BRB No. 11-0511 BLA

DAVID HARRISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DAGS BRANCH COAL COMPANY	)	DATE ISSUED: 04/11/2012
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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:

Employer appeals the Decision and Order Award of Benefits (2008-BLA-06030) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim[1] filed on March 6, 2003, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] In a Decision and Order dated April 14, 2011, the administrative law judge credited claimant with twenty-eight years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined the newly submitted evidence was sufficient to establish that claimant has complicated pneumoconiosis and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Based on his review of the entire record, the administrative law judge further found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in allowing

[1] Claimant filed an initial claim on September 24, 2001, which was denied by Administrative Law Judge Alice M. Craft on August 19, 2003. Director's Exhibit 1. Judge Craft found that while claimant proved the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he failed to establish total disability pursuant to 20 C.F.R. §718.204(b). *Id*. Claimant took no further action until filing his subsequent claim on March 6, 2006. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on January 19, 2007. Director's Exhibit 28. Thereafter, claimant filed a timely request for modification and the case was assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge). Director's Exhibit 29.

[2] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The amendments are not applicable to this case, as claimant's initial and subsequent claims were filed prior to January 1, 2005.

[3] Although the administrative law judge made a preliminary determination that claimant established a mistake in a determination of fact with respect to the district director's denial of benefits, he was not required to do so. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*¸ 17 BLR 1-9 (1992).

claimant to re-designate his evidence or, in the alternative, by not ruling on employer's request to develop rebuttal evidence in light of claimant's revised evidentiary designations. With regard to the merits of claimant's entitlement, employer also argues that the administrative law judge erred in finding that claimant suffers from complicated pneumoconiosis and is entitled to the irrebuttable presumption at 20 C.F.R. §718.304. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief asserting that, contrary to employer's assertion, the administrative law judge acted within his discretion in allowing claimant to amend his evidentiary designations. The Director also maintains that the administrative law judge's finding of complicated pneumoconiosis is supported by substantial evidence and should be affirmed.

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.[4] 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).

Initially, we address employer's contention that the administrative law judge "erred in allowing [claimant] to re-designate evidence as affirmative proof post-hearing." Employer's Petition for Review and Brief at 13. The record reflects that claimant submitted an evidence summary form on May 26, 2010. On that form, claimant designated as an affirmative autopsy report, Dr. Caffrey's October 23, 2006 report, wherein Dr. Caffrey reviewed twenty surgical slides obtained from needle and wedge biopsies taken from claimant's left and right lungs. Director's Exhibit 33. Dr. Caffrey opined, based on his review of the biopsy slides, that claimant has complicated pneumoconiosis. *Id*.

At the hearing held on June 17, 2010, the administrative law judge reviewed claimant's evidence summary form and questioned why an "autopsy" report was submitted in conjunction with a living miner's claim. Hearing Transcript at 14. In response, claimant's counsel advised that there was an error on the evidence summary form and that Dr. Caffrey's report was mistakenly listed as an autopsy report when it should have been designated as a biopsy report. *Id*. at 14-15. The administrative law judge stated that he would "mark that out," and there is no further discussion in the hearing transcript of Dr. Caffrey's opinion *Id*. The administrative law judge subsequently issued an Interim Order on December 1, 2010, which included proposed

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4.

findings of fact. The administrative law judge observed therein that claimant "did not submit as a [medical] report," Dr. Caffrey's October 23, 2006 opinion diagnosing complicated pneumoconiosis, but also found that "employer did not present any evidence or opinion to controvert this evidence." December 1, 2010 Interim Order at 4. The administrative law judge gave the parties until January 3, 2011, to comment on the proposed findings of fact. *Id*.

Employer responded, stating that, "[i]n the event, [c]laimant request[s] reopening of the record or redesignation of the evidence, [e]mployer notes that it does object to same. Submission of evidence at this point, almost a half a year post-hearing, would change the entire landscape and necessitate a remand to the District Director." Employer's December 17, 2010 Response to Interim Order (unpaginated) at [1]. By letter dated January 3, 2011, claimant submitted a revised evidence summary form, wherein he designated Dr. Caffrey's report as both an affirmative biopsy report and an affirmative medical report. Claimant's Response to December 1, 2010 Interim Order. On January 18, 2011, employer objected to claimant's revised evidence summary form, arguing that the redesignation of Dr. Caffrey's report was "prejudicial." Employer's Supplemental Response to December 1, 2010 Interim Order (unpaginated) at [2]. Employer explained that until the time that claimant made his request to re-designate his evidence, there was no need for employer to rebut Dr. Caffrey's report, as it was not properly designated as evidence in the case, either an affirmative biopsy or an affirmative medical report. *Id*. Employer requested that the administrative law judge either refuse to admit the revised evidence summary into the record, or issue a continuance and reopen the record for further medical development by employer to rebut Dr. Caffrey's opinion. *Id*.

On January 19, 2011, the administrative law judge admitted claimant's revised evidence summary into the record. The administrative law judge stated:

> I note that [claimant] is not asking for the submission of additional evidence, but is requesting to clarify and correct misclassifications. All of this evidence is already included in the record. Additionally, these revisions do not violate the evidentiary limitations. I may give wide latitude to admissibility, and weigh the evidence in my decision. Therefore, in the interest of justice, I accept the revised evidence summary form.

January 19, 2011 Order Establishing Briefing Schedule at 2. The administrative law judge did not address employer's request to develop rebuttal evidence. *Id*.

Contrary to employer's argument, the administrative law judge acted within his discretion in permitting claimant to submit a revised evidence summary form. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Dempsey v. Sewell*

Coal Corp., 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). We agree, however, that the administrative law judge erred in failing to address employer's request to develop rebuttal evidence, in response to the redesignation of claimant's evidence. Although an administrative law judge is generally afforded broad discretion in dealing with procedural matters, he must ensure 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). Because the administrative law judge failed to properly rule on employer's request, we are compelled to vacate the award of benefits and remand the case for further consideration. On remand, the administrative law judge must address Employer's Supplemental Response to the December 1, 2011 Interim Order and specifically determine whether employer is entitled to have the record reopened for development of additional evidence in rebuttal of Dr. Caffrey's opinion.[5] If additional evidence is submitted by the parties, the administrative law judge must reconsider claimant's entitlement to benefits based on all of the record evidence. If the administrative law judge does not reopen the record on remand, he may reinstate the award of benefits.

[5] Because the evidentiary record in this case may not be complete, we decline to address employer's argument that the administrative law judge erred in finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is vacated, and the case is remanded 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