BRB No. 98-1280 BLA

ANN M. SWINKO (Widow of JOHN SWINKO) Claimant-Petitioner v. GILBERTON COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the surviving spouse of a deceased miner, appeals the Decision and Order Denying Benefits (98-BLA-0072) of Administrative Law Judge Ralph A. Romano with respect to 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).[1] The

[1]The miner died on January 12, 1997. Director's Exhibit 3. Dr. Nair prepared the death certificate and identified pneumonia and metastatic pancreatic cancer as the immediate causes of death. *Id.*. In the portion of the death certificate labeled "Other Significant Conditions," Dr. Nair listed anthracosilicosis. *Id.*.

administrative law judge accepted the parties' stipulation to thirty-two years of coal mine employment and considered the claim, filed on April 28, 1997, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was entitled to the presumption that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further determined, however, that the evidence of record was insufficient to support a finding that pneumoconiosis or complications of pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge erred in granting employer's motion to submit the medical opinion of Dr. Levinson after the hearing and in denying claimant's request that she be permitted to submit evidence in rebuttal to Dr. Levinson's opinion.[2] Claimant also maintains that the administrative law judge did not properly weigh the evidence relevant to Section 718.205(c)(2). Employer has responded in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable 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).

With respect to the administrative law judge's decision to admit Dr. Levinson's report, claimant contends that the administrative law judge did not make a good cause finding in accordance with 20 C.F.R. §725.456(b)(2). In a Motion to Enlarge Time received by the administrative law judge on April 3, 1998, employer asked the administrative law judge for additional time within which to procure Dr. Levinson's opinion. Employer asserted that the medical evidence of record was forwarded to Dr.

[2]The administrative law judge did permit claimant to submit an affidavit by Dr. Kraynak concerning the accuracy of the transcription of Dr. Kraynak's deposition testimony, obtained on March 13, 1998. Hearing Transcript at 16.

[3]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202, 718.203, 718.205(c)(1) and 718.205(c)(3), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Levinson on December 12, 1997 for his review. Employer stated that Dr. Levinson was contacted on several occasions regarding his progress and that he indicated that due to his heavy workload, he had not yet prepared his comments. Employer contacted Dr. Levinson on March 31, 1998 and urged him to provide employer with his report by the date of the hearing, which was set for April 9, 1998. Employer then submitted the Motion to Enlarge Time.

At the hearing, which was convened on the scheduled date, employer reiterated its request for additional time within which to obtain Dr. Levinson's report. Hearing Transcript at 5. Claimant's counsel objected to employer's request, as employer did not demonstrate good cause for failure to comply with the requirement, set forth in 20 C.F.R. §725.456(b)(1), that documentary evidence be exchanged at least twenty days before the date of the hearing. Hearing Transcript at 6. Claimant's counsel asserted specifically that once employer was aware that Dr. Levinson was having a problem finding the time to prepare his report, employer should have sought out another physician. In response, employer set forth the facts reported in the Motion to Enlarge Time. *Id.*. The administrative law judge found in employer's favor, stating:

> What impresses me here is that [employer's counsel] began his efforts to do this even before I issued the Notice of Hearing. As a matter of fact about a month plus even before I issued the Notice of Hearing. So I'm going to permit – I'll give you only 30 days on this, though.

Hearing Transcript at 7. The administrative law judge's determination, that employer's sustained effort to obtain Dr. Levinson's report constituted good cause for failure to timely submit the report pursuant to Section 725.456(b)(2), fell within the broad discretion granted to him in resolving procedural issues. *See Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986); *Pendleton v. United States Steel Corp.*, 6 BLR 1-815 (1984). The administrative law judge's decision to admit Dr. Levinson's report is, therefore, affirmed.

Claimant is correct, however, in alleging that the administrative law judge was required to permit her to submit rebuttal evidence in response to Dr. Levinson's report. Section 725.456(b)(3) provides in relevant part that:

> A medical report which is not made available to the parties in accordance with paragraph (b)(1) of this section shall not be admitted into evidence in any case unless the hearing record is kept open 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)(3). In addition, the principles of due process require that a party be allowed to respond to evidence which forms an essential part of the opposing party's

case and to which the party did not have an opportunity to respond prior to the hearing.[4] *See Miller v. North American Coal Co.*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Pendleton*, *supra*. We reverse, therefore, the administrative law judge's determination that claimant was not entitled to submit rebuttal evidence in response to Dr. Levinson's opinion. On remand, the administrative law judge must reopen the record to permit claimant to respond to Dr. Levinson's report.

The remaining issues on appeal concern the administrative law judge's weighing of the medical opinions of record under Section 718.205(c)(2). In order to avoid the repetition of any error on remand, we will address claimant's allegations with respect to the administrative law judge's findings. Claimant argues that the administrative law judge failed to explain adequately his rejection of the medical opinion of Dr. Kraynak, the miner's treating physician. This contention has merit. The administrative law judge determined that Dr. Kraynak was the only physician of record who concluded that pneumoconiosis hastened the miner's death and stated that:

> In support of this opinion, Dr. Kraynak stated generally that pneumoconiosis weakened the miner and rendered him less able to ward off the carcinoma. I find Dr. Kraynak's general statement insufficient to establish the miner's death was hastened by the presence of pneumoconiosis.

Decision and Order at 14. We hereby vacate the administrative law judge's finding with respect to Dr. Kraynak's opinion, inasmuch as the administrative law judge did not consider Dr. Kraynak's statement that the miner would have had a greater capacity to withstand the pneumonia, which was one of the causes of his death, if he did not also suffer from pneumoconiosis. Director's Exhibit 3; Claimant Exhibits 5, 9 at 8-9; *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[4]In determining that claimant did not establish that pneumoconiosis was a contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2), the administrative law judge relied upon the opinion of Dr. Levinson, as corroborated by the opinion of Dr. Michos. Decision and Order at 14; Director's Exhibit 5; Employer's Exhibit 10.

Claimant also alleges that the administrative law judge erred in crediting the medical opinions of Drs. Levinson and Michos without adequate explanation.[5] Claimant asserts specifically that Dr. Michos's opinion regarding whether pneumoconiosis contributed to the miner's death lacks an adequate foundation, as he relied upon objective studies procured two years before the miner died. Based upon a review of three hospital discharge summaries and three medical reports of record, Dr. Michos stated that inasmuch as the pulmonary function study and blood gas study obtained on January 25, 1995 produced normal results, the miner's pneumoconiosis did not produce a respiratory impairment significant enough to hasten his death from metastatic pancreatic carcinoma. Director's Exhibit 5. As claimant suggests, in assessing the credibility of Dr. Michos's opinion under Section 718.205(c)(2), the administrative law judge should have rendered a finding as to whether Dr. Michos's reliance upon objective studies procured two years before the miner died affected the credibility of his opinion. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). We vacate, therefore, the administrative law judge's finding with respect to Dr. Michos's medical report. The administrative law judge must reconsider this report under Section 718.205(c)(2) on remand.

Regarding Dr. Levinson's medical report, we hold that under the circumstances of this case, the administrative law judge did not provide a sufficient rationale for his decision to credit Dr. Levinson's opinion under Section 718.205(c)(2). Pursuant to Section 718.202(a)(1), the administrative law judge found that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis. The administrative law judge further determined, based upon the fact that the preponderance of the well documented and reasoned medical opinions of record, particularly those submitted by physicians possessing superior qualifications, was negative for pneumoconiosis, that claimant did not establish the existence of the disease pursuant to Section 718.202(a)(4). The administrative law judge concluded, however, that even when weighed against the contrary probative evidence of record, the x-ray evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a). Decision and Order at 12; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

[5]Claimant is also incorrect in maintaining that the administrative law judge resolved the conflict between Dr. Kraynak's opinion and the opinions of Drs. Levinson and Michos by merely "counting noses." The administrative law judge referred to the extent to which the conclusions expressed were explained and to the respective qualifications of the physicians. Decision and Order at 14.

Dr. Levinson reviewed the medical evidence of record and determined that the miner did not have pneumoconiosis or any coal mine related pulmonary impairment. Employer's Exhibit 10. Dr. Levinson also stated that there was no relationship between the miner's coal mine employment and his death. *Id.*. Inasmuch as the administrative law judge did not attempt to resolve the conflict between his finding under Section 718.202(a) and Dr. Levinson's conclusion regarding the existence of pneumoconiosis, the administrative law judge's decision to credit Dr. Levinson's opinion under Section 718.205(c)(2) is not supported by an adequate rationale.[6] *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983). Thus, the administrative law judge must reconsider Dr. Levinson's opinion under Section 718.205(c)(2) on remand and provide a complete explanation of his weighing of this opinion.

[6]Although the administrative law judge acted within his discretion in citing Dr. Levinson's superior qualifications when engaging in a relative weighing of the medical opinions under 20 C.F.R. §718.205(c)(2), he could not rely upon this factor to credit the opinion absent a determination that Dr. Levinson's opinion is reasoned and documented. Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge