BRB No. 06-0538 BLA

ONSBY C. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/22/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joel K. Stein (Lynn and Stein, P.C.), Wabash, Indiana, for claimant.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (05-BLA-0032) of Administrative Law Judge Rudolf L. Jansen 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). The administrative law judge addressed claimant's request for modification of the denial of a claim filed on August 21, 1998.[1] The administrative law

[1] Claimant's application for benefits was denied in a Decision and Order issued by Judge Jansen on December 13, 2000. The Board affirmed the denial of benefits and denied claimant's subsequent Motion for Reconsideration. *Johnson v. Director, OWCP*, BRB No. 01-0679 BLA (Sept. 10, 2002)(unpub. Order); *Johnson v. Director, OWCP*,

judge noted that he had denied benefits in his prior decision because claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(b)(2), although the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 4-5.

Addressing the merits of claimant's request for modification, the administrative law judge credited the miner with seven and one-quarter years of coal mine employment and applied the regulations set forth in 20 C.F.R. Part 718. Initially, the administrative law judge declined to admit evidence submitted by claimant with his post-hearing brief because the Director, Office of Workers' Compensation Programs (the Director), did not have a chance to review it or respond to it. Decision and Order at 2 n.1. The administrative law judge determined that the evidence of record did not support a finding that there was a mistake in a determination of fact. Decision and Order at 9-10. In addition, the administrative law judge found that the evidence submitted since the prior denial was insufficient to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 12. Accordingly, the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000).[2]

On appeal, claimant contends that the administrative law judge erred in declining to admit the evidence submitted by claimant with his post-hearing brief. Claimant also argues that the administrative law judge must reconsider his determination that total disability was not established under Section 718.204(b)(2) based upon a consideration of all of the relevant evidence of record, including the improperly excluded evidence. In response, the Director urges the Board to affirm the administrative law judge's finding that the new evidence fails to establish that claimant has a totally disabling respiratory impairment and, thus, that claimant failed to establish modification. With regard to the issue of the admittance of the post-hearing evidence, the Director states that while the administrative law judge's rationale was problematic, any error in his rejection of this

---

BRB No. 01-0679 BLA (May 13, 2002)(unpub.). The United States Court of Appeals for the Sixth Circuit denied claimant's petition for review in an unpublished decision issued on December 5, 2003. *Johnson v. Director, OWCP*, No. 02-4287 (6th Cir. Dec. 5, 2003)(unpub.). Claimant requested modification in a letter dated August 16, 2004. Director's Exhibit 24.

[2] The amended version of 20 C.F.R. §725.310 does not apply in this case, as the claim, filed on August 21, 1998, was pending when the amended regulations became effective on January 19, 2001. *See* 20 C.F.R. §725.2.

evidence is harmless because the additional evidence does not support a finding of total disability pursuant to Section 718.204(b)(2).[3]

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).

Claimant contends that the administrative law judge erred in declining to admit into the record the evidence submitted with claimant's post-hearing brief. Specifically, claimant alleges that this evidence was exchanged with the Director's counsel on August 11, 2005, and that claimant believed that the evidence was included in the exhibits forwarded to the administrative law judge prior to the hearing conducted on September 9, 2005. Claimant's Brief at 2. Claimant then states that when the parties noticed that the evidence was not in the record, claimant's counsel forwarded it with his post-hearing brief. *Id*. at 3. Claimant argues that since, contrary to the administrative law judge's finding, the Director received the evidence in advance of the hearing, the Director would not be prejudiced by the inclusion of this evidence in the record. *Id*. at 4.

Pursuant to 20 C.F.R. §725.456(b)(1) (2000), any evidence not submitted to the district director may be received in evidence, subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing.[4] *See* 20 C.F.R. §725.456(b)(1) (2000); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Under 20 C.F.R. §725.456(b)(2) (2000), the administrative law judge may admit, at his discretion,

[3] Neither claimant nor the Director, Office of Workers' Compensation Programs, has alleged any error in the administrative law judge's finding that the evidence admitted into the record was insufficient to establish a mistake of fact or a change in condition pursuant to Section 725.310 (2000). In addition, claimant acknowledges that the administrative law judge determined correctly that the opinions of record in which Drs. Hayhurst and Fouts indicated that claimant is totally disabled are not adequately documented. Claimant's Brief at 3. Therefore, we affirm, as unchallenged on appeal, the administrative law judge's finding that the record before him did not contain evidence sufficient to establish the prerequisites for modification pursuant to Section 725.310 (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1986).

[4] The amended version of 20 C.F.R. §725.456 does not apply in this case, as the claim, filed on August 21, 1998, was pending when the amended regulations became effective on January 19, 2001. *See* 20 C.F.R. §725.2.

documentary evidence that was not submitted to the district director and not exchanged by the parties within twenty days of a hearing, if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged in a timely manner. *See* 20 C.F.R. §725.456(b)(2) (2000); *Miller*, 870 F.2d 948, 12 BLR 2-222; *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). If the administrative law judge admits "late" evidence into the record, Section 725.456(b)(3) (2000) requires that the record be left open for at least thirty days after the hearing to permit the parties the opportunity to respond to such evidence. *See* 20 C.F.R. §725.456(b)(3) (2000); *Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984); *but see Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 150, 16 BLR 2-1, 2-6 (4th Cir. 1991)(the thirty day post-hearing period is provided only for the party that needs to take some action "in response to" the late evidence and does not give all parties an opportunity to submit additional evidence).

In this case, the administrative law judge declined to admit the evidence submitted with claimant's post-hearing brief, based on his finding that the Director did not have an opportunity to review it or object to it because claimant did not submit the evidence at the hearing. Decision and Order at 2 n.1. Claimant referred to this evidence at the hearing when discussing the Joint Exhibit prepared by claimant and the Director, but did not at that time specifically offer it for admission into the record.[5] Hearing Transcript at 7-8, 9-10. The administrative law judge, nonetheless, instructed claimant to address any evidence not included in the Joint Exhibit in his post-hearing brief. Hearing Transcript at 9-10. Claimant then submitted a copy of the evidence with his post-hearing brief and requested that it be considered. *See* Claimant's Post-Hearing Brief at 1-2.

The Director, in his response brief, acknowledges that claimant forwarded a copy of this evidence to the Director's counsel in August 2005, prior to the scheduled September 9, 2005 hearing, but that the cover letter did not specifically state that it was going to be offered for inclusion in the record. Director's Brief at 3-4. Based upon the Director's receipt of this evidence before the hearing, however, the Director concurs that the administrative law judge's explanation for excluding the evidence, *i.e.*, that the Director did not have the opportunity to respond to the evidence, is "problematic." Director's Brief at 3. Nevertheless, the Director contends that any error in the exclusion of the evidence is harmless, as it is insufficient to establish entitlement to benefits. *Id*. at 4.

[5] The Joint Exhibit, set forth in the format provided by the Office of Administrative Law Judges, consisted of a listing of the objective evidence, specifically the x-ray, pulmonary function study and blood gas study evidence, which the parties submitted to the administrative law judge.

In light of the Director's acknowledgement that claimant forwarded the evidence in question to the Director's counsel prior to the hearing and the fact that the rationale provided by the administrative law judge for rejecting the evidence is incorrect, we vacate the administrative law judge's findings on this matter and remand the case to the administrative law judge for further consideration. 20 C.F.R. §725.456(b)(1), (b)(2); *Miller*, 870 F.2d 948, 12 BLR 2-222; *Cochran*, 12 BLR 1-137, 1-138; *Luketich v. Director, OWCP*, 8 BLR 1-477 (1986). We also vacate the administrative law judge's determination that the newly submitted evidence did not establish total disability pursuant to Section 718.204(b)(2), because the administrative law judge's evidentiary rulings on remand may impact his findings on this issue. We decline to accept the Director's contention that remand is not necessary because the evidence in question is insufficient to establish a total respiratory disability. Making factual determinations and assessing the weight to be accorded to the relevant evidence of record are solely within the purview of the administrative law judge and the Board is not empowered to perform these functions. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

On remand, the administrative law judge must begin by determining whether the medical records were exchanged with the Director at least twenty days prior to the hearing.[6] 20 C.F.R. §725.456(b)(1) (2000); *Luketich*, 8 BLR at 1-479. If so, then the evidence should be admitted. *Luketich*, 8 BLR 1-479. If, the administrative law judge determines that it was not exchanged in accordance with Section 725.456(b)(1) (2000), then the administrative law judge must determine if the parties have waived the twenty day requirement, or if good cause exists for the failure to timely exchange such evidence. *See* 20 C.F.R. §725.456(b)(2) (2000); *Miller*, 870 F.2d 948, 12 BLR 2-222; *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Lastly, if the administrative law judge determines this evidence to be "late" evidence and admits it into the record, Section 725.456(b)(3) (2000) requires that the record be left open for at least thirty days after the hearing to permit the Director to respond to such evidence. *See* 20 C.F.R. §725.456(b)(3) (2000); *Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984).

If the administrative law judge admits into the record on remand the evidence included with claimant's post-hearing brief and any evidence in response to it, he must weigh all of the relevant evidence of record to determine if claimant establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2).

[6] Whether the evidence was exchanged with the administrative law judge at least twenty days prior to the hearing is not relevant to the inquiry under 20 C.F.R. §725.456(b)(1). *Luketich v. Director, OWCP*, 8 BLR 1-477, 1-479 (1986).

See Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989); *Luketich*, 8 BLR at 1-479. If the administrative law judge finds that the evidence in question is not admissible, however, the administrative law judge may reinstate the denial of benefits, as neither party has alleged that the administrative law judge erred in determining that the evidence before him was insufficient to establish the prerequisites for modification set forth in Section 725.310 (2000).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge