

BRB No. 99-0712 BLA

EVELYN M. HARNER)	
(Widow of LEONARD HARNER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BAYLOR RUSH, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
AMERICAN MINING 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-Awarding Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (98-BLA-0695) of Administrative Law Judge Ainsworth H. Brown on a survivor's 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 found that employer stipulated to a coal mine employment history of twenty-six and one-quarter years. Decision and Order at 3. The administrative law judge refused to admit the medical opinion of Dr. Osterling, proffered by employer, as the request for admission occurred after the record was closed. After considering the evidence of record, the administrative law judge found that the miner's death was due to pneumoconiosis. Decision and Order on Remand at 3-4. Accordingly, survivor's benefits were awarded.

On appeal, employer contends that the administrative law judge's refusal to open the record to allow the admission of Dr. Osterling's medical opinion constituted a denial of its due process rights. Employer asserts that the exclusion of the opinion prevents employer from presenting any evidence regarding the autopsy slides. Employer asserts that the lengthy delay in obtaining the autopsy slides from Dr. Bindie precluded its efforts to develop medical evidence and that the administrative law judge's decision, excluding Dr. Osterling's opinion, unfairly penalizes employer. Claimant, in response, urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has declined to file a brief.

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 asserts that on January 27, 1998, it initially requested the pathology slides from the autopsy performed on the miner on December 1, 1995. Employer contends that over the course of the next several months it repeated its requests for the slides in order to allow for preparation of its case. Employer asserts that it did not receive these slides until December 8, 1998, the date of the hearing in this case. Employer acknowledges that it did not comply with the deadlines established by the administrative law judge at the hearing, but that "fundamental fairness" would require the administrative law judge to admit the report of

¹ Claimant, Evelyn Harner, is the widow of the miner, Leonard Harner, who died December 1, 1995. The death certificate lists the causes of death as hemolytic-uremic syndrome and thrombotic purpura. Director's Exhibit 8. Coal workers' pneumoconiosis is listed on the death certificate as an other significant condition. Director's Exhibit 8.

Dr. Osterling, in view of the lengthy delay it suffered in securing the slides and the fact that the decision to exclude the opinion precluded it from presenting any defense to the claim. Employer, therefore, requests that the record be reopened to allow for the admission of Dr. Osterling's medical opinion.

In refusing to admit Dr. Osterling's opinion into the record, the administrative law judge found that employer failed to abide by the agreed upon time frame for the submission of evidence, failed to explain its tardiness in submitting evidence, and failed to seek an extension of time in which to submit evidence. Decision and Order at 2. The administrative law judge further concluded that the delay that employer experienced in receiving the autopsy slides did not automatically entitle employer to miss deadlines imposed at the hearing for the submission of evidence. Decision and Order at 2. Accordingly, the administrative law judge refused to admit the opinion of Dr. Osterling into the record.

We reject employer's assertions. The administrative law judge's decision to exclude the opinion of Dr. Osterling did not constitute a denial of due process. At the hearing on December 8, 1998, the administrative law judge addressed the issue of Dr. Bindie's tardiness in complying with employer's repeated requests for the autopsy slides. *See* Hearing Transcript at 5-8, 14-15. Employer stated that he had just received the slides for the first time on the day of the hearing and requested an opportunity to have the slides reviewed and a report prepared pursuant to that review. Hearing Transcript at 6. The administrative law judge asked employer the amount of time it anticipated that such a review would take and the amount of time it would take for a report to be prepared. Hearing Transcript at 6. Employer replied that a total of forty-five days would be required. The administrative law judge, therefore, granted employer forty-five days to prepare and submit this evidence. Hearing Transcript at 6. This forty-five day period would expire on or about January 22, 1999. The administrative law judge also indicated that if employer was delayed in its review of the evidence or preparation of the medical opinion then, after consulting with claimant's counsel, it could make a request for more time. Hearing Transcript at 14-15. Finally, the administrative law judge provided for an additional twenty day period beyond the forty-five days for the submission of written closing arguments. Hearing Transcript at 15. This time period would expire on or about February 10, 1999.

As the administrative law judge found, the forty-five day period elapsed without the submission of a medical opinion by employer or a request for an extension of time to submit such opinion. Moreover, the additional twenty day period also elapsed without employer producing any evidence or a request for an extension of time. Not until March 2, 1999 did employer request an extension of time to submit a report. On March 10, 1999, employer forwarded the report of Dr. Osterling. On March 12, 1999, the administrative law judge issued an Order refusing to admit the opinion.

The administrative law judge has broad discretion in procedural matters. *See Clark v.*

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985); *see generally Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577 (1984). In the instant case, the record demonstrates that employer understood the time frame established by the administrative law judge for submission of further evidence, as well as the time frame provided for seeking an extension of time. Employer failed to comply with that time period, failed to provide a reason for its failure to comply, nor did it request an extension of time. Accordingly, the administrative law judge's refusal to admit Dr. Osterling's opinion into the record does not constitute an abuse of the administrative law judge's discretion, and we reject employer's assertion that the administrative law judge's failure to admit the opinion constitutes a violation of due process.² *See Clark, supra; Itell, supra; see generally Gladden, supra.*

Employer has not challenged the administrative law judge's determination on the merits, *i.e.*, that the medical opinion evidence supports a conclusion that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205; *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *see also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Accordingly, we affirm the administrative law judge's determination as unchallenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), and we affirm the award of survivor's benefits.

² We are mindful that the lengthy delay in receiving the autopsy slides could constitute a severe detriment to employer's preparation of its case. Nevertheless, we conclude that the administrative law judge's action in granting employer a time-period subsequent to the hearing in order to submit a report based on those slides was sufficient to counter any detriment experienced by employer. *See generally Clark, supra; Itell, supra.*

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge