BRB No. 09-0438 BLA

GARY N. FOX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 04/16/2010
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.

John C. Cline, Piney View, West Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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 (07-BLA-5984) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of

the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). This case involves a subsequent claim filed on November 8, 2006.[1] Prior to a hearing, the administrative law judge granted claimant's motion to compel employer to produce any x-rays or pathology slides that it had not previously submitted, or exchanged with claimant, in the adjudication of the prior 1999 claim. However, before complying with the Order, employer withdrew its controversion of claimant's 2006 claim, withdrew its request for a hearing, and requested that the case be remanded to the district director for the payment of benefits. The administrative law judge, however, at claimant's request, retained jurisdiction of the case and ordered employer to produce the requested documents. Employer complied with the discovery order, producing the pathology reports of Drs. Naeye and Caffrey, along with several x-ray interpretations. After reviewing these documents, along with the evidence previously submitted in connection with claimant's 1999 claim, the administrative law judge found that, in claimant's 1999 claim, employer committed fraud on the court by concealing pathology reports diagnosing claimant with complicated pneumoconiosis. The administrative law judge, therefore, found that the prior denial of benefits was ineffective. The administrative law judge granted claimant's motion to set aside the judgment denying benefits in his prior claim, and awarded benefits as of January 1, 1997, the date of the first x-ray that was interpreted as positive for complicated pneumoconiosis.

On appeal, employer argues that the administrative law judge erred in ordering it to produce the pathology reports of Drs. Naeye and Caffrey. Employer contends that these reports are protected by the "work product" rule. *See* 29 C.F.R. §18.14. Employer further contends that the administrative law judge did not establish a proper record, did not apply the evidentiary limitations set forth at 20 C.F.R. §725.414, and prevented employer from submitting its own relevant evidence. Employer also challenges the administrative law judge's finding that employer committed fraud on the court. Claimant[2] responds in support of the administrative law judge's granting of his motion to set aside the judgment denying benefits in the prior claim, and urges affirmance of the administrative law judge's determination regarding the onset date of benefits. The

[1] Claimant initially filed a claim for benefits on May, 4, 1999. In a Decision and Order dated January 5, 2001, Administrative Law Judge Edward Terhune Miller found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Miller denied benefits. There is no indication that claimant took any further action in connection with his 1999 claim.

[2] By letter dated May 8, 2009, claimant's counsel informed the Board that claimant died on April 14, 2009. Claimant's surviving spouse, Mary L. Fox, is pursuing the claim.

Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's assertion that the administrative law judge erred in ordering employer to produce the pathology reports of Drs. Naeye and Caffrey. The Director further urges the Board to reject employer's arguments that the administrative law judge did not establish a proper record, did not properly apply the evidentiary limitations set forth at 20 C.F.R. §725.414, and prevented employer from submitting its own evidence. In a reply brief, employer reiterates its previous contentions of error.[3]

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).

The "Work Product" Rule

Employer argues that the administrative law judge erred in ordering it to produce the pathology reports of Drs. Naeye and Caffrey. Citing *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), employer contends that the reports of these non-testifying, consulting experts are protected by the work product rule set out in 29 C.F.R. §18.14(c).[4] Employer's Brief at 28. Employer's reliance on *Blake* is

[3] On August 29, 2009, claimant filed a request for Oral Argument. By Order dated October 16, 2009, the Board denied claimant's motion for Oral Argument, noting that Oral Argument was not required to resolve the issues raised on appeal. *Fox v. Elk Run Coal Co.*, BRB No. 09-0438 BLA (Oct. 16, 2009) (Order) (unpub.). On February 19, 2010, claimant renewed his motion for oral argument. For the reason previously set forth in our October 16, 2009 Order, we deny claimant's request for Oral Argument in this case.

[4] Section 18.14(c) provides that:

> A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal

misplaced. The type of information sought in this case is different from the type of information that was sought *Blake*. In *Blake*, the employer sought draft reports and attorney-expert communications that claimant's counsel provided to claimant's experts before they formed their medical opinions.[5] In this case, claimant sought the actual medical reports prepared by employer's non-testifying experts. The administrative law judge reasonably found that the information sought by claimant is not protected work product because it is "the work product of physicians, not attorneys." Order Granting Motion to Compel Discovery (Order) at 2.

Additionally, the administrative law judge reasonably found that claimant showed a substantial need for the information and would be unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Order at 2; *see* 29 C.F.R. §18.14(c). The administrative law judge found that claimant had a substantial need to know whether employer had withheld pertinent x-ray and pathology reports during the adjudication of claimant's prior 1999 claim. The Director accurately notes that, in order to prove that employer provided false information to its reviewing physicians in the 1999 claim, it was necessary for claimant to discover what information employer actually possessed. Director's Brief at 3. Moreover, the Director accurately notes that there was no way for claimant to obtain this information without asking employer to provide it. Consequently, we reject employer's argument that the administrative law judge abused his discretion in granting claimant's motion to compel

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> theories of an attorney or other representative of a party concerning the proceeding.

29 C.F.R. §18.14(c).

[5] In *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), the employer sought discovery of draft reports and attorney-expert communications in seeking to determine which portions of expert 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. The United States Court of Appeals for the Fourth Circuit noted that the employer was seeking these materials for a legitimate purpose, *i.e.*, to fully explore the trustworthiness and reliability of the claimant's experts. The Fourth Circuit, therefore, held 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 view of the opinions expected from such experts, are not entitled to protection under the work product doctrine." *Blake*, 480 F.3d at 303, 23 BLR at 2-470. However, the Fourth Circuit noted 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. *Blake*, 480 F.3d at 303 n.25, 23 BLR at 2-470 n.25.

the discovery of the pathology reports of Drs. Naeye and Caffrey. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-243 (2007) (*en banc*).

The Establishment of a Proper Evidentiary Record

We agree, however, with employer that the administrative law judge failed to assemble a proper evidentiary record. In his Decision and Order, the administrative law judge reviewed and discussed numerous documents in reaching his determination that employer committed fraud on the court by producing misleading evidence in the prior claim. Decision and Order at 2-18. However, none of these documents is in the record before the Board. An administrative law judge is required to receive into evidence the testimony of witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the district director under 20 C.F.R. §725.421, and other properly submitted evidence. 20 C.F.R. §§725.455(b), 725.456(a). All evidence upon which the administrative law judge relies for his decision must be contained in the transcript of testimony, either directly or by appropriate reference. 20 C.F.R. §725.464. Furthermore, all medical reports, exhibits, and pertinent documents must be marked for identification and incorporated into the record. *Id.* In this case, the parties did not submit, and the administrative law judge did not admit, any medical reports, documents, or exhibits into evidence. Because the administrative law judge did not develop a proper evidentiary record, his decision fails to comply with the Administrative Procedure Act. *See* 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Due to the lack of an evidentiary record before us, we are unable to review the administrative law judge's findings. Consequently, we are constrained to vacate the administrative law judge's determinations regarding fraud on the court and the onset date of claimant's entitlement to benefits, and remand this case for further proceedings. *See* 20 C.F.R. §802.301(b); *Berka v. North Am. Coal Corp.*, 8 BLR 1-183 (1985).

Therefore, we vacate the administrative law judge's finding that employer committed fraud on the court, and the administrative law judge's determination regarding the onset date of claimant's entitlement to benefits. This case is remanded to the administrative law judge for him to provide the parties with an opportunity to submit evidence, and to file any objections to evidence submitted by the other parties. On remand, after making the necessary evidentiary rulings, the administrative law judge should mark the admissible evidence for identification, and incorporate it into the record. After a proper evidentiary record is developed, the administrative law judge should reconsider whether employer's actions, in the adjudication of claimant's prior 1999 claim, constituted "fraud on the court." Fed. R. Civ. P. 60(d)(3). The administrative law

judge should also reconsider the onset date of claimant's entitlement to benefits.[6]

Accordingly, the administrative law judge's Decision and Order awarding 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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] As employer withdrew its controversion and concedes entitlement in this claim, the award of benefits is affirmed. In light of the foregoing, we hold that application of the recent amendments to the Act would not alter the outcome of this case. *See* Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).