BRB No. 07-0841 BLA
Case No. 2006-BLA-00041

JULIUS JOHN REZNICK, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/10/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Respondent	)	ON RECONSIDERATION

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

Rita Roppolo (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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:

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely Motion for Reconsideration of the Board's Decision and Order in *J.R.* [*Reznick*] *v. Director, OWCP*, BRB No. 07-0841 BLA (July 30, 2008)(unpub.), which vacated the Decision and Order denying modification and benefits of Administrative Law Judge Janice K. Bullard.[1] In *Reznick*, the Board held that the administrative law judge erred in

[1] This case involves claimant's request for modification of a denial of his duplicate claim. The administrative law judge credited claimant with nine and one-quarter years of coal mine employment. Adjudicating the claim pursuant to 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 a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found that claimant established that

denying claimant's request to obtain an additional examination and/or a pulmonary function test, in response to Dr. Dittman's September 24, 2006 report, which was submitted by the Director, on the eve of the twentieth day before the hearing. Citing *North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), the Board vacated the administrative law judge's evidentiary ruling and remanded the case to the administrative law judge to permit claimant to respond to Dr. Dittman's report in a manner consistent with his due process right to fully present his case.[2]

The Director seeks reconsideration, asserting that the Board misinterpreted *Miller* as requiring a new examination when a report by the opposing party is submitted just prior to the twenty-day deadline for exchanging evidence pursuant to 20 C.F.R. §725.456. We have considered the Director's arguments on reconsideration and upon further reflection of the applicable law, the administrative law judge's evidentiary ruling and the post-hearing submissions of claimant, we are compelled to vacate, in part, our decision insofar as it pertains to the development of additional evidence on remand.

The pertinent facts of the case are as follows: Dr. Dittman examined claimant on September 15, 2006, at the request of the Department of Labor. On October 13, 2006, twenty-one days prior to the hearing scheduled for November 3, 2006, the Director sent a facsimile copy of Dr. Dittman's report to claimant. Upon receipt of the report, claimant filed a motion on October 19, 2006, asking the administrative law judge to exclude Dr. Dittman's report. Alternatively, claimant sought: 1) to obtain a reading of the September 15, 2006 x-ray and a review of the pulmonary function results; and/or 2) to obtain an additional physical examination, which would include a new pulmonary function test. At the hearing, the administrative law judge ruled on claimant's motion and determined that, because Dr. Dittman's report was timely exchanged in accordance with 20 C.F.R. §725.456(b)(2), there was no basis to exclude it from the record. Hearing Transcript at 11. The administrative law judge agreed to permit claimant to have Dr. Dittman's examination report and the results of Dr. Dittman's objective testing reviewed by claimant's physicians, but the administrative law judge denied claimant's request to

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his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), but did not prove that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied modification and benefits.

[2] Because the Board vacated the administrative law judge's evidentiary rulings, the Board vacated her findings under 20 C.F.R. §§718.204(b)(2)(i), (iv) and (c). *J.R.* [*Reznick*] *v. Director, OWCP*, BRB No. 07-0841 BLA, slip op. at 7-8 (July 30, 2008) (unpub.).

undergo a new examination and pulmonary function test, noting that claimant was recently examined on August 9, 2006. *Id*. After the hearing, claimant submitted a November 21, 2006 report by Dr. Kraynak, based on his review of Dr. Dittman's examination, five readings of the September 15, 2006 x-ray, and the reports of three physicians who invalidated the results of the September 15, 2006 pulmonary function study.[3] Claimant's Exhibits 17-23. The administrative law judge admitted this evidence into the record and considered it, along with the other relevant evidence, prior to issuing her Decision and Order denying benefits. On appeal, however, the Board agreed with claimant that, under *Miller*, the administrative law judge erred in denying his request to procure a new examination.

The Director maintains that the Board misinterpreted the holding of the United States Court of Appeals for the Third Circuit in *Miller* as mandating that claimant be permitted to obtain a new examination. Director's Motion for Reconsideration at 3. The Director points out that, unlike the facts of this case, the Third Circuit in *Miller* was presented with a situation where an administrative law judge had provided no opportunity to the employer to respond to evidence that was timely submitted by the claimant on the eve of the twentieth day before the hearing. *See Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29. The Third Circuit held that, by refusing to permit the employer to develop responsive evidence, the administrative law judge violated the employer's due process right to a full and fair hearing. *Id*. The Third Circuit, however, did not specifically address, in *Miller*, whether the employer had the right to have claimant reexamined. *Id*. The Director contends that because the administrative law judge in this case permitted claimant to respond to Dr. Dittman's report, she acted properly in denying claimant's request for a new examination. Thus, the Director maintains that the requirements of *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*), have been satisfied. We agree.

In *Shedlock*, the Board held that a party was entitled to respond to evidence that was submitted by the opposing party immediately prior to the twenty-day deadline imposed by 20 C.F.R. §725.456(e). *Shedlock*, 9 BLR at 1-200. The Board has also recognized, however, that a party's right to respond to evidence submitted shortly before the hearing does not include an automatic right to have claimant reexamined. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990) (*en banc*). Rather, a determination as to whether an additional examination is required rests within the sound discretion of the administrative law judge, based on his or her review of the evidentiary submissions of record. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en*

[3] In our June 30, 2008 Decision and Order, we incorrectly stated that "[c]laimant did not submit any additional [post-hearing] evidence" in rebuttal of Dr. Dittman's report and objective testing. *Reznick*, BRB No. 07-0841 BLA, slip op. at 4.

banc).

In this case, the administrative law judge acted reasonably, and in accordance with *Shedlock*, insofar as she gave claimant the opportunity to respond to Dr. Dittman's report by allowing claimant to submit Dr. Kraynak's reviewing report, the five additional x-ray readings, and the three pulmonary function study invalidation reports. The administrative law judge also reasonably found that, because claimant had been recently examined by his treating physician in August 2006, it was not necessary for claimant to obtain a new *contemporaneous* examination in order to respond to Dr. Dittman's September 2006 examination report.

Thus, because the administrative law judge has discretion to resolve evidentiary issues, and as there has been no abuse of discretion shown with regard to the administrative law judge's refusal to grant claimant's request for an additional pulmonary evaluation and/or pulmonary testing, we vacate our prior remand order to the extent it directed further evidentiary development. *Clark*, 12 BLR at 1-153; *Shedlock*, 9 BLR at 1-200. Consequently, we grant the Director's motion for reconsideration and modify our decision to reflect that the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.456 are affirmed. In all other respects, we reaffirm our Decision and Order dated July 30, 2008.

Accordingly, the Director's Motion for Reconsideration is granted. The Board's Decision and Order of July 30, 2008, is modified in part, reaffirmed in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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