

BRB No. 99-0210 BLA

NORVAL ROUSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARBON FUEL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Norval Rouse, Winifrede, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (97-BLA-0837) of Administrative Law Judge Daniel L. Leland on a duplicate claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

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<sup>1</sup> Claimant is Norval Rouse, the miner, who filed his first application for benefits on December 28, 1981, a second claim on March 17, 1989, a third application on May 31, 1994, and the fourth and pending claim on January 2, 1996. Director's Exhibits 1, 38-40. The administrative law judge erroneously found that claimant filed his third application on March 31, 1994, however, we deem this error harmless inasmuch as it is not dispositive in the instant case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 2.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge acknowledged that this is a duplicate claim pursuant to 20 C.F.R. §725.309(d) and credited claimant with thirty-five and three-quarter years of qualifying coal mine employment. The administrative law judge found that, because claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), he demonstrated a material change in conditions under 20 C.F.R. §725.309(d). Next, the administrative law judge addressed the merits of the claim and found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), and accordingly, denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this appeal, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to claimant's appearance without counsel at the formal hearing before the administrative law judge, a review of the record and hearing transcript reveals that claimant was not afforded a full and fair hearing in accordance with Section 725.362(b) inasmuch as the administrative law judge did not fully comply with the procedural safeguards delineated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). Claimant appeared at the formal hearing without the assistance of counsel. A review of the formal hearing transcript reveals that, at the beginning of the hearing, the administrative law judge did not discuss with claimant his lack of representation by counsel and did not provide any explanation to claimant regarding the conduct of the proceedings or the issues involved in this case. Furthermore, the administrative law judge did not inquire about claimant's efforts to obtain counsel; nor did he permit claimant the opportunity to object to evidence, or inform claimant of his right to appeal an adverse decision. Hearing Transcript at 4-27. Although the administrative law judge permitted claimant to submit evidence and to testify, Hearing Transcript at 6-23, he did not allow claimant the opportunity to object to employer's submission of evidence nor did he apprise claimant of what kind of objection was permitted.<sup>2</sup>

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<sup>2</sup> When ruling on employer's submission of its exhibits into the record, the

*See* 20 C.F.R. §725.456(b). Notwithstanding that this case was continued in order to provide an opportunity for claimant to obtain counsel, there is no indication in the evidence of record that claimant explicitly and voluntarily waived his right to an attorney.<sup>3</sup> Finally, a review of the record indicates that claimant suggests that there is additional evidence that was given to the Department of Labor, forwarded to employer, and was apparently lost by employer. *See* Hearing Transcript at 23-24.<sup>4</sup>

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administrative law judge did not allow claimant to object or question the documents:

Judge Leland: Ms. Maloy, do you have any evidence to present on behalf of employer?

Ms. Maloy: Yes, your Honor, on behalf of the Employer I have four exhibits to offer and I brought them here today.

Mr. Rouse: I'd like to ask her a question, if I may. She asked me some.

Judge Leland: Well, you're the witness in this case. That's why she asked the questions.

Mr. Rouse: I'd still like to ask her a question. What I want to know is where my papers, original papers went that I let them have? They sent the x-rays back and kept the reports.

Judge Leland: Anything about that?

Ms. Maloy: No. Whose reports?

Mr. Rouse: All I can tell you is what Dennis Burnside told me. He's - you all said you lost them.

Hearing Transcript at 23.

<sup>3</sup> By correspondence dated July 21, 1997, the Department of Labor (DOL) informed claimant that his formal hearing was scheduled for October 23, 1997. [no exhibit number]. This notice was accompanied by a letter from Ms. Irene K. Rothert, legal technician, notifying claimant that because black lung claims often involve complex factual and legal issues, he should retain an attorney to represent him in this proceeding. [no exhibit number]. Moreover, Ms. Rothert also informed claimant that either his former employer or the government Trust Fund would pay for any attorney's fees incurred, in the event of an award, and in the case of a denial, the attorney was not permitted to charge a fee. Subsequently, claimant appeared at the hearing without the assistance of counsel and requested a continuance to secure counsel, which Administrative Law Judge Gerald M. Tierney granted on February 11, 1998.

<sup>4</sup> By correspondence dated August 5, 1996, the district director forwarded claimant's x-rays and reports to employer's counsel and informed employer to return these items directly to claimant. [no exhibit number]. In a handwritten note on the bottom of this letter,

It has consistently been held that the administrative law judge has the responsibility both to inform a claimant of his right to be represented by an attorney of his choice, at no cost to him, and to inquire whether claimant desires to proceed without such representation. If claimant wishes to proceed, the administrative law judge must inform claimant of the issues in the case, provide claimant the opportunity to offer evidence and object to the admission of the adversary's evidence, and provide claimant the opportunity to offer testimony concerning relevant issues. *Shapell*, 7 BLR at 1-306-307. Furthermore, the administrative law judge must make clear to claimant that he is entitled to counsel at no cost, and must determine whether the lack of representation was voluntary. *Id.* We hold, therefore, that the formal hearing before the administrative law judge was not properly conducted in accordance with the requirements of fairness and due process delineated in *Shapell* and such error is presumed to have prejudiced claimant. *See Shapell, supra*; Hearing Transcript at 4-26. On remand, the administrative law judge must properly apprise claimant concerning his right to counsel and, if claimant is unable to engage counsel, the administrative law judge must apprise claimant of the issues involved in the case and of his right to submit evidence and object to evidence in accordance with the requirements in *Shapell*. Furthermore, the administrative law judge should render a determination regarding claimant's allegation as to the missing evidence.

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claimant wrote, "Carbon Fuel claims they lost my reports that went with my x-rays and the labor dept. called them and [employer] told them that they had lost them. I don't think or feel that they are lost." [no exhibit number].

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is vacated, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge