BRB No. 05-0740 BLA

ANNA KOSCHOFF (Widow of STEPHEN KOSCHOFF)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 06/08/2006
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

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

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

Rita Roppolo (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (05-BLA-5191) of Administrative Law Judge Paul H. Teitler (the administrative law judge) denying benefits on a survivor's 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).[2] The administrative law judge

[1]Claimant is the widow of the miner, Stephen Koschoff.

[2]The Department of Labor (the DOL) has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended

adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[3] The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. The administrative law judge, however, found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge violated her right to due process of law by allowing the Director, Office of Workers' Compensation Programs (the Director), to submit Dr. Sherman's report into the record post-hearing without rendering a finding of good cause. Claimant also contends that the administrative law judge violated her right to due process of law by denying her request to submit rebuttal and rehabilitative evidence in response to the Director's post-hearing submission of Dr. Sherman's report. Further, claimant contends that the administrative law judge erred in relying on Dr. Sherman's report, in light of the doctor's reliance on hospital records that are not in the record. Lastly, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The Director responds by letter brief, urging affirmance of the administrative law judge's discrediting of Dr. Kraynak's opinion at Section 718.205(c).[4] The Director urges

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regulations.

[3]The miner filed a claim on March 9, 1981. On January 20, 1988, Administrative Law Judge Lawrence E. Gray issued a Decision and Order denying benefits. Judge Gray denied benefits in the miner's claim because the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Judge Gray noted that the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis. The Board affirmed Judge Gray's denial of benefits. *Koschoff v. Director, OWCP*, BRB No. 88-0567 BLA (Apr. 24, 1990)(unpub.). The miner filed a request for modification on March 29, 1991. On September 7, 1993, Administrative Law Judge Paul H. Teitler (the administrative law judge) issued a Decision and Order denying benefits in the miner's claim. The administrative law judge denied the miner's claim because the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000) and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Because the miner did not pursue this claim any further, the administrative law judge's denial in the miner's claim became final. The miner died on July 16, 2003. Director's Exhibits 2, 7. Claimant filed a survivor's claim on September 17, 2003. Director's Exhibit 2.

[4]Claimant also filed a brief in reply to the Director's response brief, reiterating her prior contentions. 20 C.F.R. §802.213. We accept claimant's reply brief as part of the record. 20 C.F.R. §802.217(a).

the Board, however, to vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge to allow claimant to submit rebuttal evidence in response to Dr. Sherman's report.[5]

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).

The pertinent procedural history of this case is as follows: In a December 29, 2004 Notice of Hearing, the administrative law judge advised the parties that a hearing in the case was scheduled for March 15, 2005. Claimant, in a letter dated January 18, 2005, notified the administrative law judge that a deposition of Dr. Kraynak was scheduled for February 18, 2005. In a subsequent letter dated January 26, 2005, claimant notified the administrative law judge that Dr. Kraynak's deposition had to be rescheduled, and requested an extension of time until thirty days following the date of the deposition to submit the transcript. In a February 7, 2005 Order, the administrative law judge granted claimant's request for an extension of time of thirty days from the date of the deposition to submit the transcript. The administrative law judge did not render a finding of good cause for allowing claimant to submit this medical evidence.

In a Motion dated March 1, 2005, the Director requested an extension of time to file a medical report less than twenty days before the March 15, 2005 hearing. The Director stated that he sought the opportunity to rebut both the medical evidence received from claimant on February 23, 2005, which was the last day for the submission of evidence under the twenty day rule, and Dr. Kraynak's February 25, 2005 deposition, which was taken less than twenty days before the date of the hearing. The Director additionally stated that the transcript for Dr. Kraynak's deposition was not yet available. In a March 3, 2005 Order, the administrative law judge granted the Director's request for an extension of time to file medical evidence outside of the time prescribed by the twenty day rule. The administrative law judge did not render a finding of good cause for allowing the Director to submit medical evidence in this Order.

Subsequent to the administrative law judge's issuance of the March 3, 2005 Order, claimant filed a response, dated March 4, 2005, to the Director's request for an extension of time to submit medical evidence. Claimant stated that although the Director may not have

[5]Because no party challenges the administrative law judge's findings that the evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

had the transcript of Dr. Kraynak's February 25, 2005 deposition, the Director agreed to that date for the deposition, participated in the deposition, and was aware of Dr. Kraynak's testimony in the deposition. In a letter dated March 8, 2005, claimant requested that the administrative law judge reconsider his March 3, 2005 Order for the following three reasons: 1.) "the Director's Motion [for enlargement of time to submit medical evidence] fails to indicate any contact with [c]laimant's counsel to obtain the [c]laimant's position and does not include the [c]laimant's position in that Motion;" 2.) the rules governing the time period for responses to motions, *see* 29 C.F.R. §18.6(b), allow parties a period of ten days after a motion is served to respond to it; and 3.) the administrative law judge's order did not allow claimant ample opportunity to respond to the Director's request because the order was issued two days after the motion.

During the March 15, 2005 hearing, the Director noted that the administrative law judge had previously granted his request for an extension of time to file medical evidence. Hearing Transcript at 5. The Director also noted that he was still waiting for the transcript of Dr. Kraynak's February 25, 2005 deposition[6] and he wanted to have the recently obtained medical evidence produced by Dr. Kraynak reviewed by his medical expert for the purpose of rendering an opinion on the cause of the miner's death. *Id*. Hence, the Director requested that the administrative law judge allow him an extension of time to submit this evidence into the record. *Id*. Based on the Director's reasons for not submitting this medical evidence at least twenty days before the hearing, the administrative law judge found that the Director established good cause for the post-hearing submission of this evidence. *Id*. at 7. Consequently, the administrative law judge granted the Director's request and ordered the Director to submit a post-hearing medical report into the record by April 14, 2005. *Id*. at 6-7. In addition, the administrative law judge ordered the Director to submit closing arguments by April 20, 2005. *Id*.

During the hearing on March 15, 2005, claimant requested an opportunity to submit evidence in rebuttal of the evidence that the Director would be allowed to submit post-hearing. Hearing Transcript at 8. However, the administrative law judge denied claimant's request to submit rebuttal evidence, on the basis that he could not find good cause for the admission of additional evidence into the record. *Id*. at 8-9. The administrative law judge specifically stated:

> Sorry, I can't give you that. The record will be closed. With your submission from Dr. Kraynak, I found good cause to examine Dr. Kraynak's record and that's as far as I can go with this case. I can't admit any additional documents.

[6]Claimant's counsel stated that the transcript of Dr. Kraynak's February 25, 2005 deposition was received by his office on March 14, 2005, but his secretary mailed it out, rather than having him bring it to the hearing. Hearing Transcript at 6.

Id. Further, in response to claimant's request for a reason why he denied her request to submit rebuttal evidence, the administrative law judge stated, "[b]ecause the Board says that I have to go with the record as it exists, unless I can find good cause for [the] submission of additional documents." *Id*. at 9. Nonetheless, the administrative law judge advised claimant that a motion to submit medical evidence in rebuttal to the Director's medical evidence could be filed after she received that evidence. *Id*.

By letter dated April 18, 2005, the Director requested an extension of time of two weeks from April 14, 2005, or until April 28, 2005, to submit a post-hearing medical report that he asserted was delayed by a change of counsel in this case. The Director also requested an extension of time of two weeks from April 29, 2005, or until May 4, 2005, for the filing of the parties' closing arguments. In an April 19, 2005 Order, the administrative law judge granted the Director's request for an extension of time for the parties to file closing arguments.[7] However, the administrative law judge did not address the Director's request for an extension of time to submit a post-hearing medical report. Nonetheless, by cover letter dated April 27, 2005, the Director submitted Dr. Sherman's report. Director's Exhibit 22. In addition, by cover letter dated May 4, 2005, the Director filed his closing brief in this case.

By cover letter dated May 13, 2005, claimant filed a request for time to submit rebuttal and rehabilitative evidence. Specifically, claimant requested an opportunity to submit rebuttal evidence in response to the Director's post-hearing submission of Dr. Sherman's report and to submit a rehabilitative report by Dr. Kraynak. In a response dated May 18, 2005, the Director opposed claimant's request for time to submit rebuttal and rehabilitative medical evidence on the following grounds: 1.) claimant waited sixteen days after receiving the Director's medical evidence to request time to submit rebuttal and rehabilitative medical evidence; 2.) claimant waited nine days after the deadline for the submission of briefs to request time to submit rebuttal and rehabilitative medical evidence; 3.) claimant's reliance on 20 C.F.R. §725.456(b)(4) is misplaced; and 4.) due process does not require that the record be held open. By cover letter dated May 25, 2005, claimant submitted to the administrative law judge Dr. Kraynak's May 20, 2005 report as rehabilitative evidence. In a May 25, 2005 Order, however, the administrative law judge denied claimant's request for an extension of time to submit rebuttal and rehabilitative evidence. Hence, Dr. Kraynak's May 20, 2005 report was excluded from the record.

Claimant initially contends that the administrative law judge violated her right to due process of law by allowing the Director to submit Dr. Sherman's report into the record post-hearing, without rendering a finding of good cause. Section 725.456(b)(3) provides:

Documentary evidence, which is not exchanged with the parties in accordance

[7]The administrative law judge noted that claimant had no objections to the Director's April 18, 2005 request for an extension of time to file closing arguments.

> with this paragraph, may be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph. If documentary evidence is not exchanged in accordance with paragraph (b)(2) of this section and the parties do not waive the 20 day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence.

20 C.F.R. §725.456(b)(3). There was no consent by claimant to allow the Director to submit late evidence into the record. Nonetheless, as discussed *supra*, the Director filed three requests for extensions of time to submit late evidence, which were granted by the administrative law judge. Although the administrative law judge did not specifically render findings of good cause to allow the Director to submit late evidence for all of the Director's requests, he explicitly found during the March 15, 2005 hearing that there was good cause to grant the Director's request to extend the time to submit post-hearing evidence. Hearing Transcript at 7. By cover letter dated April 27, 2005, the Director submitted Dr. Sherman's report. Director's Exhibit 22. In his May 31, 2005 Decision and Order, the administrative law judge noted his basis for finding good cause established, during the hearing, for granting the Director's request for an extension of time to submit post-hearing evidence, and admitted Dr. Sherman's report into the record. The administrative law judge specifically stated:

> Director requested additional time to submit an expert medical report as the Director was still awaiting the transcript from Dr. Kraynak's deposition. I found good cause existed for allowing the Director to submit expert medical reports outside of the 20-day rule pursuant to §725.456(b)(3), and granted the Director an additional 30 days for their submission. Director submitted an expert report by Dr. Michael Sherman on April 27, 2005, and Dr. Sherman's curriculum vitae on April 29, 2005. These records are herewith received into evidence as DX 22 and DX 23, respectively.

Decision and Order at 2 (footnotes omitted).

In view of the foregoing, we hold that the administrative law judge acted within his discretion in admitting Dr. Sherman's report into the record on the basis of his finding of good cause during the March 15, 2005 hearing. Consequently, we reject claimant's contention that the administrative law judge violated her right to due process of law by allowing the Director to submit Dr. Sherman's report into the record post-hearing, without rendering a finding of good cause. 20 C.F.R. §725.456(b)(3).

Claimant next contends, and the Director agrees, that the administrative law judge violated her right to due process of law by denying her request to submit rebuttal evidence in

response to the Director's post-hearing submission of Dr. Sherman's report. Claimant also contends that the administrative law judge violated her right to due process of law by denying her request to submit medical evidence to rehabilitate Dr. Kraynak's opinion. As discussed *supra*, claimant requested an extension of time to submit rebuttal and rehabilitative medical evidence during the March 25, 2005 hearing, Hearing Transcript at 8-10, and post-hearing by letter dated May 13, 2005. Specifically, claimant asked the administrative law judge to allow her to submit medical evidence in rebuttal to the Director's submission of Dr. Sherman's report and to submit Dr. Kraynak's May 20, 2005 report to rehabilitate Dr. Kraynak's prior opinions that were rebutted by Dr. Sherman's report. The administrative law judge denied both of claimant's requests.

Section 725.456(b)(4) provides that a medical report which is not made available to the parties at least twenty days before a hearing is held shall not be admitted into evidence in any case unless the hearing record is kept open for at least thirty days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. 20 C.F.R. §725.456(b)(4). In addition, Section 725.414, which, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record, provides that in rebuttal of the case presented by the opposing party, each party shall be entitled to submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii).

Contrary to the administrative law judge's finding during the hearing, neither the Board nor the pertinent regulations require the finder-of-fact to render a finding of good cause for the submission of rebuttal evidence when it does not exceed the evidentiary limitations set forth in 20 C.F.R. §725.414. 20 C.F.R. §725.414(b)(2)(ii), (b)(3)(ii), and (b)(3)(iii). Rather, the pertinent regulations provide that the claimant has a right to submit this type of evidence into the record. Thus, we hold that the administrative law judge erred in denying claimant's request for an extension of time to submit rebuttal evidence in response to the Director's post-hearing submission of Dr. Sherman's report into the record.[8] Consequently, we vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c) and remand the case for further consideration of the evidence thereunder. On remand, the administrative law judge must allow claimant to submit rebuttal and/or rehabilitative evidence in response to Dr. Sherman's report in accordance with the evidentiary limitations set forth in 20 C.F.R. §725.414.[9]

[8]We recognize that an administrative law judge has discretion not to admit rebuttal evidence submitted into the record post-hearing when a party has untimely submitted such evidence.

[9]Section 725.414 provides that following rebuttal, each party shall be entitled to

In addition, claimant contends that the administrative law judge erred in relying on Dr. Sherman's report in light of the doctor's reliance upon hospital records that were not admitted into the record. In an April 24, 2005 report, Dr. Sherman reviewed two discharge summaries from Geisinger Medical Center dated April 14, 2003 and July 15, 2003.[10] Director's Exhibit 22. Although hospital records for a respiratory, pulmonary, or related disease are not limited by the evidentiary limitations set forth in Section 725.414, none of the parties submitted the records from Geisinger Medical Center for inclusion in the record. 20 C.F.R. §725.414(a)(4). Because the regulations do not specify what is to be done with a medical report that references inadmissible evidence, *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*), the Board has held that the weight to be accorded such evidence is committed to an administrative law judge's discretion, *Brasher v. Pleasant View Mining Co.*, BLR , BRB No. 05-0570 BLA (Apr. 28, 2006); *Harris v. Old Ben Coal Co.*, BLR , BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). Thus, the administrative law judge, on remand, is instructed to address whether Dr. Sherman relied upon inadmissible evidence and, if so, the weight that should be accorded his opinion as a result of his reliance on such evidence.[11]

In sum, the administrative law judge's findings that the evidence is sufficient to

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submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." 20 C.F.R. §725.414(b)(2)(ii), (b)(3)(ii), and (b)(3)(iii).

[10]Similarly, during a February 25, 2005 deposition, Dr. Kraynak stated that he reviewed records from Geisinger Medical Center dated April 14, 2003 and July 10, 2003. Claimant's Exhibit 1. However, Dr. Kraynak was asked not to consider the hospital records in rendering his opinion with respect to whether coal workers' pneumoconiosis played a role in the miner's death. *Id*.

[11]If the administrative law judge, on remand, determines that Dr. Sherman relied upon inadmissible evidence, he has several available options for addressing Dr. Sherman's opinion, namely, excluding his report, redacting the objectionable content, asking the physician to submit a new report, and factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *Brasher v. Pleasant View Mining Co.*, BLR , BRB No. 05-0570 BLA (Apr. 28, 2006); *Harris v. Old Ben Coal Co.*, BLR , BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). We note, however, that exclusion is not a favored option because it results in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id*.

establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203 are affirmed. However, the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) is vacated and the case is remanded for further consideration of the evidence. At the outset, however, the administrative law judge, on remand, must allow claimant to submit rebuttal and/or rehabilitative evidence in response to the Director's post-hearing submission of Dr. Sherman's report, in accordance with the evidentiary limitations set forth in 20 C.F.R. §725.414. Further, the administrative law judge, on remand, must consider whether Dr. Sherman relied upon inadmissible evidence and, if so, the weight that should be accorded to his opinion as a result of his reliance on such evidence.[12]

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

SO ORDERED.

[12]In view of our decision to vacate the administrative law judge's denial of benefits and remand the case for further consideration of the evidence, we decline to address claimant's contentions at Section 718.205(c) on the merits.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge