BRB No. 99-0887 BLA

RONALD C. HUBLER	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED:
SCHUYLKILL COAL PROCESSING	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Order Granting Claimant's Motion to Strike, Order Denying Employer's Motion for Reconsideration, and Decision and Order Awarding Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Order Granting Claimant's Motion to Strike, the Order Denying Employer's Motion for Reconsideration, and the Decision and Order Awarding Benefits (98-BLA-0328) of Administrative Law Judge Paul H. Teitler rendered 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). In his Decision and Order Awarding Benefits, the administrative law judge accepted the parties' stipulation to sixteen and three-quarter years of coal mine employment and found that all of the relevant medical evidence weighed together established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a),

718.203(b). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The administrative law judge additionally found that the evidence established that claimant suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and that claimant's pneumoconiosis is a substantial contributor to his total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Bonessa v. United States Steel Corp*., 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding from the record the medical reports and testimony of employer's examining physician, Dr. Galgon. Claimant has not responded to employer's appeal, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in the appeal.

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).

Employer contends that the administrative law judge erred in excluding the reports and testimony of Dr. Galgon based on employer's failure to comply with the administrative law judge's order compelling the production of Dr. Galgon's office notes and records. The administrative law judge's discovery rulings will not be disturbed on appeal absent an abuse of discretion. *See Cline v. Westmoreland Coal Co*., 21 BLR 1-69, 1-77 (1997); *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366-67 (1990).

Two months before the hearing, claimant's counsel requested from employer all documents pertaining to Dr. Galgon's January 20, 1998 examination of claimant, including any notes taken by Dr. Galgon during the examination. By the time of the April 20, 1998 hearing, employer had supplied claimant with Dr. Galgon's report, original pulmonary function and blood gas studies, and x-ray, but not Dr. Galgon's office notes. By agreement at the hearing, the record was left open for the parties to complete further evidentiary development. At Dr. Galgon's post-hearing deposition on June 16, 1998, he testified that he had taken notes during his examination of claimant. Galgon Dep. Tr. at 27. Thereupon, claimant's counsel renewed her request for Dr. Galgon's office notes. Employer's counsel agreed to furnish the notes.

Claimant did not receive the notes, however, and on July 24, 1998, claimant moved to compel production of the office notes and records of Dr. Galgon. There being no response, on August 24, 1998, claimant again moved to compel production. On September 24, 1998, claimant moved to strike Dr. Galgon's reports and testimony based on employer's failure to respond to claimant's discovery request. On October 19, 1998, claimant renewed the motion to strike.

On November 9, 1998, the administrative law judge granted claimant's motion to compel production and denied the motion to strike. The administrative law judge ordered employer to produce Dr. Galgon's office notes and records within ten days of receipt of the order. Two days later, employer's counsel responded to claimant's October 19 motion to strike, stating that after the June 16 deposition, he had instructed Dr. Galgon's office to forward the office notes to claimant.

Counsel stated that he "became aware that claimant's counsel did not receive these notes" only after receiving claimant's September 24, 1998 motion to strike. Letter, Nov. 11, 1998. Counsel reported that he had again directed Dr. Galgon's office to turn over the notes.

On December 1, 1998, claimant's counsel renewed the motion to strike, reporting that she had not been provided with Dr. Galgon's notes but rather, with merely another copy of Dr. Galgon's report. On January 5, 1999, the administrative law judge granted claimant's motion to strike. The administrative law judge noted that claimant had not yet received the office notes, and observed that "to date, no objection has been filed by employer in response to claimant's [renewed] motion." Order, Jan. 5, 1999. Finding that employer "failed to comply" with the November 9, 1998 discovery order, the administrative law judge excluded Dr. Galgon's medical report and deposition testimony. *Id*.

On January 11, 1999, employer requested reconsideration. Employer's counsel repeated that he had directed Dr. Galgon's office to send all of the pertinent records, and he attached an affidavit from Dr. Galgon's records custodian stating that she had twice sent "any and all office notes" to claimant's attorney, first on November 13, 1998 and again on December 3, 1998. Letter, Jan. 11, 1999 and Deposition Affidavit. Claimant's counsel responded that on both occasions she had received only additional copies of Dr. Galgon's report, not the requested office notes which were the subject of the administrative law judge's order compelling production. Claimant's counsel attached copies of the documents that had been sent to her.

On February 4, 1999, the administrative law judge denied employer's motion for reconsideration. The administrative law judge found it significant that employer did not respond to claimant's repeated discovery motions until November 11, 1998, and did not file a response to claimant's December 1, 1998 motion to strike. Additionally, the administrative law judge considered employer's argument that it complied with the administrative law judge's order, and claimant's response that the office notes were never produced. Finding that employer "failed to produce Dr. Galgon's office notes and records in accordance with the November 9, 1998 Order," the administrative law judge denied reconsideration of his order excluding Dr. Galgon's reports and testimony. Order, Feb. 4, 1999.

On these facts, we conclude that the administrative law judge did not abuse his discretion in excluding employer's reports. *See Cline, supra*; *Martiniano, supra*. The administrative law judge appropriately considered employer's lengthy delay in responding to claimant's repeated requests and motions until November 11, 1998. Additionally, the record supports the administrative law judge's finding that employer did not produce Dr. Galgon's office notes, as ordered. Although employer requested that Dr. Galgon's office forward its records to claimant, the record indicates that the items sent were simply copies of Dr. Galgon's report and test data, not his notes. Claimant reported this problem on December 1, 1998. We are at a loss to understand why employer did not ensure that the office notes were produced. We conclude that employer's delay in this matter and employer's failure to produce the office notes despite the administrative law judge's order were sufficiently serious to justify the administrative law judge's order excluding Dr. Galgon's reports and testimony.

Therefore, we hold that the administrative law judge did not abuse his discretion or violate employer's due process rights.

As employer does not otherwise challenge the administrative law judge's findings, we affirm the administrative law judge's findings pursuant to Sections 718.202(a), 718.203(b), and 718.204. Consequently, we affirm the award of benefits.

[1] Employer's contention that the administrative law judge ignored the affidavit of Dr. Galgon's records custodian lacks merit. It is clear to us that the administrative law judge considered the affidavit when he assessed employer's "argu[ment] that Dr. Galgon's office had forwarded the notes and records to [c]laimant . . . ." Order, Feb. 4, 1999. Employer also argues that the administrative law judge erred by not holding a hearing on the issue of whether the notes were sent or received. However, the record does not indicate that employer requested a hearing on this issue, nor does the record reflect that employer identified any office notes which it sent claimant and copied in an attachment to a pleading.

Accordingly, the administrative law judge's Order Granting Claimant's Motion to Strike, Order Denying Employer's Motion for Reconsideration, and Decision and Order awarding benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge