

BRB No. 01-0601 BLA

RAYMOND KERSHETSKY)
)
 Claimant-Respondent)
)
 v.)
)
 LEHIGH COAL & NAVIGATION)
 COMPANY)
)
 and) DATE ISSUED:
)
 OLD REPUBLIC 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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Lenore S. Ostrowsky (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0520) 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).¹ This case is before the Board for the second time. Initially,

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued

Administrative Law Judge Ralph A. Romano (hereinafter, the administrative law judge) granted claimant's motion for reconsideration and excluded Dr. Levinson's deposition testimony from the record. The administrative law judge credited claimant with twenty-seven years of coal mine employment and, applying the regulations at 20 C.F.R. Part 718, found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) (2000). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Accordingly, benefits were awarded.

Employer appealed to the Board. On appeal, the Board vacated the administrative law judge's Decision and Order awarding benefits. *See Kershetsky v. Lehigh Coal & Navigation Co.*, BRB No. 99-0837 BLA (Sept. 21, 2000)(unpublished). The Board instructed the administrative law judge on remand to reconsider his denial of employer's objection to the admission of Claimant's Exhibits 5 and 7 and his denial of employer's request to submit additional interpretations of claimant's x-rays because the administrative law judge did not provide a basis for his rulings as required by 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) and 30 U.S.C. §932(a). *See Kershetsky, supra*. Additionally, the Board instructed the administrative law judge to reconsider his decision to exclude Dr. Levinson's deposition transcript. *Id.*

On remand, the administrative law judge overruled employer's objection to Claimant's Exhibits 5 and 7 and denied employer's request to submit additional x-ray interpretations. Decision and Order on Remand at 2-3. Additionally, the administrative law judge excluded Dr. Levinson's deposition transcript. Decision and Order on Remand at 3-4.

its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments regarding the impact of the challenged regulations made by employer in its appellate brief and the Director, Office of Workers' Compensation Programs, in his letter to the Board.

In the current appeal, employer asserts that the administrative law judge abused his discretion by excluding Dr. Levinson's deposition testimony. Employer's Brief at 11-14. Employer contends that the administrative law judge erred in failing to provide a reasonable basis for denying employer's objection to the admission of Claimant's Exhibits² 5 and 7 and for denying employer's motion to submit additional interpretations of claimant's x-rays. Claimant's Brief at 14-16. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to participate in the merits of this appeal.

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).

²Employer contends that the administrative law judge erred in denying employer's objections to Claimant's Exhibits 5-7. Employer's Brief at 7, 14. However, because employer clearly only objected to Claimant's Exhibits 5 and 7 at the hearing, Hearing Transcript at 5, and because Claimant's Exhibit 6 is the deposition transcript of Dr. Kraynak, it is assumed that employer's reference to Claimant's Exhibits 5-7 in his brief is a typographical error.

We first address employer's contention that the administrative law judge erred in again failing to provide an adequate rationale for denying employer's objection to the admission of Claimant's Exhibits 5 and 7³ and for denying employer's motion to submit additional interpretations of claimant's August 7, 1997 and March 5, 1998 x-rays. At the July 23, 1998 hearing, the administrative law judge denied employer's objection to the admission of claimant's x-ray interpretations, stating that while he did not "quite understand the objection," he nevertheless did not hear "any valid objections." Hearing Transcript at 5-6. On appeal, the Board remanded this case to the administrative law judge because he did not provide a proper basis for denying employer's objection to the admission of Claimant's Exhibits 5 and 7 or for denying employer's motion to submit additional interpretations of claimant's August 7, 1997 and March 5, 1998 x-rays. *See Kershetsky, supra.*

On remand, the administrative law judge again overruled employer's objection to the admission of Claimant's Exhibits 5 and 7. Decision and Order on Remand at 2. As support for his decision, the administrative law judge stated that employer "did not raise any traditional form of objection as, for instance, to the competency, relevancy or materiality of the evidence. . . ." *Id.* The administrative law judge added that employer "did not indicate that any of employer's procedural efforts to obtain the films in question were ignored by Claimant." *Id.* In overruling employer's objection to the admission of Claimant's Exhibits 5 and 7, the administrative law judge merely reiterated his initial reasons for doing so, *see* discussion, *supra*, and additionally noted that employer failed to inform him of any of its prior attempts to obtain these films. Decision and Order on Remand at 2. However, in a letter sent from employer to the administrative law judge prior to the hearing, Employer's Exhibit 8,⁴ employer indicated to the administrative law judge that the several attempts he

³Claimant's Exhibit 5 consists of four positive interpretations of claimant's August 7, 1997 x-ray, while Claimant's Exhibit 7 consists of three positive interpretations of claimant's March 5, 1998 x-ray.

⁴By letter dated July 13, 1998, employer asked the administrative law judge for an extension of time in which to submit additional readings of claimant's August 7, 1997 and March 5, 1998 x-rays. In support of its request, employer informed the administrative law judge:

Please be advised that we have made several attempts to obtain these two films from [claimant's counsel] who continues to have multiple readings completed and submitted. Despite our efforts, including a Specific Request for Productions of Documents directed to the Department of Labor in March of 1998 and [claimant's counsel] in May of 1998, we have yet to receive the August 7, 1997 film.

made to obtain these films were not fruitful.

With regard to employer's motion to submit additional x-ray evidence, the administrative law judge originally denied employer's request by declaring "What I'm hearing is you need the record open on the basis that you want to submit an equal amount of interpretations?" Hearing Transcript at 22. On remand, the administrative law judge stated that when he asked employer at the hearing what the basis for this motion was, employer responded that it wanted to submit an equal number of x-ray interpretations. Noting that he was unaware of any statute or regulation which requires an equal amount of evidence, the administrative law judge found that "discretion was exercised in denying this motion." Decision and Order on Remand at 2. The administrative law judge further found, without explanation, that employer had offered no "good cause" pursuant to 20 C.F.R. §725.456(b)(2) (2000) to justify the waiver of the twenty day rule. *Id.*

Inasmuch as the administrative law judge has again failed to provide an adequate rationale for his rulings, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally North American Coal Corp. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), we vacate the administrative law judge's denial of employer's objection to Claimant's Exhibits 5 and 7 and his denial of employer's motion to respond to additional x-ray readings proffered by claimant just prior to the twenty day deadline for the submission of evidence. The administrative law judge's analysis on remand does not comport with the APA, which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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) and 30 U.S.C. §932(a); *see Wojtowicz, supra; Tenney, supra.* Accordingly, we remand this case to the administrative law judge for reconsideration of his decisions on these two issues.

Employer's Exhibit 8.

We next address employer's assertion that the administrative law judge erred in excluding Dr. Levinson's deposition testimony.⁵ Employer's Brief at 11-14. In his first Decision and Order dated April 16, 1999, the administrative law judge granted claimant's motion for reconsideration and excluded Dr. Levinson's deposition testimony from the record. Decision and Order at 8-9. In granting claimant's motion, the administrative law judge found that "no good cause" had been shown for employer's failure to exchange this evidence with claimant's counsel as requested by the administrative law judge at the hearing.⁶ *Id.*

On appeal, the Board instructed the administrative law judge on remand to reconsider whether Dr. Levinson's deposition testimony should be admitted into the record because its exclusion was based on the administrative law judge's mistaken impression that claimant had not been provided with a copy of the transcript. *See Kershetsky, supra.* Additionally, the Board stated that while the administrative law judge faulted employer for not responding to claimant's repeated requests for reconsideration of the administrative law judge's decision to admit the deposition transcript, employer asserted that it did not think that a response was necessary since it had complied with the administrative law judge's directive by providing

⁵Employer also argues that the administrative law judge's exclusion of Dr. Levinson's deposition testimony effectively stripped the record of employer's defensive proof. Employer's Brief at 13. While an administrative law judge has a duty to insure a full and fair hearing on all the issues, *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*), it does not relieve a party of its obligation to submit evidence in a timely and proper manner.

⁶At the July 23, 1998 hearing, the administrative law judge admitted Dr. Levinson's deposition testimony into the record as Employer's Exhibit 9. Hearing Transcript at 20-21. The administrative law judge, however, directed employer to provide claimant with a copy of Dr. Levinson's deposition transcript as soon as possible. Hearing Transcript at 19.

claimant with a copy of the transcript. *Id.* The Board further noted that if it was unclear whether claimant had been provided with a copy of the transcript, the administrative law judge should have issued a show cause order addressing why the deposition should not be excluded. *Id.*

On remand, the administrative law judge again excluded the deposition transcript, stating:

Employer's silence/inaction in the face of Claimant's repeated protestations of Employer's recalcitrance, is altogether unacceptable and unreasonable, and itself entirely justifies the exclusion of the deposition upon its failure to comply with a discretionary order governing the conduct of the hearing.

Decision and Order on Remand at 3. It appears that the administrative law judge excluded Dr. Levinson's deposition on remand because employer did not notify the administrative law judge that, notwithstanding claimant's letters to the contrary, he had sent the transcript to claimant. However, as the Board stated in its prior Decision and Order, if it was unclear whether claimant had been provided with a copy of the transcript, the administrative law judge should have issued a show cause order addressing why the deposition should not be excluded. *See Kershetsky, supra.* Additionally, the administrative law judge on remand has not sufficiently explained why he excluded the transcript after admitting that claimant's counsel's October 1, 1998 correspondence to him on this issue was "- - particularly misleading- -" [sic], and also, nothing less than irresponsible and unbecoming of a lawyer." Decision and Order on Remand at 3 n.7. Accordingly, we hold that the administrative law judge erred in excluding Dr. Levinson's deposition testimony on remand inasmuch as he has failed to fully explain his rationale for doing so.⁷ *See Clark v. Karst-Robbins Coal Co.*, 12

⁷Employer contends that the administrative law judge did not address on remand whether Dr. Levinson's testimony should be excluded because employer did not provide claimant with at least thirty days notice prior to the date of the deposition pursuant to 20 C.F.R. §725.458 (2000). Employer's Brief at 13-14. Employer further contends that, while the administrative law judge did not address this issue on remand, employer agrees with the administrative law judge's initial ruling that claimant had waived his opportunity to object to employer's notice of Dr. Levinson's deposition by failing to object promptly. *Id.* At the July 23, 1998 hearing, the administrative law judge admitted Dr. Levinson's deposition testimony into the record after noting that employer had provided nineteen days notice of the taking of Dr. Levinson's deposition to claimant and that claimant's counsel had failed to "raise the notice issue promptly upon receiving the Notice of Deposition." Hearing Transcript at 20-21. Inasmuch as none of the parties has challenged the administrative law judge's ruling on this issue in the current appeal, we affirm it as unchallenged. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

BLR 1-149 (1989)(*en banc*); *see also Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see generally Morgan v. Director, OWCP*, 8 BLR 1-491 (1986)(an administrative law judge is afforded discretion in dealing with matters of fairness and judicial efficiency); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge