BRB No. 99-0423 BLA

FRANK M. BRZOSTOWSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED:
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Remand and Order denying reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Richard Davis (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand and Order denying reconsideration (96-BLA-1275) of Administrative Law Judge Ralph A. Romano awarding benefits 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). This case is

before the Board for the second time. Originally, in a Decision and Order issued on April 29, 1997, the administrative law judge credited claimant with forty-one years of coal mine employment, as stipulated by the parties, and determined that inasmuch as the instant claim was a duplicate claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).[1] The administrative law judge considered the newly submitted evidence pursuant to 20 C.F.R. Part 718 and found it sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Thus, the administrative law judge found that a material change in conditions was established pursuant to Section 725.309(d) and that entitlement to benefits was established under Part 718. Accordingly, benefits were awarded.

Employer appealed and the Board initially held that the administrative law judge's summary finding at the hearing that employer failed to demonstrate good cause for its late submission of a medical report from Dr. Dittman pursuant to 20 C.F.R. §725.456(b)(2) appeared arbitrary and did not satisfy the provisions of the Administrative Procedure Act (APA). *Brzostowski v. Reading Anthracite Co.*, BRB No. 97-1159 BLA (May 6, 1998)(unpub.). Thus, the Board remanded the case for the administrative law judge to

[1]Claimant originally filed a claim on May 29, 1973, which was ultimately denied by the Department of Labor on review on May 4, 1981, as claimant failed to establish the existence of pneumoconiosis, pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, Director's Exhibit 32. No further action was taken on this claim. Although claimant also filed a claim on October 9, 1992, claimant's request to withdraw this claim was granted by Administrative Law Judge Robert D. Kaplan by order dated February 22, 1994, *id*. Thus, as claimant withdrew this claim, it is considered not to have been filed, *see* 20 C.F.R. §725.306(b). Subsequently, claimant filed the instant, duplicate claim, at issue herein, on December 11, 1995, Director's Exhibit 1.

provide a complete rationale for his determination as to whether good cause was demonstrated by employer to excuse the late submission of evidence pursuant to Section 725.456(b)(2). The Board instructed the administrative law judge that if he admitted additional evidence into the record on remand, he must redetermine whether the elements of entitlement were established under Part 718. Contrary to employer's further contentions, however, the Board found no error in the administrative law judge's evaluation and weighing of the evidence that had been admitted into the record in finding it sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(4). Finally, the Board vacated the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) for a reevaluation on remand as to whether the newly submitted evidence establishes that claimant's condition has worsened pursuant to the standard enunciated in the standard enunciated in *Swarrow*, *supra*.

On remand, at issue herein, the administrative law judge found that employer failed to establish good cause for the late submission of the medical report of Dr. Dittman pursuant to Section 725.456(b)(2). Next, the administrative law judge found the existence of pneumoconiosis established by the newly submitted evidence pursuant to Section 718.202. Thus, because the newly submitted evidence established one of the elements previously adjudicated against claimant, the administrative law judge found a material change in conditions established pursuant to Section 725.309(d) in accordance with the standard enunciated in *Swarrow*. Finally, adopting the rationale provided in his prior Decision and Order, the administrative law judge found the evidence of record as whole established entitlement to benefits under Part 718. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to establish good cause for the late submission of the medical report of Dr. Dittman pursuant to Section 725.456(b)(2), erred in failing to determine whether claimant's condition had worsened in finding a material change in conditions established pursuant to Section 725.309(d) and erred in finding claimant entitled to benefits under Part 718. Neither claimant or the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has responded to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer contends that the administrative law judge erred in finding that employer failed to establish good cause for the late submission of the medical report of Dr. Dittman

pursuant to Section 725.456(b)(2). The hearing in the instant case was scheduled for, and held on, October 17, 1996, so that the 20-day deadline for the submission of evidence pursuant to Section 725.456(b) was September 27, 1996, *see* 20 C.F.R. §725.456(b)(1)-(2). Employer filed a motion for an extension of time with the administrative law judge on August 16, 1996, on the ground that the first available date that Dr. Dittman could examine claimant was September 24, 1996, Employer's Exhibits 3, 8. Employer argued at the hearing that the delay in scheduling Dr. Dittman's examination was because claimant did not respond until August 16, 1996, to a January, 1996, request for production of documents propounded by employer, which employer wished to provide to Dr. Dittman for review in conjunction with his examination, Hearing Transcript at 29.[2] Employer eventually submitted Dr. Dittman's report, dated October 2, 1996, on October 10, 1996, *see* Employer's Exhibit 12, a week before the hearing, but after the 20-day deadline. At the hearing , the administrative law judge stated that "I didn't hear good cause as to why I should excuse the late filing" of Dr. Dittman's report and, therefore, determined that it should be stricken from the record, Hearing Transcript at 30. On appeal, the Board agreed with employer's contention that the administrative law judge's summary finding appeared arbitrary and did not comply with the APA, as he did not provide a complete rationale for his determination, *Brzostowski*, BRB No. 97-1159 BLA at 2-3.

On remand, at issue herein, the administrative law judge held that employer did not take all action available to it in order to avoid the necessity of the late submission of Dr. Dittman's report. Decision and Order On Remand at 1-2. The administrative law judge noted that employer took no action from its January, 1996, request to claimant for the production of documents until claimant responded in August, 1996, when employer then scheduled Dr. Dittman's examination. The administrative law judge stated that employer could have motioned to compel claimant's compliance with its request to claimant for the production of documents at any time after the appropriate time period governing discovery response and/or, failing compliance with any order issued compelling response, could have moved for sanctions, including the exclusion of any documents not produced by claimant. Thus, the administrative law judge held that employer's inaction for six to seven months after its request to claimant for the production of documents "disqualifies" employer from establishing good cause for the late submission of the medical report of Dr. Dittman pursuant to Section 725.456(b)(2).

[2]The record contains a medical report from Dr. Kraynak dated January 17, 1996, Director's Exhibit 6, which the administrative law judge ultimately relied on, in part, in awarding benefits.

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 20 days before the hearing, *see* 20 C.F.R. §725.456(b)(1); *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). Pursuant to 20 C.F.R. §725.456(b)(2), the administrative law judge may admit, at his discretion, documentary evidence not submitted to the district director and not exchanged by the parties within 20 days before 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, *see* 20 C.F.R. §725.456(b)(2); *Miller, supra; Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). In addition, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that due process and the APA, *see* 5 U.S.C. §556(d), as implemented by 20 C.F.R. §725.455(c), require an opportunity for rebuttal where it is necessary to the full presentation of a party's case, *see Miller, supra*; *see also* 20 C.F.R. §725.456(b)(3).

Employer contends that the administrative law judge denied employer's due process right to rebuttal under the APA and the holding of the Third Circuit in *Miller* by excluding Dr. Dittman's report, which rebuts the opinion relied on by the administrative law judge in awarding benefits from Dr. Kraynak. We agree. The Third Circuit Court held in *Milller* that pursuant to 5 U.S.C. §556(d), all parties to a hearing must have the opportunity to fully present their case by way of argument, proof, and cross-examination as may be required for a full and true disclosure of the facts and that this principle may not be circumvented by a restrictive application of the 20-day rule under Section 725.456(b)(2) so as to preclude rebuttal evidence, *see* 5 U.S.C. §556(d)*; Miller, supra*. The Court held that by excluding a physician's report submitted by the employer in that case after the 20-day deadline, the employer's due process rights were violated where the administrative law judge provided no opportunity for a response to medical evidence which was relied upon for an award of benefits, *see Miller, supra*. Thus, the Court held that good cause was shown for employer's failure to submit a medical report in accordance with the 20-day deadline, *id.*

Consequently, by excluding Dr. Dittman's report, but relying upon Dr. Kraynak's opinion on the merits, the administrative law judge in this case failed to provide employer an adequate opportunity to respond to or rebut Dr. Kraynak's opinion, which was necessary to the full presentation of employer's case, in advance of the administrative law judge's determination on the merits, as is required by due process under the APA, *see* 5 U.S.C. §556(d), as implemented by 20 C.F.R. §725.455(c)*; Miller, supra*; *see also* 20 C.F.R. §725.456(b)(3). We vacate the administrative law judge's award of benefits, therefore, and remand the case to the administrative law judge to provide employer an opportunity to respond to Dr. Kraynak's opinion and, subsequently, for the administrative law judge's reconsideration of the duplicate claim on the merits pursuant to Section 725.309(d) and Part

718.[3]

Finally, in order to avoid repetition of error on remand, we address employer's contention that the administrative law judge did not follow the Board's prior remand instructions and determine whether the newly submitted evidence establishes that claimant's condition has worsened in finding a material change in conditions established under Section 725.309(d). In order to establish a material change in conditions under Section 725.309(d) in accordance with the standard enunciated in *Swarrow*, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, *see Swarrow*, *supra*. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change, *id*. Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits, *id*.

Subsequent to the issuance of the Board's prior Decision and Order, the Board held that the standard enunciated by the Third Circuit in *Swarrow* does not require the administrative law judge to explain how the newly submitted evidence is qualitatively different from the previously submitted evidence, *i.e.*, that it establishes that claimant's condition has worsened, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, *see Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-20 (1999). Thus, inasmuch as the Board must apply the law in effect at the time of its decision, *see Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-147 (1989), we reject employer's contention that the administrative law judge erred in not determining whether the newly submitted evidence establishes that claimant's condition has worsened in finding a material change in conditions established under Section 725.309(d).

[3]Inasmuch as we vacate the administrative law judge's award of benefits and remand the case to the administrative law judge to provide employer an opportunity to respond to Dr. Kraynak's opinion, we need not address employer's contentions as to the administrative law judge's findings on the merits based on the record as it currently stands under Sections 718.202(a) and 718.204(b), (c).

Accordingly, the Decision and Order On Remand and Order denying reconsideration of the administrative law judge awarding benefits is vacated and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge