BRB No. 07-0658 BLA

C.L.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARSON COAL COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 04/30/2008
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Clinic, Washington and Lee University), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor of Labor; 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:

Employer appeals the Decision and Order (05-BLA-5633) of Administrative Law Judge Daniel L. Leland awarding benefits 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). This case involves a subsequent claim filed on January 16, 2003.[1] After crediting claimant with twelve years and seven months of coal mine employment, the administrative law judge found that the new evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge found that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior, 1992 claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2003 claim on the merits. After noting that employer stipulated that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in refusing to admit into evidence Dr. Wiot's interpretation of a June 1, 2006 CT scan and his interpretations of x-rays taken on February 24, 1981, July 21, 1987, and May 21, 1992. Employer also challenges the administrative law judge's length of coal mine employment finding and his finding pursuant to 20 C.F.R. §725.309. Employer also contends that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, arguing that the

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[1] Claimant filed three previous claims. Director's Exhibits 1-3. The first claim, filed on January 19, 1981, was denied on June 18, 1981, because claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. The second claim, filed on June 22, 1987, was denied on November 24, 1987, because claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 2. The third claim, filed on April 9, 1992, was denied by Administrative Law Judge John C. Holmes on February 28, 1995, because claimant did not establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 3.

administrative law judge permissibly excluded employer's proffered evidence. The Director also requests that the Board reject employer's argument that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement. Finally, the Director contends that, contrary to employer's contention, 20 C.F.R. §725.101(a)(32)(iii) does not mandate the application of a set formula in calculating the length of a miner's coal mine employment.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

The Administrative Law Judge's Exclusion of Evidence

Employer initially argues that the administrative law judge erred by not permitting it to submit Dr. Wiot's interpretation of a June 1, 2006 CT scan and his interpretations of x-rays taken on February 24, 1981, July 21, 1987, and May 21, 1992. Employer argues that it should have been allowed to submit this evidence in rebuttal to evidence that was contained in claimant's medical treatment records.

We decline to address this issue. As the Director notes, any error that the administrative law judge may have committed in excluding employer's proffered x-ray and CT scan interpretations is harmless. The excluded evidence in dispute is relevant to the issue of whether claimant suffers from clinical pneumoconiosis.[2] Since the administrative law judge found that the evidence before him did not establish the existence of clinical pneumoconiosis, *see* Decision and Order at 8, the excluded evidence would only serve to support the administrative law judge's uncontested finding. Consequently, any error that the administrative law judge may have committed in

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[2] Dr. Wiot interpreted claimant's February 24, 1981, July 21, 1987, May 21, 1992 x-rays as negative for clinical pneumoconiosis. Employer's Exhibit 3 (excluded). Dr. Wiot also interpreted claimant's June 1, 2006 CT scan as negative for clinical pneumoconiosis. Employers Exhibit 5 (excluded).

excluding this evidence was harmless.[3] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

20 C.F.R. §725.309

Employer next argues that the administrative law judge erred in finding that the evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer specifically contends that because claimant "was found disabled and without pneumoconiosis [in his prior claim], he must now show that pneumoconiosis is a necessary part of his disability to show a material change in condition." Employer's Brief at 7. Employer further contends that, because claimant was previously "found disabled due to diseases other than coal workers' pneumoconiosis, it is impossible for him to show that coal workers' pneumoconiosis is causing a significant part of his disability." *Id.* at 8. We disagree.

The revised regulations provide that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant did not establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis in order to obtain review of the merits of his 2003 claim. 20 C.F.R. §725.309(d)(2),(3).

In this case, the administrative law judge found that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in an applicable condition of entitlement. Although, as discussed *infra*, we must vacate the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge was correct in identifying the existence of pneumoconiosis as one of the applicable conditions of entitlement that claimant could establish under 20 C.F.R. §725.309(d).

[3] Due process may require an opportunity for rebuttal if it is necessary to the full presentation of a party's case. *See* 5 U.S.C. §556(d); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 149, 16 BLR 2-1, 2-5 (4th Cir. 1991). However, employer has not explained how the exclusion of this evidence prevented it from fully presenting its case.

Length of Coal Mine Employment

Employer contends that the administrative law judge erred in crediting claimant with twelve years and seven months of coal mine employment. Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). The Board has held that, where an administrative law judge's computation of time is based on a reasonable method and is supported by substantial evidence, it will be upheld. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Claimant testified that he started his coal mine work in May of 1943. Transcript at 37. At that time, claimant testified that he worked with a co-worker named Lee Heck. *Id.* at 38. Mr. Lee Heck submitted a statement verifying that he worked with claimant in 1943 for B C and L Coal Company. *See* Director's Exhibit 10. Because it is supported by substantial evidence, we affirm the administrative law judge's decision to credit claimant with six months of coal mine employment for B C and L Coal Company in 1943. Decision and Order at 3.

Claimant also testified that he hauled coal for Shannon Trucking Company beginning in 1959. Transcript at 51-53. In a statement dated April 9, 1992, Mr. Otto D. Shannon indicated that claimant hauled coal for his brother, Thaddeus Shannon, in 1959 and 1960. Director's Exhibit 9. In a statement dated September 23, 2006, Ms. Juanita Shannon Poe, Thaddeus Shannon's widow, indicated that claimant drove a coal truck for Shannon Coal Company from March of 1958 to November of 1960. Claimant's Exhibit 9. Mrs. Poe noted that she was able to obtain the dates of claimant's employment from her deceased husband's business records. Because it is supported by substantial evidence, the administrative law judge's decision to credit claimant with two years and eight months of coal mine employment during this period is affirmed. Decision and Order at 3.

In a letter dated May 22, 1987, Mr. Henry C. Marson IV, the President of Marson Coal Company, indicated that claimant worked for his company from February of 1969 to July of 1971. *See* Director's Exhibit 11. Because it is supported by substantial evidence, we affirm the administrative law judge's decision to credit claimant with two years and five months of coal mine employment with Marson Coal Company. Decision and Order at 3.

The administrative law judge also credited claimant with an additional twenty-eight quarters of coal mine employment from 1944 to 1956 in which his Social Security Administration earnings statement indicated that he earned at least $50.00 in each

quarter.[4] Decision and Order at 3. The Board has held that this is a reasonable method of calculation. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984).

Claimant accurately notes that the administrative law judge, in his consideration of claimant's Social Security records, inadvertently credited claimant with one quarter of coal mine employment with Pieare Coal Company and one quarter of coal mine employment with Casella Coal Company during the same quarter, the third quarter of 1948. Claimant's Brief at 22 n.6. Thus, we modify the administrative law judge's length of coal mine employment finding to reflect twenty-seven quarters of coal mine employment based upon claimant's Social Security records.

Employer contends that the administrative law judge, in calculating the length of claimant's coal mine employment, erred in not utilizing the formula set forth at 20 C.F.R. §725.101(a)(32)(iii). This regulation provides that:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer *may* use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii) (emphasis added).

As the Director accurately notes, application of the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) is not mandatory. Director's Brief at 4. Consequently, we reject employer's contention that the administrative law judge erred in not applying the formula

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[4] The administrative law judge credited claimant with two quarters of coal mine employment with Pickens Coal Company in 1944; two quarters with Pickens Peerless Coal Company in 1945; one quarter with Pieare Coal Company in 1948; one quarter with Casella Coal Company in 1948; two quarters with Queen Brothers Coal Company in 1950; two quarters with Linan Coal Company in 1950 and 1951; and a total of eighteen quarters with Bethlehem Collieries Corporation./Bethlehem Mines Corporation from 1952 through 1956. Decision and Order at 3. The administrative law judge, therefore, credited claimant with a total of twenty-eight quarters (seven years) of coal mine employment based on his Social Security records.

Claimant's Social Security records also indicate minimal earnings (less than $50.00) in four additional quarters from 1948 until 1956. *See* Director's Exhibit 13. The administrative law judge did not credit claimant with any coal mine employment during these periods of employment.

to the facts of this case.[5]

Consequently, we modify the administrative law judge's length of coal mine employment finding to reflect twelve years and four months of coal mine employment.[6]

Legal Pneumoconiosis

Employer also contends that the administrative law judge erred in finding that the new medical evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7]

The administrative law judge considered the opinions of Drs. Rasmussen, Parker, Renn, and Rosenberg. Dr. Rasmussen diagnosed chronic obstructive pulmonary disease/emphysema due to coal dust exposure and cigarette smoking. Director's Exhibit 17; Employer's Exhibit 7. Dr. Parker diagnosed severe obstructive lung disease attributable to coal dust exposure and cigarette smoking. Claimant's Exhibits 7, 8. Dr. Renn diagnosed chronic bronchitis and pulmonary emphysema due to cigarette smoking. Director's Exhibit 32. Dr. Rosenberg opined that claimant suffered from smoking-related

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[5] Employer notes that the administrative law judge erred in considering the length of claimant's coal mine employment since the district director, in considering claimant's 1992 claim, credited claimant with 7.42 years of coal mine employment. We disagree. First, employer acknowledges that claimant's 1992 claim was subsequently forwarded to the Office of Administrative Law Judges for a formal hearing. In his Decision and Order dated February 28, 1995, Judge Holmes did not address the length of claimant's coal mine employment. Director's Exhibit 3. Moreover, the regulations provide that if a claimant demonstrates a change in one of the applicable conditions of entitlement, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue . . . shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4). There is no indication that claimant failed to contest the issue of the length of his coal mine employment in the prior claim.

[6] The administrative law judge's finding reflects six months with B C and L Coal Company; two years and eight months with Shannon Coal Company; two years and five months with Marson Coal Company; and a total of twenty-seven quarters (six years and nine months) with Pickens Coal Company, Pickens Peerless Coal Company, Pieare Coal Company, Casella Coal Company, Queen Brothers Coal Company, Linan Coal Company, and Bethlehem Collieries Corporation/Bethlehem Mines Corporation.

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

chronic obstructive pulmonary disease with a hyperactive response due to asthma. Employer's Exhibit 1.

The administrative law judge credited Dr. Parker's opinion, that claimant's severe obstructive lung disease was due to coal dust exposure and cigarette smoking, over the opinions of Drs. Renn and Rosenberg that claimant's chronic obstructive pulmonary disease (COPD) was due solely to his cigarette smoking. Decision and Order at 8. The administrative law judge credited Dr. Parker's opinion based upon his superior qualifications and because the administrative law judge found that Dr. Parker's opinion was the "best reasoned opinion in the record." *Id.*

Employer initially contends that the administrative law judge erred in finding that Dr. Parker possessed superior qualifications to those of Drs. Renn and Rosenberg. Although the administrative law judge noted that Drs. Parker, Renn, and Rosenberg are all Board-certified pulmonary specialists, the administrative law judge noted that Dr. Parker was better qualified because he (1) studied occupational and non-occupational lung diseases at NIOSH; (2) contributed to the NIOSH *Criteria Document* on occupational diseases; and (3) wrote peer-reviewed articles and a textbook on occupational lung diseases. Decision and Order at 8.

Employer contends that the administrative law judge erred in not considering the additional qualifications of Drs. Renn and Rosenberg. We agree. As employer notes, the administrative law judge did not address the significance of Dr. Renn's additional Board-certification in Forensic Medicine. *See* Director's Exhibit 32. The record also reflects that Dr. Renn authored several articles and textbooks on pulmonary disease.[8] *Id.* Additionally, the record reflects that Dr. Renn is an Associate Professor of Medicine at the West Virginia University Medical Center. *Id.*

Employer also notes that the administrative law judge did not address the significance of the fact that Dr. Rosenberg has a Masters Degree in Public Health, which includes an academic program in Occupational Medicine. Employer's Exhibit 2. Moreover, in addition to his Board-certification in Internal Medicine and Pulmonary Disease, Dr. Rosenberg is also Board-certified in Occupational Medicine. *Id.* Additionally, Dr. Rosenberg is the Director of Occupational Medicine at University Hospitals Health System in Cleveland, Ohio and has authored numerous articles on pulmonary diseases. *Id.*

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[8] Dr. Renn's curriculum vitae documents that he authored a journal publication entitled "Meretricious Effects of Coal Dust." Director's Exhibit 32. Dr. Renn also wrote books on pulmonary disease. *Id*.

Although the administrative law judge permissibly considered the fact that Dr. Parker, in addition to being a Board-certified pulmonologist, possessed additional professional qualifications, *see generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), the administrative law judge erred in failing to explain why these factors were more significant than the additional qualifications of Drs. Renn and Rosenberg. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

We also agree with employer that the administrative law judge did not adequately address whether Dr. Parker's opinion was sufficiently reasoned. The administrative law judge never addressed Dr. Parker's basis for opining that that claimant's obstructive lung disease was attributable in part to his coal dust exposure. Although the administrative law judge observed that Dr. Parker noted that claimant "had a relatively brief and remote cigarette smoking history and that [claimant's] coal mine employment largely took place before the imposition of dust controls," *see* Decision and Order at 8, the administrative law judge did not address the specific reasons underlying Dr. Parker's opinion that claimant's obstructive lung disease was partly attributable to his coal dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Employer similarly contends that the administrative law judge failed to adequately address the explanations provided by Drs. Renn and Rosenberg for opining that claimant's chronic obstructive pulmonary disease was not attributable to his coal dust exposure. Dr. Renn opined that claimant's ventilatory function was characteristic of tobacco smoke-induced obstructive airway disease but was inconsistent with the physiologic pattern known to be caused by coal workers' pneumoconiosis.[9] Dr.

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[9] Dr. Renn explained that claimant's spirometry revealed a pattern that was consistent with pulmonary emphysema caused by tobacco smoking. Dr. Renn explained that:

> Coal workers' pneumoconiosis causes a relative reduction in the total lung capacity but not below 90% of predicted and an elevation of the residual volume but not greater than 120% of predicted. The diffusing capacity is consistent with tobacco smoke-induced pulmonary emphysema. The diffusing capacity in tobacco smoke-induced pulmonary emphysema is considerably more reduced than it is in coal workers' pneumoconiosis. In simple coal workers' pneumoconiosis it can be reduced some 10 to 12% below normal but not greater than that.

Director's Exhibit 32.

Rosenberg also opined that claimant's COPD was not related to his coal dust exposure.[10] The administrative law judge found that:

> Dr. Renn and Dr. Rosenberg also attempted to identify factors in the miner's pulmonary function studies that led them to conclude that the miner's obstructive pulmonary disease is due exclusively to cigarette smoking, but Dr. Parker convincingly demonstrated that they were distinguishing between radiographic or clinical pneumoconiosis and smoking related pulmonary impairments rather than between legal pneumoconiosis and smoking related pulmonary impairments.

Decision and Order at 8.

The administrative law judge failed to explain his basis for crediting Dr. Parker's assessment of the opinions of Drs. Renn and Rosenberg. Although the administrative law judge stated that Dr. Parker "convincingly demonstrated" that Drs. Renn and Rosenberg were not distinguishing between legal pneumoconiosis and smoking related pulmonary impairments, the administrative law judge did not discuss the reason for Dr. Parker's opinion or explain why he found that it was convincing. Consequently, the administrative law judge's analysis of the new medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In light of these errors, we vacate the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, we also vacate the administrative law judge's finding that the evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Moreover, we also vacate the

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[10] Dr. Rosenberg explained that when "one specifically looks at [claimant's] severe FEV1% reduction, combined with a marked reduction in FEV1% in association with a marked bronchodilator response, increased air trapping (increased RV/TLC) and a severe reduced diffusing capacity, the characteristics of his pulmonary functions are not characteristic of coal mine dust related obstructive lung disease." Employer's Exhibit 1. Dr. Rosenberg noted that claimant's findings were classic for a smoking-related chronic obstructive pulmonary disease with a hyperactive response due to asthma. *Id.*

administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On remand, when reconsidering whether the new medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[11] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Development of Post-hearing Evidence

Finally, employer contends that the administrative law judge erred in not providing it with an opportunity to adequately respond to Dr. Parker's September 13, 2006 report. Claimant sought to admit Dr. Parker's report at the October 19, 2006 hearing. At the hearing, employer objected to the admission of this evidence. Employer noted that it had submitted interrogatories to claimant, requesting information regarding any further scheduled medical examinations. Transcript at 21. Employer argued that claimant should have supplemented his answers to its interrogatories when Dr. Parker's examination was scheduled so that employer would know what evidence it would have to develop in response. *Id.* However, because Dr. Parker's report was submitted in compliance with the twenty-day rule, the administrative law judge permissibly admitted Dr. Parker's report into evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

There is no dispute that Dr. Parker's report was submitted in compliance with the twenty-day rule. However, that is not the end of the matter, for "the administrative law judge is obliged to insure a full and fair hearing on all the issues presented." *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*). Where a party would be denied the full presentation of its case if unable to respond to evidence submitted just prior to or upon the twenty-day deadline, due process as incorporated into the APA requires the opportunity to respond.[12]

[11] Although the administrative law judge referenced Dr. Rasmussen's opinion, he did not address the weight that he accorded his opinion. On remand, the administrative law judge should also address the weight, if any, accorded to Dr. Rasmussen's opinion pursuant to 20 C.F.R. §718.202(a)(4). Director's Exhibit 17.

[12] Section 556(d) of the Administrative Procedure Act (APA) provides that:

Bethlehem Mines Corp. v. Henderson, 939 F.2d 143, 148-49, 16 BLR 2-1, 2-5 (4th Cir. 1991); *North Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990); *Shedlock,* 9 BLR at 1-200.

At the hearing, employer requested an opportunity to develop post-hearing evidence. Specifically, employer requested an opportunity to take Dr. Parker's deposition and to have its "affirmative evidence" physicians, Drs. Renn and Rosenberg, submit written reports in response to Dr. Parker's report. Transcript at 74. Although the administrative law judge did not allow employer to submit post-hearing medical reports from Drs. Renn and Rosenberg, he allowed employer to take the post-hearing deposition of Dr. Parker.[13] *Id.* at 75. Employer took Dr. Parker's deposition testimony on November 22, 2006. The administrative law judge admitted this evidence into the record as Employer's Exhibit 8. Decision and Order at 2.

Employer presently argues that "[b]oth Dr. Renn and Dr. Rosenberg should be allowed to respond to Dr. Parker's examination and deposition." Employer's Brief at 20. However, in its post-hearing brief, employer, after having taken Dr. Parker's deposition, did not contend that it needed to develop any further post-hearing evidence. *See* Employer's Post-Hearing Brief dated March 29, 2007. We, therefore, decline to address employer's allegation of error regarding further development of the evidence. *See Taylor v. 3D Coal Co*., 3 BLR 1-350 (1981).

> A party is entitled to present his case or defense by oral or documentary evidence, *to submit rebuttal evidence*, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5 U.S.C. §556(d)(emphasis supplied). The requirements of the APA are 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).

[13] The administrative law judge advised employer that it could submit a post-hearing brief in support of its request that Dr. Parker's report be excluded or in support of its request to develop additional post-hearing evidence. Transcript at 75.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and modified in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge