BRB No. 02-0602

STEPHEN B. McKENNEY (Decedent) EILEEN L. McKENNEY (Widow)	)	
Claimant-Petitioner	)	
v.	)	
BATH IRON WORKS CORPORATION	)	
and	)	
ONE BEACON INSURANCE (f/k/a COMMERCIAL UNION INSURANCE)	)	DATE ISSUED: May 22, 2003
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

G. William Higbee (McTeague, Higbee, Case, Cohen, Whitney & Toker, PA), Topsham, Maine, for claimant.

Richard F. Van Antwerp and Thomas R. Kelly (Robinson, Kriger & McCallum), Portland, Maine, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (2001-LHC-1016) of Chief Administrative Law Judge John M. Vittone rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Decedent, a pipe coverer and electrician, filed a claim for disability benefits during his lifetime on March 14, 2000, alleging that his disabling lung cancer was caused by asbestos exposure at work. He died on January 1, 2001, due to lung cancer, and decedent's widow (claimant) filed a claim for death benefits. 33 U.S.C. §909. She alleged that her husband's death due to lung cancer was caused in part by his occupational asbestos exposure. The administrative law judge consolidated the disability and death benefits claims for decision.

In his decision, the administrative law judge denied disability and death benefits. The administrative law judge found that invocation and rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption was established. Upon a weighing of the evidence as a whole, the administrative law judge credited the opinion of employer's expert, Dr. Craighead, over that of claimant's expert, Dr. Pohl. The administrative law judge relied on the fact that Dr. Pohl based his conclusion on the presence of interstitial fibrosis, a marker for asbestosis, on a March 2000 chest x-ray but did not explain the lack of these findings on later May and July 2000 x-rays. Unlike Dr. Pohl's opinion, Dr. Craighead's opinion explained the discrepancy among the x-rays, referring to the March 2000 x-ray finding of interstitial fibrosis as "artifactual" or indicating a brief infection. The administrative law judge also relied on the absence of an asbestosis diagnosis in the opinions of the decedent's treating physicians, Drs. Kneebone and Polkinghorn. Thus, the administrative law judge found that claimant did not establish by a preponderance of the evidence that the decedent's disability and death due to lung cancer were caused in part by his occupational asbestos exposure.

Claimant filed a timely motion for reconsideration of the administrative law judge's decision. She requested that the administrative law judge reconsider the denial of benefits after admitting into evidence and weighing a chest x-ray dated September 28, 2000, indicating interstitial fibrosis, which she stated was inadvertently omitted from the record. Claimant also challenged the administrative law judge's reliance on Dr. Craighead's interpretation of the May 23, 2000, x-ray. Dr. Craighead portrayed the May 2000 x-ray as failing to show interstitial markings which were present on the March 2000 x-ray. Claimant asserted that the May 23, 2000, x-ray does indicate interstitial markings but not as clearly as those shown on the March 2000 x-ray. Employer sought denial of claimant's motion for reconsideration, requesting that the administrative law judge not consider claimant's additional evidence post-decision. Alternatively, employer asserted that claimant's motion for reconsideration should be construed as a motion to reopen the record and requested that it be given the opportunity to respond to claimant's new evidence if it were admitted into the record.

The administrative law judge denied claimant's motion for reconsideration, citing Section 556(e) of the Administrative Procedure Act (APA), 5 U.S.C. §556(e). The administrative law judge stated,

Section 556(e) of the APA, 5 USC §[556](e), states the transcript of

> testimony and exhibits, together with all the papers and requests *filed in the proceeding*, constitute the exclusive record for decision. Claimant states in its (sic) own brief that the new evidence was not submitted to this tribunal by either party, and a final determination has been issued. Accordingly; Claimant's Motion for Reconsideration is **DENIED.**

Order Denying Motion for Reconsideration at 1 (emphasis in original).

On appeal, claimant challenges the administrative law judge's denial of her motion for reconsideration. Claimant also challenges the administrative law judge's reliance on Dr. Craighead's interpretation of the May 2000 x-ray as negative for interstitial fibrosis. Employer responds in support of the administrative law judge's denial of benefits.

Claimant initially argues that the administrative law judge abused his discretion by failing to admit into the record the inadvertently omitted September 28, 2000, chest x-ray indicating interstitial fibrosis which claimant sought to admit in her motion for reconsideration. The administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious, or an abuse of discretion. *See, e.g., Patterson v. Omniplex World Services*, 36 BRBS 149 (2003). Concomitant with this discretion, however, is the administrative law judge's duty to admit all relevant and material evidence. 20 C.F.R. §702.338; *see also* 33 U.S.C. §923(a).

We hold that the administrative law judge erred in refusing to admit the evidence submitted with claimant's motion for reconsideration on the basis of Section 556(e) of the APA. Although the administrative law judge law judge accurately set forth Section 556(e), this section does not limit the time frame during which any documents must be received into evidence. *See Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 879 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978). Thus, the administrative law judge erred in relying on Section 556(e) to support his conclusion that he could not admit this evidence post-decision. Moreover, nothing in the Act or regulations prevents the administrative law judge from admitting evidence into the record pursuant to a motion for reconsideration. While Section 702.338 of the Act's regulations, 20 C.F.R. §702.338, explicitly allows the administrative law judge to reopen the record for the admission of additional evidence at any time prior to the issuance of a compensation order, the regulation does not preclude the administrative law judge from admitting additional evidence submitted via a timely motion for reconsideration, as the proceedings before him have not become final. Moreover, the administrative law judge is charged with making "such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." 33 U.S.C. §923(a).

In any event, the additional evidence presented with claimant's motion for reconsideration would be admissible under Section 22 of the Act, 33 U.S.C. §922,

which allows for modification of a decision because of a mistake in a determination of fact at any time prior to one year after the rejection of a claim. 33 U.S.C. §922; *see also* 20 C.F.R. §702.373. Pursuant to Section 22, the administrative law judge can correct any mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1972); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002) (motion for modification cannot be denied solely on the basis that the evidence could have been presented at an earlier stage in the proceedings).

In *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986), the Board addressed a case with similar facts. Therein, the employer filed a timely motion for reconsideration of the administrative law judge's decision. The administrative law judge issued a denial of the motion in March 1981, but the district director did not file the order until April 22, 1981. In the interim, the employer filed an amended motion for reconsideration seeking to admit additional evidence, which the administrative law judge denied inasmuch as an appeal (albeit premature) had been filed with the Board. The Board construed the employer's amended motion for reconsideration as a petition for modification pursuant to Section 22, and held that the administrative law judge erred in not admitting the documents into evidence, as they were relevant and material to the issue at hand. *Williams*, 19 BRBS at 69-70.

Although the instant case does not present the procedural complexities of *Williams*, the Board's decision in *Williams* demonstrates that motions to admit additional evidence, whether via a timely motion for reconsideration, as here, or a timely motion for modification pursuant to Section 22, cannot be dismissed lightly. The x-ray evidence claimant seeks to admit was apparently omitted inadvertently. Moreover, the September 2000 x-ray is relevant and material to the issue of the work-relatedness of decedent's lung cancer. The administrative law judge relied on Dr. Craighead's opinion that the decedent's lung cancer was caused solely by his 84 pack year smoking history; the opinion was based on the absence of interstitial fibrosis in the May and July 2000 x-rays. Decision and Order at 10; Emp. Ex. 1. Dr. Craighead discounted the March 1, 2000, x-ray showing interstitial fibrosis as either a temporary infection or a mistake in the x-ray reading (saying it may be "artifactual") based on the fact that interstitial fibrosis did not appear on the May and July 2000 x-rays. Emp. Ex. 1. In addition, the administrative law judge did not accord greater weight to Dr. Pohl's opinion that the decedent's occupational asbestos exposure contributed to his lung cancer because it was based on the March 2000 x-ray showing interstitial fibrosis and those findings subsequently were called into question by the May and July 2000 x-rays. Decision and Order at 11; Cl. Ex. 12. The administrative law judge stated, "Dr. Pohl fails to address the inconsistencies in the May and July [2000] x-rays in his report, and Claimant has not provided any additional evidence to refute Dr. Craighead's conclusion. Without a finding of interstitial fibrosis, Dr. Pohl's medical opinion collapses under it's (sic) own

weight." Decision and Order at 11. That an x-ray taken after those in May and July 2000 was interpreted as showing interstitial fibrosis is thus clearly relevant to the administrative law judge's weighing of the evidence. We, therefore, vacate the administrative law judge's order denying claimant's motion for reconsideration, and we remand this case to the administrative law judge for further consideration pursuant to this opinion. On remand, the administrative law judge must provide employer an opportunity to respond to any newly admitted evidence.

Claimant also argues, with respect to the administrative law judge's Decision and Order, that the administrative law judge erred in crediting Dr. Craighead's opinion over that of Dr. Pohl because Dr. Craighead erroneously interpreted the May 2000 x-ray as not showing interstitial fibrosis. The interpretation of the medical evidence is best left for the medical experts while the weighing of the medical evidence is for the administrative law judge. *See generally Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). The March 1, 2000, x-ray showed "some interstitial lung disease primarily bibasilar . . . . that was most prominent in the medial aspect of the upper right lung." Emp. Ex. 1 at 1; ALJ Ex. 1A (#3). An interpretation of the May 23, 2000, chest x-ray by Dr. Stern, a radiologist, states that,

> Some very subtle nodular densities previously seen in the lateral aspect of the left hemithorax are not as clearly seen nor am I able to see the very faint nodular densities previously questioned on the right side. . . A number of faintly seen nodular densities on the previous exam (sic) and/or interstitial prominence is no longer as apparent.

ALJ Ex. 1A (#3); Ex. B to Cl. Motion for Reconsideration. A fair reading of these reports, taken together, could be that interstitial fibrosis appeared on the right lung on March 1, 2000, but the radiologist was not able to see it on May 23, 2000. Thus, that Dr. Craighead, after reviewing the report of the May 2000 x-ray, interpreted it as negative for interstitial fibrosis was a fact upon which the administrative law judge could rationally rely. *See Donovan*, 300 F.2d 741; Decision and Order at 8-9; Emp. Ex. 1. The administrative law judge's weighing of the evidence on the existing record is thus affirmed.

Accordingly, the administrative law judge's Order Denying Motion for Reconsideration is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge