BRB No. 06-0653 BLA

CLYDE C. BELCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 05/31/2007
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (02-BLA-5034) of Administrative Law Judge Thomas M. Burke (the administrative law judge) awarding benefits on a subsequent 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] The administrative law judge credited claimant with at least thirty-three years of coal mine employment based on employer's concession and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). In addition, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the instant claim was timely filed by claimant. Employer also challenges the administrative law judge's decision to admit the CT scan readings by Drs. Shipley and Spitz into the record, and exclude numerous x-ray readings by Drs. Spitz and Maki from the record. In addition, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Moreover, employer contends that the information sought by claimant's interrogatories is not discoverable because it is protected by employer's counsel's work-product privilege. Lastly, employer contends that liability for the payment of benefits in this case should be transferred to the Black Lung Disability Trust Fund (Trust Fund). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to reject employer's contentions that the administrative law judge erred: in finding that claimant timely filed his application for benefits; in excluding Dr. Spitz's x-ray readings from the record;[2] and in finding the existence of pneumoconiosis established, as improperly premised on a presumption that pneumoconiosis is always a progressive disease. In addition, the Director urges the Board to reject employer's contention that the medical evidence sought by claimant's interrogatories is not discoverable. Furthermore, the Director urges the Board to reject employer's contention

[1] Claimant filed his first claim on November 24, 1987. Director's Exhibit 33. On September 20, 1989, Administrative Law Judge Robert M. Glennon issued a Decision and Order denying benefits on the basis that claimant failed to establish total disability. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his most recent claim on January 22, 2001. Director's Exhibit 1.

[2] The Director, Office of Workers' Compensation Programs, stated that the administrative law judge erred in excluding Dr. Maki's x-ray reading from the record *if* employer's argument that this x-ray reading was admissible as a treatment record is accurate.

that the Board should transfer the liability for the payment of benefits in this case to the Trust Fund.[3]

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

Initially, we will address employer's contention that the instant claim filed by claimant is barred by the statute of limitations. Specifically, employer argues that claimant's testimony, that Dr. Smith provided a medical determination of total disability due to pneumoconiosis, triggered the running of the statute of limitations clock more than three years before the instant claim was filed, and requires the denial of this claim as a matter of law.

The Director urges the Board to reject employer's argument that the administrative law judge erred in finding that claimant timely filed his application for benefits. The Director asserts that claimant's hearing testimony in this case, regarding Dr. Smith's opinion, is legally insufficient to prove that claimant received a diagnosis of total disability due to pneumoconiosis more than three years prior to his filing of the claim.

The administrative law judge stated that "the [e]mployer has not shown that the [c]laimant's present application for benefits, filed on January 22, 2001, was not timely filed." Decision and Order at 6. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a *medical* determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that neither the Black Lung Benefits Act, nor the implementing regulation, requires that the notice to a miner of a determination of his total disability due to pneumoconiosis be in writing to trigger the start of the three-year statute of limitations clock on black lung claims. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006). In defining what constitutes a medical determination that is sufficient to start the running of the limitations clock, the United States Court of Appeals for the Sixth Circuit, in *Tennessee Consol.*

[3]Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Coal Co. v. Kirk, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. Under the language set forth in *Kirk*, a claimant's mere response of "yes" to the question of whether he was told by a physician that he was disabled by black lung disease is insufficient to trigger the running of the limitations clock. *Id*.

In the instant case, employer relies solely on the testimony provided by claimant about Dr. Smith's opinion at the November 10, 2004 hearing before the administrative law judge to rebut the presumption of timeliness.[4] On cross-examination, employer's counsel asked claimant if Dr. Smith ever told him that he was totally disabled by black lung disease or coal workers' pneumoconiosis. Hearing Transcript at 51. Claimant responded, "Yes, he's told me that before; he told me a long time ago." *Id*. Claimant further stated:

> It's probably, I don't know how long ago it's been. It's been a good while back. He asked me, "did I ever", you know, "apply for Black Lung?" And he said, that's what he said all along, "you've got that."

Id. at 52. Claimant then stated that it has probably been five or six years since Dr. Smith told him that he had black lung disease. *Id*.

The administrative law judge stated that "Dr. Smith's comments, as recalled by [c]laimant in his testimony, that he should apply for black lung benefits because he has black lung, can hardly be considered a 'medical determination' as referenced [at] 20 C.F.R. §725.308(a)." Decision and Order at 6. The administrative law judge further stated that "[a]t the very least, the requisite 'medical determination' has to be found to be well reasoned." *Id*. Moreover, as argued by the Director, there is no evidence that Dr. Smith's opinion was communicated to claimant more than three years before he filed the instant claim.[5] Thus, because the administrative law judge acted within his discretion in

[4] The administrative law judge stated that "Dr. Rasmussen's [January 8, 1988] report was found to be unreasoned in the earlier claim and therefore can not now be considered as sufficient to trigger the statute of limitations." Decision and Order at 5. Employer does not challenge the administrative law judge's consideration of Dr. Rasmussen's opinion.

[5] Claimant testified at the hearing on November 10, 2004 that Dr. Smith told him that he had black lung five or six years ago. According to claimant's testimony, the latest date that Dr. Smith communicated his medical determination to claimant was November

finding that no credible medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years before the instant claim was filed, we reject employer's assertion that Dr. Smith's opinion is sufficient to have triggered the running of the statute of limitations clock. Furthermore, we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness provided at Section 725.308(c) and, therefore, affirm his finding that the instant claim was timely filed.

Next, we address employer's contention that the administrative law judge erred in admitting the readings of the July 2, 2002 CT scan by Drs. Shipley and Spitz into the record. Although claimant submitted the CT scan readings of Drs. Shipley and Spitz less than twenty days before the hearing, the administrative law judge admitted them into the record. Hearing Transcript at 19-21.

Section 725.456(b)(2) provides that evidence that was not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). However, Section 725.456(b)(3) provides that if documentary evidence is not exchanged in accordance with paragraph (b)(2) of this section and the parties do not waive the twenty-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3). Further, Section 725.456(b)(4) provides that a medical report that is not made available to the parties in accordance with paragraph (b)(2) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least thirty days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. 20 C.F.R. §725.456(b)(4).

During the hearing, employer's counsel objected to the admission of the readings of the July 2, 2002 CT scan by Drs. Shipley and Spitz, on the ground that they were not submitted within twenty days of the hearing. Hearing Transcript at 19-21. Employer's counsel stated that although this evidence was sent to claimant on August 19, 2004, in accordance with an Order by Administrative Law Judge Daniel L. Leland, claimant did not proffer it to be a part of this case until November 1, 2004. *Id*. at 20. Employer's counsel additionally stated, "If they had been proffered in a timely manner, we might've opted to go back to Dr. Shipley and ask him to refine his opinion or even to take his deposition in this case." *Id*. In response to employer's counsel's objection, claimant's

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10, 1998. However, because the instant claim was filed on January 22, 2001, Director's Exhibit 1, Dr. Smith's opinion had to be communicated to claimant on January 22, 1998 for the claim to be barred by the statute of limitations. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

counsel stated, "Your honor, they [*i.e.*, employer] had [them]; we got [them] from them [*i.e.*, employer]. It's oversight." *Id*. at 20.

The administrative law judge overruled employer's objections to the admission of the readings of the July 2, 2002 CT scan by Drs. Shipley and Spitz into the record because employer already had copies of this evidence. *Id*. at 20-21. However, the administrative law judge did not explain why he determined that the fact that employer had copies of the late evidence established good cause on the part of claimant for admitting the late evidence into the record. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Further, although he left the record open for sixty days after the hearing for employer to submit a deposition of Dr. Smith, Hearing Transcript at 23, 89-90, the administrative law judge did not afford employer an opportunity to respond to claimant's late submission of evidence, Hearing Transcript at 19-21. Thus, because the administrative law judge failed to comply with the requirements of Section 725.456(b), we vacate the administrative law judge award of benefits on the merits and remand the case for further consideration of the evidence. 20 C.F.R. §725.456(b)(4). At the outset, the administrative law judge must determine whether claimant established good cause for admitting the CT scan readings of Drs. Shipley and Spitz into the record. 20 C.F.R. §725.456(b)(3); *Wojtowicz*, 12 BLR 1-165. Moreover, if the administrative law judge finds that the CT scan readings of Drs. Shipley and Spitz are admissible, then he must leave the record open for at least thirty days for employer to respond to this evidence. 20 C.F.R. §725.456(b)(4).

In addition, for the sake of judicial economy, we address employer's contentions with regard to the issues of the evidentiary limitations, discovery, and due process. Employer asserts that the administrative law judge erred in excluding the x-ray readings by Drs. Spitz and Maki from the record. During the hearing, employer submitted the x-ray readings of Drs. Spitz and Maki. Employer submitted Dr. Spitz's readings of x-rays dated March 24, 1999, July 11, 2000, May 24, 2001, April 1, 2002, and April 18, 2002 in response to a statement made by Dr. Spitz in the CT scan report submitted by claimant. Hearing Transcript at 71. Employer's counsel stated, "They are technically outside the limitations of evidence, however, I think you could find, easily, good cause to receive them." Hearing Transcript at 73. Employer's counsel further stated, "Here, the physician [*i.e.*, Dr. Spitz] that [claimant's counsel's] offered the CT scan interpretation of, says, "I'd like to correlate the CT scan interpretation with plain films." Hearing Transcript at 73. However, in clarifying Dr. Spitz's statement, employer's counsel quoted Dr. Spitz and stated, " 'It might be helpful to correlate these findings with plain film findings.' " Hearing Transcript at 73-74. In response, the administrative law judge stated, "Might be helpful. All right." Hearing Transcript at 74. Then the administrative law judge denied employer's request to admit Dr. Spitz's readings of x-rays dated March 24, 1999, July 11, 2000, May 24, 2001, April 1, 2002, and April 18, 2002 into the record.

The pertinent regulation provides that "[m]edical evidence in excess of the limitations contained in 20 C.F.R §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1) (emphasis added). Although he considered the basis for good cause provided by employer, the administrative law judge denied employer's request to admit Dr. Spitz's x-ray readings into the record. Because the administrative law judge acted within his discretion, we reject employer's assertion that the administrative law judge erred in excluding Dr. Spitz's x-ray readings from the record. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (recognizing that an administrative law judge has broad discretion in handling procedural matters). Nonetheless, with regard to employer's assertion that the administrative law judge erred in excluding Dr. Maki's x-ray reading from the record, we instruct the administrative law judge, on remand, to consider whether Dr. Maki's x-ray reading is admissible as a treatment record. *See* 20 C.F.R. §725.414(a)(4).

Employer further asserts that the administrative law judge erred by not allowing the parties to determine which evidence to designate in compliance with the evidentiary limitations set forth at 20 C.F.R. §725.414. Contrary to employer's assertion, employer submitted an evidence summary form dated June 2, 2004 to Judge Leland. Moreover, the administrative law judge afforded the parties an opportunity to submit evidence in accordance with the evidentiary limitations at the November 10, 2004 hearing. Hearing Transcript at 11-27, 59-87. Thus, we reject employer's assertion that the administrative law judge erred by not allowing the parties to determine which evidence to designate in compliance with the evidentiary limitations set forth at 20 C.F.R. §725.414.

Employer additionally contends that the administrative law judge erred in granting claimant's request for the discovery of information that is sought by claimant's interrogatories 1-3. Specifically, employer asserts that the attorney work product privilege protects it from the forced disclosure of the identity and medical findings of its non-testifying expert witnesses. Employer maintains that the information sought by claimant is privileged. In addition, employer maintains that claimant failed to make a showing of substantial need of the materials. The Director asserts that the information sought in claimant's interrogatories 1-3 is discoverable because it is neither privileged nor an attorney work product.

Claimant submitted thirty-three interrogatories for employer's response. On June 19, 2003, employer filed a motion to quash claimant's interrogatories, a motion for protective order and/or a motion to hold in abeyance. By Order dated July 14, 2003, Judge Leland granted employer's motion to hold this case in abeyance until the Board issued its decision in a similar case that was pending before it.

During a June 23, 2004 hearing, however, Judge Leland stated that the Board's decision in a similar case, *Wood v. Elkay Mining Co.*, BRB No. 03-0178 BLA (Nov. 12,

2003)(unpub.), did not resolve the pertinent discovery issues. June 23, 2004 Hearing Transcript at 4. Consequently, Judge Leland left the record open for thirty days for the parties to submit briefs regarding whether claimant's discovery requests were appropriate. *Id*. at 11-13, 16.

By Order dated July 29, 2004, Judge Leland denied employer's motion to quash claimant's interrogatories 1-3, but granted employer's motion to quash claimant's interrogatories 3-32. Judge Leland found that the information sought in claimant's interrogatories 1-3 is not privileged and that claimant had shown a substantial need for the information. Judge Leland also ordered employer to provide the information sought in claimant's interrogatories 1-3 within thirty days of the date of the order. In a letter dated August 19, 2004, employer advised Judge Leland that it had complied with his July 29, 2004 Order by providing claimant's counsel with the requested information sought in claimant's interrogatories 1-3. On October 6, 2004, Judge Leland issued a Notice of Reassignment that advised the parties that the hearing scheduled for November 10, 2004 would be held before a different administrative law judge.

Employer asserts that the Federal Rules of Civil Procedure (FRCP) are persuasive authority to support its argument that the report of a non-testifying expert witness does not have to be disclosed without a showing of exceptional circumstances. Contrary to employer's assertion, the administrative law judge properly relied on 29 C.F.R. §18.14 of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. *Cline v. Westmoreland Coal Co*., 21 BLR 1-69 (1997). Section 18.14 provides, in pertinent part, that a party may obtain discovery regarding any relevant matter, not privileged, upon showing substantial need of the materials in the preparation of the party's case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 29 C.F.R. §18.14.

The Fourth Circuit court has recently held, in *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, --- BLR --- (4th Cir. 2007), that draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his views of the opinions expected from such experts, are not entitled to protection under the work product doctrine. *Blake*, 480 F.3d at 303, --- BLR at ----. The court declared that employer in that case was not seeking to benefit from its opposing counsel's work product. *Blake*, 480 F.3d at 302, --- BLR at ----. Rather, the court determined that employer was seeking the materials for the legitimate purpose of fully exploring the trustworthiness and reliability of certain doctors. *Blake*, 480 F.3d at 302-3, --- BLR at ----. The court reasoned that employer sought discovery of draft reports and attorney-expert communications in seeking to determine which portions of the experts' reports, if any, had been prepared by counsel, or with the assistance of counsel, and to assess and ascertain which portions thereof resulted from the experts' independent efforts. *Blake*,

480 F.3d at 302, --- BLR at ----. The court further determined that the discovery of the material requested by employer would not undermine any settled policies underlying the work product doctrine. *Id*. In addition, the court observed the importance of distinguishing between testifying experts and non-testifying or consulting experts with regard to the discovery of draft reports or attorney-expert communications. *Blake*, 480 F.3d at 303 n. 25, --- BLR at ----. The court held that any draft reports or attorney communications made or provided to non-testifying or consulting experts should be entitled to protection under the work product doctrine. *Id*.

The facts in *Blake* are distinguishable from the facts in the instant case. Although the Fourth Circuit court emphasized the importance of distinguishing between testifying and non-testifying experts with regard to determining whether the information sought was discoverable, the type of information that was sought in *Blake* is different from the type of information that is sought in the instant case. In *Blake*, the information that was sought consisted of draft reports and attorney-expert communications that counsel provided to its experts before they formed their medical opinions. However, in the instant case, the information that is sought consists of medical evidence prepared by non-testifying experts.

Judge Leland reasonably found that the information sought by claimant is not protected work product because "[t]hese undisclosed medical reports do not represent the mental impression, conclusions, opinions, or legal theories of [employer's] counsel." July 29, 2004 Order Granting in Part and Denying in Part Employer's Motion to Quash Claimant's Interrogatories at 3; *Clark*, 12 BLR at 1-153. In addition, Judge Leland reasonably found that claimant showed a substantial need for the information because "[c]laimant's evidentiary development is not the substantial equivalent of the evidence that [e]mployer [had] refused to disclose and which might aid [c]laimant in proving entitlement to benefits." *Id*. Thus, we reject employer's assertion that the administrative law judge erred in granting claimant's request for the discovery of information that is sought in claimant's interrogatories 1-3. *See generally Keener v. Peerless Eagle Coal Co*., BRB No. 05-1008 BLA, --- BLR --- (2007)(holding that the administrative law judge acted within his discretion in finding that, while employer had not established that the targeted documents were protected by privilege, claimant had not established the requisite "substantial need" for the requested documents, or that undue hardship would result from not obtaining them).[6]

[6] In *Keener v. Peerless Eagle Coal Co*., BRB No. 05-1008 BLA, --- BLR --- (2007), claimant sought the production of medical evidence obtained by employer that employer did not intend to introduce into evidence.

Finally, employer contends that liability for the payment of benefits in this case should be transferred to the Trust Fund. Employer's contention is based on the premise that Administrative Law Judge Michael P. Lesniak made inappropriate remarks and suggestions to claimant's counsel for the strategic development of the evidence that violated employer's right to due process in referencing the methods of discovery performed by Attorney Robert Cohen. Specifically, employer asserts that "[w]hile it remains unclear whether [c]laimant's counsel followed [Judge Lesniak's] suggestion and contacted or called [Attorney Cohen], the interrogatories served by [claimant's counsel] are nearly identical to the interrogatories filed by Attorney Cohen in *Wood v. Elkay Mining Co.*, BRB No. 03-0178 BLA (Nov. 12, 2003)." Employer's Brief at 23. Employer maintains that the damage to its right to due process by Judge Lesniak was not alleviated by the reassignment of the case to a new administrative law judge.

The Director argues that employer has not suffered a deprivation of its right to due process. The Director further argues that Judge Lesniak's recusal and assignment of the case to another administrative law judge removed any threat of a biased fact-finder and ensured employer of a fair opportunity to be heard.

In a motion dated September 30, 2002, employer requested that Judge Lesniak recuse himself from this case. In support of its motion, employer set forth the following facts as supportive of a due process violation: (1) that during a telephone conference dated September 18, 2002 that was convened by the administrative law judge without a court reporter, the administrative law judge discussed discovery issues with the counsels of claimant and employer; (2) that after making evidentiary rulings that limited employer's discovery and evidence, the administrative law judge asked claimant's counsel if he knew Attorney Cohen, a claimant's attorney from northern West Virginia; (3) that when claimant's counsel responded that he knew Attorney Cohen, the administrative law judge told him that he should pick up the telephone and call Attorney Cohen, who had been doing some novel methods of discovery in federal black lung claims; (4) that during a telephone conference dated September 24, 2002 that was reconvened by the administrative law judge with a court reporter, employer's counsel asked the administrative law judge, based on employer's counsel's concern for his client's ability to get a full and fair hearing, if he could recall his comments to claimant's counsel about Attorney Cohen at the last telephone conference; (5) that Judge Lesniak responded that he was "not going to get into this;" and (6) that employer believes that Judge Lesniak's instructions to claimant's counsel with respect to how to conduct discovery by contacting another attorney were biased and prejudicial. Claimant filed a response in opposition to employer's motion on October 1, 2002.

By Order of Continuance and Recusal dated October 2, 2002, Judge Lesniak cancelled a hearing that was scheduled for October 9, 2002 and returned the case file to docket for reassignment. The case was reassigned to Judge Leland. As discussed *supra*,

Judge Leland denied employer's motion to quash claimant's interrogatories 1-3, but granted employer's motion to quash claimant's interrogatories 3-33. The case was subsequently reassigned to Judge Burke for a hearing and decision on the merits.

The Fourth Circuit court has held that the right to due process is violated when a party is deprived of a fair opportunity to mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). In the instant case, employer was timely notified of its potential liability for benefits in the claim. Employer was also given the opportunity to fully present its case and to introduce supporting documentary evidence at the hearing before the administrative law judge. Further, Judge Lesniak recused himself and assigned the case to another administrative law judge. In addition, employer merely speculates that Judge Lesniak's suggestions for discovery tactics to claimant's counsel prejudiced all of the proceedings in this case. However, employer has shown no prejudice based on Judge Lesniak's suggestions to claimant's counsel. *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989). Therefore, under the facts of this case, we reject employer's contentions and decline to transfer liability to the Trust Fund.[7]

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

[7] In view of our decision to vacate the award of benefits, we decline to address employer's contentions at 20 C.F.R. §718.202(a).

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge