

BRB No. 04-0861 BLA

WILLIAM C. HERRING)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED: 12/7//2005

DECISION and ORDER on
RECONSIDERATION

Appeal of Appeal of the Decision and Order - Denying Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Claimant has filed a timely Motion for Reconsideration requesting the Board to reconsider its Decision and Order dated June 30, 2005 as issued in the captioned case, which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In that decision the Board affirmed in part, and vacated in part, the administrative law judge's denial of benefits, and remanded the case for further consideration of the medical evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and whether claimant established a

basis for modification pursuant to 20 C.F.R. §725.310. *Herring v. Director, OWCP*, BRB No. 04-0861 BLA (June 30, 2005) (unpub.). The Director, Office of Workers' Compensation Programs (the Director), has not filed a response to claimant's Motion for Reconsideration.

Claimant specifically seeks reconsideration of the Board's holding that the administrative law judge acted within his discretion when he denied claimant's request for the opportunity to rebut Dr. Rashid's report, which the administrative law judge had admitted into the record inside the twenty-day rule¹ at the request of the Director. Claimant maintains that because the administrative law judge had earlier ruled that claimant would have the opportunity to rebut Dr. Rashid's report, because the Director did not object to the claimant's opportunity for rebuttal, and because claimant was ultimately unable to meet the administrative law judge's initial timetable for the submission of evidence due to an extension of time granted to the Director, the administrative law judge's subsequent denial of claimant's request for an extension of time to submit rebuttal evidence was fundamentally unfair and in violation of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Upon further review, we agree with claimant that the administrative law judge erred by not allowing claimant the opportunity to submit rebuttal evidence to Dr. Rashid's report. The record reveals that at the hearing, the administrative law judge granted, over claimant's objection, the Director's motion to compel claimant to undergo a complete pulmonary evaluation, but also granted claimant the opportunity to rebut the Director's evidence. Hearing Transcript at 12-13, 16. The administrative law judge stated that the record would be held open until April 4th 2000 for the receipt of all evidence from all parties. Hearing Transcript at 14. Following the hearing, by Order dated April 2, 2004, the administrative law judge granted the Director's request for an extension of time until June 11, 2004 to submit the results of the complete pulmonary evaluation scheduled to be performed by Dr. Rashid. By letter dated June 17, 2004, claimant's counsel asserted that she had not received Dr. Rashid's examination report until June 8, 2004, and thus requested an additional forty-five days to submit rebuttal evidence. By Order dated June 22, 2004, the administrative law judge denied claimant's motion for an extension of time to submit rebuttal evidence and subsequently also

¹ The regulation at 20 C.F.R. §725.456(b) (2000) provides that evidence which was not submitted to the deputy commissioner, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim, or upon a showing of good cause why such evidence was not exchanged accordingly. 20 C.F.R. §725.456(b)(1), (2) (2000).

rejected claimant's proffer of a rebuttal report from Dr. R. Kraynak. In our prior decision, we accepted the Director's contention that Dr. Rashid's examination was obtained by the Director in response to the numerous reports already submitted by claimant, and that, therefore, the administrative law judge had acted within his discretion in refusing to allow claimant to submit repetitious medical evidence. 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Upon further reflection and review of the record, however, we hold that it was error for the administrative law judge to deny claimant the opportunity to rebut Dr. Rashid's report. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989)(the APA requires an opportunity for rebuttal where it is necessary to the full presentation of a case); see also *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991)(discussing the appropriateness of allowing rebuttal to untimely evidence); Director's January 6, 2004 Motion for Order Compelling Physical Examination at 2. Therefore, we instruct the administrative law judge on remand to grant claimant's request for the opportunity to submit rebuttal evidence to Dr. Rashid's report.

Accordingly, we grant claimant's Motion for Reconsideration, modify our prior Decision and Order of June 30, 2005, and remand this case for further consideration consistent with our original decision and the modifications contained herein.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge