BRB No. 13-0355 BLA

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| EARL BEGLEY | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| MANALAPAN MINING COMPANY, INCORPORATED | ) | DATE ISSUED: 06/16/2014 |
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| 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 Denying Employer's Motion to Dismiss and Addressing Evidentiary Motions of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Employer's Motion to Dismiss and Addressing Evidentiary Motions (2007-BLA-05659) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) rendered on a claim filed on June 19, 2006, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).

This case has been before the Board previously. In a Decision and Order dated November 29, 2010, the administrative law judge determined that employer was the responsible operator, he credited claimant with at least 15 years in underground coal mine employment,[1] and he adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). The administrative law judge also found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Additionally, the administrative law judge determined that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), and that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's determination that employer was a potentially liable operator pursuant to 20 C.F.R. §725.495(b). *Begley v. Manalapan Mining Co.*, BRB No. 11-0232 BLA, slip op. at 4 n.2 (Dec. 29, 2011)(unpub.). However, the Board vacated the administrative law judge's determination that employer was the responsible operator and remanded the case for further consideration. *Begley*, BRB No. 11-0232 BLA, slip op. at 6. The Board instructed the administrative law judge to consider claimant's testimony regarding his employment with Tricoal, Incorporated (Tricoal) and to determine whether it was sufficient to establish that claimant worked for Tricoal for a period of one cumulative year. *Id*. The Board also instructed the administrative law judge to address all of the record evidence pertaining to whether there was a successor relationship between Tricoal and any other coal mine operator that employed claimant. *Id*. Further, the Board held that the administrative law judge erred by failing to address employer's motions to submit additional evidence in response to the change in law regarding amended Section 411(c)(4). *Begley*, BRB No. 11-0232 BLA, slip op. at 8. Consequently, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Id*. The Board noted that the administrative law judge should address employer's outstanding motions and claimant's request to submit evidence to rebut evidence submitted by employer on remand. *Id*. Lastly, the Board held that the administrative law judge erred in limiting employer to one rebuttal reading of the August 8, 2007 x-ray because employer was entitled to respond to each of the two readings that claimant submitted of this x-ray as his affirmative evidence, regardless of the fact that they involved the same x-ray. *Begley*, BRB No. 11-0232 BLA, slip op. at 9. The Board therefore instructed the administrative law judge to admit employer's rebuttal reading

[1] Administrative Law Judge Kenneth A. Krantz (the administrative law judge) accepted the parties' stipulation that claimant worked as a coal miner for 27 years.

into the record. *Id*.

On remand, the administrative law judge found that employer failed to demonstrate that it was not the potentially liable operator that most recently employed claimant.[2] The administrative law judge therefore denied employer's motion to dismiss it as the responsible operator in this case. Regarding the evidentiary requests of the parties, the administrative law judge stated that "[t]he evidence addressing [amended Section 411(c)(4)] has been developed at this level and a remand to the [d]istrict [d]irector is not necessary." 2013 Decision and Order at 21. The administrative law judge then admitted Dr. Kendall's reading of the September 20, 2007 x-ray into the record. The administrative law judge also found that "the extension [of the deadline for submission of evidence] should have been granted and that the evidence submitted prior to the remand shall be admitted, so long as it is within the evidentiary limitations." *Id*. at 22. Hence, the administrative law judge admitted Dr. Dahhan's July 31, 2010 report and Dr. Rosenberg's September 17, 2010 report into the record as employer's affirmative evidence, based on his determination that they did not exceed the evidentiary limitations. The administrative law judge also admitted Dr. Forehand's January 17, 2012 report into the record as claimant's affirmative evidence, based on his determination that it did not exceed the evidentiary limitations. However, the administrative law judge did not admit Dr. Rosenberg's May 29, 2012 report into the record because he found that employer failed to demonstrate good cause to reopen the record on remand for the purpose of submitting additional evidence that employer did not specifically request to file prior to the 2010 Decision and Order.

On appeal, employer contends that the administrative law judge erred in naming it as the responsible operator. Employer also contends that the administrative law judge erred in excluding Dr. Rosenberg's May 29, 2012 report from the record. Claimant has not filed a response to this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited letter brief, urging the Board to affirm the

[2] The administrative law judge found that employer failed to demonstrate that Tricoal, Incorporated was the most recent potentially liable operator to employ claimant for at least one year. The administrative law judge also found that employer failed to demonstrate that Oak Mountain Resources, LLC (Oak Mountain), as successor operator to Boone Mountain Services, Incorporated (Boone Mountain), was the most recent potentially liable operator to employ claimant for at least one year. Lastly, the administrative law judge found that the evidence was insufficient to establish that "[Kelly Branch Mining, Incorporated (Kelly Branch)] is the successor of Tricoal and that [Lakeway Mining] is the successor to Kelly Branch," and that "[t]he evidence similarly does not demonstrate that all three entities were in fact one entity." 2013 Decision and Order at 20.

administrative law judge's finding that employer is the properly designated responsible operator.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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 contends that the administrative law judge erred in naming it as the responsible operator. Specifically, employer asserts that it was not the operator that employed claimant most recently for a period of more than one year under the requirements of 20 C.F.R. §725.494. Consequently, employer asserts that the Black Lung Disability Trust Fund should be liable for any benefits payable to claimant in this case.

To be liable for the payment of benefits as the responsible operator, the employer must be the last coal mine operator to have employed the miner for a period of at least one year. 20 C.F.R. §725.494(c). A "year" is defined as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). If the miner worked for the employer for one year, there is a rebuttable presumption that he worked at least 125 days. 20 C.F.R. §725.101(a)(32)(ii). The employer bears the burden of proving, *inter alia*, that a more recent operator employed the miner for at least a year. *See* 20 C.F.R. §725.495(c)(2).

In this case, the administrative law judge addressed whether employer demonstrated that it was not the potentially liable operator that most recently employed claimant. The administrative law judge considered claimant's Social Security Administration (SSA) record, his employment history forms, and his testimony. It is undisputed that claimant worked for employer from 1989 to 1999. The SSA record reflects that claimant subsequently worked for North Star Mining, Incorporated in 2000; for Tricoal in 2000 and 2001; for Kelly Branch Mining, Incorporated in 2002; for Boone Mountain Services, Incorporated (Boone Mountain) in 2002 and 2003; for Oak Mountain Resources, LLC (Oak Mountain) in 2003; and for Lakeway Mining in 2003. Based on claimant's testimony at depositions dated March 23, 2007 and February 1, 2008, and at

[3] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibit 4. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

the April 28, 2009 hearing, the administrative law judge determined that claimant's testimony concerning the length of his employment with Tricoal was not credible. Further, based on claimant's SSA record and his employment history forms, the administrative law judge determined that the evidence was insufficient to establish the beginning and ending dates of claimant's employment with Tricoal. Nevertheless, the administrative law judge used two different computation methods to determine the length of claimant's employment with Tricoal. First, the administrative law judge determined that Tricoal employed claimant for a total of 232 working days by dividing claimant's yearly earnings from it of $5,248.75 in 2000 and $28,208.00 in 2001 by an hourly rate of $18.00. Second, the administrative law judge determined that Tricoal employed claimant for a total of 42 percent of a year by dividing claimant's yearly earnings from it of $5,248.75 in 2000 and $28,208.00 in 2001 by the average yearly wage base reported for coal mine workers by the Bureau of Labor Statistics in Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual, Wage Base History*.[4] Hence, the administrative law judge found that employer did not demonstrate that claimant worked for Tricoal for the requisite calendar year.

Employer argues that Tricoal is the responsible operator because claimant had over one year of coal mine employment with Tricoal after his work for employer. Specifically, employer argues that the administrative law judge erred in discrediting claimant's testimony concerning the length of his employment at Tricoal. Employer maintains that claimant's testimony establishes that Tricoal employed him for at least one calendar year. We disagree.

In his prior decision, the administrative law judge determined that "the [c]laimant's testimony was confusing and his memory is unclear[,] especially with

[4] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the finder-of-fact may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). Additionally, the pertinent regulation provides that "[a] copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history." *Id*. The Department of Labor uses the tables identified as Exhibits 609 and 610 of the *Office of Workers' Compensation Programs Coal Mine* (*BLBA*) *Procedure Manual*. Whereas Exhibit 609, titled *Wage Based History*, contains the average annual wages by year for miners, Exhibit 610, titled *Average Earnings of Employees in Coal Mining*, contains the average annual earnings by year for miners who spent an actual 125 days at a mine site.

respect to his employment history. (TR 12)." 2010 Decision and Order at 27-28. Based on the inconsistent nature of claimant's testimony, as well as claimant's lack of authoritative knowledge regarding the ownership of the mines, the administrative law judge gave the greatest weight to the SSA record and the employment history records. The administrative law judge therefore found that employer failed to establish that it was not claimant's last employer for at least one year. However, the Board held that the administrative law judge erred in failing to adequately explain, in accordance with the Administrative Procedure Act, why claimant's testimony was not credible regarding the length of his employment for Tricoal. *Begley*, BRB No. 11-0232 BLA, slip op. at 5. The Board instructed the administrative law judge to consider claimant's testimony concerning his employment with Tricoal and determine whether it was sufficient to establish that claimant worked for Tricoal for a period of one cumulative year. *Begley*, BRB No. 11-0232 BLA, slip op. at 6.

Here, as previously noted, the administrative law judge gave no weight to claimant's testimony regarding the length of claimant's employment with Tricoal because he found that it was not credible. In so finding, the administrative law judge determined that "[c]laimant's testimony on all topics was often contradictory or inaccurate." 2013 Decision and Order at 11. In finding that claimant's testimony regarding his employment with Tricoal was confusing and equivocal, the administrative law judge explained that "[c]laimant's testimony indicated that his understanding of the length of his employment with Tricoal was based on conversations with his son, and not on his own memory." *Id*. at 12. The administrative law judge also explained that "[c]laimant testified that he could not remember the date at which he left Tricoal" and that "[c]laimant's admission that he was relying on his son's memory, along with his inability to recall when he left Tricoal, indicates that he has an unclear recollection of his length of employment with Tricoal." *Id*. Further, the administrative law judge explained that "[t]here is a concern that [c]laimant credited time spent with other companies as time spent working for Tricoal because he believed that Tricoal and the other mine companies were interrelated." *Id*. at 13. Thus, the administrative law judge reasonably found, in evaluating claimant's testimony as a whole, that despite a good faith effort, claimant was unable to remember details, both generally and as related to his length of employment with Tricoal. *Id*.; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). Consequently, we reject employer's assertion that the administrative law judge erred in discrediting claimant's testimony concerning the length of his employment with Tricoal.

Employer also argues that the administrative law judge erred in failing to explain "why [claimant's] employment [with Tricoal] during calendar year 2000 and [the] full calendar year of 2001 does not satisfy the requirements of the regulations, when the actual earnings establish well over 125 working days." Employer's Brief at 13. We disagree. As discussed, *supra*, using the computation method of dividing claimant's

earnings in 2000 and 2001 from Tricoal by an hourly rate of $18.00, the administrative law judge determined that, "[i]n total, [c]laimant is credited with 232 working days of employment with Tricoal." 2013 Decision and Order at 15. The administrative law judge therefore found that, "[e]ven accounting for weekends and federal holidays, 232 working days falls significantly short of a calendar year of employment." *Id*. Because substantial evidence supports the administrative law judge's finding that claimant was not employed by Tricoal for a full calendar year, *see Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 2-183 (2003)(McGranery, J., concurring), we reject employer's assertion that the administrative law judge erred in failing to explain why claimant's employment with Tricoal did not satisfy the requirements of the regulations for establishing a calendar year of employment.

We also reject employer's argument that Boone Mountain is the responsible operator because claimant had over one year of coal mine employment with Boone Mountain after his work for employer. *See Clark*, 22 BLR at 2-183. The administrative law judge noted that the SSA record and the employment history forms did not list the beginning and ending dates of claimant's employment with Boone Mountain. Nevertheless, the administrative law judge determined that "[t]he record is sufficient to demonstrate that [c]laimant worked for Boone Mountain throughout the calendar year of 2003."[5] 2013 Decision and Order at 18. The administrative law judge further determined that, "[a]s a calendar year of work is established, [e]mployer must also demonstrate that [c]laimant worked 125 days *with the companies*." *Id*. (emphasis added). The administrative law judge then determined that claimant's combined earnings of $21,998.00 at an hourly rate of $18.00 with Boone Mountain and Oak Mountain would equate to 152.8 days of work. The administrative law judge additionally stated that, "[i]f [e]mployer can demonstrate that Oak Mountain is a successor entity of Boone Mountain, [e]mployer will have demonstrated that Oak Mountain is the potentially liable operator that most recently employed [c]laimant." *Id*. Substantial evidence supports the administrative law judge's finding that employer failed to establish that Boone Mountain solely employed claimant for at least 125 working days in 2003. *See* 20 C.F.R. §725.101(a)(32); *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 22 BLR 2-349 (6th Cir. 2002). Consequently, we reject employer's assertion that Boone Mountain is the responsible operator because it was the most recent potentially liable operator that employed claimant for at least one year.

[5] The administrative law judge noted that "[t]he record listed earnings with Boone Mountain during the first, second, third, and fourth quarters of 2003." 2013 Decision and Order at 18. Specifically, the record listed the following earnings from Boone Mountain in 2003: $720.00 in the first quarter; $3,172.50 in the second quarter; $4,147.00 in the third quarter; and $5,401.00 in the fourth quarter.

Employer further argues that Oak Mountain is the responsible operator as a successor operator to Boone Mountain, because claimant had over one year of combined coal mine employment with Boone Mountain and Oak Mountain since it employed him. Employer maintains that there is evidence that Boone Mountain and Oak Mountain are the same entity or in a predecessor/successor relationship.[6]

A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492. Additionally, Section 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). If the prior operator does not meet the conditions set forth in 20 C.F.R. §725.494, the successor operator is primarily liable for the payment of benefits to any miners previously employed by the prior operator. *See* 20 C.F.R. §725.492(d)(1).

In his 2010 decision, as discussed, *supra*, the administrative law judge determined that claimant's testimony was confusing, and that his memory was unclear regarding his employment history. The administrative law judge further determined that, because claimant testified that he was not a shareholder, officer, or president of any of the companies that employed him, "his testimony cannot be used to prove the mines are related. (TR 36)." 2010 Decision and Order at 28. The Board affirmed the administrative law judge's finding that claimant's testimony, standing alone, was insufficient to establish a successor relationship between the coal companies that employed him after he worked for employer. *Begley*, BRB No. 11-0232 BLA, slip op. at 5. However, the Board held that the administrative law judge erred in failing to address the significance, if any, of the fact that the employment questionnaires and reported wages earned by claimant from Boone Mountain and Oak Mountain were completed by the same person, Randall Fleming. *Id*. Hence, the Board instructed the administrative law judge to consider whether this documentary evidence was corroboration for claimant's testimony that Boone Mountain and Oak Mountain were actually the same

[6] Employer argues that "[t]he Department of Labor should have imposed the burden of proof on Boone Mountain and Oak Mountain to prove that they are <u>not</u> operating as one entity under [20 C.F.R. §]725.493(a) for purposes of the employment of [claimant]." Employer's Brief at 18. Contrary to employer's assertion, since employer was designated as the responsible operator, it bore the burden of proving that it was not the potentially liable operator that most recently employed claimant. *See* 20 C.F.R. §725.495(c)(2). Thus, we reject employer's assertion that the Department of Labor should have imposed the burden of proof on Boone Mountain and Oak Mountain to prove that they were not operating as one entity under Section 725.493(a).

company. *Begley*, BRB No. 11-0232 BLA, slip op. at 5-6. The Board additionally instructed the administrative law judge to "address employer's assertion that Mr. Fleming's statements on the questionnaires did not reflect a complete statement of the length of time that claimant worked for either Boone Mountain or Oak Mountain, as he reported overlapping periods of employment for claimant with these companies, and since the dates listed on the questionnaires do not correspond to the SSA records, which indicate that claimant had worked for Boone Mountain in 2002." *Begley*, BRB No. 11-0232 BLA, slip op. at 6.

The administrative law judge specifically determined that claimant's testimony, standing alone, is insufficient to establish a successor relationship between Boone Mountain and Oak Mountain. The administrative law judge also noted that "[Mr. Fleming] completed the employment questionnaire for [c]laimant's employment with both Boone Mountain and Oak Mountain," and that "[the SSA] records list [Mr. Fleming] as a 'member' of Oak Mountain." 2013 Decision and Order at 18. Nonetheless, the administrative law judge determined that "[t]he fact that [Mr. Fleming] filled out both employment questionnaires, and that Oak Mountain and Boone Mountain shared a P.O. Box, is not sufficient to corroborate [c]laimant's testimony that they were the same company." *Id*. at 19. The administrative law judge therefore found that "[t]he evidence is insufficient to show that [Boone Mountain and Oak Mountain] were either the same company or that one company acquired the mine, or substantially all of the assets of the mine, from the other."[7] *Id*. Thus, because the administrative law judge reasonably found that the evidence of record does not support employer's assertion that Oak Mountain was a successor operator to Boone Mountain, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984)(holding that the administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof), we reject employer's assertion that Oak Mountain is the responsible operator as a successor operator to Boone Mountain.

In light of the foregoing, we affirm the administrative law judge's finding that employer failed to establish that it is not the potentially liable operator that most recently employed claimant, as supported by substantial evidence.

[7] The administrative law judge explained that "[t]his is not a case where the evidence demonstrates that the entity underwent a name change but continued with the same employees, performing the same work, and using most of the same equipment." 2013 Decision and Order at 19. The administrative law judge concluded that "[t]he evidence is too sparse to determine that one company is either the same as or a successor of the other company." *Id*.

Finally, we turn to the administrative law judge's consideration of the evidentiary record on remand. The administrative law judge noted that "[t]he [2010] Decision and Order contained medical reports from Drs. Baker, Dahhan, Powell, and Rosenberg" and that "[e]mployer submitted the reports of Drs. Dahhan and Rosenberg." 2013 Decision and Order at 22. The administrative law judge also noted that employer filed a position statement on June 3, 2010, requesting that the case be remanded to the district director or, in the alternative, that an extension of time be allowed to respond to changes in the law. Further, the administrative law judge noted that employer subsequently submitted Dr. Dahhan's July 31, 2010 supplemental report and Dr. Rosenberg's September 17, 2010 supplemental report for admission into the record, and that claimant subsequently submitted Dr. Forehand's January 17, 2012 report for admission into the record to rebut the reports submitted by employer.[8] The administrative law judge found that the employer's prior request for additional time to develop evidence necessary to address the presumption at amended Section 411(c)(4) should have been granted and that the evidence submitted prior to the remand shall be admitted, if it was within the evidentiary limitations.[9] Hence, the administrative law judge admitted Dr. Dahhan's July 31, 2010 supplemental report and Dr. Rosenberg's September 17, 2010 supplemental report into the record because he found that they did not exceed the evidentiary limitations.[10] The

[8] After noting that claimant requested to submit Dr. Fino's report as rebuttal evidence, the administrative law judge stated: "[t]he evidentiary rules, however, do not provide for the rebuttal of medical reports themselves. Instead, a separate provision allows a party to respond to the other party's medical opinion evidence by having one or both of the doctors who prepared its affirmative medical reports review and address the opinion evidence." 2013 Decision and Order at 23. Hence, the administrative law judge stated that "the salient question presented in this case is whether claimant could submit a 'supplemental report' or an additional report within the evidentiary limitations in response to [e]mployer's affirmative medical reports." *Id*.

[9] The regulations governing the development of evidence provide that each party may submit, in support of its affirmative case, two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Notwithstanding the limitations" of 20 C.F.R. §725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of 20 C.F.R. §725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

[10] The administrative law judge found that Dr. Dahhan's July 31, 2010 report was not in excess of the evidentiary limitations because it, like Dr. Dahhan's August 22, 2007

administrative law judge also admitted Dr. Forehand's January 17, 2012 report into the record because he found that it did not exceed the evidentiary limitations.[11] However, the administrative law judge did not admit Dr. Rosenberg's May 29, 2012 report into the record because he found that employer failed to establish good cause to reopen the record on remand to admit it.

Employer contends that the administrative law judge erred in excluding Dr. Rosenberg's May 29, 2012 report from the record. Employer asserts that the administrative law judge erroneously applied an inconsistent standard for admitting evidence, as he admitted Dr. Forehand's January 17, 2012 report while excluding Dr. Rosenberg's May 29, 2012 report. Employer also asserts that "the administrative law judge's exclusion of employer's rebuttal evidence constitutes a violation of employer's due process rights to submit new evidence to respond to the new legal standards." Employer's Brief at 23. We disagree. An administrative law judge's finding on the issue of "good cause" is reviewed for an abuse of the broad discretion granted to him in resolving procedural issues. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). In this case, the administrative law judge noted that employer sought to introduce Dr. Rosenberg's May 29, 2012 report, which was based on a May 14, 2012 medical examination of claimant. The administrative law judge determined that it was not necessary for him to allow employer to submit additional evidence that it did not specifically request to file prior to the issuance of the 2010 Decision and Order. Further, based on his finding that "there are two reports from July and September of 2010," 2013 Decision and Order at 24, the administrative law judge rejected employer's assertion that good cause existed to reopen the record on remand to admit Dr. Rosenberg's May 29, 2012 report because the evidence had grown stale. Hence, the administrative law judge found that employer

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report, was based on an August 22, 2007 examination of claimant. Further, the administrative law judge stated that, while Dr. Rosenberg never performed a physical examination of claimant, "I find that that this report does not exceed the evidentiary limitations, as the September 17, 2010 report merely expounds upon his previously submitted reports." 2013 Decision and Order at 22.

[11] The administrative law judge noted that claimant offered Dr. Baker's report as the Department of Labor sponsored examination of him, and that he offered Dr. Powell's report as his initial medical opinion evidence. After noting that the Department of Labor sponsored examination did not count against claimant or employer, the administrative law judge determined that "[c]laimant has only filled one of his evidence slots for medical reports." 2013 Decision and Order at 23. The administrative law judge therefore admitted Dr. Forehand's January 17, 2012 report into the record as one of claimant's affirmative case medical reports.

failed to establish good cause for admitting Dr. Rosenberg's May 29, 2012 report into the record. We conclude, therefore, that the decision to reopen the record on remand in this instance was a procedural matter within the discretion of the administrative law judge. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *see also Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). Contrary to employer's assertion, the administrative law judge did not abuse his discretion by determining that employer failed to establish good cause for admitting Dr. Rosenberg's May 29, 2012 report into the record on remand. Consequently, we reject employer's assertion that the administrative law judge's refusal to reopen the record on remand to admit Dr. Rosenberg's May 29, 2012 report was an abuse of discretion that violated fundamental fairness and employer's right to due process.

Accordingly, the administrative law judge's Decision and Order Denying Employer's Motion to Dismiss and Addressing Evidentiary Motions is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge