

BRB Nos. 98-1179 BLA  
and 98-1179 BLA-A

RAYMOND JONES	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

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

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

Jill M. Otte (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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Upon Reconsideration (97-BLA-1949) of Administrative Law Judge Ralph A. Romano awarding benefits on a 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). This case has a lengthy procedural history. In his initial Decision and Order issued on June 18 1996, the administrative law judge accepted the parties’ stipulation that claimant had 9.75 years of qualifying coal mine employment, and determined that this claim, filed on February 23, 1995, was subject to the duplicate claim provisions at 20 C.F.R. §725.309(d) because claimant took no action within one year of the

final denial of his original claim, filed on August 24, 1983. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but insufficient to establish its etiology pursuant to 20 C.F.R. §718.203(c), total respiratory disability pursuant to 20 C.F.R. §718.204(c), disability causation pursuant to 20 C.F.R. §718.204(b), or a material change in conditions pursuant to Section 725.309(d). Accordingly, benefits were denied.

Claimant filed a timely appeal with the Board, but subsequently moved to remand the case to the district director for modification proceedings. The Board granted claimant's motion by Order dated February 14, 1997.

Following denial of modification by the district director, the case was forwarded to the Office of Administrative Law Judges. On October 10, 1997, the administrative law judge issued an Order to Show Cause as to whether a hearing was necessary, and the parties responded that a decision could be made on the record. The administrative law judge then issued an Order on October 23, 1997, allowing the parties thirty days for the submission of any further documentary evidence and an additional thirty days thereafter within which to submit closing arguments. The administrative law judge denied both parties' requests for extensions of time within which to submit evidence, and issued a Decision and Order on January 9, 1998. The administrative law judge found that no change in conditions or mistake in a determination of fact was established pursuant to 20 C.F.R. §725.309, and that the evidence was insufficient to establish either that claimant's pneumoconiosis arose out of coal mine employment at Section 718.203(c), or that claimant had a totally disabling respiratory impairment pursuant to Section 718.204(c). Consequently, the administrative law judge denied benefits.

On February 6, 1998, claimant requested reconsideration of the denial of benefits on the ground that Dr. Kraynak's medical reports dated November 20, 1997, and November 21, 1997, were timely submitted and should have been admitted into evidence. On May 13, 1998, the administrative law judge issued a Decision and Order Upon Reconsideration, admitting Dr. Kraynak's reports into the record and finding that claimant established all elements of entitlement pursuant to 20 C.F.R. Part 718, and a change in conditions at Section 725.310. Accordingly, benefits were awarded.

In the present appeal, claimant challenges the administrative law judge's findings regarding the onset date of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.503. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant's arguments pursuant to Section 725.503. The Director has also filed a cross-appeal, contending that the administrative law judge erred in closing the evidentiary record prematurely. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

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 law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the procedural issue, the Director contends that the administrative law judge abused his discretion by closing the evidentiary record on November 24, 1997. While the Director acknowledges that the administrative law judge has broad discretion to set time frames for the submission of evidence, the Director maintains that his right to due process was violated because he was effectively denied any opportunity to develop and submit evidence in response to the reports of Dr. Kraynak, which claimant mailed to the administrative law judge and the Director on November 24, 1997, and upon which uncontradicted evidence the administrative law judge ultimately relied in awarding benefits.<sup>1</sup> The Director's arguments have merit. 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), specifically requires an opportunity for rebuttal where it is necessary to the full presentation of a case. "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). In the present case, inasmuch as the Director received Dr. Kraynak's reports on November 28, 1997, four days after the administrative law judge's deadline for the submission of evidence had passed, the administrative law judge's refusal to allow the Director a reasonable opportunity to submit rebuttal evidence constitutes an abuse of discretion. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Consequently, we vacate the administrative law judge's findings pursuant to Sections 718.203(c) and 718.204(b), (c), and the award of benefits, and remand this case for the administrative law judge to readjudicate the merits after reopening the record and allowing the parties sufficient opportunity to develop and submit responsive evidence. *See Miller, supra*.

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<sup>1</sup> The Director additionally notes that he did not receive the results of claimant's pulmonary function studies, obtained by Dr. Kraynak on November 10, 1997, and mailed by claimant on November 18, 1997, until Friday, November 21, 1997. The Director thus effectively had no opportunity to obtain consultative validation of this objective data prior to the closing of the record on November 24, 1997.

Turning to claimant's appeal, claimant challenges the administrative law judge's designation of November 1997, the month and year of Dr. Kraynak's most recent medical opinions, as the appropriate date from which benefits commence herein. Claimant argues that all relevant evidence must be weighed in determining the onset date of total disability due to pneumoconiosis, and that pursuant to Section 725.503(b), if the onset date cannot be determined, claimant is entitled to benefits as of the filing date of his duplicate claim. The Director agrees with claimant's arguments, noting that Dr. Kraynak's reports, if credited, merely establish that the miner became totally disabled at some time prior to the date of the reports. *See Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Claimant's and the Director's arguments have merit. Consequently, we vacate the administrative law judge's findings pursuant to Section 725.503. If, on remand, the administrative law judge again finds that claimant is entitled to benefits, he must weigh all evidence relevant to the date of onset of total disability due to pneumoconiosis, and render findings consistent with *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order Upon Reconsideration - Awarding Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge