BRB No. 04-0727 BLA

MELVIN L. KRISE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KOCHER COAL COMPANY	)	
	)	DATE ISSUED: 04/29/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-5100) of Administrative Law Judge Paul H. Teitler 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

October 21, 2002. Director's Exhibit 2. The administrative law judge accepted the parties' stipulations to 18.46 years of coal mine employment[1] and that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge found, however, that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in permitting employer to conduct and submit into evidence a post-hearing deposition of its physician. Claimant further asserts that the administrative law judge did not address claimant's request to submit evidence in response to employer's post-hearing deposition. Additionally, claimant contends that the administrative law judge erred in his analysis of the pulmonary function studies and medical opinions when he found that claimant did not establish that he is totally disabled. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to either deem claimant's procedural arguments waived, or to remand the case for the administrative law judge to clarify why he permitted employer to conduct a post-hearing deposition and to address claimant's motion to submit responsive evidence.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 the administrative law judge erred in permitting employer to conduct a post-hearing deposition of Dr. Levinson and in admitting Dr. Levinson's

[1] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

deposition into evidence. Claimant argues further that the administrative law judge did not rule on his request to submit responsive evidence to employer's post-hearing deposition. The revelant procedural history is as follows:

The district director denied benefits. Director's Exhibits 27, 30. On October 10, 2003, while the claim was still pending before the district director, employer's counsel withdrew. On October 17, 2003, at claimant's request, the district director referred the claim to the Office of Administrative Law Judges (OALJ) for a hearing. Director's Exhibits 28, 30, 31. On October 31, 2003, the administrative law judge issued a notice indicating that a hearing was scheduled for February 2, 2004. On November 21, 2003, employer's new counsel served claimant with Dr. Levinson's medical report. Employer's new counsel entered her appearance before the OALJ on December 17, 2003, and asked to be advised when a hearing was scheduled. On December 29, 2003, the administrative law judge provided employer's counsel with a copy of the notice of hearing scheduled for February 2, 2004.

On January 22, 2004, employer moved for an extension of time to take and submit the deposition of Dr. Levinson. Employer stated that by the time the administrative law judge provided the notice of hearing, "the period for scheduling a timely deposition of Dr. Levinson had already passed." Employer's Motion, Jan. 22, 2004. Employer's counsel also indicated that she had consulted with claimant's counsel concerning the extension request and that claimant's counsel was "not agreeable" to it. Cover Letter, Jan. 22, 2004. By order dated January 23, 2004, the administrative law judge granted employer's motion and authorized the post-hearing deposition of Dr. Levinson. The administrative law judge noted employer's statement that "at the time that she entered an appearance on this claim the time period for filing had already expired." Order, Jan. 23, 2004.

By letter dated January 30, 2004, claimant's counsel informed the administrative law judge and the parties that because she was not given an opportunity to respond to employer's motion, she would be prepared to argue for reconsideration at the hearing. However, at the February 2, 2004 hearing, claimant's counsel did not move for reconsideration and the issue of Dr. Levinson's post-hearing deposition was not discussed.

On February 5, 2004, employer mailed a notice to claimant that Dr. Levinson's deposition was scheduled for February 11, 2004. Claimant received the notice on February 9, 2004. On the same day, claimant filed written objections with employer and the administrative law judge and moved to preclude the taking of Dr. Levinson's deposition as scheduled for February 11, 2004. Claimant argued that employer did not raise the issue of Dr. Levinson's deposition at the hearing, did not demonstrate "good

cause" to keep the record open for a post-hearing deposition, and did not provide claimant with adequate notice of the deposition.

According to the parties' briefs on appeal, the administrative law judge denied claimant's motion to preclude the taking of Dr. Levinson's deposition as scheduled. Claimant's Brief at 5; Employer's Brief at 3; Director's Brief at 2. Apparently, the administrative law judge orally denied the motion.[2] The record contains no confirmation in writing of the administrative law judge's apparent oral ruling. Thus, the record does not disclose his reasons for denying claimant's motion.

At Dr. Levinson's February 11, 2004 deposition, the parties agreed to place any objections on the record for the administrative law judge to rule on when the deposition was submitted. Employer's Exhibit 8 at 5. Claimant's counsel again objected to the post-hearing deposition, arguing that claimant was never heard on employer's motion to take the deposition, that employer did not raise the issue at the hearing, and that the notice was inadequate. Employer's Exhibit 8 at 5-6. Claimant's counsel then participated in the deposition and cross-examined Dr. Levinson.

By letter to the administrative law judge dated February 12, 2004, claimant noted his objection to Dr. Levinson's deposition and requested forty-five days following receipt of the transcript to submit responsive evidence. Claimant noted that Dr. Levinson testified to his review of medical records that he did not discuss in his medical report, and also "offered rebuttal to certain portions of Dr. Kraynak's prior testimony."[3] Claimant's Letter, Feb. 12, 2004. On February 19, 2004, employer objected to the submission of any additional evidence by claimant. Employer's Letter, Feb. 19, 2004. In an undated letter in response to the parties' filings, the administrative law judge discussed a different matter that was resolved at the hearing concerning claimant's review of Dr. Levinson's pulmonary function study. The administrative law judge instructed the parties to advise him if they had further comment.

By letter dated March 3, 2004, claimant reiterated his request to submit responsive evidence to Dr. Levinson's post-hearing deposition and asked the administrative law judge to "advise as to whether Your Honor is Granting the Claimant's Motion." Claimant's Letter, Mar. 3, 2004. Review of the record does not disclose a response to this request by the administrative law judge.

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[2] Claimant states that he was "verbally advised that the Administrative Law Judge had Ruled that the deposition was to go forward and that Claimant's Motion was Denied." Claimant's Brief at 5.

[3] Dr. Kraynak is one of claimant's physicians in this case, who has opined that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibits 4, 5, 9.

On June 2, 2004, the administrative law judge issued his Decision and Order - Denying Benefits. In the Decision and Order - Denying Benefits, the administrative law judge noted that, pursuant to his January 23, 2004 order, the employer had submitted the transcript of Dr. Levinson's post-hearing deposition, and the administrative law judge admitted it into evidence as Employer's Exhibit 8. Review of the administrative law judge's decision reveals no discussion of claimant's objections to the deposition made after the administrative law judge's January 23, 2004 order, or of claimant's request to submit responsive evidence. In denying benefits, the administrative law judge considered and relied on Dr. Levinson's deposition testimony to some extent.

Having reviewed the foregoing facts in view of the issues raised by the parties on appeal, the Board is unable to adequately review the administrative law judge's rulings. *See* 5 U.S.C. §557(c)(3)(A), 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we must remand this case to the administrative law judge for further consideration.

At the outset, we reject employer's and the Director's suggestions that claimant waived any objections to the post-hearing deposition.[4] Although claimant did not move for reconsideration of the administrative law judge's January 23, 2004 order at the hearing, he filed timely written objections with the administrative law judge and the parties and placed his objections on the record at the deposition. Further, as noted above, the parties inform the Board in their briefs that the administrative law judge addressed, apparently orally, claimant's February 9, 2004 motion to preclude the post-hearing deposition. Accordingly, we conclude that claimant did not waive his objections to the post-hearing deposition. *Cf. Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-7 (1995)(deeming an issue waived because the party did not raise it "at the hearing level").

The applicable regulation provides that "[n]o post hearing deposition . . . shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim." 20 C.F.R. §725.458. The moving party must establish "the necessity for the evidence" by showing that (1) the evidence is probative and not merely cumulative, (2) reasonable steps were taken to secure the evidence before the hearing or the evidence was unknown or unavailable at an earlier time, and (3) the evidence is reasonably necessary to ensure the opportunity for a fair hearing. *Lee v. Drummond Coal Co.*, 6 BLR 1-544, 1-547 (1983). Additionally, "at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived." 20 C.F.R. §725.458. Because the

[4] In so doing, we note that the Director has alternatively suggested that the Board remand this case for the administrative law judge to "explain precisely why he allowed the post-hearing deposition to occur." Director's Brief at 2 n.2.

administrative law judge's January 23, 2004 order granted, with little discussion, employer's request for a post-hearing deposition, and the record does not contain his reasons for overruling claimant's subsequent objections to the post-hearing deposition, we are unable to effectively review the administrative law judge's rulings to determine whether he abused his discretion. *Wojtowicz*, 12 BLR at 1-165. Consequently, without ruling on the administrative law judge's exercise of his discretion, we vacate his Decision and Order and remand this case for him to consider employer's motion, claimant's objections thereto, and to make an articulated ruling on the matters presented by the parties under 20 C.F.R. §725.458 and *Lee*.

Claimant alleges further that the administrative law judge did not rule on his request to submit responsive evidence to the post-hearing deposition. Due process may require an opportunity for rebuttal where it is necessary to the full presentation of the case. *North Am. Coal Co. v. Miller*, 870 F.2d 948, 952, 12 BLR 2-222, 2-228 (3d Cir. 1989). The administrative law judge's undated letter to the parties does not clearly address claimant's request to submit responsive evidence to the post-hearing deposition. We therefore instruct the administrative law judge on remand to address claimant's request and employer's objections thereto. Finally, because the administrative law judge considered and relied upon Dr. Levinson's post-hearing deposition, we do not reach the issues raised concerning the administrative law judge's findings on claimant's entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge