BRB No. 03-0178 BLA

| | | |
|---|---|---|
| FRED B. WOOD | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ELKAY MINING COMPANY | ) | DATE ISSUED: _____ |
| | ) | 11/12/2003 |
| Employer-Petitioner | ) | |
| | ) | |
| GREGORY FINO | ) | |
| | ) | |
| Intervenor | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-In-Interest | ) | |

DECISION and ORDER

Appeal of the Order Granting Claimant's Motion to Compel Discovery of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Kathy L. Snyder, Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for intervenor.

Barry H. Joyner (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Claimant's Motion to Compel Discovery (2001-BLA-0701) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).[1] Claimant filed his application for benefits on June 8, 2000.[2] On November 20, 2000, the district director awarded benefits. Director's Exhibit 33. The district director considered additional medical evidence submitted by employer and again awarded benefits on February 22, 2001. Director's Exhibit 45. Employer requested a hearing, Director's Exhibit 46, and the case was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing on April 15, 2001. Director's Exhibit 48, 49.

During the claim's processing, employer obtained x-ray readings, medical reports, and deposition testimony from Drs. Stephen Bush, Richard Naeye, John Bellotte, and Gregory Fino.[3] On August 29, 2002, claimant served employer with twenty-four interrogatories and requests for production of documents. In the interrogatories numbered one through four claimant requested employer to identify and produce any medical evidence it had developed but did not submit. In the interrogatories numbered five through twenty-four claimant requested employer to provide the following information regarding Drs. Bush, Naeye, Bellotte, and Fino: (1) the number of referrals employer made to each physician in the previous four years to obtain opinions in black lung cases; (2) the number of times each physician diagnosed pneumoconiosis in those cases; (3) where the physician diagnosed pneumoconiosis, the number of times the physician determined that the pneumoconiosis did not cause any impairment; (4) where

[1] 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.

[2] Claimant's application indicates that his coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Because there has been no hearing on the claim, not all of these items are in the record before the Board. Consequently, we rely on the parties' description of the evidence developed below.

the miner was diagnosed with obstructive lung disease, the number of times the physician determined that coal mine dust exposure contributed to that disease; (5) the amount employer paid each physician for his opinion in this case; and (6) the amount employer has paid each physician for his opinions in all black lung cases in the previous four years.

Employer responded to claimant's discovery request on September 27, 2002. Employer objected to interrogatories one through four on the ground that the information sought was privileged and not subject to discovery. In response to interrogatories five through twenty-four, employer disclosed the amount it paid each physician for an opinion in this case, but otherwise objected, asserting that the information sought was irrelevant and that the interrogatories were unreasonable and unduly burdensome. Claimant moved to compel discovery on October 17, 2002. Employer responded to claimant's motion to compel on October 31, 2002, disclosing that employer possessed one x-ray reading that it did not intend to submit into evidence, but otherwise reasserting its objections to the interrogatories. Employer moved for a protective order, and requested a hearing "to discuss this matter." Employer's Brief, App. C, Elkay Mining Company's Response at 2.

On November 5, 2002, the administrative law judge granted claimant's motion to compel and denied employer's request for a protective order, without holding a hearing on the parties' motions. In a six-sentence order, the administrative law judge found that the information sought by claimant was relevant, that its relevancy outweighed the burden imposed on employer in responding, and that the reports of non-testifying experts are discoverable. The administrative law judge ordered employer to respond fully to claimant's interrogatories and requests for production by November 12, 2002.

Employer's appeal and Dr. Fino's request to intervene followed. Claimant moved to dismiss employer's appeal as interlocutory. On November 25, 2002, the Board determined that interlocutory review in this case was "necessary to properly direct the course of the adjudicatory process." *Wood v. Elkay Mining Co.*, BRB No. 03-0178 BLA, slip op. at 2 (Nov. 25, 2002)(Order)(unpub.). The Board additionally found that Dr. Fino had established that his rights may be affected by the proceedings before the Board, and granted his motion to intervene and to participate as a party. 20 C.F.R. §802.214(a). By order issued May 14, 2003, the Board denied employer's request for oral argument. 20 C.F.R. §802.306.

On appeal, employer contends that the administrative law judge violated employer's due process rights by failing to hold a hearing before ruling on the discovery motions. Employer further asserts that the administrative law judge's order does not comply with Section 557(c)(3) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as 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), because the administrative law judge did not explain the reasons for his findings. Employer argues that the administrative law judge abused his discretion in ordering employer to disclose information that employer asserts is either

irrelevant or protected by the work product doctrine. Additionally, employer alleges that the administrative law judge did not properly consider employer's motion for a protective order to shield it from the burden it argues is imposed by claimant's discovery request. Intervenor Dr. Fino argues that the financial data claimant seeks about him is irrelevant and that the disclosure of the gross dollar amounts of his previous compensation from employer violates his right to privacy. Intervenor further contends that the administrative law judge's order compelling disclosure of the amounts employer has paid him in the past violates the Privacy Act, 5 U.S.C. §552a, and he requests that the Board enjoin the OALJ from ordering such disclosure in any future black lung proceeding. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge did not err in failing to hold a separate hearing on the discovery issues, but the Director agrees in part with employer that the administrative law judge did not adequately explain his findings. The Director urges affirmance of the portion of the administrative law judge's order compelling the disclosure of medical evidence in employer's possession, but urges that the remainder of the order be vacated and the case be remanded for the administrative law judge to reconsider whether employer is entitled to a protective order. The Director further responds that the Privacy Act is inapplicable because the information claimant seeks from employer is not a record within the possession of an agency. Employer has filed a reply brief reiterating its contentions. On October 1, 2003, employer filed an Advisory of New Precedent, which is hereby accepted.

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). The Board reviews the administrative law judge's discovery rulings for abuse of discretion. *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-77 (1997); *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366-67 (1990).

Employer contends that the administrative law judge erred by failing to hold a hearing before ruling on the parties' motions. Claimant and the Director respond that a formal hearing had already been requested, at which employer could argue its position, and that employer was not entitled to a separate hearing. As we discuss below, we must remand this case for further consideration. Thus, we construe employer's argument to be that on remand, the administrative law judge must hold a separate hearing before he can rule on the discovery motions. Employer argues that it is deprived of a full and fair hearing unless it is afforded "an opportunity for its counsel to fully explain the company's position" before the administrative law judge rules on the motions. Employer's Brief at 8. Due process does not necessarily require oral argument. *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272-85 (1949); *see Spark v. Catholic Univ. of America*, 510 F.2d 1277, 1280 (D.C. Cir. 1975)("[D]ue process does not include

the right to oral argument on a motion."); *United States Fid. and Guar. Co. v. Lawrenson*, 334 F.2d 464, 466-67 (4th Cir. 1964)("[A] hearing on motions filed in a district court is not required by considerations of due process."), *cert. denied*, 379 U.S. 869 (1964). Further, we agree with the Director that the Act requires a hearing on any contested issue of fact or law in respect of a claim, 33 U.S.C. §919(c),(d), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.450, but neither requires nor prohibits a separate hearing on discovery motions prior to the formal hearing on the claim. Review of the Rules of Practice and Procedure for Administrative Hearings Before the OALJ discloses that the administrative law judge has the discretion to hold oral argument or conferences on prehearing motions. 29 C.F.R. §§18.6(c), 18.8(a), 18.40(a). Finally, we note that claimant and employer filed extensive briefs with the administrative law judge. On appeal, employer does not explain to the Board how the briefing process fails to provide employer with the opportunity to set forth its position. In light of all the foregoing, we decline to instruct the administrative law judge that he must hold a separate hearing on the parties' discovery motions on remand. The administrative law judge retains the discretion to hold such proceedings as he deems appropriate to aid in the disposition of the discovery issues. 29 C.F.R. §§18.6(c), 18.8(a), 18.29(a); 20 C.F.R. §725.455(d).

Employer argues that the administrative law judge violated Section 557(c)(3) of the APA by failing to provide a rationale for his order granting claimant's motion to compel. Claimant responds that the administrative law judge's order is not a decision for which an explanation is required under the APA. Claimant contends that the administrative law judge's order proceeds from the power under Section 556 of the APA to "dispose of procedural requests or similar matters." 5 U.S.C. §556(c)(9). Claimant asserts that an administrative law judge's authority to dispose of procedural matters is separate from his or her power to "make or recommend decisions in accordance with section 557. . . ." 5 U.S.C. §556(c)(10). Claimant therefore concludes that the Section 557(c)(3) duty of explanation applies to the administrative law judge's substantive decision, but "does not apply to decisions on procedural matters such as Motions to Compel Discovery." Claimant's Brief at 9. Claimant's contention lacks merit.

The APA's duty of explanation applies to the administrative law judge's order in this case. A formal hearing was requested. Section 919(d) of the Longshore and Harbor Workers' Compensation Act, as incorporated by 30 U.S.C. §932(a), provides that any hearing held "shall be conducted in accordance with the provisions of section 554 of Title 5." 33 U.S.C. §919(d). Section 554 of the APA requires a hearing "in accordance with sections 556 *and 557* of this title." 5 U.S.C. §554(c)(2)(emphasis added). Section 557 of the APA provides that "[a]ll decisions . . . are a part of the record and shall include a statement of--(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must conduct the hearing "in accordance with" the requirement that "all decisions" include findings and explanation on all "material issues

of fact, law, or discretion." 5 U.S.C. §§554(c)(2), 557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Review of the parties' filings below reflects that they raised numerous and complex discovery issues. The administrative law judge recognized that material issues of fact, law, or discretion were presented and made findings. Thus, the Board must have before it "the reasons or basis therefor . . . ." 5 U.S.C. §557(c)(3)(A); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998)(observing that a function of Section 557(c)(3)(A) is to permit appellate review); *Wojtowicz*, 12 BLR at 1-165.

Upon consideration of the administrative law judge's order in light of the arguments raised on appeal, we agree with employer's contention that the Order Granting Claimant's Motion to Compel Discovery is not in compliance with Section 557(c)(3)(A) of the APA. Claimant and employer argued extensively below as to the relevance of the information sought by claimant under 29 C.F.R §18.14. The Board has held that an administrative law judge must consider a motion to compel under the standard for the scope of discovery set forth at 29 C.F.R. §18.14, in conjunction with the provisions of 20 C.F.R. §725.455, and should also consider the requirement of 30 U.S.C. §923(b) that all relevant evidence be considered. *Cline*, 21 BLR at 1-76-77. The administrative law judge's order concludes that "the prior track record of proposed witnesses is relevant," but does not set forth the administrative law judge's reasoning for drawing this conclusion under *Cline*, precluding review by the Board. *Wojtowicz*, 12 BLR at 1-165. In an apparent reference to the chest x-ray in employer's possession, the administrative law judge cites *Cline* and concludes that "reports by medical experts not expected to testify at trial are discoverable," but does not apply the test set forth in *Cline*. This omission deprives the Board of the administrative law judge's reasoning on this issue. Finally, the administrative law judge's order includes no explanation for the finding that "the relevance of the information [sought by claimant] outweighs the burden imposed upon Employer in responding to the interrogatories." Thus, the Board cannot discern the administrative law judge's reasons for denying employer's motion for a protective order under 29 C.F.R §18.15. *Wojtowicz*, 12 BLR at 1-165. We must therefore vacate the administrative law judge's order and remand the case for him to reconsider claimant's motion to compel, employer's objections thereto, and employer's motion for a protective order. *See v. Washington Metro. Transit Auth.*, 36 F.3d 375, 384, 28 BRBS 96, 106 (CRT)(4th Cir. 1994)(explaining that remand is required where the administrative law judge does not supply the reasoning for a conclusion).

On remand, the administrative law judge should reconsider claimant's motion to compel discovery under the standard for the scope of discovery under 29 C.F.R. §18.14 in accordance with *Cline*. Section 18.14 of the OALJ rules provides that:

> (a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any

> matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.
>
> (b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

29 C.F.R. §18.14. The administrative law judge should fully explain the rationale for his findings. 5 U.S.C. §557(c)(3)(A). If the administrative law judge determines that the information is relevant and discoverable, he must then consider whether employer has demonstrated "good cause" for a protective order under the standard set forth at 29 C.F.R. §18.15(a), which provides that:

> (a) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) The discovery not be had;
>
> (2) The discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

> (4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters;
>
> (5) Discovery be conducted with no one present except persons designated by the administrative law judge; or
>
> (6) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way.

29 C.F.R. §18.15. The administrative law judge must explicitly address employer's contentions that the interrogatories are unduly burdensome, and fully explain his findings. 5 U.S.C. §557(c)(3)(A). As the Director notes, if the administrative law judge determines that a protective order is appropriate, 29 C.F.R. §18.15(a) provides a range of alternatives for the administrative law judge to consider in formulating the order. 29 C.F.R. §18.15(a)(1)-(6).

Because the administrative law judge made no findings as to the privacy interests raised by intervenor, those interests not having been raised below, we do not reach intervenor's arguments on appeal. Intervenor remains free to request permission to participate below and to raise his privacy concerns. 20 C.F.R. §725.361; 29 C.F.R. §18.10(b)-(d). The Board lacks jurisdiction to consider intervenor's request for an injunction under the Privacy Act. 5 U.S.C. §552a(g)(1)(conferring jurisdiction on the district courts of the United States).

Accordingly, the administrative law judge's Order Granting Claimant's Motion to Compel Discovery is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge