

BRB No. 06-0135 BLA

MELVIN L. KRISE)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 11/30/2006
)
 KOCHER COAL COMPANY)
)
 and)
)
 LACKAWANNA CASUALTY COMPANY)
)
 Employer/Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer/carrier.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Claimant appeals the Decision and Order on Remand (04-BLA-5100) of Administrative Law Judge Paul H. Teitler rendered 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 is the second time that this case has been before the Board.¹ In its prior Decision and Order, the Board vacated the administrative law judge's Decision and Order on the ground that it was unable to adequately review the administrative law judge's evidentiary rulings because the administrative law judge did not set them forth in sufficient detail. The Board remanded the case to the administrative law judge with instructions to reconsider employer's motion requesting a post-hearing deposition of Dr. Levinson and to articulate his ruling, including the underlying rationale, based upon his application of 20 C.F.R. §725.458 and the holding in *Lee v. Drummond Coal Co.*, 6 BLR 1-544 (1983). The Board also instructed the administrative law judge to address claimant's request to submit evidence in response to Dr. Levinson's post-hearing deposition, citing the holding of the United States Court of Appeals for the Third Circuit in *North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989).² In light of this disposition, the Board did not reach the administrative law judge's finding that claimant failed to establish that he is suffering from a totally disabling respiratory and pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Krise v. Kocher Coal Co.*, BRB No. 04-0727 BLA (Apr. 29, 2005)(unpub.), slip op. at 6.

On remand, the administrative law judge granted employer's motion to take Dr. Levinson's post-hearing deposition over claimant's objections and found that claimant was not allowed to submit responsive evidence because the deposition was admitted solely for rehabilitative purposes. Regarding the merits of entitlement, the administrative

¹ Claimant filed his application for benefits on October 21, 2002. Director's Exhibit 2. In a Decision and Order issued on June 2, 2004, the administrative law judge accepted the parties' stipulations to 18.46 years of coal mine employment and that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge denied benefits, however, as he determined that claimant failed to prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

² The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

law judge incorporated the findings from his June 2, 2004 Decision and Order, that the medical evidence was insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly resolve the issues concerning employer's motion to obtain the post-hearing deposition of Dr. Levinson. Additionally, claimant contends that the administrative law judge erred in finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2). In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, states that he will not address the merits of claimant's arguments, other than to incorporate his prior response to claimant's argument concerning the weight and deference to which a treating physician's opinion is entitled.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

The procedural and evidentiary issues raised in this case concern reports authored by Drs. Kraynak and Levinson and Dr. Levinson's post-hearing deposition. Dr. Levinson examined claimant on September 18, 2003 and obtained an x-ray, a pulmonary function study, a blood gas study, and an EKG. Employer's Exhibit 3. In a written opinion dated October 15, 2003, Dr. Levinson stated that claimant is not suffering from an occupational pulmonary disease or a totally disabling pulmonary or respiratory impairment. *Id.* In subsequent reports dated December 17, 2003 and December 30, 2003, Dr. Levinson invalidated the pulmonary function studies done by Dr. Kraynak on October 15, 2002 and November 14, 2003. Claimant's Exhibits 1, 7; Employer's Exhibits 4, 5. Dr. Kraynak submitted a response to Dr. Levinson's pulmonary function study reviews in which he challenged Dr. Levinson's conclusions. Claimant's Exhibit 10. On January 22, 2004, employer submitted a motion requesting an extension of time within which to depose Dr. Levinson. By Order dated January 23, 2004, the administrative law judge granted employer's request. At the hearing, which was held on February 2, 2004, the administrative law judge granted both claimant's request for additional time to procure Dr. Kraynak's review of the pulmonary function study obtained by Dr. Levinson and employer's renewed request for a post-hearing deposition of Dr. Levinson. Hearing Transcript at 11.

Claimant contends that the administrative law judge erred in finding that employer established good cause for its untimely request to depose Dr. Levinson, in permitting

employer to obtain Dr. Levinson's post-hearing deposition, and in admitting it into the record. In addition, claimant alleges that the administrative law judge erred in denying his request for an opportunity to respond to this evidence. Upon reviewing the record in this case, the administrative law judge's findings, and the issues raised by the parties, we hold that claimant's contentions have merit, in part, as the administrative law judge did not provide a sufficient explanation of his determination that Dr. Levinson's post-hearing deposition constituted rehabilitative evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); *see also* 5 U.S.C. §557(c)(3)(A), 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). We affirm, however, the administrative law judge's determination that employer established good cause for its untimely request to depose Dr. Levinson, as employer's counsel did not enter an appearance until after the period for scheduling a timely deposition of Dr. Levinson had passed. The administrative law judge's finding was within the broad discretion granted to him in resolving procedural issues. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

Regarding the administrative law judge's decision to admit Dr. Levinson's deposition, the administrative law judge did not adequately identify the evidence that the deposition was admitted to rehabilitate pursuant to Section 725.414(a)(3)(ii). In support of his finding, the administrative law judge initially cited to the portion of the hearing transcript in which employer requested that Dr. Levinson be permitted to respond to Dr. Kraynak's statement concerning Dr. Levinson's review of the pulmonary function study that Dr. Kraynak obtained on October 12, 2002. Decision and Order on Remand at 4; Hearing Transcript at 7. The administrative law judge also cited to the discussion at the hearing, wherein claimant was allowed to obtain a post-hearing review of the September 18, 2003 pulmonary function study obtained in conjunction with Dr. Levinson's examination of claimant. Decision and Order on Remand at 4; Hearing Transcript at 11; Employer's Exhibit 3. The administrative law judge further stated that the purpose of obtaining Dr. Levinson's deposition was to allow Dr. Levinson to rehabilitate his initial report. Decision and Order on Remand at 4, *citing* Hearing Transcript at 7 lines 16-21.

Because the administrative law judge cited to three different passages concerning the purpose for which Dr. Levinson's deposition was admitted, it is not clear what evidence Dr. Levinson's deposition was admitted to rehabilitate. Moreover, based upon our review of the administrative law judge's findings on the merits, it appears that the administrative law judge considered Dr. Levinson's deposition testimony not only in evaluating the pulmonary function study evidence, but in his weighing of all the evidence of record, including his discussion of the medical opinion evidence. *See* 2004 Decision and Order at 6-8. Thus, it is unclear for what purpose Dr. Levinson's post-hearing deposition was admitted, whether for the sole purpose of rehabilitating the September 18, 2003 pulmonary function study or for additional evidentiary purposes as set forth at 20

C.F.R. §725.414(c). Consequently, we vacate his findings and remand the case for the administrative law judge to provide a more detailed explanation of his acceptance of Dr. Levinson's post hearing deposition. *Wojtowicz*, 12 BLR 1-162; *Tenney*, 7 BLR 1-589.

On remand, the administrative law judge must direct the parties to designate whether each individual item of evidence is being submitted in support of their affirmative case, in rebuttal of the opposing parties affirmative evidence, or in rehabilitation of a specifically identified piece of affirmative evidence. 20 C.F.R. §725.414(a); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). The administrative law judge must then determine whether, pursuant to Section 725.414(a)(3)(i), (ii), the scope of Dr. Levinson's post-hearing deposition was appropriate in light of the purpose for which it was submitted and whether claimant is entitled to proffer responsive evidence. In considering whether claimant is entitled to respond to Dr. Levinson's post-hearing deposition, the administrative law judge must address the requirements of Section 725.456(b)(4), which pertain to the due process right of a party to respond to untimely submitted medical evidence, in conjunction with the evidentiary limitations set forth in Section 725.414. 20 C.F.R. §§725.414, 725.456(b), 725.457, 725.458; *see Miller*, 870 F.2d at 952, 12 BLR at 2-228; *Lee*, 6 BLR at 1-547.

Finally, because the administrative law judge considered and relied upon Dr. Levinson's post-hearing deposition in addressing the merits of entitlement, we do not reach the issues raised concerning the administrative law judge's findings on claimant's entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in part and vacated in part and this 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