BRB Nos. 95-2212 BLA
and 98-1438 BLA

ERNEST WORKMAN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 10/29/99
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Charles P. Rippey and the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judges, United States Department of Labor.

Roger Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Paul E. Frampton (Bowles Rice McDavid Graff & Love, PPLC), Fairmont, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (95-BLA-0824) of Administrative Law Judge Charles P. Rippey and the Decision and Order -

Denying Benefits (97-BLA-0259) of Administrative Law Judge Gerald M. Tierney 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 a claim for benefits in December, 1993. After the district director awarded benefits on December 7, 1994, the case was transferred to the Office of Administrative Law Judges (OALJ). In a Decision and Order dated August 14, 1995, Administrative Law Judge Charles P. Rippey found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and denied benefits. Claimant appealed to the Board. In light of a request for modification filed by claimant, the Board dismissed the appeal and remanded the case to the district director for modification proceedings. *Workman v. Eastern Associated Coal Corp.,* BRB No. 95-2212 BLA (Apr. 4, 1996) (unpub. Order).

The case was subsequently transferred to the OALJ. In a Decision and Order dated July 20, 1998, Administrative Law Judge Gerald M. Tierney (the administrative law judge) noted that claimant previously failed to establish the existence of pneumoconiosis. The administrative law judge found that although the newly submitted evidence was sufficient to establish total disability, the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant failed to establish a change in conditions under 20 C.F.R. §725.310. After stating that he reviewed the entire record, the administrative law judge further found that there was not a mistake made in a determination of fact. Accordingly, the administrative law judge denied benefits. Claimant appeals, asserting that the administrative law judge erred in excluding the deposition and medical opinion of Dr. Rasmussen.[1] Employer responds, urging affirmance of the administrative law judge's findings. The Director,

[1]By Order issued August 13, 1998, the Board reinstated claimant's appeal in BRB No. 95-2212 BLA and consolidated that appeal with claimant's appeal in BRB No. 98-1438 BLA. *Workman v. Eastern Associated Coal Corp.,* BRB No. 98-1438 BLA (Aug. 13, 1998)(unpub. Order).

Office of Workers' Compensation Programs, has not filed a brief in this claim.[2]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2]We affirm the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Claimant argues that the administrative law judge erred in failing to admit the report and deposition of Dr. Rasmussen into the record. On October 14, 1997, twenty-four days before the hearing, employer's counsel mailed a supplemental report by Dr. Zaldivar, a consultative report by Dr. Fino and two x-ray rereadings to claimant's counsel. On the next day, employer's counsel mailed a consultative report by Dr. Tuteur. On October 16, 1997, claimant's counsel provided the parties with notice that Dr. Rasmussen's deposition was scheduled to be taken on October 30, 1997. On October 27, 1997, claimant's counsel provided Dr. Rasmussen's report dated October 16, 1997 to employer's counsel. At the November 7, 1997 hearing, claimant offered into evidence the deposition of Dr. Rasmussen and Dr. Rasmussen's medical report. Employer objected on the ground that this evidence was not exchanged in accordance with the twenty-day rule and that insufficient notice of Dr. Rasmussen's deposition was provided.[3]

At the hearing, the administrative law judge excluded both the deposition and the report of Dr. Rasmussen on the ground that they were not provided to employer within twenty days of the hearing.[4] 20 C.F.R. §725.456(b)(1); Hearing Transcript at 7. In his Decision and Order, the administrative law judge reiterated his decision to

[2] In reply to employer's objection, claimant's counsel indicated that this evidence was provided in response to the evidence submitted by employer's counsel on the "eve" of the twenty-day deadline. Hearing Transcript at 7.

[4] 20 C.F.R. §725.456(b)(1) provides that any documentary evidence not submitted to the district director may be received into evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before the hearing. Section 725.456(b)(2) permits the administrative law judge to admit evidence at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged.

exclude both the report of Dr. Rasmussen and his deposition as untimely. Decision and Order at 2. The administrative law judge also rejected claimant's contention that the five-day notice requirement for depositions provided at 29 C.F.R. §18.22(c) should apply; rather, the administrative law judge found that 20 C.F.R. §725.458, which requires thirty days notice of the taking of a deposition in a black lung claim, was controlling. *Id*. Thus, the administrative law judge found that claimant failed to provide sufficient notice of Dr. Rasmussen's deposition under Section 725.458.

Claimant argues that the five-day notice requirement under 29 C.F.R.§18.22(c), rather than the thirty-day notice requirement under 20 C.F.R. §725.458, should control. As the administrative law judge noted, Section 18.1 of the *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges* provides that when there is any inconsistency between those rules and a rule of special application, executive order or regulation, the latter are controlling. 29 C.F.R. §18.1. Thus, the administrative law judge properly applied Section 725.458, which requires thirty days notice prior to the taking of a deposition, and properly found that the fourteen day notice of Dr. Rasmussen's deposition was insufficient.[5] However, the administrative law judge erred in not considering whether employer waived its right to object to the untimely notice of Dr. Rasmussen's deposition. Section 725.458 specifically provides that "at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived." 20 C.F.R. §725.458. The Board has held that a deposition taken in violation of the thirty-day notice requirement may be admissible if the opposing party expressly or implicitly waives the notice requirement. *See Peyton v. Brown Badgett Coal Co.,* 10 BLR 1-122 (1987). In the instant case, employer failed to note an objection at the time of the deposition. Moreover, employer participated in the cross-examination of Dr. Rasmussen, and waited until the hearing to object to the admission of the deposition into evidence on the ground that insufficient notice was given under Section 725.458. Thus, under these circumstances, we hold that employer's actions constituted an implicit waiver of the untimely notice of the deposition. *Id.*

[5]20 C.F.R. Part 725 is specifically applicable to claims for black lung benefits filed under Part C of Title IV of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. §901 *et seq*.

Moreover, while an administrative law judge is generally afforded broad discretion in dealing with procedural matters, the administrative law judge is obliged to insure a full and fair hearing on all the issues presented. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.,* 9 BLR 1-236 (1987)(*en banc*); *North American Coal Co. v. Miller,* 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Under the circumstances of this case, employer's submission of medical evidence just prior to the twenty-day deadline, coupled with the administrative law judge's refusal to allow claimant the opportunity to respond to this evidence, constituted a denial of claimant's due process right to a fair hearing. *Id.* Thus, good cause was shown as to why Dr. Rasmussen's deposition was not submitted in compliance with the twenty-day rule.[6] *Id.* In light of the foregoing, we reverse the administrative law judge's decision to exclude Dr. Rasmussen's deposition as untimely and remand the case for the administrative law judge to admit Dr. Rasmussen's deposition and weigh it along with the other relevant evidence of record under Sections 718.202(a)(4) and 718.204(b).[7]

[6] Claimant has not specifically argued on appeal that there was good cause for the untimely submission of Dr. Rasmussen's October 16, 1997 report or that it was offered in response to employer's evidence submitted immediately before the twenty-day deadline. We therefore affirm the administrative law judge's decision to exclude Dr. Rasmussen's October 16, 1997 report as untimely under 20 C.F.R. §725.456(b)(1). *See Jennings v. Brown Badgett, Inc.,* 9 BLR 1-94 (1986)*, rev'd on other grounds sub. nom. Brown Badgett, Inc. v. Jennings,* 842 F.2d 899, 11 BLR 2-92 (6th Cir. 1988).

[7]In light of our reversal of the administrative law judge's decision to exclude Dr. Rasmussen's deposition, we vacate the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or total disability due to pneumoconiosis pursuant to Section 718.204(b). We note that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that a claimant's general allegation of error is sufficient to require the administrative law judge to consider the entire record in addressing whether there was a mistake in a determination of fact. 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part, and reversed in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge