BRB No. 05-0177 BLA
and 05-0177 BLA-A

CAROL T. ROSSI (Widow of VINCENT ROSSI) Claimant-Respondent Cross-Petitioner v. READING ANTHRACITE COMPANY Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/13/2005 DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2004-BLA-00032 and 2004-BLA-05251) of Administrative Law Judge Ralph A. Romano denying modification of an award of benefits on a miner's claim and awarding benefits on a survivor's 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] The administrative law judge accepted the stipulation of the parties that the miner had twenty-seven years of qualifying coal mine employment and suffered from simple pneumoconiosis arising out of coal mine employment, and adjudicated both claims pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that modification of the prior award of benefits in the miner's claim was not warranted pursuant to 20 C.F.R. §725.310 (2000) because the weight of the evidence established the existence of complicated pneumoconiosis, thus claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, 30 U.S.C. §921(c)(3). The administrative law judge further found that even if complicated pneumoconiosis had not been established, the weight of the evidence established that the miner's death was due to

[1] Claimant, Carol T. Rossi, is the widow of the deceased miner, Vincent Rossi. The miner filed his claim for benefits on February 9, 1996, following his withdrawal of an earlier claim. Director's Exhibits 1, 32, Miner's Claim (MDX). On August 6, 1998, Administrative Law Judge Ainsworth H. Brown awarded benefits based on his finding of complicated pneumoconiosis, MDX-51, and in a Decision and Order on Reconsideration issued on March 30, 1999, Judge Brown amended the onset date to February 1, 1996. MDX-68. On appeal, the Board affirmed Judge Brown's findings of 27 years of qualifying coal mine employment and the existence of pneumoconiosis arising out of coal mine employment, but vacated his finding of complicated pneumoconiosis and remanded the case for further consideration. MDX-71, 80. Judge Brown subsequently denied employer's motions to reopen the record, for reconsideration and for modification, MDX-84-90, and on September 29, 2000, Judge Brown again found complicated pneumoconiosis established and awarded benefits. MDX-92. Judge Brown denied employer's motion for reconsideration, MDX-93, 99, but on appeal, the Board vacated the award and remanded the case to the district director for consideration of employer's petition for modification. MDX-107. The miner died on May 2, 2002, and claimant filed her claim for survivor's benefits on July 17, 2002. Director's Exhibit 3, Widow's Claim (WDX). After the Board denied claimant's motion for reconsideration in the miner's claim on June 5, 2002, MDX-108, 109, the district director issued two Proposed Decisions and Orders on July 29, 2003, denying modification of the award of benefits in the miner's claim, MDX-112, and awarding benefits in the survivor's claim, WDX-24. Following employer's request for a formal hearing, both claims were consolidated for hearing before Administrative Law Judge Ralph A. Romano.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded in both claims.

On appeal, employer contends that the administrative law judge erred in finding complicated pneumoconiosis established at Section 718.304 and death due to pneumoconiosis established at Section 718.205(c). Employer also challenges various evidentiary rulings made by the administrative law judge, specifically his exclusion of x-ray interpretations at Director's Exhibits 76 and 89 in the miner's claim (MDX); his exclusion of portions of Dr. Hurwitz's deposition testimony at Employer's Exhibit 8; and his admission into the record of late evidence submitted by claimant at Claimant's Exhibit 6. Claimant responds, urging affirmance of the award of benefits in both claims, and, in the alternative, cross-appeals, challenging the administrative law judge's finding that the medical opinion evidence was insufficient to establish complicated pneumoconiosis at Section 718.304 and his denial of claimant's request to present rehabilitative evidence in response to the depositions of Drs. Hippensteel and Hurwitz at Employer's Exhibits 5, 8. Employer responds to claimant's cross-appeal, urging affirmance of the administrative law judge's evidentiary rulings regarding claimant's evidence, but agreeing with claimant that the administrative law judge's findings under Section 718.304 do not comport with the requirements of the Administrative Procedure Act (APA), 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). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to both appeals, declining to address the merits but arguing that the administrative law judge properly excluded the evidence at MDX-76 and 89, as well as portions of Dr. Hurwitz's deposition testimony, and properly disallowed the submission of rehabilitative evidence thereto by claimant. The Director, however, agrees with employer's argument that the administrative law judge erred in finding that Claimant's Exhibit 6 was exchanged with employer in a timely manner pursuant to 20 C.F.R. §725.456. Employer replies in support of its position.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the procedural issues, employer contends that the administrative law judge erred in granting claimant's motion to strike the x-ray interpretations at MDX-76 and 89 from the record based on employer's failure to file a post-hearing written objection to the motion. Employer notes that claimant moved to strike this evidence on the ground that it had previously been excluded from the record and therefore its submission on modification was precluded. *See* Hearing Transcript at 7-8. However,

while the evidence was in existence at the time of the original hearing before Administrative Law Judge Ainsworth H. Brown in the miner's claim, employer asserts that it had not been submitted for inclusion in the record at that time and was not subsequently excluded; rather, Judge Brown declined to reopen the record. Consequently, employer maintains, and the Director agrees, that claimant's motion to strike had no merit, as the disputed evidence could properly be submitted in support of modification. Employer's Brief at 17-19; Director's Response Brief at 7-9; *see Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002), *rehearing denied* Aug. 21, 2002; *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998); *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Employer thus asserts that since no legal or factual basis exists for excluding employer's relevant, probative evidence, the administrative law judge should simply have denied claimant's motion to strike without requiring employer to file a written objection thereto. Employer's Brief at 17-19; Employer's Reply Brief at 2-3. Contrary to employer's arguments, however, the Director accurately notes that employer indicated at the hearing that it needed to review the record to determine whether it would oppose claimant's motion, and if thereafter employer objected to the motion, employer would notify the administrative law judge and brief its rationale. *See* Hearing Transcript at 8, 9, 35. In view of employer's representations, the administrative law judge reserved a decision on claimant's motion to strike pending submission of any objection thereto by employer post-hearing. *Id*; Decision and Order at 2. Since employer took no further action and did not mention the disputed evidence in its closing brief, we agree with the Director's argument that employer's silence effectively waived any objection to claimant's motion. Director's Response Brief at 6-7; *see Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1009-1010, 21 BLR 2-113, 2-129, 2-130 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369, 374 (7th Cir. 1996). Consequently, we uphold the administrative law judge's decision to grant claimant's motion to strike the evidence at MDX-76 and 89 from the record.[2]

Employer also argues that the administrative law judge abused his discretion in striking from the record those portions of Dr. Hurwitz's post-hearing deposition

[2] There is no merit to employer's additional argument that, since claimant received an opportunity to respond to the excluded x-ray interpretations, "it is only fair to strike her responsive evidence if the proof that she responded to is no longer in the record." Employer's Brief at 19. The record reflects that, at the original hearing in the miner's claim, Judge Brown held the record open for the miner to submit his own readings of the x-ray films that employer had in its possession, Hearing Transcript at 21-22, but that employer did not offer its interpretations for inclusion in the record at that time. It is the responsibility of each party to introduce its medical evidence into the record. *See generally White v. Director, OWCP*, 6 BLR 1-368 (1983).

testimony which exceeded the scope of the physician's May 2003 report, specifically Dr. Hurwitz's response to the opinions of Drs. Fisk and Kraynak.[3] Employer asserts that the administrative law judge's ruling is contrary to the regulations, which provide that where rebuttal evidence tends to undermine the conclusions of a physician who prepared a medical report submitted by the responsible operator, the responsible operator may submit additional statements from the physician who prepared the report, explaining his conclusions in light of the rebuttal evidence. 20 C.F.R. §725.414(a)(3)(ii). Because claimant submitted Dr. Fisk's report and took Dr. Kraynak's deposition after Dr. Hurwitz rendered his written reports, and since Drs. Fisk and Kraynak challenged Dr. Hurwitz's conclusions, employer contends that it was entitled to submit rehabilitative evidence. Employer's Brief at 21-22. As the Director states, however, the record reflects that the administrative law judge did not base his ruling on the evidentiary limitations at Section 725.414, but on employer's voluntary offer to limit the scope of Dr. Hurwitz's testimony. Director's Response Brief at 12-13. At the hearing, claimant had no objection to leaving the record open for employer to submit the deposition testimony of Dr. Hurwitz, but claimant requested permission to submit rehabilitative evidence thereafter. Hearing Transcript at 19. Employer then objected to claimant's motion "because it's anticipated that Dr. Hurwitz will testify in accordance to his report that was previously exchanged…by letter dated May 30, 2003," eleven months prior to the hearing. Hearing Transcript at 19-20. Based on employer's representations, the administrative law judge permissibly denied claimant's motion and indicated that "the only reason I'm leaving the record open is for the deposition as indicated by the Employer." Hearing Transcript at 20. We therefore reject employer's challenge to the administrative law judge's exclusion of any testimony which exceeded the scope of Dr. Hurwitz's May 2003 report, as we can discern no abuse of the administrative law judge's discretion under the facts of this case. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, there is no merit to claimant's argument on cross-appeal that due process mandates that she be allowed to submit rehabilitative evidence in response to Dr. Hurwitz's deposition testimony.[4]

[3] Employer's argument, that the administrative law judge over-inclusively excluded Dr. Hurwitz's testimony after page 22 of the transcript, *see* Employer's Brief at 22, Employer's Reply Brief at 4, is without support in the record. *See* Decision and Order at 2, 13.

[4] Employer and the Director additionally note that claimant had the opportunity to cross-examine Dr. Hurwitz at the deposition, and that any response to Dr. Hurwitz's written report that was permissible under the evidentiary limitations should already have been submitted. Employer's Response Brief at 5-7; Director's Response Brief at 13.

We also find no merit in claimant's argument on cross-appeal that the administrative law judge improperly excluded Dr. Fisk's supplemental report from the record. Claimant asserts that the report was offered as rehabilitative evidence following her receipt of Dr. Hippensteel's deposition transcript on March 29, 2004, "close to" the 20-day rule deadline of April 10, 2004, *see* 20 C.F.R. §725.456(b)(2), thus claimant contends that the administrative law judge erred in finding that good cause was not shown for the late submission of this evidence. Claimant's Brief at 3-4. We disagree. At the hearing, and in its subsequent written opposition, employer accurately noted that Dr. Fisk's supplemental report, exchanged for the first time at the hearing, was not specifically responsive to Dr. Hippensteel's deposition testimony but only addressed evidence available in the record for at least eight months. Hearing Transcript at 15-17. On the basis of employer's objection that claimant had ample time to submit a supplemental report from Dr. Fisk, the administrative law judge, within a proper exercise of his discretion, found that claimant failed to demonstrate good cause for the late submission of this evidence and excluded the report pursuant to Section 725.456(b)(3). Hearing Transcript at 17; Decision and Order at 2; *Clark*, 12 BLR at 1-153. The administrative law judge's findings pursuant to Section 725.456 are supported by substantial evidence and are affirmed.

Employer and the Director next maintain that, contrary to the administrative law judge's finding, the evidence at Claimant's Exhibit 6, consisting of multiple x-ray interpretations and a CT scan, was not timely exchanged in accordance with the 20-day rule set forth at Section 725.456(b)(2). We agree. The record reflects that claimant exchanged this evidence with employer on April 12, 2004, eighteen days prior to the hearing on April 30, 2004. At the hearing, the administrative law judge admitted the evidence into the record, over employer's objections, based on his finding that the exchange was timely because the twentieth day before the hearing fell on a Saturday and claimant filed her evidence the following Monday. Hearing Transcript at 14. Employer and the Director, however, correctly assert that the plain language of the regulation does not provide that the 20-day period may be shortened due to intervening weekends or holidays. 20 C.F.R. §725.456; Employer's Brief at 19-21; Director's Response Brief at 9-11. As the administrative law judge did not render findings of fact as to whether good cause was shown for the admission of the late evidence pursuant to Section 725.456(b)(3), we must remand this case for him to do so. If, on remand, the administrative law judge determines that good cause was not established, he shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3). If the administrative law judge finds that good cause was demonstrated, he is instructed to determine whether due

process requires that employer be allowed to submit responsive evidence. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989).[5]

Because the administrative law judge's evidentiary rulings on remand may impact his findings on the merits, we vacate his findings pursuant to Sections 718.304 and 718.205(c). On remand, the administrative law judge is instructed to consider all relevant evidence of record on the issue of the existence of complicated pneumoconiosis, *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*), and provide a rationale for his credibility determinations which comports with the requirements of the APA.[6] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). If the administrative law judge finds complicated pneumoconiosis established pursuant to Section 718.304, he may rely upon this determination to award benefits in the survivor's claim. *See* 20 C.F.R. §§718.205(c) (3), 718.304. Otherwise, the administrative law judge must determine whether the weight of the evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) in the miner's claim, and death due to pneumoconiosis pursuant to Section 718.205(c) in the survivor's claim.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[6] Claimant and employer correctly maintain that the administrative law judge summarily concluded that the medical reports did not establish the existence of complicated pneumoconiosis, *see* Decision and Order at 15, without weighing the conflicting medical opinions of record.

Accordingly, the administrative law judge's Decision and Order – Award of 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

_____
REGINA C. McGRANERY
Administrative Appeals Judge