimant] has one dependent . . . for purposes of augmentation.

9. [Claimant's] most recent period of cumulative coal mine employment . . . of not less than one year was with Royal Coal Company.

10. Royal Coal Company is the Responsible Operator . . . .

Claimant's Exhibit 6 at 1-2.

On April 26, 2000, employer timely served a response in which it admitted matters 1, 2, 8, 9, and 10, but remained silent as to matters 3 through 7. Claimant's Exhibit 6 at 4. The record contains no response from the Director.

At the June 8, 2000 hearing, the administrative law judge referred to the District Director's list of contested issues at Director's Exhibit 32 and asked employer's counsel whether any issues could be withdrawn. Tr. at 6; *see* 20 C.F.R. §725.462 ("A party may, on the record, withdraw his or her controversion of any or all issues set for hearing"). In response, employer's counsel withdrew controversion of all issues except the existence of pneumoconiosis and disability causation. *Id*. During this exchange, claimant's counsel did not contend that employer had already admitted the existence of pneumoconiosis and that claimant's total disability is due to pneumoconiosis due to its failure to respond to claimant's request for an admission on these matters. Thereafter, claimant's counsel did not object to the admission of employer's evidence relating to these elements of entitlement. Subsequently, claimant proffered Claimant's Exhibits 1-6, which included the requests for admissions and responses thereto, and they were admitted without objection. Tr. 6-8. Claimant's counsel then made an opening statement in which he asserted that claimant's medical evidence would prove both the existence of pneumoconiosis and that claimant's total disability is due to pneumoconiosis. Tr. 9-11. The hearing proceeded in full with no mention of employer's having admitted

entitlement.

In claimant's closing brief, filed after employer's brief, claimant argued for the first time that employer had admitted all of the elements of entitlement. Claimant's Closing Argument at 2. Claimant noted that employer had specifically admitted matters 1, 2, 8, 9, and 10 listed in claimant's Request for Admissions, but failed to address the other five statements relating to the elements of entitlement. Claimant cited 29 C.F.R. §18.20 of the Rules of Practice and Procedure before the Office of Administrative Law Judges, which provides in relevant part:

> (a) A party may serve upon any other party a written request . . . for the admission of the truth of any specified relevant matter of fact.
>
> (b) Each matter of which an admission is requested is admitted unless . . . the party to whom the request is directed serves on the requesting party:
>
> (1) A written statement denying specifically the relevant matters of which an admission is requested;
>
> (2) A written statement setting forth in detail the reasons why he or she can neither truthfully admit nor deny them; or
>
> (3) Written objections . . . .
>
> (e) Any matter admitted . . . is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

29 C.F.R. §18.20. Claimant asserted that because employer failed to respond to all of the requested admissions, the unanswered matters were admitted and were thus conclusively established, entitling claimant to benefits. Claimant's Closing Argument at 3. Claimant argued alternatively that the medical evidence established entitlement. Claimant's Closing Argument at 4-14.

In the ensuing Decision and Order--Denying Benefits, the administrative law judge did not address claimant's argument that employer had admitted entitlement. The administrative law judge credited claimant with twelve and three-quarter years of coal mine employment and found that the weight of the credible medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment, but did not establish the existence of pneumoconiosis or that claimant's total disability is due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. Subsequently, the administrative law judge denied claimant's

motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred as a matter of law in denying benefits. Employer responds, urging affirmance, and the Director has declined to participate in this appeal. Claimant has filed a reply brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that, as a matter of law pursuant to 29 C.F.R. §18.20, the Board must reverse the denial of benefits and order an award because employer in its response to the request for admissions did not specifically deny that claimant is totally disabled due to pneumoconiosis. We disagree.

The OALJ rule of procedure relied upon by claimant, 29 C.F.R. §18.20, is inapplicable to the extent it conflicts with a procedure required by the Act or regulations. *See* 29 C.F.R. §18.1 ("To the extent that these rules may be inconsistent with a rule of special application as provided by statute . . . or regulation, the latter is controlling."); *Adams v. Newport News Shipbuilding and Dry Dock Co*., 22 BRBS 78, 81 (1989). The Act requires only that hearings in black lung claims be conducted in accordance with the Administrative Procedure Act. *See* 30 U.S.C. §932(a), incorporating 33 U.S.C. §919. The implementing regulations, however, set forth specific "procedures to be followed . . . in the . . . processing [and] adjudication . . . of claims filed under part C of title IV of the Act." 20 C.F.R. §725.2(a).

These procedural regulations include provisions for identifying the contested issues to be resolved at the hearing. Accordingly, for example, when an operator is first notified of a claim after the district director has made findings regarding entitlement, the responding operator must "indicate its agreement or disagreement with each such finding" by the district director. 20 C.F.R. §725.413(a)(2000). If an

optional, informal conference is held, the district director must prepare a stipulation of contested and uncontested issues for signature by the parties and the district director, and must place the stipulation in the record. *See* 20 C.F.R. §725.417(a)(2000). Whether or not an informal conference is held, when the claim is referred to the OALJ for a hearing, the district director must execute and submit into the record a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7)(2000).

This statement of issues prepared by the district director is of critical importance, as the regulations contemplate that this document will provide the road map for the hearing. *See* 20 C.F.R. §725.463(a)(the hearing is "confined to those contested issues which have been identified by the district director (see §725.421) . . . ."); *see also* 20 C.F.R. §725.450(the parties have a right to a hearing on "any contested issue of fact or law unresolved by the district director.") Additionally, the hearing issues form is often referred to at the hearing to determine whether any contested issues can be withdrawn so as to narrow the issues for decision. *See* 20 C.F.R. §725.462(a); Tr. at 6.

Review of the record indicates that the Part 725 procedures were followed in this claim: both employer and the Director completed Employment Standards Administration, U.S. Department of Labor Form CM-1025, listing the issues contested for the hearing; employer checked all sixteen issues and the Director checked seven. Director's Exhibit 32. Moreover, the statements of employer's counsel at the hearing, contesting the existence of pneumoconiosis and the causation of total disability, went unchallenged. Tr. at 6. The alleged admissions that claimant points to under 29 C.F.R. §18.20 are in conflict with the issues listed on Form CM-1025 pursuant to the black lung regulations, yet claimant does not explain his apparent assumption that the black lung procedures are trumped by 29 C.F.R. §18.20 because of employer's technical error in drafting its response to the request for admissions.

The administrative law judge is not bound by "technical or formal rules of procedure, except as provided by" the Administrative Procedure Act and Part 725. 20 C.F.R. §725.455(a); *Cline v. Westmoreland Coal Co*., 21 BLR 1-69, 1-76 (1997). Furthermore, the Board has long disfavored default awards based on a party's alleged technical mistake. *See Young v. Barnes and Tucker Co*., 11 BLR 1-147, 1-149-50 (1988)(default award vacated as employer's actions indicated that it merely intended to raise no defense, not concede liability, and "claimant bears the burden of proving his entitlement . . . even where employer offers no defense"); *Carpenter v.*

[2] Employer requested an informal conference in this case, but no conference was held. Director's Exhibit 28.

Eastern Associated Coal Corp., 6 BLR 1-784, 1-786 (1984)(the parties' conduct and awareness of mutual intent to litigate issues are critical in determining whether an issue is contested; the mere absence of a check mark on the hearing issues sheet is not determinative). Additionally, claimant does not argue that he actually relied on employer's alleged admissions in preparing for trial, nor is such reliance apparent on this record. Therefore, we hold that because the admissions allegedly made under 29 C.F.R. §18.20 are in direct conflict with the contested issues which were raised utilizing the procedures required by the regulations, 29 C.F.R. §18.20 is inapplicable in the procedural context of this case because the black lung regulations are "controlling." *See* 29 C.F.R. §18.1; *Adams*, *supra*. Consequently, we reject claimant's contention that 29 C.F.R. §18.20 compels reversal in this case.

Moreover, even assuming *arguendo* that 29 C.F.R. §18.20 were applicable, claimant waived his right to rely on employer's alleged admissions. As noted, at the hearing the parties and the administrative law judge considered the issues to be resolved. Tr. at 6. At that time, despite having employer's alleged admissions in hand, counsel for the claimant did not object to employer contesting the existence of pneumoconiosis or disability causation. *Id*. Furthermore, claimant did not object to the introduction of employer's evidence relating to these issues. He submitted evidence on these issues, and he stated that his evidence would establish entitlement. Tr. 5, 8-11. On appeal, claimant offers no explanation for his failure to raise Rule 18.20 at this key point in the proceedings. Consequently, we hold that by failing to raise the admissions issue at the hearing when contested issues were being identified and evidence proffered, claimant waived his right to rely on employer's alleged admissions. *See Dankle v. Duquesne Light Co*., 20 BLR 1-1, 1-6 (1995); *Grant v. Director, OWCP*, 6 BLR 1-619, 1-621 (1983).

Therefore, we reject claimant's allegation that we must reverse the denial of benefits and award benefits as a matter of law. We likewise reject the remedy proposed by our dissenting colleague, remand of the case to the administrative law judge. Unlike claimant, our dissenting colleague implicitly recognizes that 29 C.F.R. §18.20 provides the administrative law judge with broad discretion to permit withdrawal or amendment of the admissions. *See* 29 C.F.R. §18.20(e). It seems clear that it would constitute an abuse of discretion for the administrative law judge to hold on remand that employer had admitted both the existence of pneumoconiosis and causation of disability, because the conduct of the parties at the hearing makes manifest that employer did not admit these issues and that claimant understood they

[3] The purpose of the discovery rule cited by claimant is to save the time and resources of both the court and the parties by narrowing the issues for trial. C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure §2252 (2d ed. 1994)(discussing Federal Rule of Civil Procedure 36, upon which 29 C.F.R. §18.20 is based).

were not admitted. A holding that the issues were admitted pursuant to the regulation would contravene the Supreme Court's teaching that procedural rules should not be applied when to do so would "sacrifice . . . the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *see Karpa v. Commissioner of Internal Revenue*, 909 F.2d 784, 789 (4th Cir. 1990). Because claimant alleges no error in the administrative law judge's evaluation of the evidence or in his application of the law pursuant to 20 C.F.R. Part 718, the denial of benefits is affirmed. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711-12 (1983).

Accordingly, the administrative law judge's Decision and Order--Denying Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the holding of my colleagues and would remand this case to the administrative law judge to determine whether claimant conclusively established his case through employer's admissions, which were entered into the record without objection as Claimant's Exhibit 6, pursuant to 29 C.F.R. §18.20. This issue was clearly raised by claimant in his closing argument and was not addressed by the administrative law judge in his decision.

Claimant properly served employer and the Director with a set of ten (10)

requests for admission on March 30, 2000, after the case had been referred by the District Director on June 4, 1999 to the Office of Administrative Law Judges for a hearing and a Notice was issued on February 16, 2000 by the administrative law judge scheduling the matter for hearing on June 8, 2000. Employer served its answers to said requests for admission on April 26, 2000, in which it specifically admitted requests 1, 2, 8, 9 and 10, but was silent as to requests 3-7.

The hearing before the administrative law judge was a proceeding conducted pursuant to 29 C.F.R. Part 18 (Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges). Section 18.20 provides, in pertinent part, that a party may serve upon any other party a written request for admissions. 29 C.F.R. §18.20(a). Section 18.20(b) provides, in pertinent part, that each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request, the party to whom the request is directed serves a written response in which he or she admits, denies with specificity, provides in detail the reasons why he or she can neither admit or deny, or files written objections to the request for admission. 29 C.F.R. §18.20(b)(emphasis supplied). Further, 29 C.F.R. §18.20(e) specifies that "[a]ny matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission." 29 C.F.R. §18.20(e).

Claimant in this case served employer with 10 requests for admission, in response to which employer timely admitted requests 1, 2, 8, 9, and 10, but was silent as to requests 3-7. Pursuant to the above-referenced rules, silence is the same as an admission. *See* 29 C.F.R. §18.20(b). Thus, requests for admission 1-10 were conclusively established unless the administrative law judge, pursuant to an appropriate motion, permitted amendment or withdrawal of such admission or admissions. *See* 29 C.F.R. §18.20(e). If said admissions were accepted as conclusively established pursuant to 29 C.F.R. §18.20(e), claimant proved all elements necessary to require an award of benefits.

Employer acknowledges that the administrative law judge should have addressed its failure to specifically answer certain of the requests for admission propounded by claimant. Employer's Brief at 3. However, employer asserts that the judge's failure to consider the effect of the unanswered requests does not constitute an error of law justifying an award of benefits to claimant. The only legal authorities employer cites to bolster its position, that the admissions do not conclusively establish claimant's entitlement to benefits, are: (1) Section 556(d) of the Administrative Procedure Act, which requires an administrative law judge to qualify evidence as "reliable, probative and substantial" before relying upon it to grant or deny a claim, 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); and (2) *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 442, 21 BLR 2-269, 2-276 (4th Cir. 1997), for the proposition that an administrative law judge has a statutory duty to consider all of the relevant evidence regarding the existence of pneumoconiosis

and that disease's contribution to claimant's disability.

While the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has not directly addressed the impact of admissions in a Black Lung case, it has held that where a party could have moved for an extension of time to answer or could have stated that it did not have sufficient information to answer, but did neither, and thus made only minimal efforts to comply with Federal Rule of Civil Procedure 36, which is virtually identical to 29 C.F.R. §18.20, the district court did not abuse its discretion in refusing to allow an untimely response to a request for admissions. *Metpath, Inc. v. Modern Medicine*, No. 90-2234, 1991 WL 87534 at *3 (4th Cir. May 29, 1991). In the instant case, employer never moved for leave to amend or withdraw admissions; in fact, it did not object to the admission into the record of such admissions.

Metpath cites a First Circuit case, *Brook Village North Assoc. v. General Elec. Co*., 686 F.2d 66 (1st Cir. 1982), where the court held, *inter alia*, that (1) a more restrictive standard applies to opening up or withdrawal of admissions once trial has begun and a lesser standard applies to pretrial requests, *Brook Village*, 686 F.2d at 71; and (2) "[r]equiring a party . . . to elect between relying on admissions by default and introducing no evidence, and introducing evidence but foregoing the binding force of the admissions, unfairly forces a party who chooses to make use of admissions by default to limit his proof at trial to the scope of his request for admissions." *Brook Village*, 686 F.2d at 72. Therefore, the court held that "a party who obtains an admission by default does not waive his right to rely thereon by presenting evidence at trial which overlaps the matters controlled by the admission." *Id*. This is precisely what happened in the case at bar: claimant, after having his exhibits properly admitted as evidence at the hearing, continued to put on further evidence to support his claim.

In this case, the Requests for Admissions and Responses thereto were admitted as evidence, Claimant's Exhibit 6, with no objection from employer. Employer could have, but did not, object to the admission of this evidence and could have, at or prior to the hearing, filed a motion for leave to withdraw or amend its answers to the requests for admission, but it did not. However, by the same token, claimant could have filed a motion for summary judgment at the hearing, once Claimant's Exhibit 6 had been admitted, based on that exhibit, but he did not.

As to the majority's view that 29 C.F.R. §18.20 is inapplicable to the extent it conflicts with a procedure required by the Act or regulations, *see* 29 C.F.R. §18.1, I would hold that there is no conflict in this case. While there are

[4] However, in this case, as noted above, employer never even made a motion, either before, at, or after the hearing, for leave to withdraw or amend its admissions.

procedural rules which provide for identifying the contested issues to be resolved at hearing, Claimant's Exhibit 6 came in as evidence which must be given appropriate consideration and, perhaps, controlling weight.

I agree with my colleagues that the procedural regulations relating to claims for Black Lung benefits require the District Director to execute and submit into the record a "statement . . . of contested and uncontested issues in the claim," 20 C.F.R. §725.421(b)(7)(2000), and that the parties have a right to a hearing on "any contested issue of fact or law unresolved by the [District Director]." 20 C.F.R. §725.450. The purpose of these regulations is to narrow the issues which may be presented by the parties and which will require a decision by the administrative law judge.

However, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges are controlling unless they are deemed to be inconsistent with a rule of special application as provided by statute, executive order, or regulation. *See* 29 C.F.R. §18.1. I submit that there is no conflict between Section 18.20 and the cited regulations found at 20 C.F.R. Part 725. Simply put, the provisions for requesting admissions furnish a supplemental or additional method of narrowing the issues as well as a procedure for extracting admissible evidence.

In this case, the District Director certified the issues when he referred the case to the Office of Administrative Law Judges on June 4, 1999. Claimant did not serve his requests for admission until nearly ten (10) months later on March 30, 2000, which was more than two months before the hearing was held on June 8, 2000. Thus it is my view that, in the context of this case, there is no conflict between 20 C.F.R. Part 725 (Claims for Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act, as Amended) and 29 C.F.R. Part 18 (Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges).

Further, I disagree with my colleagues when they characterize employer's answers to admissions and lack thereof as a "technical" mistake. The "courts have not hesitated in appropriate cases to apply the sanction[s] of Rule 36 [and parallel rules] to material facts that conclusively establish or preclude a party's claim." *Brook Village*, 686 F.2d at 70 (citations omitted).

I also differ with my colleagues in that I do not agree that the "conduct of the parties at the hearing makes manifest that employer did not admit these issues and that claimant understood they were not admitted." Slip op. at 7. It is true that 29 C.F.R. §18.20 provides the administrative law judge with discretion to permit withdrawal or amendment of the admissions. However, in this case the hearing was conducted, closing arguments submitted, and the record was closed

without employer ever filing a motion for leave to withdraw or amend its response to claimant's requests for admissions. Therefore, it appears that employer waived its right to file a motion for leave to withdraw or amend. In fact, employer did not object to the requests for admissions and responses thereto being entered into the record. Further, nothing in the record convinces me that claimant understood that the admissions he had elicited through discovery were no longer binding on employer. In this case, closing arguments, by agreement of the parties and the administrative law judge, came in the form of post-hearing briefs, in which claimant made clear his position that the admissions were binding.

In addition, I disagree with my colleagues in that I do not believe that claimant necessarily waived his right to rely on the admissions when, at the commencement of the hearing, the administrative law judge asked if any of the contested issues could be withdrawn. Employer withdrew all but two remaining issues and claimant did not

object, based on the fact that he knew he had extracted admissions as to the remaining issues and that he would shortly move to introduce such admissions into the record. In the first place, the administrative law judge was directing his question regarding potential withdrawal of any outstanding issues to the respondent, not to claimant. Second, I can imagine that, perhaps for strategic reasons, claimant chose not to highlight his legal strategy until after he had his admissions introduced into the record.

The holding of the majority particularly disturbs me because it effectively eliminates requests for admission as a tool for developing evidence and narrowing issues in Black Lung cases. I find this neither necessary nor desirable. Many months can, and usually do, go by between the time the District Director certifies the contested issues pursuant to 20 C.F.R. §725.421(b)(7)(2000) and the time of a hearing before the administrative law judge. Unless a party voluntarily withdraws his or her controversion of an issue pursuant to 20 C.F.R.§725.462 or agrees to stipulations, requests for admission provide the only viable tool for narrowing or eliminating issues prior to the hearing. Presumably, pursuant to the majority's holding, one party could have extracted admissions as to one or all relevant issues but such admissions would mean nothing because the opposing party could come to the hearing and simply rely on the fact that, months ago, the District Director had certified the issue or issues.

Based on all of the above, I believe this case should be remanded to the administrative law judge to determine whether there is any valid reason why Admissions 1-10, which were properly introduced into evidence with no objection, should not be binding on employer and thus dictate an award of benefits to claimant.

BETTY JEAN HALL
Administrative Appeals Judge