

BRB No. 99-1101 BLA

ERNEST T. MAZEIKA)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED))	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

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

Rita Roppolo (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Modification and Denying Benefits (99-BLA-0602) of Administrative Law Judge Ralph A. Romano on a duplicate claim¹ filed pursuant to

¹Claimant filed his original claim for benefits on August 25, 1978, Director's Exhibit 1, which was denied by the district director on April 2, 1979, on the ground that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 30. Claimant took no further action until the filing of the present claim for benefits on December 21, 1983. Director's Exhibit 2. Following the denial of claimant's duplicate claim by Administrative Law Judge Chester Shatz on June 26, 1987, Director's Exhibit 48, and the Board's affirmance of the denial of benefits, Director's Exhibit 61, claimant submitted new medical evidence to the Board, and the case was remanded to the district director for further

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). The administrative law judge determined that, subsequent to the issuance of his prior Decision and Order Denying Modification and Denying Benefits on December 30, 1996, Director's Exhibit 183, new evidence submitted in support of modification was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), an element of entitlement which claimant previously failed to establish, thus claimant did not establish a change in conditions pursuant to 20 C.F.R. §725.310.² The administrative law judge further found

consideration. Director's Exhibit 63. In a Decision and Order issued on April 8, 1992, Administrative Law Judge Paul H. Teitler denied benefits, finding the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), 718.203(b), and a material change in conditions pursuant to 20 C.F.R. §725.309, but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Director's Exhibit 120. Claimant subsequently submitted new evidence and requested modification following Judge Teitler's denial and the denials of modification issued by Judge Romano on March 16, 1995, Director's Exhibit 154, and December 30, 1996, Director's Exhibit 183.

²Although claimant seeks modification of Judge Romano's prior denial herein, the underlying claim is a duplicate claim. Thus, the central inquiry remains whether new evidence submitted subsequent to the denial of the earlier claim establishes a material change in conditions pursuant to 20 C.F.R. §725.309 under the standard enunciated in *Labelle*

no mistake in any prior determination of fact. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge abused his discretion and violated claimant's due process rights by denying claimant the opportunity to submit rebuttal evidence for inclusion in the record. Claimant requests that the Board remand this case for a reopening of the record and reassignment to a different administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), responds, requesting a remand for the admission of claimant's rebuttal evidence into the record, but urging the Board to reject claimant's request for reassignment.

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).

Claimant and the Director contend that claimant's right to due process was violated because, after the deadline for the submission of evidence had passed, the administrative law judge admitted into the record rebuttal evidence provided by the Director's experts, but did not afford claimant the opportunity to respond to this evidence or to evidence submitted by the Director at or near the evidentiary deadline. The parties' arguments have merit. Following the parties' waiver of a formal hearing, by Order dated April 16, 1999, the administrative law judge acknowledged that no hearing would be conducted, and allowed the parties until May 20, 1999, within which to submit any additional documentary evidence. Pursuant to this order, claimant submitted the following evidence: (1) on May 11, 1999, the medical report of Dr. Matthew J. Kraynak, with accompanying pulmonary function studies dated November 12, 1998, Claimant's Exhibit 1; (2) on May 13, 1999, Dr. Raymond J. Kraynak's validation of pulmonary function studies he conducted on December 3, 1997,

Processing Co. v. Swarrow, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. Once a material change in conditions is established, the administrative law judge must adjudicate the merits of the claim based on his assessment of the entirety of the evidentiary record. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

Claimant's Exhibit 2; (3) on May 19, 1999, the results of pulmonary function studies performed on May 13, 1999, Claimant's Exhibit 3; and (4) on May 20, 1999, the medical report of Dr. Raymond J. Kraynak, Claimant's Exhibit 4. The Director submitted the medical report of Dr. Abdul Rashid, with accompanying pulmonary function studies and blood gas studies, on May 17, 1999, Director's Exhibits 198-200.

Both parties then requested the opportunity to respond to the evidence submitted by the opposing party. In this regard, on May 19, 1999, the Director requested an enlargement of time for his expert to review and determine the validity of the pulmonary function studies performed on November 12, 1998; and on May 25, 1999, the Director requested an enlargement of time for his expert to review the pulmonary function studies performed on May 13, 1999. On May 28, 1999, claimant opposed the Director's request for review of the November 12, 1998 test results, but sought the opportunity to respond to Dr. Rashid's examination and testing, and requested that the Director provide claimant with the original tracings of Dr. Rashid's pulmonary function studies for expert review or, in the alternative, for the administrative law judge to strike this evidence from the record. On June 15, 1999, the Director submitted reports from his expert, Dr. Ranavaya, which invalidated the pulmonary function studies performed on November 12, 1998 and May 13, 1999. On June 22, 1999, claimant submitted the responses of the two Drs. Kraynak to Dr. Ranavaya's invalidation reports and requested, *inter alia*, a ruling on his earlier motion and the opportunity to respond to Dr. Ranavaya's invalidations. The administrative law judge did not respond to either party's motions until the issuance of his Decision and Order on July 13, 1999, in which he admitted the Director's rebuttal evidence into the record but did not address claimant's motion and submissions of June 22, 1999. The administrative law judge also denied claimant's motion of May 28, 1999, on the ground that claimant did not specify the rebuttal evidence to be submitted and "[a]dditional independent medical reports would not be acceptable." Decision and Order at 4.

While the administrative law judge has broad discretion to set time frames for the submission of evidence, the Administrative Procedure Act (APA), 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), 30 U.S.C. §932(a), explicitly provides that "[a] party is entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d). When an administrative law judge relies heavily upon an item of medical evidence submitted by a party, and the opposing party is afforded no opportunity for cross-examination, the requirements of procedural due process, as incorporated under 20 C.F.R. §725.455(c), are not met if such cross-examination is necessary to the full presentation of the case. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). In the present case, the administrative law judge denied benefits after crediting the

medical opinion and testing of Dr. Rashid and relying in part on Dr. Ranavaya's invalidations to discredit the medical opinions and testing of the two Drs. Kraynak. Decision and Order at 5-7. Inasmuch as the administrative law judge did not afford claimant any opportunity to respond to this critical evidence, the requirements of procedural due process were not met. *See Miller, supra*. We therefore vacate the administrative law judge's Decision and Order, and remand this case for the administrative law judge to first provide claimant an opportunity for rebuttal and then to determine whether the evidence of record is sufficient to establish entitlement to benefits.

Lastly, we reject claimant's request that this case be reassigned to a different administrative law judge on remand, as claimant has demonstrated no evidence of recalcitrance on the part of the administrative law judge and adverse rulings, by themselves, are not sufficient to show bias on the part of the administrative law judge. *See generally Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order - Denying Modification and Denying Benefits is vacated, and this 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

REGINA C. McGRANERY
Administrative Appeals Judge