BRB No. 98-1395 BLA

PAUL A. HUMPHREY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CEDAR COAL COMPANY	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Sean Harter, Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1873) of Administrative Law Judge Daniel F. Sutton 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). Claimant's initial application for benefits filed on March 21, 1973 was denied on March 14, 1979 by the Social Security Administration, which then forwarded the claim to the Department of Labor where it was again denied. Director's Exhibit 30. Claimant's second application filed on

March 17, 1987 was finally denied by the Department of Labor on September 4, 1987. Director's Exhibit 31. On March 26, 1996, claimant filed the present application for benefits which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d).

The administrative law judge accepted employer's concession of thirty-four years of coal mine employment and the parties' stipulation that employer is the responsible operator, and admitted into the record a post-hearing medical report submitted by claimant. The administrative law judge found that the medical evidence developed since the previous denial demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309(d) by establishing that claimant now suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Considering the merits of entitlement, the administrative law judge found that the weight of the record evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), (b). Accordingly, he awarded benefits.

On appeal, employer contends that it was denied due process when the administrative law judge permitted claimant to develop post-hearing evidence. Employer also argues that the administrative law judge made several errors in his findings of fact and in his application of the law in awarding benefits. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, onset, and pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

To assess employer's contention that it was denied due process, it is useful to discuss the chronology of the development of the record. Approximately two months after the claim was filed, the Department of Labor provided claimant with a pulmonary evaluation by Dr. Daniel, who diagnosed chronic obstructive pulmonary disease (COPD) due to smoking, with a moderate pulmonary impairment. Director's Exhibit 11. Based on this evaluation, the Department of Labor denied the claim. Director's Exhibit 15. Subsequently, claimant requested a hearing. Director's Exhibit 18. In the meantime, claimant submitted the medical reports of Drs. Rasmussen and Cohen, and employer submitted the report of Dr. Zaldivar. Director's Exhibits 25, 26; Claimant's Exhibit 2.

As of January 7, 1998, when the case was set for hearing on March 25, 1998, these were the new medical opinions of record. The major points of conflict between them were fairly clear, and involved the diagnostic significance of claimant's pulmonary function and blood gas studies. Dr. Daniel believed that claimant does not have pneumoconiosis but rather smoking-related COPD, based in part on Dr. Daniel's finding of ventilatory obstruction on claimant's pulmonary function study. Director's Exhibit 11. By contrast, Dr. Rasmussen opined that claimant suffers from pneumoconiosis based upon a positive chest x-ray, mild ventilatory restriction on pulmonary function testing, and the presence of an impairment in blood oxygenation when claimant exercises. Director's Exhibit 25. Dr. Zaldivar, however, concluded that claimant does not have pneumoconiosis, that his restrictive ventilatory impairment is related to his prior heart surgery, and that claimant's drop in blood oxygen with exercise is due to heart disease. Director's Exhibit 26. Subsequently, Dr. Cohen reviewed the medical evidence of record and stated that Dr. Zaldivar was mistaken in attributing claimant's drop in blood oxygen to heart disase, and he concluded that claimant's ventilatory restriction coupled with hypoxemia on exercise is consistent with intrinsic lung disease such as pneumoconiosis. Claimant's Exhibit 2.

On March 5, 1998, exactly twenty days before the scheduled hearing, employer submitted and served on claimant's counsel a consultation report by Dr. Fino. Employer's Exhibit 2. In opining that pneumoconiosis was absent, Dr. Fino raised a medical issue not addressed by any of the other physicians. Specifically, Dr. Fino opined that claimant's abnormal blood oxygenation with exercise was due to obesity, and that therefore there was “no evidence of an oxygen transfer impairment related to coal mine dust inhalation.” Employer's Exhibit 2 at 8.

At the hearing, when employer proffered Dr. Fino's report, claimant's counsel requested time to respond to Dr. Fino's assertion that obesity was the cause of claimant's exercise hypoxemia by having Dr. Fino's report reviewed by one of claimant's physicians. Hearing Transcript at 8, 32-33, 35. After hearing argument

from both parties, the administrative law judge ruled that given the nature and timing of Dr. Fino's report, "an opportunity for rebuttal is warranted." Hearing Transcript at 33. Accordingly, over employer's objection, the administrative law judge held the record open for thirty days for claimant to submit a responsive report, allowing an additional thirty days thereafter for post-hearing briefs. Hearing Transcript at 33-34.

Claimant chose to have Dr. Fino's report reviewed by Dr. Rasmussen, who disagreed with Dr. Fino's interpretation of claimant's exercise blood gas study. Claimant's Exhibit 3. Dr. Rasmussen stated that while "obesity may result in abnormal resting blood gases . . . obesity does not produce hypoxia during exercise. In fact, the usual pattern of gas exchange in obese subjects is improvement in gas exchange during exercise." Claimant's Exhibit 3 at 2. In Dr. Rasmussen's view, the worsening of claimant's blood gas exchange with exercise ruled out obesity as the cause and "implie[d] that the patient has interstitial type lung disease consistent with coal workers' pneumoconiosis." Claimant's Exhibit 3 at 3.

In admitting Dr. Rasmussen's post-hearing report into the record, the administrative law judge reaffirmed his ruling that "considering the nature of Dr. Fino's report and the timing of its submission, due process requires that the [c]laimant be provided with an opportunity to submit rebuttal in support of his position." Decision and Order at 3 n.4 Ultimately, in awarding benefits the administrative law judge credited Dr. Rasmussen's view of the significance of claimant's exercise blood gas studies over that of Dr. Fino. Decision and Order at 15.

Employer contends that the administrative law judge violated its due process rights by allowing claimant post-hearing rebuttal of a medical report that was timely exchanged in accordance with 20 C.F.R. §725.456(b)(1).[2] Employer's Brief at 6-7. We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989).

[2] Section 725.456(b)(1) provides that any medical evidence not submitted to the district director may be received into evidence, subject to objection by any party, if such evidence is exchanged with the other parties at least twenty days before the hearing. 20 C.F.R. §725.456(b)(1).

There is no dispute that Dr. Fino's report was submitted in compliance with the twenty-day rule. However, that is not the end of the matter, for "the administrative law judge is obliged to insure a full and fair hearing on all the issues presented." *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*). Where a party would be denied the full presentation of its case if unable to respond to evidence submitted just prior to or upon the twenty-day deadline, due process as incorporated into the Administrative Procedure Act requires the opportunity to respond.[3] *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 148-49, 16 BLR 2-1, 2-5 (4th Cir. 1991); *North American Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990); *Shedlock, supra*.

Here, a new and potentially dispositive argument regarding a critical piece of medical evidence was raised by employer exactly upon the twenty-day deadline. Up until that point, claimant had diligently developed his affirmative evidence, Director's Exhibits 11, 25; Claimant's Exhibit 2, and thus, in requesting rebuttal was not seeking to develop primary evidence under the guise of responding to Dr. Fino's report. *See Henderson*, 939 F.2d at 149, 16 BLR at 2-5 (timely submissions should not give rise to claims of unfair surprise where a party is placed at a disadvantage by its own delay in preparation). On these facts, the administrative law judge did not

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[3] Section 556(d) of the Administrative Procedure Act (APA) provides that:

> A party is entitled to present his case or defense by oral or documentary evidence, *to submit rebuttal evidence*, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5 U.S.C. §556(d)(emphasis supplied). The requirements of the APA are 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).

abuse his discretion in concluding that rebuttal was necessary for a "full and true disclosure of the facts." 5 U.S.C. §556(d); *see Henderson, supra*; *Miller, supra*; *Shedlock, supra*. Therefore, we reject employer's contention that its due process rights were violated by the administrative law judge's decision to allow claimant to develop post-hearing evidence.

We also reject employer's contention that the administrative law judge violated its due process rights by crediting as "uncontradicted" Dr. Rasmussen's post-hearing report. Employer's Brief at 7. The administrative law judge did not simplistically credit Dr. Rasmussen's report as the last word, but rather found Dr. Fino's view regarding the non-respiratory cause of claimant's blood oxygenation abnormality "called into question by Dr. Rasmussen's uncontradicted statement that obese patients typically show improvement in gas exchange values with exercise," not worsening, as occurred when claimant exercised. Decision and Order at 15; Claimant's Exhibit 3. Substantial evidence supports the administrative law judge's finding, as Dr. Fino simply asserted that claimant's drop in blood oxygen with exercise was due to obesity without offering a supporting explanation to account for the specific pattern of claimant's blood gas impairment, whereas Dr. Rasmussen offered such an explanation. Employer's Exhibit 2. Since the administrative law judge permissibly assessed the quality of the physicians' reasoning, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536, 21 BLR 2-323, 2-335, 2-341 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997), we reject employer's contention.[4]

Employer next contends that the administrative law judge erred by relying upon the reports of Drs. Rasmussen and Cohen to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) because, employer asserts, their opinions are undocumented and unreasoned. Employer's Brief at 10. This contention lacks merit. The administrative law judge carefully assessed the adequacy of these two reports in response to the arguments employer raised in its brief to the administrative law judge. Decision and Order at 15-16. As the administrative law judge found, Dr. Rasmussen's diagnosis of pneumoconiosis did not rest solely upon a chest x-ray and coal mine employment history, but was based also upon an examination, symptoms, pulmonary function and blood gas testing, smoking history, and review of medical records. Decision and Order at 8-9, 15; Director's Exhibit 25; Claimant's Exhibit 3; *see Hicks, supra*; *Akers, supra*. Further,

[4] We also reject employer's contention that the administrative law judge ignored Dr. Fino's qualifications in crediting Dr. Rasmussen. Employer's Brief at 13. The administrative law judge weighed all of the competing medical opinions in light of the physicians' qualifications. *See Hicks, supra*; *Akers, supra*.

the administrative law judge within his discretion found that Dr. Cohen adequately explained his diagnosis and that, contrary to employer's contention, Dr. Cohen's opinion was internally consistent. Decision and Order at 15-16; *see Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993)(administrative law judge exercises broad discretion in determining whether a medical opinion is reasoned); *Clark*, 12 BLR at 1-155 (same). Therefore, we reject employer's contention.

Employer asserts that the administrative law judge erred by discounting Dr. Daniel's diagnosis of COPD as based upon an invalid pulmonary function study when other physicians of record also relied upon invalid pulmonary function studies. Employer's Brief at 11. This contention lacks merit, as the administrative law judge did not selectively discredit Dr. Daniel's opinion on this basis. Except for Dr. Daniel, who merely supplied brief responses on the CM-988 form, all of the physicians discussed the fact that claimant's pulmonary function studies were unreliable and thus of limited value. Director's Exhibits 25, 26; Claimant's Exhibit 2; Employer's Exhibit 2. Dr. Daniel concluded that claimant's June 5, 1996 pulmonary function study revealed a moderate restrictive defect and a "severe obstructive defect." Director's Exhibit 11 at 3. Consequently, he diagnosed COPD due to smoking. Director's Exhibit 11 at 4. However, no other examining physician detected obstruction on pulmonary function testing, and no other physician diagnosed COPD. In this context, the administrative law judge permissibly accorded "little weight" to Dr. Daniel's diagnosis as unsupported by that of any other physician and as apparently "based on evidence of an obstructive impairment obtained from an invalid pulmonary function study which was not reproduced in the subsequent studies conducted by either Dr. Rasmussen or Dr. Zaldivar."[5] Decision and Order at 13; *see Hicks, supra*; *Akers, supra*; *Clark, supra*. Therefore, we reject employer's contention.

Employer also alleges that in finding the existence of pneumoconiosis established the administrative law judge erred by deferring to Dr. Cohen as more highly qualified than Dr. Zaldivar to determine the cause of claimant's abnormal exercise blood gases. Employer's Brief at 12. Dr. Zaldivar is Board-certified in Internal Medicine, Pulmonary Disease, and Sleep Disorders, and is a B-reader.

[5] While acknowledging the limited diagnostic value of claimant's pulmonary function studies, Drs. Rasmussen and Zaldivar interpreted them as revealing restriction. Director's Exhibit 25, 26. In contrast to Dr. Daniel, the other physicians of record apparently viewed claimant's prior one-half-pack-per-day smoking habit as a minor factor, since it ended in 1977. Director's Exhibits 25, 26; Claimant's Exhibits 2, 3; Employer's Exhibit 2.

Employer's Exhibit 2. Dr. Cohen is Board-certified in Internal Medicine, Pulmonary Disease, Critical Care, and as a Medical Examiner, and is an instructor in Advanced Cardiac Life Support. Claimant's Exhibit 2. In concluding that pneumoconiosis was absent, Dr. Zaldivar attributed claimant's drop in exercise blood oxygen to coronary artery disease and not a respiratory impairment. Director's Exhibit 26. Dr. Cohen reviewed Dr. Zaldivar's report and disagreed. He stated that coronary artery disease would only produce abnormal blood gases if a patient were suffering from congestive heart failure with pulmonary edema, which claimant does not have. Claimant's Exhibit 2. Since the issue to be resolved was the role of coronary artery disease, the administrative law judge permissibly deferred to Dr. Cohen "in view of his superior qualifications, particularly his certification in advanced cardiac life support." Decision and Order at 14. Since the administrative law judge reasonably concluded that Dr. Cohen's qualifications were more relevant to the issue in dispute, *see Hicks, supra*; *Akers, supra*, we reject employer's argument.

Employer next contends that the administrative law judge erred by finding Dr. Fino's opinion to be hostile to the Act. Employer's Brief at 14. This dispute also relates to the clinical significance of claimant's abnormal exercise blood gas studies. As another reason for concluding that claimant does not have pneumoconiosis, Dr. Fino opined that since claimant left mining in 1984, any drop in his exercise blood oxygen should have been seen much earlier if pneumoconiosis were its cause. Employer's Exhibit 2 at 7. The administrative law judge interpreted Dr. Fino's comment as expressing the assumption that pneumoconiosis would not be expected to progress absent further dust exposure, and therefore discounted Dr. Fino's opinion, in part, for that reason. Decision and Order at 14-15.

Even assuming *arguendo* that Dr. Fino did not rely on a premise at odds with the Act and thus should not have been discounted on that basis, the administrative law judge provided alternative, permissible reasons for discounting Dr. Fino's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983)(Miller, J., dissenting). First, substantial evidence supports the administrative law judge's finding that Dr. Fino "cite[d] no studies to support [the] assumption . . ." that claimant's blood gas impairment would have had to manifest itself earlier to be diagnostic of pneumoconiosis. Decision and Order at 14; Employer's Exhibit 2. It is the administrative law judge's duty to assess the adequacy of the documentation and reasoning provided by a physician. *See Hicks, supra*; *Akers, supra*; *Clark, supra*. Second, the administrative law judge clearly stated that "an additional reason" for discounting Dr. Fino's report was his unpersuasive view that claimant's drop in blood oxygenation with exercise was due to obesity. Decision and Order at 15; *see* discussion, *supra*. Therefore, we reject employer's contention, and we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Employer additionally contends that claimant has not established total disability due to pneumoconiosis pursuant to Section 718.204 or a material change in conditions pursuant to Section 725.309(d). Employer's Brief at 14-17. However, employer merely cites favorable evidence and repeats its arguments that the opinions credited by the administrative law judge are unreasoned. As employer alleges no other error with respect to the administrative law judge's analysis, we affirm the administrative law judge's findings pursuant to Sections 725.309(d) and 718.204(c), (b). *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge