BRB No. 09-0741 BLA

WAYNE E. KOUGH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THOMAS J. SMITH, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 07/22/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.[1]

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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.

[1] Ms. Glagola is a lay representative.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2009-BLA-5555) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed, on April 24, 2007, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] The case was set for hearing on October 21, 2008, at which time claimant submitted a medical report from Dr. Rasmussen dated September 9, 2008, and a medical report from Dr. Begley dated September 23, 2008. These reports were sent with employer's counsel on September 26, 2008, twenty-six days prior to the hearing. At the hearing, employer requested that it be given the opportunity to rebut claimant's evidence with a post-hearing examination of claimant by Dr. Kaplan, citing *North American Coal Company v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989) and *Shedlock v. Bethlehem Mines Corporation*, 9 BLR 1-195 (1986), *aff'd on recon*, 9 BLR 1-236 (1987) (*en banc*). The administrative law judge deferred a ruling and asked for the parties to submit post-hearing briefs on the issue. Thereafter, the administrative law judge issued an "Order Limiting Employer's Rebuttal Evidence to Submission of Supplemental Medical Reports and Disallowing the December 5, 2008 Examination Scheduled with Dr. Kaplan." Order dated November 6, 2008. Employer requested reconsideration, which was denied by the administrative law judge. Order dated November 19, 2008. Thereafter, the administrative law judge issued his Decision and Order awarding benefits on June 30, 2009. The administrative law judge credited claimant with twenty-five years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

[2] By Order dated May 4, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Kough v. Thomas J. Smith, Inc.*, BRB No. 09-0741 BLA (May 4, 2010) (unpub. Order). Claimant and the Director, Office of Workers' Compensation Programs (the Director), have responded and assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.

On appeal, employer does not raise specific error with regard to the administrative law judge's credibility findings or his award of benefits pursuant to 20 C.F.R. Part 718. Rather, employer asserts that the administrative law judge erred in denying employer's request to have claimant reexamined in rebuttal to medical reports submitted by claimant just prior to the requirement imposed by 20 C.F.R. §725.456(b)(2), which regulation states, in part, that "any documentary material, including medical reports, which was not submitted to the district director, may be received into evidence subject to the objection of any parity, if such evidence is sent to all parties at least [twenty] days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(2). Employer maintains that the administrative law judge's evidentiary ruling deprived it of its right to submit rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii), and of its right to a full and fair hearing. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a brief, urging the Board to affirm the administrative law judge's evidentiary ruling and award of benefits.

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

The administrative law judge specifically ruled in his November 6, 2008 Order that employer was entitled to submit rebuttal evidence in the form of a supplemental report by Dr. Fino; or, in the alternative, have Dr. Kaplan review the evidence of record and prepare a report. The administrative law judge explained:

> Having considered both parties['] arguments, I find that [e]mployer is entitled to submit rebuttal evidence in response to the reports of Drs. Begley and Rasmussen which were exchanged with [e]mployer just prior to the [twenty-]day evidentiary deadline. However, I agree with [c]laimant that an additional medical examination is not appropriate rebuttal. Employer had the opportunity to examine [claimant] prior to the evidentiary deadline, and has not offered persuasive argument[s] as to why an entire examination is required in order for [e]mployer to rebut the reports of Drs. Begley and Rasmussen. In fact, [e]mployer argues that the case of *North American Coal* [*Co.*], 870 F.2d 948 (3d Cir. 1989) is "strikingly similar" to this case, but in *North American Coal*, the rebuttal

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

> evidence offered by Employer was merely a report from a physician which critiqued the reports submitted by Claimant. I think that the same rebuttal is appropriate in this case.

Order dated November 6, 2008 at 2.

Employer asserts on appeal that the administrative law judge's ruling has deprived it of the right to a full and fair hearing in this case. In support of its position, employer principally relies on the cases of *Shedlock* and *Miller*,[4] to argue that it was entitled to rebut claimant's evidence by having claimant reexamined. The Director asserts that "nothing in the evidence limiting rules suggests that a new medical examination is permissible 'rebuttal' to an opposing party's eleventh-hour medical report." Director's Letter Brief at 2. The Director explains that the "regulations at 20 C.F.R. §725.414(a)(3)(ii) address the development of evidence on rebuttal but do not specifically provide for rebuttal of medical opinion evidence." *Id*. The Director maintains that "if a party submits an admissible medical report, the opposing party, pursuant to 20 C.F.R. §725.414(a), may have its doctor(s) review and respond to that report," but, in the absence of good cause, there is no right to have a new examination or a review of the evidence by a third physician. *Id*., citing *J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co*., 24 BLR 1-78, 1-86-87 (2008).

We reject employer's argument and conclude that the administrative law judge acted within his discretion in rendering his evidentiary ruling. Although *Shedlock*

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[4] In *Shedlock v. Bethlehem Mines Corporation*, 9 BLR 1-195 (1986), *aff'd on recon*, 9 BLR 1-236 (1987) (*en banc*), the claimant timely submitted a medical report of an examination performed approximately fifty days prior to the hearing. *See Shedlock*, 9 BLR at 1-200. In response, employer had the claimant examined by a different doctor eighteen days before the hearing. *Id*. The miner objected to the admission of the second examination report, citing the twenty-day rule at 20 C.F.R. §725.456(b)(2). Employer's evidence was not admitted into the record. *Id*. On appeal, the Board held that claimant's submission of a medical examination report "just prior to the deadline imposed by the [twenty]-day rule for submitting documentary evidence into the record, coupled with the administrative law judge's refusal to allow employ the opportunity to respond to the claimant's introduction of this 'surprise' evidence, constituted a denial of employer's due process right to a fair hearing." *Shedlock*, 9 BLR at 1-200. The Third Circuit, in *North American Coal Co. v. Miller*, 870 F.2d 948 (3rd Cir. 1989), has also recognized that "due process as incorporated into the Administrative Procedure Act requires an opportunity for rebuttal where it is necessary to the full presentation of the case." *Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29; *see also Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990).

requires that employer be given an opportunity to respond to evidence submitted immediately prior to the twenty-day requirement imposed by 20 C.F.R. §725.456, employer's opportunity to respond does not include an automatic right to have claimant reexamined. *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47 (1990) (*en banc*). Rather, a determination as to whether an additional examination is required rests within the sound discretion of the administrative law judge, based on his or her review of the evidentiary submissions of record. *See generally Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989) (*en banc*).

Contrary to employer's assertion, unlike the facts of this case, the Third Circuit in *Miller* was presented with a situation where an administrative law judge provided no opportunity to the employer to respond to evidence that was timely submitted by the claimant on the eve of the twentieth day before the hearing. *See Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29. The Third Circuit held that, by refusing to permit the employer to develop any responsive evidence, the administrative law judge violated the employer's due process right to a full and fair hearing. *Id*. The Third Circuit, however, did not specifically address, in *Miller*, whether the employer had the right to have the claimant reexamined. *Id*. As the administrative law judge noted in his November 6, 2008 Order, the rebuttal evidence offered by employer in *Miller*, and improperly disallowed, "was merely a report from a physician which critiqued the reports submitted by Claimant." Order dated November 6, 2008 at 2.

In this case, the administrative law judge reasonably found that "[e]mployer had the opportunity to examine [claimant] prior to the evidentiary deadline, and has not offered persuasive argument[s] as to why an entire examination is required in order for [e]mployer to rebut the reports of Drs. Begley and Rasmussen." Order dated November 6, 2008 at 2. Employer has also failed to demonstrate prejudice with the evidentiary ruling, insofar as the administrative law judge specifically indicated that he would consider the March 26, 2008 examination by Dr. Fino, obtained by employer, to be contemporaneous with the September 12, 2008 examination by Dr. Begley, and that "neither will be considered more recent." Order dated November 19, 2008 at 1.

We conclude that the administrative law judge satisfied the requirements of *Shedlock*, insofar as he gave employer the opportunity to respond to the medical reports of Drs. Begley and Rasmussen by allowing employer to submit rebuttal evidence in the form of a supplemental report from Dr. Fino, responding to the reports of Drs. Begley and Rasmussen, or by allowing employer to have Dr. Kaplan review the evidence of record and provide a report in response. Order dated November 6, 2008 at 2. The administrative law judge reasonably found that "an additional medical examination is not appropriate rebuttal" under the facts of this case. *Id*. at 2; *see Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29; *Owens*, 14 BLR at 1-47; *Clark*, 12 BLR at 1-153; *Shedlock*, 9 BLR at 1-200. Thus, because the administrative law judge has discretion to resolve

evidentiary issues, and as there has been no abuse of discretion shown with regard to the administrative law judge's refusal to grant employer's request to have claimant reexamined, we affirm the administrative law judge's evidentiary ruling and his award of benefits.[5] *Clark*, 12 BLR at 1-153; *Shedlock*, 9 BLR at 1-200.[6]

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

[5] Because we affirm the administrative law judge's award of benefits, it is not necessary that we address claimant's argument that Employer's Petition for Review and brief were untimely filed. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Based on our review of the record, and the briefs filed by claimant and the Director, and because we affirm the administrative law judge's award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).