BRB No. 03-0395 BLA

JOHN WILDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LANGLEY & MORGAN CORPORATION	)	
	)	DATE ISSUED: 12/18/2003
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Fifth Remand of Administrative Law Clement J. Kichuk, United States Department of Labor.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Sarah Hurley (Howard 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Fifth Remand (89-BLA-0373) of Administrative Law Judge Clement J. Kichuk with respect to 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). The relevant procedural history of this case is as follows.[1] The administrative law judge found in his prior Decision and Order, that the evidence of record, including a computer printout which purported to show that an election card was sent to the miner, was insufficient to establish that such a card was mailed, but not returned. The administrative law judge determined, therefore, that claimant's Part B claim for benefits might still be viable, therefore satisfying the prerequisites for transfer of liability for the payment of benefits from employer to the Black Lung Disability Trust Fund (the Trust Fund).

On appeal, the Board declined to reach the merits of the administrative law judge's transfer findings. Rather, the Board remanded the case to the administrative law judge with instructions to render a good cause finding, pursuant to 20 C.F.R. §725.456(b)(2), with respect to the Director's alleged late submission of the computer printout and other items of evidence with his Motion for Reconsideration of the administrative law judge's Decision and Order on Fourth Remand. *Wilder v. Langley & Morgan Corp.*, BRB No. 00-0760 BLA (May 3, 2001)(unpub.). On remand, the administrative law judge determined that no good cause existed and found that liability transferred to the Trust Fund.

On appeal, the Director argues that the administrative law judge's exclusion of the computer printout from the record was arbitrary, capricious, and an abuse of discretion. The Director also reiterates the arguments that he raised with respect to the administrative law judge's transfer of liability to the Trust Fund in his prior appeal to the Board. Employer has responded and urges affirmance of the administrative law judge's Decision and Order. Claimant has not responded to this appeal.

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. 33 U.S.C. '921(b)(3), as incorporated into the Act by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, the Director asserts that he promptly obtained and exchanged the computer printout with employer in response to the request for discovery it submitted after the case was remanded to the administrative law judge for the development of evidence regarding the transfer issue. As a result, according to the Director, the printout was never "surprise" evidence, a fact which employer implicitly confirmed by mentioning the printout in its request that the administrative law judge issue a subpoena to the Social Security Administration (SSA), ordering SSA to provide information

[1] The lengthy procedural history of this case is set forth fully in *Wilder v. Langley & Morgan Corp.*, BRB No. 98-0717 BLA (Feb. 23, 1999)(unpub.), slip op. at 2-3.

regarding claimant's Part B claim. The Director further contends that the failure to submit the printout to the administrative law judge was nothing more than an oversight and does not establish that the Director did not comply with the administrative law judge's orders in a timely manner. The Director also argues that it made little sense for the administrative law judge to exclude the printout when he referred to it in his Decision and Order on Reconsideration. As support for this assertion, the Director cites employer's comment in its brief in response to the prior appeal that the administrative law judge's failure to address the good cause issue constituted harmless error. Finally, the Director asserts that the administrative law judge unfairly rejected his explanation for not submitting the printout in response to the administrative law judge's second order requiring the Director to gather evidence relating to whether transfer of liability was appropriate in this case.

The Director's contentions are without merit. The Director essentially asserts that the omission of the computer printout was of little or no significance because it was exchanged with employer well before the administrative law judge closed the record and the parties themselves agreed that the true issue concerned getting information from SSA about the notation on SSA's records concerning the Part B claim.[2] This argument does not recognize that regardless of the parties' understanding concerning the evidence that has been exchanged between them, absent a formal stipulation, the administrative law judge, as fact-finder, must render his findings with respect to the contested issues based upon the record before him. If evidence that the parties have provided to each other is not present in that record, the administrative law judge cannot properly perform the function that he has been assigned in the adjudicatory process. *See* 20 C.F.R. §§725.350, 725.351, 725.455.

Moreover, pursuant to 20 C.F.R. §725.479(b), the procedures to be followed in addressing a motion for reconsideration of an administrative law judge's Decision and Order are determined by the administrative law judge. 20 C.F.R.§725.479(b) (2000). Thus, the Board has held that, "provided that proper procedural safeguards are maintained, an administrative law judge is neither bound to accept new evidence nor precluded from considering such evidence in disposing of a motion for reconsideration." *Covert v. Westmoreland Coal Co.*, 6 BLR 1-1111, 1-1113 (1984); *see also Hensley v. Grays Knob Coal Company*, 10 BLR 1-88 (1987). The Board has also held that in order to receive new evidence into the record, the administrative law judge must make a determination whether there was "good cause" for the failure to obtain and exchange the evidence in compliance with Section 725.456(b)(2) (2000). 20 C.F.R. §725.456(b)(2)

[2] There is a handwritten notation on the denial letter issued by the Social Security Administration that includes the number 559, a person's illegible signature, and the date "7/16/86." Director's Exhibit 17.

(2000); *Hensley*,10 BLR 1-88; *Thomas v. Freeman United Coal Mining Co.*, 6 BLR 1-739 (1984).

In this case, the administrative law judge acted within his discretion in determining that the Director did not establish good cause for failing to exchange with employer letters from the Associate Regional Solicitor for the Department of Labor and a claims examiner in a timely fashion. Decision and Order on Fifth Remand at 7. The administrative law judge rationally found that the Order in which he noted that he had not received any additional documentation from the Director regarding the transfer issue and in which he required the Director to provide all documentation necessary for an informed consideration of the transfer issue put the Director on notice that the computer printout was not in the record. *Hensley*, 10 BLR 1-88; *Thomas*, 6 BLR 1-739.

Section 725.456(b)(2) (2000) is not applicable to the computer printout itself, however, because the Director exchanged it with employer within the time limits established by the administrative law judge. Nevertheless, requiring the parties to demonstrate that there was a rational reason, or "good cause," for failure to submit the evidence proffered with a motion for reconsideration earlier in the adjudicatory process falls within the broad discretion granted the administrative law judge in resolving the evidentiary issues that may arise in conjunction with such motions. *Hensley*, 10 BLR 1-88. Based upon the facts of this case, we hold that the administrative law judge's determination that the "computer printout was unreasonably absent from the record prior to the Fourth Decision and Order on Remand" does not represent an abuse of discretion and is supported by substantial evidence. Decision and Order on Fifth Remand at 7; *Covert*, 6 BLR 1-1111; *Hensley*, 10 BLR 1-88. We affirm, therefore, the administrative law judge's exclusion of this evidence from the record.

Regarding the administrative law judge's finding that liability for the payment of benefits transfers to the Trust Fund in this case, the regulations provide for a two prong analysis of SSA claims subject to the transfer of liability provisions. First, there must be a claim filed and denied by SSA prior to March 1, 1978. Then, it must be shown that claimant requested review of this denied claim under Section 435 of the Act, by having filed an election card or an equivalent document with SSA. 20 C.F.R. §§410.704, 725.496(a), (d), 725.497, 727.104 (2000); *see Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 21 BLR 2-464 (6th Cir. 1998); *Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Director, OWCP v. Quarto Mining Co. [Bellomy]*, 901 F.2d 532, 13 BLR 2-435 (6th Cir. 1990). In the instant case, the parties agree that claimant's Part B claim, filed with SSA on June 21, 1973, was denied by SSA on November 6, 1973, and that no further appeals were taken at that time. Director's Exhibit 39. The parties differ as to whether the evidence of record shows that claimant was mailed an election card, which he did not return to SSA.

In his Decision and Order on Fifth Remand, the administrative law judge did not render new findings regarding whether the prerequisites for transfer were present. He simply reaffirmed the findings set forth in his Decision and Order on Fourth Remand. Decision and Order on Fifth Remand at 7. The evidence that the administrative law judge weighed consisted of two letters describing the SSA determinations in this case,[3] *see* Administrative Law Judge Exhibits 7, 9, and a "Memorandum to File" from the district director dated November 24, 1999, which stated that claimant filed a claim with SSA on June 21, 1973, which was denied by SSA on November 6, 1973. In addition, the district director stated that "the computer records reveal an election card was forwarded to the miner on March 24, 1978. However, the miner did not return the election card or any other document requesting review." Administrative Law Judge Exhibit 8. The district director further indicated that SSA advised that they did not have any records on file relevant to the issue of transfer in this case. Consequently the memo concluded that:

> [W]hile the evidence reflects Mr. Wilder was provided an election card on March 24, 1978, there is no evidence that he returned the card, nor submitted an election for review by any other means. Accordingly, we must find that Section 205 of the Transfer Provisions do not apply in this case.

[3]The Director stated that Social Security Administration (SSA) offices in Pikeville and Baltimore had been contacted regarding transfer. Following a review of the records, SSA stated that no information regarding the SSA Black Lung claim had been located. As for the "7/16/86" notation, SSA stated that such notations are often merely used for "local case control" and have no bearing on determinations. Administrative Law Judge's Exhibits 7, 8, 9.

Administrative Law Judge's Exhibit 8.

In considering this evidence, the administrative law judge emphasized that the Director, as guardian of the Trust Fund, bears the burden of establishing that the miner did not elect review and, thus, that liability for the claim does not transfer to the Trust Fund. The administrative law judge found that :

> [D]espite this Court's leaving the record open for six months following remand in order to develop such evidence, [the Director] failed to proffer any documentation establishing that Mr. Wilder was sent an election card in this case. Moreover, the documents that were submitted show that there is *no* record of an election card having been sent to the miner.

Decision and Order on Fourth Remand at 5 (emphasis in original). Consequently, the administrative law judge found that the record contained no direct evidence that an election card was mailed to claimant. Therefore, based on the case law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, the administrative law judge found that the transfer provisions in Section 205 of the 1981 amendments apply to this case. *Id*., citing *Bellomy,* 901 F.2d 532, 13 BLR 2-435. Accordingly, the administrative law judge dismissed employer as the party responsible for the payment of benefits and transferred liability for payment to the Trust Fund. Decision and Order on Fourth Remand at 6.

The Director argues that the administrative law judge erred in finding that the remaining evidence in the record does not establish that an election card was sent to claimant on March 24, 1978 and was not returned. This contention has merit. As the Director asserts, the administrative law judge did not adequately discuss why the evidence was insufficient to establish that an election card was sent to claimant in light of the holdings of the Sixth Circuit in *Satterfield* and *Crace*, which were issued subsequent to *Bellomy*. In *Bellomy*, the court held that a printout merely listing the names of various miners, with nothing more, was insufficient to establish that an election card was sent to a particular miner. *Bellomy*, 901 F.2d 532, 13 BLR 2-435. In *Satterfield*, the court held that a computer printout in the record indicating that SSA mailed an election card to the miner was sufficient to defeat transfer of liability to the Trust Fund. *Satterfield*, 150 F.3d 568, 21 BLR 2-464. The Sixth Circuit held in *Crace* that a computer printout indicating that an election card was sent to a miner created a presumption that the correspondence was properly sent and was received by the addressee. *Crace*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997).

Although the administrative law judge acted within his discretion in excluding the computer printout from the record in this case, he did not adequately explain, in light of Sixth Circuit case law, why he found the detailed written statements from the district director less than credible and, therefore, insufficient to establish that an election card was mailed to, and received by, claimant. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We vacate, therefore, the administrative law judge's finding pursuant to Section 725.496(a) and remand the case to the administrative law judge for reconsideration of the evidence in the record at the time of his Fourth Decision and Order on Remand in light of the Sixth Circuit's decisions in *Satterfield* and *Crace*.

Accordingly, the Decision and Order on Fifth Remand of the administrative law judge is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge