BRB No. 04-0756 BLA

BILLY D. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/08/2005
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell Jr., Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

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

Helen H. Cox ((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: SMITH, HALL, and McGRANERY, Administrative Appeals Judges.

McGranery, Administrative Appeals Judge:

Employer appeals the Decision and Order (03-BLA-5329) of Administrative Law Judge Fletcher E. Campbell, Jr. awarding benefits on a subsequent 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). Employer appeals, challenging the administrative law judge's procedural rulings with respect to discovery and the admissibility of evidence on the ground that the administrative law judge was biased against employer's counsel and medical experts. Employer, however, does not raise any allegation of error with respect to the weight the administrative law judge accorded its medical experts on the issues of entitlement. Claimant and the Director, Office of Workers' Compensation Programs (the Director), filed response briefs, urging the Board to reject all of employer's arguments as without merit. They assert that the administrative law judge acted properly, and that his decision awarding benefits 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. 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 understand the issues raised on appeal, it is necessary to set forth a detailed history of the litigation. The record reflects that claimant filed a subsequent claim on June 6, 2001.[1] Director's Exhibit 3. The district director issued a Proposed Decision and Order – Award of Benefits on May 8, 2002. Employer requested a hearing, which was scheduled for September 11, 2003. Prior to the hearing, claimant served on employer a set of fourteen interrogatories and a request for production of documents, by which claimant sought to obtain information about the financial relationship between employer and its medical experts, Drs. Renn and Rosenberg.[2] On August 18, 2003,

[1] Claimant first filed a claim for benefits on July 27, 1995. Director's Exhibit 1. The Department of Labor sent claimant for a complete pulmonary evaluation with Dr. Jaworski, who opined that claimant did not suffer from pneumoconiosis and that he was not totally disabled by a respiratory or pulmonary impairment. *Id*. Claimant was subsequently examined, on his own accord, by Dr. Lebovitz on September 28, 1995. *Id*. Apparently a copy of Dr. Lebovitz's November 9, 1995 report, finding claimant to be totally disabled due to pneumoconiosis, was never provided to the district director. Thus, at the time of the district director's denial of the claim on January 11, 1996, Dr. Lebovitz's report was not of record. The district director denied the first claim on the grounds that claimant failed to establish the existence of pneumoconiosis, and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1.

[2] Interrogatories 1-4 concerned medical reports employer had in its possession that had not yet been submitted. Interrogatories 5-14 specifically asked how many referrals for examination or consultation employer had made to Drs. Renn and Rosenberg in the last four years, the number of cases in which each physician had found the existence of

employer responded in part to the interrogatories, disclosing the amount of money that had been paid by employer to Dr. Renn and Dr. Rosenberg for their opinions in this case. Employer refused to answer the remaining interrogatories and filed objections with the administrative law judge. On September 3, 2003, claimant filed a motion to compel discovery and a motion to exclude the supplemental consultative reports of Dr. Renn dated June 25, 2003 and of Dr. Rosenberg dated June 27, 2003, marked for identification as Employer's Exhibits 7 and 8.

At the September 11, 2003 hearing, the parties discussed their objections to various exhibits, and the administrative law judge provisionally admitted Director's Exhibits 1-45, four proposed Claimant's Exhibits and nine proposed Employer's Exhibits. Judge Campbell granted employer's request to obtain one rebuttal report from either Dr. Renn or Dr. Rosenberg post-hearing in response to claimant's submission of Dr. Cohen's July 15, 2003 report, marked as Claimant's Exhibit 3. Hearing Transcript at 100-104. Employer was also granted the opportunity to obtain a reading of the July 15, 2003 x-ray upon which Dr. Cohen relied. *Id*. The administrative law judge ordered that the parties file any necessary motions to strike evidence within thirty days of the hearing, with responses to such motions to be filed within an additional twenty days.[3] Hearing Transcript at 93-96.

With respect to the motion to compel discovery, claimant withdrew Interrogatories 1-4. The administrative law judge made some modifications to Interrogatories 5-14, and indicated that he was inclined to grant the discovery request, but reserved his ruling.[4]

---

pneumoconiosis, the number of cases in which the physician had found that the pneumoconiosis was too insignificant to have caused any impairment, the number of such cases in which the physician had found that a miner's coal mine dust exposure had contributed to a miner's obstructive airways impairment, the amount of money paid to each physician in the instant case, and the total amount of money each physician had been paid by employer in the last four years for preparation of reports and testimony.

[3] On September 29, 2003, employer's counsel submitted a letter identifying the evidence submitted in support of its affirmative case. Claimant subsequently filed a motion to strike evidence on October 14, 2003.

[4] Upon representation by employer's counsel that employer had no medical opinions in its files that had not been divulged, claimant withdrew his motion to compel responses to Interrogatories 1-4. With respect to Interrogatories 5-14, the administrative law judge limited discovery to include only information obtained from those cases where Jackson Kelly represented Consolidation Coal Company and there was a medical referral

Hearing Transcript 74-93. Following claimant's hearing testimony, employer moved to dismiss the claim on the ground that it was not timely filed within three years of Dr. Lebovitz's advising claimant that he was totally disabled due to pneumoconiosis. *See* Hearing Transcript at 43-44, 55. The administrative law judge denied the motion but stated that employer could further address the issue in a post-hearing brief.

The administrative law judge issued an Order Granting Claimant's Motion to Compel on December 9, 2003. *See* ALJ Order dated December 9, 2003. The administrative law judge gave employer until January 30, 2004 to provide the requested information. On January 28, 2004, employer filed an appeal with the Board. The Board dismissed this appeal as interlocutory. *Williams v. Consolidation Coal Co*., BRB No. 04-0389 BLA (Feb. 24, 2004). Upon notice of the Board's dismissal order, the administrative law judge issued an order compelling discovery and setting a schedule for the filing of responses and replies. Employer next submitted a request for reconsideration *en banc* with the Board, which was granted. The Board, however, ultimately determined that employer's appeal failed to meet the criteria for granting review of an interlocutory appeal, and therefore, the appeal was dismissed. *See* Order on Reconsideration *En Banc*, BRB No. 04-0389 BLA (April 14, 2004) (unpub.).[5]

Employer next renewed its motion for summary judgment; relying on *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) to support its position that claimant's subsequent claim was untimely filed. In an Order dated April 16, 2004, the administrative law judge denied employer's motion, finding that, under *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), the Department of Labor's 1996 denial repudiated the 1995 medical determination by Dr. Lebovitz that claimant was totally disabled due to pneumoconiosis and "nullified the communication by Dr. Lebovitz insofar as its ability to trigger the running of the statue of limitations." ALJ Order dated April 16, 2004, slip op. at 2. The

---

to Drs. Renn and/or Rosenberg. Hearing Transcript at 76, 78; ALJ Order dated December 9, 2003.

[5] The Board distinguished this case from *Wood v. Elkay Mining Corp., BRB No. 03-0178 BLA* (Nov. 25, 2002 (unpub. Order), holding that employer had not identified considerations of the kind that led the Board to initially grant interlocutory review in *Wood*. *See* Order on Reconsideration *En Banc*, BRB No. 04-0389 BLA (April 14, 2004) (unpub.). The Board noted that the present case did not involve the rights of any third-party interveners, nor did employer allege that the administrative law judge failed to provide a discernible rationale for his decision to grant claimant's motion to compel discovery. *Id*.

administrative law judge noted that, while the Department of Labor did not have Dr. Lebovitz's opinion before it when it originally denied benefits, he took "official notice of the fact that Dr. Lebovitz's opinion [was] unreasoned and undocumented and [thus] would almost certainly not have changed the Department of Labor's disposition of the claim." *Id*.

The administrative law judge issued a Decision and Order on June 1, 2004. The administrative law judge first addressed the parties' evidentiary motions. He granted claimant's motion to strike Dr. Lebovitz's November 9, 1995 report at Director's Exhibit 1, noting that claimant had elected to rely on the December 3, 2003 report from Dr. Parker and the July 15, 2003 report by Dr. Cohen in support of his affirmative case pursuant to 20 C.F.R. §725.414(a)(2)(i). Claimant's Exhibits 1, 3; Decision and Order at 10. The administrative law judge struck Dr. Rosenberg's interpretation of an October 31, 2001 x-ray as it exceeded employer's two x-ray limit imposed by 20 C.F.R. §725.414(a)(3)(i). Employer's Exhibit 5; Decision and Order at 10. The administrative law judge denied claimant's motion to strike Dr. Rosenberg's September 16, 2002 consultative report and curriculum vitae contained at Employer's Exhibits 4 and 5. Decision and Order at 10. Although the doctor had relied on inadmissible x-rays; the administrative law judge reasoned that since claimant acknowledged that the preponderance of the x-ray evidence was negative for pneumoconiosis, it was unlikely that Dr. Rosenberg's opinion would have changed if he had considered one or two fewer negative readings. *Id*. Additionally, the administrative law judge reversed his ruling at the hearing and granted claimant's motion to exclude the June 27, 2003 supplemental report of Dr. Renn and the June 25, 2003 supplemental report of Dr. Rosenberg, contained at Employer's Exhibits 7 and 8, which were proffered by employer "in response" to the January 22, 3003 report of Dr. Parker. *Id*. The administrative law judge noted that 20 C.F.R. §725.414(a)(3)(ii) "does not permit rebuttal of a medical report offered by an opposing party." Decision and Order at 10-11. The administrative law judge denied claimant's motion to strike Dr. Scott's reading of the October 31, 2001 x-ray, and instead, allowed Dr. Scott's reading to be substituted for Dr. Renn's reading of that same film. Director's Exhibit 36, Employer's Exhibit 2; Decision and Order at 10.

The administrative law judge next dismissed employer's allegation at the hearing that he was biased against Dr. Renn and further rejected employer's request that the case be reassigned to another judge.[6] Decision and Order at 11. He also reiterated his finding that the claim was timely filed. Decision and Order at 11-12. Lastly, the administrative

[6] Employer requested below that the administrative law judge recuse himself based on the administrative law judge's statement at the hearing that "this area of law is shot through with hacks and I am frankly tired of it" in addition to his observation that Dr. Renn "might be, he perfectly well might be a hack." Hearing Transcript at 81.

law judge addressed employer's failure to comply with the discovery order, noting that he had the right to strike the medical opinions of Drs. Renn and Rosenberg. He decided, however, to take "the least Draconian approach" to employer's disregard of his procedural ruling, and therefore elected to treat the opinions of Drs. Renn and Rosenberg as if employer "had complied with discovery and as if its response to that discovery had demonstrated significant bias by both witnesses toward employers as a class and Jackson and Kelly clients as a class." Decision and Order at 12.

Turning to the merits of the case, the administrative law judge noted that claimant could establish a change in conditions pursuant to 20 C.F.R. §725.309(d) by establishing either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment.[7] *Id*. The administrative law judge found that claimant established the existence of legal pneumoconiosis and that he was totally disabled due to pneumoconiosis based on the credible medical opinions of Drs. Cohen and Parker. Decision and Order at 12-18. The administrative law judge thus found that claimant established a change in conditions and his entitlement to benefits pursuant to 20 C.F.R. Part 718. Decision and Order at 18.

Employer raises several arguments on appeal. Employer maintains that the administrative law judge erred in denying its motion for summary judgment and in failing to find that claimant's subsequent claim was time barred pursuant to 20 C.F.R. §725.308. Employer's Brief at 6-15. Employer alleges bias on the part of the administrative law judge in ruling on claimant's motion to compel answers to interrogatories, and that the administrative law judge improperly sanctioned employer for failing to respond to discovery by applying an adverse inference against employer's medical experts. Employer's Brief at 15-33. Employer asserts that it was denied its right to due process and a full and fair hearing on the issues presented in the case. *Id*. Specifically, employer notes that, at the time of closing arguments the parties did not know which exhibits were of record, and as a result, employer could not adequately prepare its closing argument brief or raise meaningful objections to the evidence admitted. Employer's Brief at 19. Employer also asserts that the administrative law judge erred in allowing claimant to alter the evidence in the Director's Exhibits by withdrawing the report of Dr. Lebovitz, contained at Director's Exhibit 1, as one of claimant's two permitted reports in support of his affirmative case. Employer's Brief at 49-50. On the merits of entitlement, employer also alleges that the administrative law judge failed to explain the weight accorded the medical opinions of Drs. Devabhaktuni, Parker, and Cohen. Employer's Brief at 50-54. Employer further argues that Dr. Cohen's report should have been stricken from the

[7] The administrative law judge incorrectly references this discussion under the heading of "Modification." Decision and Order at 12.

record as it was proffered by claimant in excess of the evidentiary limitations of 20 C.F.R. §725.414. Employer's Brief at 53.

Claimant contends that all of employer's arguments should be rejected. The Director argues specifically that claimant's subsequent claim was timely filed, and that the administrative law judge acted within his discretion in the issuance of his procedural rulings. Director's Brief at 13. The Director asserts that, while the administrative law judge indicated his frustration at the hearing with employer's refusal to comply with discovery, employer has failed to carry its burden of proving that the administrative law judge's ruling was biased. Director's Brief at 15. The Director maintains that the administrative law judge appropriately allowed claimant to designate its medical experts, and further notes that Dr. Lebovitz's excluded opinion was nonetheless considered by the administrative law judge with respect to the timeliness issue. Director's Brief at 21-23. Finally, the Director asserts that the administrative law judge's decision to impose sanctions was within his authority. The Director states that employer has failed to demonstrate that it was prejudiced by the sanctions imposed by the administrative law judge since the administrative law judge properly rejected employer's expert opinions on the issues of entitlement for reasons other than bias. Director's Brief 23-30.

Statute of Limitations/Timeliness of Claim

We first address employer's assertion that the administrative law judge erred in finding the claim timely filed. Employer's Brief at 6-15. In this case, the administrative law judge determined that claimant's subsequent claim was timely filed because claimant did not receive a medical opinion of total disability due to pneumoconiosis *subsequent* to the district director's January 11, 1996 denial of his prior claim. Although employer advocates that the Board adopt the legal standard announced in *Kirk*, 264 F.3d at 602, 22 BLR at 2-288, the Board declines to apply *Kirk* in cases, such as the instant one, which arise within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.[8] *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). Nevertheless, even if *Kirk* applied, the instant, subsequent claim must be considered to have been timely filed since the administrative law judge specifically rendered a finding that Dr. Lebovitz's opinion was unreasoned. The United States Court of Appeals for the Sixth Circuit acknowledged in *Kirk* that, in order to toll the statute of limitations, a claimant must

[8] Because claimant's last coal mine employment occurred in West Virginia, this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

receive a "reasoned" medical determination that he was totally disabled due to pneumoconiosis more than three years prior to filing his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298. Thus, regardless of the applicability of the time limitations, since claimant did not receive a reasoned communication from a physician, that he was totally disabled due to pneumoconiosis, the subsequent claim would not be time barred. *See Id*. We, therefore, affirm the administrative law judge's finding that claimant's subsequent claim was timely filed.

Conduct of the Hearing/Due Process Consideration.

Employer argues that it was denied its due process right to a fair hearing because the administrative law judge did not make his evidentiary rulings at the hearing, delaying his final ruling on various motions to exclude evidence until after receipt of written arguments by the parties, thereby preventing employer's counsel from making an effective closing argument. Employer's Brief at 19. Employer also asserts that the administrative law judge abused his discretion by delaying until the hearing his ruling on claimant's motion to compel employer's answers to interrogatories, which "prevented [employer] from asking for similar discovery about [claimant's] experts to show the same type of 'bias' the [administrative law judge] readily assumed to be present on behalf of the experts offering opinions at the request of [employer]." *Id*.

We disagree. The regulation at 20 C.F.R. §725.455(c) provides that "The conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing." 20 C.F.R. §725.455(c). In order to establish a denial of due process in an administrative hearing there must be a showing of substantial prejudice, *see Arthur Murray Studios of Wash., Inc. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972). In this case, employer has not demonstrated any real prejudice to its case; therefore, its due process assertions are without merit.

We specifically reject employer's assertion that Judge Campbell compromised employer's right to due process because he notified the parties of his evidentiary rulings in his Decision and Order and not at the hearing. An administrative law judge has broad discretion in handling procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). An administrative law judge is also afforded discretion in dealing with matters of fairness and judicial efficiency. *See Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

At the hearing, Judge Campbell put the parties on notice of his provisional evidentiary rulings, and he acted reasonably when he decided to consider written arguments by the parties prior to ruling whether to exclude or admit certain items of evidence in accordance with 20 C.F.R. §725.414. As the Director accurately points out,

employer's counsel was not left completely in the dark about the record evidence when he prepared his brief. Director's Brief at 14. The administrative law judge specifically directed the parties to designate the medical reports on which they would rely in compliance with Section 725.414, and to also designate substitute evidence in the event that any particular piece of evidence was withdrawn or excluded. *Id*. The administrative law judge acted reasonably when he assumed that counsel was qualified to make "alternative assumptions in your brief, assuming that certain evidence is in, [and] certain evidence is out." Hearing Transcript at 11-12; Director's Brief at 14. Because we consider the administrative law judge's approach to have been reasonable given the parties' contentious exchange at the hearing, and since the administrative law judge has great discretion in the manner in which the hearing is conducted, s*ee Clark*, 12 BLR at 1-149, there is no basis for concluding that employer was denied the opportunity for a fair hearing or that it was denied due process.[9]

Furthermore, employer's due process rights were not compromised because Judge Campbell did not rule on claimant's motion to compel discovery prior to the September 11, 2003 hearing. The record reflects that employer did not return its answers and objections to claimant's interrogatories until August 18, 2003, three weeks prior to the hearing. Claimant filed his motion to compel on September 3, 2003, eight days prior to the hearing. Given the abbreviated time frame, it was not unreasonable for the administrative law judge to reserve ruling on the motion to compel until he had had the opportunity to discuss the matter with the parties at the hearing. There is nothing in the Act or regulations that requires an administrative law judge to rule on discovery motions prior to the hearing on the merits. The record reflects that the administrative law judge not only provided employer the opportunity to be heard on its objections to discovery and on its motions in support of its position, he also agreed to narrow claimant's requests. At the hearing, employer failed to make a proffer to substantiate its assertion that responses to the interrogatories would be unduly burdensome. Hearing Transcript at 72-92. In the absence of such a proffer, the administrative law judge directed employer to answer the interrogatories as modified. *Id*. The administrative law judge more fully explained his ruling in subsequent Orders dated December 9, 2003 and March 2, 2004. We reject employer's contention that it was denied due process by the timing of the administrative law judge's rulings because employer has failed to demonstrate any undue prejudice.[10]

---

[9] We note that there is no right to file a closing argument brief, and the decision as to whether the parties are permitted closing argument briefs lies within the sound discretion of the administrative law judge. *See* 20 C.F.R. §725.455(d).

[10] Employer states that the administrative law judge's delaying in ruling on claimant's motion to compel prevented it from serving similar interrogatories on claimant. We note, however, that if employer had wished to serve similar interrogatories on claimant's counsel for the purpose of discovering bias with regard to claimant's

Allegations of Bias

Employer contends that the administrative law judge's various rulings and comments revealed his "extraordinary bias" against employer and employer's counsel. Employer's Brief at 15. After careful consideration of the hearing transcript and the administrative law judge's Decision and Order, we are not persuaded that Judge Campbell displayed bias towards employer.

Prior to the hearing, claimant sought information from employer regarding its experts to determine whether they were biased. To this end, claimant served interrogatories on employer requesting information regarding the number of referrals employer had made to Drs. Renn and Rosenberg in an attempt to discover: whether the two physicians received a significant amount of income from employer based on referrals; whether they consistently rendered opinions favorable to employer's position; and whether they had ever diagnosed a claimant as totally disabled due to pneumoconiosis. Judge Campbell modified some of the interrogatories to employer's satisfaction, but also determined that the statistical information requested concerning the findings of Drs. Renn and Rosenberg in other federal black lung cases was relevant to whether those physicians were biased, and that the relevancy of the discovery request outweighed any financial burden imposed on employer's counsel by producing the information. Hearing Transcript 74-92. The administrative law judge specifically rejected employer's assertion at the hearing that each interrogatory was irrelevant, unreasonable, and over-burdensome. *Id*. In addressing whether claimant's discovery request was reasonably calculated to lead to the discovery of admissible evidence, Judge Campbell acknowledged that doctors were not immune to developing bias as a result of financial incentive, making it necessary to ascertain whether they were financially motivated to render a diagnosis in favor of one party or another. ALJ Order dated December 9, 2003. The administrative law judge observed that he was not familiar with a case where Jackson Kelly represented a miner or where Dr. Renn testified for a claimant. *Id*. After considering the positions of both parties on this issue, Judge Campbell concluded that claimant's discovery request was reasonably calculated to lead to the discovery of admissible evidence, i.e., evidence indicating whether either Dr. Renn or Dr. Rosenberg was biased. *Id*. He thus issued an Order compelling employer to produce the requested financial information. ALJ Order dated December 9, 2003. In so doing, he was heeding the admonition of the United States Court of Appeals for the

---

medical experts, it was free to make that request at any time prior to the issuance of the Decision and Order.

Fourth in *Underwood v. Elkay Mining Co*: "[T]he administrative law judge should consider whether an opinion was, to any degree, the product of bias in favor of the party retaining the expert[s] and paying the fee." *Underwood v. Elkay Mining Co.*, 105 F.3d 946, 951, 21 BLR 2-23, 32 (4th Cir. 1997).

Contrary to employer's assertion, Judge Campbell's discovery Order did not demonstrate bias. Adverse rulings in a proceeding are not by themselves sufficient to show bias on the part of the administrative law judge. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). While employer is displeased with the result of the administrative law judge's discovery ruling, the granting of claimant's motion to compel, in and of itself, does not establish bias.

Furthermore, we reject employer's assertion that the administrative law judge's statements regarding Dr. Renn show that he is personally biased against employer's experts. Not long ago the United States Supreme Court reiterated the well-established law on judicial bias:

> Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994). This standard is applicable to administrative hearings. *Beiber v. Department of the Army*, 287 F.3d 1358, 1361 (Fed. Cir. 2002).

The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence, which is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). In the instant case, employer has not met that burden. Nothing in the tone or tenor of the administrative law judge's Decision and Order indicates that he retains "a deep seated favoritism or antagonism" that made it impossible for him to render a fair judgment of the issues presented in this case. *Liteky*, 510 U.S. at 555. The administrative law judge's even-handed efforts to reach a resolution with respect to the discovery requests by claimant and objections by employer do not evince bias or partiality. Thus, employer has failed to demonstrate that the administrative law judge was biased against it. *See Liteky*, 510 U.S. at 555, *Beiber* 287 F.3d at 1361.

Application of an Adverse Inference of Bias

Employer argues that the administrative law judge's decision must be reversed because he improperly applied an adverse inference of bias against the opinions of Drs. Renn and Rosenberg based on employer's refusal to comply with his Order compelling discovery.[11] Review of the record belies this assertion. The administrative law judge noted that he would discount employer's experts as biased only if he concluded that the opinions of Drs. Renn and Rosenberg were of equal weight to any contrary medical opinions. In other words, an adverse inference would aid claimant in carrying his burden of proof if the evidence were equally probative because the administrative law judge would apply the bias inference to diminish the weight of employer's evidence. Although the administrative law judge stated later in his opinion that he "discredit[ed] the opinions of Drs. Renn and Rosenberg because of [e]mployer's failure to comply with discovery orders…," he also stated emphatically: "Thus on the merits alone, I find that the opinions of Drs. Cohen and Parker should be credited over those of Drs. Renn and Rosenberg." Decision and Order at 16-17. He further concluded that: "The result and my principal findings in this case would be the same without the devaluation of the opinions of Drs. Renn and Rosenberg because of [e]mployer's failure to make discovery." Decision and Order at 17, n. 6.

In addressing whether claimant established the existence of legal pneumoconiosis, the administrative law judge properly assigned greater weight to the opinions of Drs. Parker and Cohen, who attributed claimant's respiratory impairment to a combination of smoking and coal dust exposure, because he found those physicians to be better qualified than Drs. Renn and Rosenberg, who opined that claimant had no coal dust-related respiratory or pulmonary impairment. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). The administrative law judge also properly credited the opinions of Drs. Parker and Cohen because he found their opinions were better reasoned than the opinions of Drs. Renn and Rosenberg. *See Clark*, 12 BLR

[11] An administrative law judge has authority to compel discovery and impose sanctions pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (OALJ) Rule 18.6(d)(2) which provides:

> If a party or an officer or agent of a party fails to comply with a [discovery order]…or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just.

OALJ Rule 18.6(d)(2). This section further permits the administrative law judge to "infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party." OALJ Rule 18.6(d)(2)(i).

at 1-149; Decision and Order at 13-14. Similarly, on the issue of total disability, the administrative law judge specifically rejected the diagnoses of Drs. Renn and Dr. Rosenberg that claimant was not totally disabled for work due to a respiratory impairment, because the administrative law judge found that these physicians did not have an accurate understanding of the physical requirements of claimant's last coal mine job, which required heavy manual labor. Contrary to the suggestion of our dissenting colleague, the administrative law judge's determination that these physicians were biased did not taint his evaluation of their opinions on the merits. Employer has not even attempted to show that it has.

Because the administrative law judge properly rejected the opinions of Drs. Renn and Rosenberg for valid reasons other than bias, and because employer has not challenged those findings on appeal, we decline to address the propriety of the administrative law judge discovery rulings. In view of the administrative law judge's weighing of the medical opinion evidence, even if the administrative law judge erred in imposing a sanction against employer for its failure to comply with discovery, the error is harmless.[12] *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

Evidentiary Limitations:

Employer argues that the administrative law judge erred in allowing claimant to withdraw Dr. Lebovitz's report and to substitute Dr. Cohen's report as one of his two medical opinions proffered in support of his affirmative case. We disagree. Where an excess number of reports have been submitted and good cause is not established to exceed the evidentiary limitations, the administrative law judge has the authority to require a party to designate which medical reports are to be submitted in accordance with 20 C.F.R. §725.414. *See Dempsey*, 23 BLR at 1-47. In the case at bar, claimant submitted three medical reports in support of his affirmative case. These included a November 9, 1995 report from Dr. Lebovitz, a December 3, 2003 report from Dr. Parker, and a July 15, 2003 report from Dr. Cohen. Since Section 725.414(a)(2)(i) permits claimant to submit only two affirmative medical reports in support of his affirmative

[12] Given the way in which this case evolved, it is not necessary for us to address employer's specific argument that the administrative law judge erred in granting claimant's motion to compel. Employer argues that the administrative law judge's Order to compel constituted reversible error because it was the basis for his determination to apply an adverse inference to employer's evidence and thereby unfairly prejudice employer in the presentation of its case. However, as discussed *supra*, the administrative law judge found employer's evidence outweighed on the merits. Therefore, the validity of the Order to Compel is moot.

case, the administrative law judge properly allowed claimant to withdraw Dr. Lebovitz's report.[13] *See* 20 C.F.R. §725.414(a)(2)(i).

We further note that the obvious reason for employer to argue to retain Dr. Lebovitz's report was to support its argument that the subsequent claim was not timely filed. Because the administrative law judge addressed Dr. Lebovitz's report in relation to the timeliness issue, notwithstanding his ruling to strike the opinion, employer was not unduly prejudiced by the administrative law judge's ruling.

Merits of Entitlement

In addressing the merits of entitlement, the administrative law judge considered all of the medical opinions of record, which included the opinions of Drs. Jaworski, Devabhaktuni, Parker, Cohen, Renn and Rosenberg, He assigned greatest probative weight to the opinions of Drs. Parker and Cohen, who opined that claimant was totally disabled due to pneumoconiosis, and thus awarded benefits. On appeal, employer has not specifically challenged the weight accorded the opinions of it experts, Drs. Renn and Rosenberg, other than to state that the administrative law judge erred in assigning their opinions an adverse inference of bias.[14] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1993); *see also* Director's Brief at 26, n.10. With respect to claimant's medical experts, employer asserts that administrative law judge failed to explain the

[13] The district director had indicated that Dr. Lebovitz's report was not sufficiently reasoned to support claimant's burden of proof. Understandably, claimant would elect to rely on more recent medical opinions that had not been discredited.

[14] The administrative law judge excluded supplemental reports prepared by Drs. Rosenberg and Renn, which were proffered by employer, and which expressed the physicians' disagreement with Dr. Parker that claimant is totally disabled due to pneumoconiosis. Employer argues that at least one of the physician's supplemental reports was arguably admissible as rebuttal evidence under the provision of 20 C.F.R. §725.414(a)(3)(ii). However, we agree with the Director that the administrative law judge's error with respect to the exclusion of both reports was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Brief at 25, n.10. Neither physician's supplemental opinion addressed the deposition testimony of Dr. Parker, whose opinion was given controlling weight on the issues of entitlement based on his qualifications. Employer has not shown how admission of either supplemental opinion would alter the administrative law judge's credibility determinations, particularly since the supplemental opinions do little more than reiterate the original reports prepared by Drs. Renn and Rosenberg, which were properly considered by the administrative law judge. In sum, employer has not shown that it was prejudiced by the administrative law judge's ruling.

weight accorded Dr. Devabhakuni's opinion, and that he erred in crediting the opinions of Drs. Parker and Cohen relevant to disability causation.

Employer's arguments are without merit. Contrary to employer's assertion, the administrative law judge properly explained in his Decision and Order the weight he accorded Dr. Devabhaktuni's opinion on all of the relevant issues of entitlement. Employer's Brief at 50. In considering whether claimant established clinical pneumoconiosis, the administrative law judge noted: "I do not consider Dr. Devabhaktuni to have given an opinion favorable to [c]laimant because, on deposition, he stated that he would not have diagnosed simple coal workers' pneumoconiosis if the x-rays were negative." Decision and Order at 13. Since the administrative law judge found the preponderance of the x-ray evidence was negative for pneumoconiosis, the administrative law judge found that "Dr Devabhaktuni's testimony weighed against the presence of medical [coal workers' pneumoconiosis]." *Id*. The administrative law judge also found Dr. Devabhaktuni's opinion of little value in determining whether claimant was totally disabled since the physician testified that he could not determine whether claimant had the pulmonary capacity to perform his last coal mine job. Decision and Order at 16. Moreover, in considering whether claimant established the existence of legal pneumoconiosis and whether he established disability causation, the administrative law judge again found that Dr. Devabhaktuni's opinion was not deserving of probative weight. Decision and Order at 17. The administrative law judge noted that Dr. Devabhaktuni's opinion that claimant's impairment was due to both coal dust exposure and smoking was too equivocal to carry claimant's burden of proof. *Id*. Consequently, although Dr. Devabhaktuni's opinion was supportive of claimant's case, the administrative law judge did not rely on it to award benefits, and employer has not demonstrated any error committed by the administrative law judge in his treatment of Dr. Devabhaktuni's opinion.

Likewise unsound, are employer's charges regarding Dr. Parker's opinion. We reject employer's assertion that Dr. Parker's opinion is flawed because he was unable to apportion the specific percentage of claimant's impairment due to smoking versus coal dust exposure. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir.1997); *Gross v. Dominion Coal Corp*., 23 BLR 1- 8 (2003); s*ee generally Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); Employer's Brief at 52. Employer also suggests that Dr. Parker based his opinion on a positive x-ray and claimant's coal mine employment history, and therefore, that it is not a reasoned opinion to support the administrative law judge's finding of disability causation. Employer's Brief at 52. The record reflects, however, that the administrative law judge properly determined that Dr. Parker's opinion was reasoned and credible on the issue of disability causation because Dr. Parker based his opinion on claimant's symptoms, work and smoking histories, x-ray abnormalities, and the results of claimant's objective studies. S*ee Gross* 23 BLR at 1- 8; *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); Decision and Order at 17;

Claimant's Exhibit 1. Moreover, in opining that claimant's impairment was due both to smoking and coal dust exposure, Dr. Parker accepted that the weight of the x-ray evidence presented in this case was negative for pneumoconiosis, which contradicted his own clinical finding that claimant had positive x-ray evidence for pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Claimant's Exhibit 1. Thus, the administrative law judge permissibly credited Dr. Parker's opinion at 20 C.F.R. §718.204(c). S*ee Gross* 23 BLR at 1-8; Decision and Order at 17.

Lastly, employer argues that Dr. Cohen's disability causation opinion is of little value since the physician opined that claimant had clinical pneumoconiosis, and the administrative law judge found the medical evidence as a whole insufficient to establish that claimant has clinical pneumoconiosis. Employer's Brief at 53. Employer, however, fails to state that the administrative law judge explained his determination that Dr. Cohen also diagnosed legal pneumoconiosis. The administrative law judge specifically credited Dr. Cohen's opinion that claimant has legal pneumoconiosis based on his diagnosis that claimant's chronic obstructive pulmonary disease was due to smoking and coal dust exposure. Claimant's Exhibit 3; Decision and Order at 13. The administrative law judge reasonably credited Dr. Cohen's opinion that claimant is totally disabled by a moderate respiratory impairment, which is due in part to coal dust exposure, and thereby found Dr. Cohen's opinion sufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.204(c). Decision and Order at 15.

Consequently, because the administrative law judge explained the weight accorded all of the record evidence, took into consideration the qualifications of the physicians, and permissibly credited those physicians whose opinions he found to be well-reasoned and documented, *see Clark*, 12 BLR at 1-149, we affirm as supported by substantial evidence, the administrative law judge's finding that that claimant is totally disabled due to pneumoconiosis. We therefore affirm the administrative law judge's award of benefits.

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

SO ORDERED.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I agree that the administrative law judge properly found claimant's subsequent claim to be timely filed since claimant did not receive a *reasoned* communication from a physician that he was totally disabled subsequent to the district director's January 11, 1996 denial of his prior claim. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). I also agree with my colleagues that the administrative law judge properly allowed claimant to withdraw Dr. Lebovitz's report as one of his two affirmative medical reports, substituting Dr. Cohen's opinion in its place. *See* 20 C.F.R. §725.414(a)(2)(i).

However, I respectfully dissent from the majority opinion and their decision to affirm the administrative law judge's treatment of employer's medical experts. In my judgment, the administrative law judge's reference to Dr. Renn in the context of the Black Lung Benefits Program, hearing transcript at 80-81, displayed preconceived bias, and tainted his consideration of all of the record evidence. When employer failed to comply with the motion to compel, rather than exercise his authority under the Rules of Practice and Procedure for Administrative Hearings before the Office of the Administrative Law Judges (OALJ) Rule 18.6(d)(2) and exclude consideration of the reports of Drs. Renn and Rosenberg, which authority he clearly recognized, the

administrative law judge established a different standard for consideration of employer's evidence. In effect, he transferred his annoyance with employer's counsel to employer's evidence, and by so doing, failed to consider all evidence of record under the same standard. He portended to consider the opinions of Drs. Renn and. Rosenberg under a colored evaluation standard, on the one hand, while suggesting in fact that he had excluded their opinions from consideration.

The administrative law judge has an obligation to consider all evidence fairly. This he has not done. His predetermined evaluation of employer's evidence tainted his consideration of all evidence, which in my judgment violates the basic tenets of the Administrative Procedure Act, (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33U.S.C. §919(d) and 30 U.S.C. §932(a), which requires a full and fair hearing on "all material issues of fact, law or discretion presented on the record."

Consequently, I would vacate the award of benefits and remand this case for reassignment to a different administrative law judge and a reweighing of the evidence on the merits of entitlement.

_____

ROY P. SMITH
Administrative Appeals Judge