BRB No. 02-0663 BLA

ELEANOR O'BRIEN (Widow of ROBERT O'BRIEN)	)	
Claimant-Petitioner	)	
v.	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: _____
Party-in-Interest	)	DECISION and ORDER

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

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

Michelle S. Gerdano (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denial of Benefits (01-BLA-0611) of Administrative Law Judge Ralph A. Romano on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969,

[1] Claimant, the miner's widow, filed the instant claim on November 8, 2000. Director's Exhibit 1. The miner's death certificate indicates that he died on September 16, 2000. Director's Exhibit 3. The immediate cause of death is listed in the death certificate as cardiac failure, due to ischemic heart disease, due to atherosclerotic coronary artery disease. *Id.*

as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge found that claimant failed to meet her burden to establish death due to pneumoconiosis under 20 C.F.R.§718.205(c).[3] The administrative law judge specifically found that the evidence of record, including the miner's medical treatment records, the death certificate, and Dr. Sherman's reports, shows that the miner's pneumoconiosis did not cause, contribute to, or hasten death. The administrative law judge further noted that the hearing transcript had been lost and that no party had objected to proceeding, nonetheless, to a decision. The administrative law judge next indicated that claimant had been advised that she had until March 29, 2002 to submit any rebuttal evidence to Dr. Sherman's November 23, 2001 report, and denied as untimely claimant's request, made in a May 10, 2002 letter to the administrative law judge from claimant's counsel, for time in which to submit rebuttal evidence. Accordingly, benefits were denied.

[2] The Department of Labor 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 regulations.

[3] Administrative Law Judge Linda S. Chapman, by Decision and Order Granting Benefits dated August 16, 1999, awarded benefits in the miner's claim, finding that the miner established that he was totally disabled due to pneumoconiosis arising out of coal mine employment. Director's Exhibit 9.

On appeal, claimant contends that her due process right to present her case fully was abridged when the administrative law judge refused her counsel's May 10, 2002 request for time within which to submit rebuttal evidence to Dr. Sherman's November 23, 2001 report. Claimant also contends that the Director failed to establish good cause for the post-hearing submission of Dr. Sherman's November 23, 2001 report and asserts that the administrative law judge never made a good cause finding. Claimant also contends, on the merits of the claim, that the administrative law judge committed reversible error in finding that the miner's pneumoconiosis did not play a role in his death. Claimant argues that the administrative law judge's decision does not meet the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §577(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 33 U.S.C. §932(a), because he summarily credited the opinion of Dr. Sherman. Claimant asserts that the administrative law judge's crediting of Dr. Sherman's "conclusory" opinion over the "more well-reasoned" opinion of Dr. Prince is inconsistent with the decisions of the Third Circuit in *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997) and *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997).[4] Claimant's Brief at 11. Claimant also argues that the administrative law judge selectively analyzed the evidence by failing to discuss the significance of the respiratory conditions noted in the miner's December 1999 hospital records. The Director, Office of Workers' Compensation Programs (the Director), responds, and seeks affirmance of the decision below, arguing that the administrative law judge properly found that the miner's death was not due to pneumoconiosis. The Director further urges the Board to reject claimant's due process arguments, and asserts that they are unsubstantiated and without merit.

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).

Under the Act's implementing regulations, any evidence not submitted to the district director may be received into evidence subject to the objection of any party, if it is sent to all other parties at least 20 days before the hearing. *See* 20 C.F.R. §725.456(b)(1); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Pursuant to 20 C.F.R. §725.456(b)(2), the administrative law judge may admit, at his discretion,

[4] Claimant also asserts that the administrative law judge mischaracterized the evidence but identifies no specific mischaracterization. Claimant's Brief at 10.

documentary evidence not submitted to the district director and not exchanged by the parties within 20 days before a hearing, if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged. *See* 20 C.F.R. §725.456(b)(2); *Miller, supra; Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). In addition, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held in *Miller* that due process and 5 U.S.C. §556(d) of the APA require an opportunity for rebuttal where it is necessary to the full presentation of a party's case. *See also* 20 C.F.R. §725.456(b)(3). The Third Circuit held in *Miller* that pursuant to 5 U.S.C. §556(d), all parties to a hearing must have the opportunity to fully present their case by way of argument, proof, and cross-examination, as may be required for a full and true disclosure of the facts, and that this principle may not be circumvented by a restrictive application of the 20-day rule under 20 C.F.R. §725.456(b)(2) so as to preclude rebuttal evidence. The Third Circuit also held in *Miller* that by excluding a physician's report submitted by the employer after the 20-day deadline, the employer's due process rights were violated, where the administrative law judge provided no opportunity for a response to medical evidence which was relied upon for an award of benefits. Thus, the Third Circuit held that good cause was shown for employer's failure to submit a medical report in accordance with the 20-day deadline. *Id*.

We first address claimant's contention that her due process rights were abridged when the administrative law judge refused the May 10, 2002 request of claimant's counsel for time in which to develop evidence to rebut Dr. Sherman's November 23, 2001 medical report.

A review of the case file, including correspondence contained therein, reveals the following facts. The Director filed a Motion to Compel Discovery Responses and a Motion for Enlargement of Time dated October 16, 2001. The Director sought, in the former motion, an order from the administrative law judge to compel claimant to provide hospitalization records and a paramedic's report pertaining to the miner's demise on September 16, 2000. The Director sought, in the latter motion, an enlargement of time for filing evidence beyond the 20-day rule set forth in 20 C.F.R. §725.456. The Director set forth his intention to develop a second report by Dr. Sherman in which the physician would address this additional medical evidence. The Director, by cover letter dated November 27, 2001, submitted to the administrative law judge Dr. Sherman's supplemental report dated November 23, 2001, and provided a copy to claimant's counsel. A hearing was held before the administrative law judge on November 2, 2001. The case file contains a memorandum from John Gagliardi[5] to the administrative law judge indicating that the administrative law judge, at the hearing, set "evidentiary restrictions regarding claimant's opportunity for rebuttal evidence to one of Employer's medical reports."

[5] It appears Mr. Gagliardi works in the Office of the Administrative Law Judges as the memo is internal.

John Gagliardi's January 29, 2002 Memorandum to Judge Romano. Mr. Gagliardi's memorandum also documents a conversation he had with the Director's counsel regarding the resolution of this and other issues. *Id.* Claimant's counsel, by letter dated February 22, 2002, advised the administrative law judge that she had just learned of the existence of Dr. Sherman's report, having never received the copy sent to her by the Director. Claimant's counsel requested forty-five days from the administrative law judge's ruling, within which to submit rebuttal evidence. The Director objected to claimant's request, and claimant's counsel, by letter dated February 28, 2002, urged the administrative law judge to grant her request over the Director's objection. Claimant's counsel, in her letter to the administrative law judge dated May 10, 2002, noted her receipt of the Director's post-hearing brief. Critically, she also noted her "outstanding request" to the administrative law judge to allow her to proceed with rebuttal to Dr. Sherman's supplemental report. Claimant's counsel also indicated that she was unaware of any ruling by the administrative law judge on her request for time within which to submit rebuttal evidence.

In his Decision and Order – Denial of Benefits dated June 12, 2002, which is the subject of this appeal, the administrative law judge initially noted that the transcript from the November 2, 2001 hearing had been lost by the reporting company, and indicated that no party had voiced any objection to proceeding to decision. The administrative law judge then indicated that claimant was afforded until March 29, 2002 to submit any rebuttal evidence to Dr. Sherman's November 23, 2001 report, which the administrative law judge admitted into the record in his Decision and Order. *See* Decision and Order at 2. The administrative law judge stated that claimant's counsel, by letter dated May 10, 2002, advised the administrative law judge that she was unaware of any ruling on her request to submit rebuttal evidence. The administrative law judge stated:

> Both parties having been advised of the filing deadlines, however, the request of claimant's counsel, as made in that letter, to submit rebuttal at this juncture is denied as untimely.

Decision and Order at 2. Accordingly, the administrative law judge denied the request of claimant's counsel for time within which to submit rebuttal to Dr. Sherman's supplemental report.

We vacate the administrative law judge's decision to deny the request of claimant's counsel for time within which to develop and submit evidence in rebuttal of Dr. Sherman's supplemental report. While the administrative law judge is granted broad discretion in resolving procedural issues, *see Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*), the administrative law judge's finding in the instant case, that claimant's counsel had been advised that she had until March 29, 2002 to submit rebuttal evidence to Dr. Sherman's supplemental report, is unexplained and

does not satisfy the requirements of the APA. 5 U.S.C. §556(d); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Further, as set forth above, the case file contains documentation dated February and May 2002, which suggests that claimant's counsel made continued efforts to obtain a ruling from the administrative law judge on her request to submit evidence in rebuttal of Dr. Sherman's supplemental report. On remand, the administrative law judge must make specific findings as to whether, and by what means, claimant was advised that she had until March 29, 2002 to submit rebuttal evidence. 5 U.S.C. §556(d).

Claimant next asserts that the administrative law judge never made a good cause finding for the submission of Dr. Sherman's supplemental report and argues that the Director failed to establish good cause for the post-hearing submission of that report. In response, the Director summarily states that claimant's contention is unsubstantiated and should be rejected by the Board. Director's Brief at 3 n.2.

Claimant's contention has merit. The case file does not reflect the administrative law judge's reasons for his decision to grant the Director's October 16, 2001 Motion For Enlargement of Time to file evidence beyond the 20-day rule set forth at 20 C.F.R. §725.456. On remand, the administrative law judge must determine whether the Director demonstrated good cause to excuse his late submission of Dr. Sherman's supplemental report under 20 C.F.R. §725.456(b)(2). In so doing, the administrative law judge must provide a rationale for his finding that comports with the requirements of the APA.

If, on remand, the body of evidence upon which the administrative law judge based his decision to deny survivor's benefits on the merits of the claim under 20 C.F.R. Part 718 changes, then the administrative law judge must make new findings on the issue of death due to pneumoconiosis under 20 C.F.R. §718.205(c). Alternatively, if there is no alteration to the body of evidence upon which the administrative law judge based his decision, which evidence included Dr. Sherman's supplemental report, then the administrative law judge may reinstate his finding that the evidence fails to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c).

We do not address the parties' arguments on the merits of the claim in view of the potential for changes in the record when the case is before the administrative law judge on remand. Any party dissatisfied with the administrative law judge's Decision and Order on remand can file an appeal with the Board. 20 C.F.R. §802.201.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge