BRB No. 12-0459 BLA

STEVEN B. HILLIARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOPKINS COUNTY COAL, LIMITED LIABILITY CORPORATION	)	DATE ISSUED: 04/30/2013
	)	
and	)	
	)	
ALLIANCE COAL, LIMITED LIABILITY CORPORATION	)	
	)	
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.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Anthony K. Finaldi and Matthew J. Zanetti (Fogle Keller Purdy, PLLC), Louisville, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judges, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Award of Benefits (2010-BLA-05169) of Administrative Law Judge Daniel F. Solomon, with respect to a claim filed on February 17, 2009, pursuant to the provisions of the Black Lung Benefits

Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with at least fifteen years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that there was no evidence to contradict Dr. Baker's opinion that claimant was totally disabled due to legal pneumoconiosis. Therefore, the administrative law judge determined that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut it.[1] Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in omitting Dr. Selby's opinion from consideration when determining whether claimant established entitlement to benefits. In addition, employer asserts that the administrative law judge erred in issuing his Decision and Order prior to the submission of the parties' closing briefs and that, at a minimum, the administrative law judge should have ruled on employer's Motion for Extension of Time to file his brief, prior to issuing his decision. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

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 applicable law.[3] 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).

[1] Section 411(c)(4) provides that a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[2] We affirm, as unchallenged on appeal, the administrative law judge's crediting of claimant with at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

I. Admission of Dr. Selby's Opinion

This case was initially assigned to Administrative Law Judge Joseph E. Kane for a hearing on June 30, 2010. Claimant requested a continuance in order to obtain counsel, which Judge Kane granted. The case was later assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge). Claimant waived an oral hearing and the parties agreed to have the administrative law judge decide the case on the record. During a telephone conference held on January 20, 2012, the parties identified the evidence that they had submitted for inclusion in the record. Transcript of 2012 Telephone Conference at 5-7, 10. Employer asserted that, when the case was before Judge Kane, it had proffered a report from Dr. Selby, which was labeled as Employer's Exhibit 1, and two additional medical reports. *Id*. at 7-8. The administrative law judge noted that the docket sheet did not reflect receipt of Dr. Selby's report and claimant's counsel indicated that he had not been provided with a copy. *Id*. at 8. The administrative law judge stated that he wanted all three of employer's medical reports presented in one packet and explained:

> The interests of justice sometimes require that I give wide latitude and that's because a high percentage of these cases came out of the Cincinnati office. So, when it comes from Cincinnati, people get confused and they start sending this stuff to Cincinnati and if it isn't[,] even sometimes when it's marked on the docket sheet, it doesn't make it to the file. So, what you'll do is you'll give it to me in a bound document.

Id. The administrative law judge left the record open for thirty days for employer to submit the bound document and for claimant to develop any rebuttal evidence. *Id*. at 9-10. The administrative law judge gave the parties until April 2, 2012 to submit briefs and until April 11, 2012 to submit rebuttal briefs. *Id*. at 15.

Employer did not proffer any exhibits but, on May 9, 2012, it filed a request for an extension of time in which to file a brief. The administrative law judge issued his Decision and Order on May 15, 2012, without ruling on employer's request. The administrative law judge relied solely on Dr. Baker's opinion, that claimant has a totally disabling impairment caused by coal dust exposure and cigarette smoking, to find that claimant established total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 2-3. The administrative law judge further determined that claimant invoked the amended Section 411(c)(4) presumption and employer did not rebut it, stating "[a]s Dr. Selby's report was not proffered, there is no evidence to controvert Dr. Baker's opinion." *Id*. at 3-4.

Employer contends that the administrative law judge erred in assuming that Dr. Selby's report was not submitted into evidence, as it was filed when the claim was before

Judge Kane. Employer also argues that because Dr. Selby's opinion would have rebutted Dr. Baker's conclusions, the claim should be remanded to the administrative law judge for reconsideration.

The administrative law judge is granted broad discretion in resolving procedural issues, including the admission of evidence into the record. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). A party seeking to overturn an administrative law judge's resolution of an evidentiary issue must prove that the administrative law judge's action represented an abuse of discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Employer has not met its burden in this case.

Based upon the discussion at the telephone conference, employer was aware that the administrative law judge could not locate Dr. Selby's report in the record and that claimant's counsel had not received a copy. Transcript of 2012 Telephone Conference at 8. Employer was also made aware that, if it wanted the administrative law judge to consider this evidence, it was required to submit it in a bound document within the designated time period. *Id*. at 9-11. Employer did not comply with the administrative law judge's request and its brief on appeal does not contain any explanation of its failure to do so. Thus, the administrative law judge acted within his discretion in finding that Dr. Selby's opinion was not a part of the record. *See Williams*, 453 F.3d at 621, 23 BLR at 2-370-71; *Clark*, 12 BLR at 1-152.

II. Extension of Time to File Briefs

Employer also asserts that that the administrative law judge erred in issuing his Decision and Order before the hearing was officially adjourned, as "the briefs of the parties had not yet been submitted." Employer's Brief at 6, *citing* 20 C.F.R. §§725.475-725.476. Employer maintains that, because the parties had agreed to an extension of briefing time, "[t]he [administrative law judge] was ostensibly aware that neither party had filed briefs, and had notice that they intended to file briefs at the time he issued his decision. Yet, he irrationally proceeded to issue his decision without considering the foregoing motion." Employer's Brief at 6.

At the January 20, 2012 telephone conference, the parties were given until April 2, 2012 to submit their briefs and until April 11, 2012 to submit rebuttal briefs. Transcript of 2012 Telephone Conference at 15. As the administrative law judge noted, neither party filed a brief prior to those deadlines. Decision and Order at 2. Although employer filed a Motion for Extension of Time on May 9, 2012, the motion was not received by the

Office of Administrative Law Judges until May 15, 2012, long after both deadlines had passed, and the day on which the administrative law judge issued his Decision and Order. Thus, contrary to employer's contention, it does not appear that the administrative law judge was aware of employer's motion when he issued his decision. Furthermore, employer has not explained how being given an opportunity to file a brief would have altered the outcome of this case, in light of its failure to timely submit evidence contradicting Dr. Baker's opinion. Consequently, we reject employer's allegation that the administrative law judge erred in issuing his Decision and Order without ruling on employer's Motion for Extension of Time. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

III. Entitlement

The administrative law judge properly determined that the only relevant medical evidence of record was Dr. Baker's opinion. Because employer does not challenge the administrative law judge's findings that Dr. Baker's uncontradicted opinion was sufficient to establish invocation of the amended Section 411(c)(4) presumption, and that it provides no support for rebuttal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge