BRB No. 09-0422

KENNETH CHASTAIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 12/29/2009
	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/ AMERICAN INTERNATIONAL UNDERWRITERS	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Jerry R. McKenny and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2007-LDA-244) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act) We must affirm

the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In June 2006, claimant was hired by employer to work as a labor foreman. On July 4, 2006, claimant was assigned to Base C-7, Kirkuk, Iraq, where he worked seven days a week, 12 hours per day. On January 1, 2008, claimant sustained a work-related injury to his back while lifting boxes off of the back of a truck; following this injury, claimant was diagnosed with a muscle strain, given Motrin, and instructed to rest for a day. On January 3, 2008, claimant sought medical attention for problems sleeping at night. After an evaluation at a combat stress center, claimant was diagnosed with acute stress and was given a 30-day leave of absence to return to the United States. Claimant returned to Corpus Christi, Texas, whereupon he commenced treatment with Drs. Allen and Potter for his back condition, and Dr. Badea-Mic, a psychiatrist, for his mental condition. Employer did not pay either compensation or medical benefits to claimant and, in March 2008, employer informed claimant that he had been terminated.

On January 8, 2008, claimant filed a claim for compensation under the Act. On May 15, 2008, the administrative law judge issued a Notice of Hearing and Pre-Hearing Order wherein, *inter alia*, the parties were directed to conclude all discovery and exchange witness lists and exhibits 20 days prior to August 25, 2008, the date set for the formal hearing. Employer did not procure counsel until approximately four days before the formal hearing; consequently, at the hearing, the administrative law judge held the record open until November 24, 2008, for employer's counsel to present relevant evidence. Tr. at 3, 5 – 6. On November 21, 2008, employer submitted nine exhibits, and on November 24, 2008, it submitted the exhibits at issue here, a medical report authored by Dr. Griffith and a vocational report authored by Mr. Stanfill, to the administrative law judge for inclusion into the record. In an Order dated November 28, 2008, the administrative law judge accepted employer's exhibits into evidence, closed the record, and ordered that the parties' post-hearing briefs be filed by December 31, 2008. On December 3, 2008, claimant filed a motion to strike employer's exhibits 10 and 11, specifically the reports of Dr. Griffith and Mr. Stanfill, asserting that claimant had no notice that employer had retained these experts and would be extremely prejudiced if the administrative law judge were to admit their reports into evidence. On December 31, 2008, claimant and employer filed their post-hearing briefs with the administrative law judge. On January 2, 2009, the administrative law judge issued an Order denying claimant's motion to strike, but stating that claimant could respond to employer's exhibits or seek leave to develop countervailing evidence before the due date set for receipt of the parties' briefs.

In his February 2, 2009, Decision and Order, the administrative law judge found that claimant sustained a work-related injury to his back, but that claimant was not precluded from returning to work for employer upon the conclusion of his 30-day leave of absence. Consequently, the administrative law judge awarded claimant temporary total disability benefits from January 8, 2008, to February 8, 2008, and reasonable and appropriate medical expenses, resulting from his work-related back condition. 33 U.S.C. §§908(b); 907. With regard to claimant's claim for benefits for a psychological condition, the administrative law judge found that claimant established his *prima facie* case for invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), that employer produced substantial evidence sufficient to rebut the presumption, and that claimant failed to establish by a preponderance of the evidence that he sustained any work-related psychological injury. Specifically, the administrative law judge concluded that a diagnosis of post-traumatic stress disorder is not supported by the record, and that the record contains no medical evidence supportive of a finding that claimant's prior depressive disorder was aggravated by his employment with employer while in Iraq.

On appeal, claimant challenges the administrative law judge's denial of his motion to strike two of employer's exhibits, asserting that these exhibits were submitted in violation of the administrative law judge's Pre-Hearing Order and that employer's failure to present evidence in compliance with the Order was due to its failure to timely retain counsel. Alternatively, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Griffith, as it was filed by facsimile on the day the record closed and was not provided to claimant's counsel until after the record closed. Lastly, claimant asserts that the administrative law judge's January 2, 2009, Order was too late to provide claimant any relief. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially asserts that the administrative law judge erred in denying his motion to strike the post-hearing reports of Dr. Griffin and Mr. Stanfill. Specifically, claimant contends that as employer made no attempt to comply with the procedure in the administrative law judge's Pre-Hearing Order regarding the timely disclosure and exchange of exhibits, employer's decision to submit these exhibits on the last day that the record was held open effectively prohibited claimant from inquiring into that evidence.

We reject the contention that the administrative law judge committed reversible error in refusing to strike employer's evidence. Claimant correctly asserts that employer failed to timely retain counsel; thus, employer did not comply with the pre-hearing Order. Nonetheless, at the formal hearing, claimant's counsel agreed to the administrative law judge's decision to hold the record open until November 24, 2008.

See Tr. at 3. In holding the record open, the administrative law judge specifically stated that employer would be allowed to present "any evidentiary matters in the way of documentation that he wishes to present." *Id.* at 5 – 6. Employer subsequently submitted exhibits 1 through 9 to the administrative law judge on November 21, 2008, and exhibits 10 and 11 on November 24, 2008. As employer complied with the date set by the administrative law judge, he did not abuse his discretion in admitting employer's exhibits. *See* 20 C.F.R. §§702.338, 702.339. *See also Durham v. Embassy Dairy*, 19 BRBS 105 (1986); *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

Nevertheless, the administrative law judge's decision cannot be affirmed. The procedural error in this case is not in the administrative law judge's admission of the evidence but in his failure to allow claimant any meaningful opportunity to respond. Where a party submits the report of an expert, due process requires that the opposing party be given the opportunity to depose the expert. *See Longo v. Bethlehem Steel Corp.*, 11 BRBS 654 (1979). *See generally Richardson v. Perales*, 402 U.S. 389 (1971); *Todd Shipyards Corp. v. Director*, OWCP, 545 F.2d 1176 (9th Cir. 1976); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951); *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997). Moreover, under the circumstances here, where the administrative law judge allowed employer ample time to correct its own failure to procure counsel, and employer did so by submitting new evidence on the due date, claimant must be given the opportunity to submit evidence in response to employer's exhibits.

The administrative law judge's acceptance of the reports of Dr. Griffith and Mr. Stanfill filed on the last day that the record was open here effectively prohibited claimant from examining their opinions or obtaining countervailing evidence. While the administrative law judge recognized that claimant was entitled to respond and attempted to allow him time to do so in the January 2, 2009, Order, he allowed a response only "if deemed necessary before the due date set for briefs." The administrative law judge had established the due date for the filing of the parties' post-hearing briefs as December 31, 2008, a date which had already passed.[1] The administrative law judge's January 2, 2009, Order was thus fatally flawed as it did not grant claimant a real opportunity to respond to employer's new evidence.[2] As a result, we cannot affirm the administrative law judge's

[1] We note that employer, in arguing that the administrative law judge "clearly gave Claimant a chance to rebut the position of Dr. Griffith," has omitted from its citation of the administrative law judge's Order the concluding clause "before the due date set for briefs" which unequivocally sets a time limitation on any response made by claimant. *See* Employer's brief at 6, 7 n.6.

[2] Moreover, the administrative law judge issued his Decision and Order one month later, on February 2, 2009.

denial of benefits. The administrative law judge's finding that claimant failed to establish that he suffers from a work-related psychological condition must therefore be vacated.[3] The case is remanded for the administrative law judge to allow claimant the opportunity to depose employer's experts and a reasonable amount of time to respond to employer's evidence. Should the claimant present additional evidence, the administrative law judge must reconsider the issues presented in this case, fully addressing all relevant evidence in accordance with the applicable law.

Accordingly, the administrative law judge's denial of benefits for a psychological injury is vacated, and the case is remanded for further proceedings in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3] Claimant raises no arguments regarding the administrative law judge's finding that he was capable of returning to his former job by February 8, 2008 based on his back injury alone. The award of disability benefits for one month and medical treatment related to the back injury are thus affirmed.