BRB No. 99-0837 BLA

RAYMOND KERSHETSKY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEHIGH COAL & NAVIGATION COMPANY	)	
	)	
	)	
and	)	DATE ISSUED:
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Richard Davis (Arter & Hadden, LLP), Washington, DC, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0520) of Administrative Law Judge Ralph A. Romano 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). After crediting claimant with twenty-seven years of coal mine employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in not permitting employer to submit additional x-ray evidence. Employer also argues that the administrative law judge erred in excluding evidence from the record. Employer also contends that the administrative law judge failed to address relevant evidence. Claimant responds in support of the administrative law judge's evidentiary rulings. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Employer contends that the administrative law judge erred in failing to explain his basis for denying employer's objection to the admission of Claimant's Exhibits 5 and 7. Claimant's Exhibit 5 consists of four positive interpretations of claimant's August 7, 1997 x-ray, while Claimant's Exhibit 7 consists of three positive interpretations of claimant's March 5, 1998 x-ray.[1] Employer argued that he was

[1]The record also contains three interpretations of claimant's August 7, 1997 x-ray that were submitted when the case was before the district director. While Drs. Barrett and Goodman interpreted claimant's August 7, 1997 x-ray as negative for pneumoconiosis, Dr. Kraynak interpreted the x-ray as positive for pneumoconiosis. *See* Director's Exhibits 16-18. Claimant also submitted Dr. Mathur's positive interpretation of the August 7, 1997 x-ray. *See* Claimant's Exhibit 1.

precluded from obtaining additional interpretations of the August 7, 1997 and March 5, 1998 x-rays because claimant retained control of these films.

An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). An administrative law judge is also afforded discretion in dealing with matters of fairness and judicial efficiency. *See Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). However, an administrative law judge is obligated to insure a full and fair hearing on all the issues. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*).

We agree with employer that the administrative law judge did not explain his basis for not allowing employer an opportunity to obtain additional interpretations of claimant's August 7, 1997 and March 5, 1998 x-rays. The administrative law judge denied employer's objection to the admission of claimant's x-ray interpretations, stating that while he did not "quite understand the objection," he nevertheless did not hear "any valid objections." Transcript at 5-6. The administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 5 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because the administrative law judge did not provide a basis for denying employer's objection to the admission of Claimant's Exhibits 5 and 7 and for denying employer's motion to submit additional interpretations of claimant's August 7, 1997 and March 5, 1998 x-rays, we remand the case to the administrative law judge for further consideration.

Employer also argues that the administrative law judge erred in excluding Dr. Levinson's deposition testimony. At the hearing on July 23, 1998, the administrative law judge admitted Dr. Levinson's deposition testimony into the record as Employer's Exhibit 9. Transcript at 20-21. The administrative law judge, however, directed employer to provide claimant with a copy of Dr. Levinson's deposition transcript as soon as possible. *Id.* at 19.

On August 24, 1998, claimant's counsel filed a motion for reconsideration, requesting that the administrative law judge reconsider his decision to admit Dr. Levinson's deposition testimony into the record. Claimant's objected to the admission of Dr. Levinson's deposition testimony on two grounds. First, claimant's

counsel noted that she had still not received a copy of the deposition transcript. Second, claimant's counsel argued that Dr. Levinson's deposition testimony should be excluded based upon the fact that employer failed to provide claimant with thirty days notice of the taking of the deposition. Employer's Brief, Exhibit F.

Under cover letter dated September 2, 1998, employer provided claimant's counsel with a copy of Dr. Levinson's June 30, 1998 deposition transcript. Employer's Brief, Exhibit G.

Despite having received a copy of Dr. Levinson's deposition transcript,[2] claimant's counsel, on three occasions, renewed her request for reconsideration of the administrative law judge's decision to admit Dr. Levinson's deposition testimony into the record. Employer's Brief, Exhibits H, I.

In his Decision and Order, the administrative law judge granted claimant's motion for reconsideration and excluded Dr. Levinson's deposition testimony from the record. In granting claimant's motion, the administrative law judge noted, *inter alia*, that claimant's counsel indicated that Dr. Levinson's deposition transcript had

[2]Employer, in its brief, asserts that it mailed a copy of Dr. Levinson's deposition transcript to claimant's counsel on September 2, 1998. Employer's Brief at 4; *see* Employer's Exhibit G. Claimant, in his response brief, does not deny having received a copy of Dr. Levinson's deposition transcript at or about that time.

still not been provided to her. *See* Decision and Order at 8-9.

Employer contends that the administrative law judge's decision to exclude Dr. Levinson's deposition testimony was based upon the administrative law judge's mistaken impression that employer had not provided a copy of Dr. Levinson's deposition transcript to claimant's counsel.[3] We agree.

The administrative law judge faulted employer for not responding to claimant's repeated requests for reconsideration. Employer, however, asserts that it did not believe that a response was necessary since it had complied with the administrative law judge's directive that it provide claimant with a copy of the transcript. Employer also notes that, if it was unclear whether claimant had been provided with a copy of the transcript, the administrative law judge could have issued a show cause order requesting the parties to show cause why Dr. Levinson's deposition testimony

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[3]Claimant's counsel's October 1, 1998 letter to the administrative law judge was particularly misleading. Despite having already received a copy of the transcript, claimant's counsel informed the administrative law judge that:

> As noted, at the hearing and in my correspondence of August 24, 1998, at no time did [employer's counsel] exchange the transcript with me, thereby severely prejudicing the Claimant in the preparation of his claim for hearing. Secondly, despite Your Honor's directive at the hearing that [employer's counsel] immediately provide the Claimant with the transcript from Dr. Levinson's testimony, [employer's counsel] failed to do so.

Employer's Brief, Exhibit H.

should not be excluded.

Because the administrative law judge's exclusion of Dr. Levinson's deposition testimony was based upon his mistaken impression that claimant had not been provided with a copy of Dr. Levinson's deposition transcript, we remand the case to the administrative law judge with instructions to reconsider whether Dr. Levinson's deposition testimony should be admitted into the record.[4]

Employer finally argues that the administrative law judge erred in failing to address Dr. Levinson's medical report. Our review of the record does not reveal the presence of a medical report completed by Dr. Levinson.[5] Other than Dr. Levinson's previously discussed deposition testimony, the only medical evidence in the record associated with Dr. Levinson is his invalidation of two pulmonary function studies. *See* Employer's Exhibit 2.

[4]Claimant contends that Dr. Levinson's deposition testimony should be excluded because employer failed to provide proper notice of the deposition. The regulations provide 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.

[5]Employer's Exhibit 5 consists of Employer's Motion for an Enlargement of Time to submit Dr. Levinson's deposition testimony. *See* Employer's Exhibit 5. In support of that motion, employer indicated that it had offered Dr. Levinson's medical report into evidence. *Id.* Despite employer's assertion, there is no indication that Dr. Levinson's medical report was ever admitted into the record.

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