

BRB No. 99-1239 BLA

JOSEPH KOWALCHICK)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge,
United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire,
Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
Richard A Seid and 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 and McGRANERY, Administrative Appeals Judges,
and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0009) of Administrative Law
Judge Ainsworth H. Brown denying benefits on 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). After accepting the parties' stipulation to fifteen years and twenty- one days
of coal mine employment, the administrative law judge, applying the 20 C.F.R. Part 718
regulations, found that claimant did not establish the existence of pneumoconiosis pursuant to
20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

¹This claim was filed in February of 1998. Director's Exhibit 1.

On appeal, claimant argues that the administrative law judge erred in failing to provide any explanation or rationale for stating that the Director, Office of Workers' Compensation Programs (the Director), established "good cause" for submitting Dr. Rashid's medical opinion in violation of the 20 day rule, and erred in denying claimant an enlargement of time to complete rebuttal, thereby violating the Administrative Procedure Act and claimant's right to due process. In addition, claimant challenges the administrative law judge's finding under Section 718.202(a). The Director responds, urging affirmance of the denial of benefits.

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).

Claimant contends that the administrative law judge's statement "well, I'll find good cause" to admit Dr. Rashid's medical opinion, fails to comport with the Administrative Procedure Act, as well as the requirements of 20 C.F.R. §725.456. Claimant argues that the administrative law judge did not provide any basis for cursorily finding "good cause" and that his finding is not supported by the record. We disagree. At the hearing, held on April 28, 1999, the administrative law judge permissibly accepted the Director's explanation that although Dr. Rashid examined claimant on February 10, 1999, his medical opinion was submitted out of time because the Director did not receive the report "until within the 20 day rule." Hearing Transcript at 8. The administrative law judge, therefore, did not abuse his discretion wherein he allowed claimant sixty days to submit rebuttal evidence. *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Hearing Transcript at 8-12. Therefore, we affirm the administrative law judge's admission of Dr. Rashid's medical opinion into the record.

Nonetheless, we agree with claimant that the administrative law judge erred in denying claimant an enlargement of time to complete the submission of rebuttal evidence. On July 29, 1999, the administrative law judge referred to claimant's letter dated July 15, 1999, and found that the time to submit rebuttal evidence expired before the request for an enlargement of time to complete the submission of evidence was received. Order Denying

²5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

³We affirm the administrative law judge's finding of fifteen years and twenty-one days of coal mine employment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Letter Motion and Request for Reconsideration. However, by letter dated July 15, 1999, claimant renewed his request to the administrative law judge to rule on his June 21, 1999 letter requesting an enlargement of time until July 30, 1999 to submit additional rebuttal evidence. Claimant's Exhibit 18. Contrary to the administrative law judge's finding, claimant's June 21, 1999 letter, received on June 24, 1999, falls within the sixty days from the date of the hearing April 21, 1999 allowed by the administrative law judge to submit rebuttal evidence. *See* Hearing Transcript at 27; 29 C.F.R. §18.4. Therefore, we vacate the administrative law judge's Decision and Order and remand this case for the administrative law judge to reconsider claimant's request for an extension of time to complete the submission of rebuttal evidence. In addition, the administrative law judge must clarify the contents of the official record and evaluate the x-rays and medical opinions separately under Section 718.202(a)(1) and (a)(4), before weighing all types of evidence together to determine whether claimant suffers from pneumoconiosis. 20 C.F.R. §718.202(a); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Should the administrative law judge, on remand, find that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he must address whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment and whether the evidence is sufficient to establish that claimant's pneumoconiosis is totally disabling. 20 C.F.R. §§718.203, 204; *Trent v. Director*,

⁴ With his June 21, 1999 letter, claimant submitted Dr. R.J. Kraynak's medical report dated June 2, 1999, Dr. Smith's rereading of an x-ray taken on February 18, 1999 and pulmonary function studies dated June 14 and 17, 1999. Claimant's Exhibit 18. Claimant informed the administrative law judge that due to the physician's schedules there was "[s]till outstanding...one additional reading of the film of February 18, 1999 as well as the [c]laimant's additional rebuttal to Dr. Ahluwalia's examination." *Id.* In a letter dated June 28, 1999, the Director objected, arguing that the parties contemplated that the rebuttal evidence would consist of no more than a validation report and "perhaps medical opinion evidence rebutting Dr. Rashid's medical report," but the Director did not argue that claimant's request was untimely. The Director argued that the admission of two new pulmonary function studies falls outside the rebuttal evidence and requested the administrative law judge to exclude the evidence from the record. In addition, the Director acknowledged that claimant's reference to additional rebuttal to "Dr. Ahluwalia's examination" in the June 21, 1999 letter may have been intended to reference Dr. Rashid's examination. The Director objected to the admission of any additional rebuttal evidence not consistent with what was discussed at the hearing. On July 1, 1999, the administrative law judge stamped the Director's June 28, 1999 letter "DENIED" and wrote "Record is closed-arguments due in this office on July 12!" On July 1, 1999 claimant renewed his request for an enlargement of time and the administrative law judge stamped claimant's letter "DENIED" and wrote "what Dr. Ahluwalia's exam? Except for an additional x-ray rereading the record has closed and has been received."

OWCP, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Kowalchick v. Director, OWCP
99-1239 BLA (3d Cir.)

I. CI appeals the D&O denying benefits on a claim properly considered under Part 718. The Director responds, urging affirmance of the denial of benefits.

II. Findings

- A. 15 years and 21 days of cme (stipulated)
- B. No pn

III. Issues

A. §725.456; Due Process- CI argues that the alj erred in failing to provide any explanation or rationale for stating that the Director established “good cause” for submitting evidence in violation of the 20 day rule and erred in denying an enlargement of time to complete rebuttal.

CI contends that the alj’s statement that “well, I’ll find good cause” fails to comport with APA as well as the requirements of Section 725.456. At the hearing, held on April 28, 1999, the Director explained that he requested Dr. Rashid to examine claimant “probably a month” before he was examined in February 10, 1999. The alj permissibly accepted the Director’s explanation that Dr. Rashid’s medical opinion was submitted out of time because the Director did not receive the report “until within the 20-day rule.” Hearing Transcript at 8. The alj did not abuse his discretion wherein he allowed CI sixty days to submit rebuttal evidence. *Clark*. Therefore, the Bd may affirm the alj’s admission of Dr. Rashid’s medical opinion, pfs and bgs.

However, the Bd may agree with CI that the alj erred in denying an enlargement of time to complete the submission of rebuttal evidence. On July 29, 1999, the alj, referring to claimant’s letter dated July 15, 1999, found that the time to submit rebuttal evidence expired before the request for an enlargement of time to complete the submission of evidence was received. Order Denying Letter Motion and Request for Reconsideration. However, CI’s July 15, 1999 letter was CI’s renewed request to the administrative law judge to rule on CI’s June 21, 1999 letter requesting an enlargement of time until July 30, 1999 to submit additional rebuttal evidence. Cx 18. Contrary to the alj’s finding, CI’s June 21, 1999 letter, received on

⁵Claim was filed on February 26, 1998. Director’s Exhibit 1.

⁶ With the June 21, 1999 letter CI submitted Dr. R.J. Kraynak’s medical report dated June 2, 1999; Dr. Smith’s rereading of the x-ray taken on February 18, 1999 and the pfs dated June 14 and 17, 1999. Cx 18. CI informed the alj that due to the physician’s schedules there was “[s]till outstanding...one additional reading of the film of February 18, 1999 as well as the [c]laimant’s additional rebuttal to Dr. Ahluwalia’s examination.”

June 24, 2000, falls within the sixty days allowed by the alj to submit rebuttal evidence. *See* Hearing Transcript at 27; 29 C.F.R. §18.4. Therefore, the Bd may vacate the alj's D & O and remand for the alj to allow cl to complete the submission of rebuttal evidence. In addition, the Bd may remand this case to the alj for clarification of the contents of the official record and to address the merits in light of the post-hearing evidence.

In a letter dated June 28, 1999, the Director objected, arguing that the parties contemplated that the rebuttal evidence would consist of no more than a validation report and "perhaps medical opinion evidence rebutting Dr. Rashid's medical report," but did not argue that claimant's request was untimely. The Director argued that the admission of two new pulmonary function studies falls outside the rebuttal evidence and requested the alj to exclude the evidence from the record. In addition, the Director acknowledged that cl's reference to additional rebuttal to Dr. Ahluwalia's examination in her June 21, 1999 letter may be intended to reference to Dr. Rashid, the Director objected to any additional rebuttal evidence not consistent with what was discussed at the hearing. On July 1, 1999, the alj stamped the Director's letter "DENIED" and wrote "Record is closed-arguments due in this office on July 12!" On July 1, 1999 cl renewed his request and the alj stamped cl's letter "DENIED" and wrote "what Dr. Ahluwalia's exam? Except for an additional x-ray rereading the record has closed and has been received."