BRB No. 04-0882 BLA

ROBERT P. COSTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GILBERTON COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	DATE ISSUED: 05/25/2005
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Charles A. Bressi, Jr., Pottsville, Pennsylvania, for claimant.

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin) Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-6152) of Administrative Law Judge Janice K. Bullard 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 filed the instant claim on May 13, 2002. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on February 25, 2003. Director's Exhibit 29. Claimant requested a hearing,

which was scheduled for November 21, 2003. The parties subsequently agreed to a decision on the record. In his Decision and Order, the administrative law judge denied claimant's request to exclude Dr. Hertz's opinion from the record, noting that employer had demonstrated good cause for the late submission of Dr. Hertz's opinion on May 10, 2004, subsequent to the April 30, 2004 deadline for submission of evidence. The administrative law judge credited clamant with at least eleven years of coal mine employment. The administrative law judge, however, found that claimant failed to establish the existence of pneumoconiosis or that he had a totally disabling respiratory or pulmonary impairment. Accordingly, the administrative law judge denied benefits.

Claimant appeals, alleging that the administrative law judge erred in admitting a medical report from Dr. Hertz submitted by employer on May 10, 2004, subsequent to the April 30, 2004 deadline scheduled by the administrative law judge for submission of employer's evidence. Claimant maintains that employer's delay in submitting Dr. Hertz's opinion until May 10, 2004 prevented him from pursuing rebuttal. Claimant further asserts that he was prevented from "cross-examining Dr. Hertz on his findings since the deposition of the doctor was never scheduled as agreed upon and noted in the [administrative law judge's] Order of November 10, 2003." Petition for Review of Claimant at 2. Claimant's sole contention on appeal is that the administrative law judge's procedural error requires the Board to vacate the administrative law judge's decision. Claimant does not challenge the administrative law judge's findings on the merits of entitlement. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989) (*en banc*). Because the administrative law judge has broad discretion in the conduct of the hearing, the Board will affirm his rulings on procedural matters unless they are shown on appeal to be arbitrary, capricious or an abuse of discretion. *See generally, Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). Further, because the administrative law judge's procedural ruling in this case does not appear to be arbitrary, capricious or abusive, we reject claimant's argument that the administrative law judge erred in admitting Dr. Hertz's opinion after his deadline of April 30, 2004.

The procedural history of this case, relevant to the admission of Dr. Hertz's opinion, begins with a letter from claimant's counsel dated October 31, 2003, wherein he informed the administrative law judge that the parties had agreed to a decision on the record without the necessity of a formal hearing, provided that: 1) claimant would be permitted to submit his testimony by deposition; 2) claimant would be permitted to submit the deposition testimony of Dr. Simelaro; and 3) employer would be given the opportunity to have claimant examined by a medical expert and to "schedule any medical deposition that [employer's counsel] may want after the examination." Claimant's Letter, October 31, 2003. By Order dated November 10, 2003, the administrative law judge granted the parties' motion for a decision on the record and cancelled the scheduled hearing. The parties were advised to complete discovery and exchange all of the evidence by January 2, 2004, with briefs due January 30, 2004. By Order dated December 22, 2003, the administrative law judge granted employer's request to extend the deadline for submission of evidence until February 28, 2004 in order to accommodate an examination of claimant scheduled with Dr. Hertz.[1] On February 10, 2004, employer requested another extension of the submission deadline for evidence, noting that, due to inclement weather, claimant had been unable to attend Dr. Hertz's scheduled examination on February 3, 2004. By Order dated February 17, 2004, the administrative law granted employer's request to keep the record open until April 30, 2004. Employer next requested an extension of time on April 30, 2004 to submit Dr. Hertz's medical report because there had been a delay with Dr. Hertz's transcription service. Dr. Hertz's report was subsequently submitted to the administrative law judge on May 10, 2004. Claimant's counsel filed an objection to Dr. Hertz's report, noting that it was untimely filed past the April 30, 2004 deadline for submission of evidence. *See* Claimant's Facsimile Letter, May 13, 2004. Claimant further objected to the admission of Dr. Hertz's report on the basis that employer had already proffered a report from Dr. Dittman. *Id.* By Order dated May 13, 2004, the administrative law judge determined that employer showed good cause for the late submission of Dr. Hertz's report, and admitted the report into evidence.

We reject claimant's first argument that the administrative law judge failed to afford him due process of law by admitting Dr. Hertz's opinion into the record after the April 30, 2004 deadline for submission of evidence. Contrary to claimant's contention, the administrative law judge properly pointed out in his decision that "the apparent delay in developing the record was caused by claimant's cancellation of Dr. Hertz's examination due to inclement weather." Decision and Order at 3. The administrative

[1] Claimant had originally been scheduled for an examination with Dr. Levinson but he did not wish to travel the distance required for that examination, and therefore, employer scheduled an examination for February 3, 2004 with Dr. Hertz, whose medical practice was nearer to claimant's residence. *See* Order, December 22, 2003.

law judge also reasonably concluded that employer showed good cause for submitting Dr. Hertz's report subsequent to April 30, 2004 since employer explained that the delay was due to a problem with Dr. Hertz's transcription service. *Id*. Thus, the administrative law judge's finding that employer demonstrated good cause for the late submission of Dr. Hertz's report is affirmed as his procedural ruling was neither arbitrary, capricious nor an abuse of discretion. Furthermore, by failing to request the opportunity for rebuttal, claimant waived his objection to the administrative law judge's procedures.

We also reject claimant's contention that he was denied the right to cross-examination.[2] Claimant counsel incorrectly implies in his brief that employer was required to schedule a deposition with Dr. Hertz. By agreement of the parties, employer's counsel was given the *option* to take Dr. Hertz's deposition if she so chose. *See* Claimant's Letter, October 31, 2003. Furthermore, the regulation at 20 C.F.R. §725.459(a) provides that: "If the witness' proponent does not intend to call the witness to appear at the hearing or deposition, any other party may subpoena the witness for cross-examination." *See* 20 C.F.R. §725.459(a). Insofar as claimant did not request a subpoena for Dr. Hertz to appear for a deposition, or otherwise indicate his desire to cross-examine the witness, claimant has failed to demonstrate in this appeal that he was prejudiced by the administrative law judge's procedural ruling below.

Consequently, we affirm the administrative law judge's decision to admit Dr. Hertz's opinion into the record. Because claimant has raised no error with respect to the administrative law judge's findings on the merits of entitlement, we affirm, as supported by substantial evidence, the administrative law judge's denial of benefits.

[2] 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).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge