BRB No. 04-0270 BLA

DONALD L. BOWMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARRY L. SIRAVO & SONS, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/29/2004
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 – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Mary Ann C. Acton (Bashline & Hutton), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-0123) of Administrative Law Judge Daniel L. Leland 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).[1] The procedural history of this case is as follows: Claimant filed

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

a claim for benefits on December 1, 1997, Director's Exhibit 1, which was finally denied by the district director on March 23, 1998. Director's Exhibit 20. The district director found that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000), but did not establish that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). *Id*. Claimant filed a second claim for benefits on August 3, 1998, Director's Exhibit 22, which was treated as a request for modification pursuant to 20 C.F.R. §725.310 (2000) since it was filed within one year of the previous denial. Director's Exhibit 23. The claim was referred to Administrative Law Judge Robert J. Lesnick, who held a hearing on December 4, 2000. Director's Exhibit 84. In an Order of Remand dated May 31, 2001, Judge Lesnick remanded the case to the district director for development of evidence relevant to the designation of the proper responsible operator. Director's Exhibit 98. The district director thereafter forwarded the case to the Office of Administrative Law Judges, and the case was assigned to Administrative Law Judge Daniel L. Leland (the administrative law judge), who held a hearing on July 31, 2003.

In his Decision and Order dated November 12, 2003, the administrative law judge credited claimant with twenty-one and one-half years of coal mine employment, and found that employer is the responsible operator liable for the payment of benefits. The administrative law judge then found that the evidence submitted on modification demonstrated total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv), and that, therefore, claimant established a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further found the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). He determined that claimant established entitlement to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. The administrative law judge also found the evidence of record sufficient to establish total disability and disability causation pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's finding that it is the properly designated responsible operator, and contends that the administrative law judge prejudiced employer by improperly excluding from the record Dr. Faber's medical opinion. Claimant has filed a response brief in opposition to employer's appeal, and in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs has not filed a response brief in this case.

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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).

On appeal, employer contends that the administrative law judge erred in finding that employer is the properly designated responsible operator, and should have determined that C.P.S. Railway Services (CPS) is the responsible operator. Employer argues that, contrary to the administrative law judge's finding, CPS was claimant's last coal mine employer for a period of over one year, rendering CPS the responsible operator pursuant to 20 C.F.R. §725.493(a)(1).

We hold that the administrative law judge's finding that employer is the last employer to employ claimant as a miner for at least one year is supported by substantial evidence. Claimant worked for employer from approximately 1972 to 1991, as a foreman and operator, repairing and building railroad tracks. Director's Exhibit 2. Claimant testified, at the December 4, 2000 and July 31, 2003 hearings, that eighty-five to ninety percent of his work for employer occurred at coal mines. 2000 Hearing Transcript at 18; 2003 Hearing Transcript at 10. The administrative law judge correctly stated that claimant identified the coal mine companies on whose property he built and repaired track while working for employer, and testified that he did heavy physical labor including shoveling coal. Decision and Order at 3; 2000 Hearing Transcript at 27-28; 2003 Hearing Transcript at 11-12. Claimant subsequently worked for CPS repairing and building railroad tracks, from June 1992 to January 1997. Director's Exhibit 2. Claimant testified that only four months of his employment with CPS occurred at a coal mine site called Power Operations in Osceola, New York, while the remainder of the work was performed at non-coal mine sites. 2000 Hearing Transcript at 31; 2003 Hearing Transcript at 12-13, 18. Contrary to employer's contention, the administrative law judge acted within his discretion in crediting claimant's uncontradicted testimony that he worked at coal mine sites for only four months of his employment by CPS. We affirm, therefore, the administrative law judge's finding, as supported by substantial evidence, that claimant's last coal mine employment for at least one year was with employer, and that employer is, therefore, the responsible operator. 20 C.F.R. §725.493(a)(1).

Employer also argues that the administrative law judge abused his discretion in excluding from the record a medical opinion from Dr. Faber, dated July 20, 2003, in which Dr. Faber reviewed the medical evidence of record. The regulations provide that documentary evidence submitted by a party may be received into evidence provided that such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). The regulations further provide that if evidence is not exchanged with the parties within twenty days of the hearing, and

the parties do not waive the twenty day requirement, or if good cause is not shown why such evidence was not exchanged in accordance with the twenty day requirement, then the administrative law judge shall either exclude the late evidence or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3). Employer exchanged Dr. Faber's report with claimant on July 23, 2003, eight days before the hearing held on July 31, 2003. Employer argues that it requested the report from Dr. Faber's office more than sixty days prior to the hearing, that it made numerous requests to obtain the report, and submitted it as soon as it was obtained. Employer asserts that the delay resulted from "some miscommunication or failure in the doctor's office," and was thus not employer's fault. Employer's Brief at 7-8. Employer argues that the administrative law judge should have determined that equity demanded that the report be admitted. Employer further argues that Dr. Faber's report is the only evidence that could rebut Dr. Schaff's opinion, and that claimant would not be prejudiced if Dr. Faber's report were admitted. Finally, employer contends that the administrative law judge should have taken into consideration employer's "late joinder" in this action to admit employer's "slightly late" submission of Dr. Faber's report into evidence. Employer's Brief at 8.

Employer's contentions lack merit. The administrative law judge has broad discretion in resolving procedural issues, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and Section 725.456(b)(2) specifically allows the administrative law judge to exercise discretion to admit or exclude documentary evidence not submitted in accordance with the twenty day requirement. 20 C.F.R. §725.456(b)(2); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). The administrative law judge acted within his discretion in determining that employer's counsel's statements at the hearing that the request for Dr. Faber to review the medical evidence "got lost," and that she "really [had] no good explanation" for the late submission of Dr. Faber's report, did not establish good cause to submit the report outside the twenty day requirement pursuant to Section 725.456(b)(2). 20 C.F.R. §725.456(b)(2); Decision and Order at 2, n.1; 2003 Hearing Transcript at 25. Contrary to employer's contention, Dr. Faber's report is not the only report of record, which if credited, could rebut claimant's evidence. The record includes medical opinions from Drs. Illuzzi and Gerhart, which indicate that claimant does not have pneumoconiosis, but rather chronic obstructive pulmonary disease attributable to cigarette smoking. Director's Exhibits 15, 58. These opinions would have supported a finding of non-entitlement to benefits had the administrative law judge credited them.[2] In addition, there is no merit to employer's suggestion that the

[2]The administrative law judge discounted Dr. Illuzzi's opinion on the ground that Dr. Illuzzi was not aware of claimant's occupational history and prolonged exposure to coal dust. Decision and Order at 7; Director's Exhibit 15. The administrative law judge found Dr. Gerhart's opinion, that claimant's pulmonary impairment is due primarily to smoking, entitled to little weight as Dr. Gerhart did not diagnose pneumoconiosis.

administrative law judge abused his discretion in determining that employer had not established good cause for the late submission of Dr. Faber's report in light of employer's "late joinder" in this action. Employer's Brief at 8. The district director notified employer of its potential liability for benefits as a responsible operator on August 7, 1998, Director's Exhibit 26, and employer remained the designated responsible operator when the case was forwarded to the Office of Administrative Law Judges on March 6, 2003, which occurred after Administrative Law Judge Robert L. Lesnick remanded the case on May 31, 2001 for further evidentiary development of the responsible operator issue. Director's Exhibits 98, 104. Employer has thus failed to demonstrate that the administrative law judge abused his discretion in finding that employer did not show good cause for the late submission of Dr. Faber's report. In addition, as claimant objected to the late submission of Dr. Faber's report at the hearing, 2003 Hearing Transcript at 24, the parties did not waive the twenty day requirement under Section 725.456(b)(1). Consequently, we affirm the administrative law judge's decision to exclude Dr. Faber's report from the record. 20 C.F.R. §725.456; *see Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-298 (1984).

Decision and Order at 7; Director's Exhibit 58. Employer does not challenge on appeal the administrative law judge's reasons for according little weight to the opinions of Drs. Illuzzi and Gerhart.

Accordingly, the administrative law judge's Decision and Order – Awarding 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

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BETTY JEAN HALL
Administrative Appeals Judge