BRB No. 95-0379 BLA

GENEVIEVE O'DELL)
(Widow of CLAYTON O'DELL))
)
Claimant-Respondent)
)
v.)
)
CONSOLIDATION COAL COMPANY)
) DATE ISSUED:
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen), Fairmont, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (92-BLA-0235) of Administrative Law Judge Eric Feirtag awarding benefits 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). The administrative law judge found that claimant[1] failed to establish the existence of complicated pneumoconiosis and, thus, invocation of the irrebuttable presumption at 20 C.F.R.

[1]Claimant is Genevieve O'Dell, the miner's widow, who filed a claim for benefits on October 17, 1986. Director's Exhibit 1. The miner, Clayton O'Dell, filed a claim for benefits on January 26, 1979. Director's Exhibit 19. The miner died on December 25, 1983, and his claim was ultimately dismissed in an order issued by the Board on September 19, 1985. Director's Exhibits 6, 19.

§718.304. Accordingly, benefits were denied. Director's Exhibit 25. Claimant filed a timely request for modification on January 28, 1991. Director's Exhibit 34. The administrative law judge found invocation of the irrebuttable presumption established pursuant to Section 718.304, and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge violated due process by "truncating" development of the medical evidence and erred in analyzing the medical evidence and applying the relevant law. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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).

Employer first contends that the administrative law judge erred in refusing to allow employer's experts to review "newly discovered" autopsy slides and requests that the claim be remanded to the administrative law judge for re-opening of the record. Employer's Brief at 10-14. The autopsy slides in question were first mentioned in a medical report by Dr. Green dated December 16, 1993; Dr. Green reviewed the slides of claimant's lungs that were sent to him as well as nine other slides of claimant's lungs that he discovered at the NIOSH facility in Morgantown, West Virginia on September 3, 1993. Claimant's Exhibit 1. Employer does not contest the fact that Dr. Green's report was timely exchanged and submitted, *see* 20 C.F.R. C.F.R. §725.456(b), but contends that the administrative law judge erred in not keeping the record open so that employer could have the nine slides reviewed by other experts of its choosing. Employer's Brief at 13.

At the hearing, the administrative law judge responded to employer's concerns by stating:

> Based on the presentation by Mr. Mattingly [employer's counsel], I think it is fair to have these slides reviewed by a physician of his choice. However, I agree with Mr. Cohen [claimant's counsel] that appropriate rebuttal does not provide the basis for opening or submitting an unlimited number of such reviews and I will confine the opportunity to one physician.

Hearing Transcript at 39. Employer then requested that it be allowed to update the opinions of Drs. Lapp and Fino by permitting them to review the nine slides, Hearing Transcript at 40, to which the administrative law judge responded:

> Okay, I'm prepared to rule. It would seem that since we are dealing with a mistake of fact and we are dealing with a situation where these two physicians have submitted an earlier opinion, I think it would be appropriate for me to allow them to submit updated opinions and therefore, I will receive that.

Hearing Transcript at 41.

It is within the administrative law judge's discretion to leave the record open post-hearing to receive additional evidence. *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992), (Brown, J. concurring; Smith, J. dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). It is also within the administrative law judge's discretion to exclude evidence which is irrelevant, immaterial, or unduly repetitious. 5 U.S.C. §556(d); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In this case, the administrative law judge acted within his discretion in limiting the amount of additional evidence that employer could submit. Hearing Transcript at 39-71; *see Krizner*, *supra*; *Lemar*, *supra*; *Clark*, *supra*. Employer did not object to the administrative law judge's rulings at the hearing and, in fact, agreed that they were fair to all parties. Hearing Transcript at 57. Further, the administrative law judge admitted into evidence post-hearing employer's exhibits marked six through ten, which included reports by Drs. Kleinerman, Hutchins, and Lapp, dated April 18 and 28, and May 9, 1994, all of whom reviewed the nine slides "discovered" by Dr. Green, as well as the depositions of Drs. Kleinerman and Green. Decision and Order at 1-2; Employer's Exhibits 6-10. Therefore, we reject employer's argument that this case must be remanded for further evidentiary development.

Employer further contends that the administrative law judge erred in forcing it to disclose Dr. Kleinerman's opinion, which should have been deemed undiscoverable. Employer's Brief at 14; Claimant's Exhibit 3; Employer's Exhibit 6, 9. Employer states that Dr. Kleinerman's opinion is that of an expert who has been retained or specifically employed in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial; thus his opinion may be

discovered only upon a showing of exceptional circumstances pursuant to Rule 35(b) of the Federal Rules of Civil Procedure. Employer's Brief at 14-17.

At the hearing on January 26, 1994, claimant's counsel argued that employer had failed to respond to interrogatories and a motion to compel production of documents served on employer on December 23, 1993. Hearing Transcript at 43. Employer admitted that it had not responded but argued that four reports prepared by its experts[2] were not discoverable pursuant to Rule 35(b). Hearing Transcript at 44.

After further discussion and review of the reports, the administrative law judge asked employer's counsel for comments prior to his ruling on the admission of Dr. Kleinerman's January 6, 1992 report. Employer's counsel stated:

> Let's give Dr. Kleinerman the other slides he hasn't seen. Let's take Dr. Kleinerman's deposition. Let's take Dr. Green's deposition. Let's let me let one of my other pathologists look at the slides. I'll offer my exhibits today, and that will be fair to everybody, because as Mr. Cohen has framed it in that fashion, "that's fair for everybody."

Hearing Transcript at 57. The administrative law judge then admitted Dr. Kleinerman's 1992 report into the record as Claimant's Exhibit 3. Hearing Transcript at 57. Subsequently, Dr. Kleinerman's April 18, 1994 report and deposition were admitted. Decision and Order at 1-2; Employer's Exhibit 6, 9.

Pursuant to 20 C.F.R. §725.455(b), the administrative law judge is not bound by common law or statutory rules of evidence. Instead, a less stringent standard is applicable to evidence submitted in administrative hearings under the pertinent provisions 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). Subject to the constraints of 20 C.F.R. §725.456, the administrative law judge is required to admit timely developed evidence. While relevancy is the critical issue in the admission of evidence, court rulings and treatise authorities favor the admission of all evidence, even where relevancy is questionable, with reliance on the trier-of-fact to determine the weight to be assigned to the evidence. *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see*

[2]The four reports are x-ray interpretations by Drs. Zaldivar and Frankie, a supplemental letter from Dr. De La Pena, and a report from Dr. Kleinerman. Hearing Transcript at 44.

Pavesi v. Director, OWCP, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987).

Because the federal evidentiary rules are not generally applicable in administrative proceedings and Dr. Kleinerman's report was determined to be relevant by the administrative law judge, the administrative law judge acted within his discretion in admitting it into the record. 20 C.F.R. §725.455(b); *see Cochran*, *supra*. Thus, we reject employer's contention regarding the admission of Dr. Kleinerman's report. *See Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991).

Employer contends that the administrative law judge erred in excluding claimant's hospital treatment records from the record. Employer's Brief at 17. However, the administrative law judge acted within his discretion in excluding these records because they were not made available to claimant at least twenty days prior to the date of the hearing pursuant to 20 C.F.R. §725.456(b). Hearing Transcript at 19; *see McFarland v. Peabody Coal Co.*, 8 BLR 1-163 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Thus, we reject this contention.

Employer next contends, without explanation, that the administrative law judge erred in not requiring claimant to depose Dr. Lapp. Employer's Brief at 17-18. This contention is without merit inasmuch as claimant is not required to take Dr. Lapp's opinion. Employer sought Dr. Lapp's opinion and offered it as evidence; thus, employer could have developed that evidence in any manner that it chose.

Finally, employer challenges the administrative law judge's weighing of the medical evidence of record pursuant to Section 718.304. Employer's Brief at 18-29. Employer argues that the administrative law judge engaged in selective analysis of the evidence and failed to analyze all relevant evidence, thus violating the APA. Employer's Brief at 19-20.

The administrative law judge found that the two physicians of record with the "most impressive credentials," Drs. Green and Kleinerman, conducted the most comprehensive and thorough examinations and agreed that the size of the lesions on lung tissue slides measured 1.7 centimeters. Decision and Order at 3-4; Claimant's Exhibit 1; Employer's Exhibit 6. The administrative law judge then stated:

> ...the existence of a lesion that is appreciably in excess of one centimeter in size constitutes an appropriate basis for a finding of the existence of complicated pneumoconiosis. In this regard it is noted that the Act's relevant provisions contain only one reference to the size [of]

> an abnormality that gives rise to the irrebuttable presumption. It refers to one centimeter when diagnosed (sic) is made by x-ray. Moreover, it is clear that the Committee disagrees with this statutory standard. On the other hand, the United States Court of Appeals for the Third Circuit has ruled that an administrative law judge's finding of the existence of complicated black lung was appropriate where it was based on autopsy findings equating nodules to x-ray evidence of abnormalities of up to 1.5 centimeters. Thus, Mr. O'Dell's affliction with lesions of up to 1.7 centimeters in size was of a severity that is hereby found to mandate the issuance of an award of benefits under the Act.

Decision and Order at 4-5. (Footnotes omitted.)

An administrative law judge may within his discretion assign more weight to the opinions of physicians with superior qualifications. *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*). The Board has held that an administrative law judge properly found invocation of the irrebuttable presumption pursuant to Section 718.304(b) where the autopsy prosector diagnosed complicated pneumoconiosis and described lesions that vary in size up to 1.0 cm in diameter. *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *see Clites v. J & L Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

In this case, the administrative law judge noted the conflicting medical opinions that the miner had only simple coal workers' pneumoconiosis and that the lesions described on the slides were "too small" to constitute complicated pneumoconiosis, but credited the two physicians "with the most impressive credentials in pulmonary pathology," Decision and Order at 4, and permissibly found that the lesions diagnosed by Drs. Green and Kleinerman are sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. *See Scott*, *supra*; *Gruller*, *supra*; *cf*. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

Inasmuch as the administrative law judge considered all relevant evidence and explained his rationale in concluding that complicated pneumoconiosis was established, we reject employer's arguments and affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Arnold v. Secretary of HEW*, 567 F.2d 258 (4th Cir. 1977). Thus, we affirm the administrative law judge's finding that claimant established a mistake in a determination of fact pursuant to Section 725.310 and the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge