BRB No. 08-0515 BLA

V.B.[1]	)	
(on behalf of I.B., deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELM GROVE COAL COMPANY	)	DATE ISSUED: 02/27/2009
	)	
Employer-Petitioner	)	
	)	
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 Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Ann Marie Scarpino (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

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[1] Claimant is the miner's widow and is pursuing his claim on his behalf.

Employer appeals the Decision and Order on Remand Awarding Benefits (02-BLA-5180) of Administrative Law Judge Daniel L. Leland rendered on a miner's subsequent 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 case has been before the Board previously, and the relevant procedural history is as follows.

The miner's initial application for benefits, filed on August 5, 1986, was finally denied on January 26, 1987 by the district director because the miner did not establish any element of entitlement. The miner filed this claim, his second, on April 4, 2001. Following the district director's award of benefits, employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges.

During the prehearing period, employer deposed claimant's physicians, Drs. Lenkey and Cohen. Both physicians testified that portions of their written reports were copied from information supplied by claimant's counsel. On July 9, 2002, employer moved to compel discovery of communications and draft reports between claimant's counsel and claimant's medical experts. By Order dated November 26, 2002, Administrative Law Judge Robert J. Lesnick denied employer's motion to compel discovery of the correspondence between claimant's counsel and the doctors, determining that the correspondence sought was protected by the attorney work product doctrine. Subsequently, the case was reassigned to Administrative Law Judge Daniel L. Leland (the administrative law judge), who held a hearing on June 4, 2003. At the hearing, employer renewed its motion to compel discovery of the communications between claimant's counsel and claimant's physicians. However, the administrative law judge declined to disturb Judge Lesnick's order. Hearing Transcript at 30-31. Subsequently, in a decision issued on October 16, 2003, the administrative law judge awarded benefits.

On appeal, the Board affirmed the administrative law judge's award of benefits, including the administrative law judge's denial of employer's request that claimant be compelled to produce the communications between claimant's counsel and Drs. Lenkey and Cohen. [*I.B.*] *v. Elm Grove Coal Co.*, BRB Nos. 04-0186 BLA and 04-0186 BLA-S (Dec. 28, 2004)(unpub.).

Employer then filed an appeal with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit vacated, *inter alia,* the Board's decision on the discovery issue, and held that discovery of the communications between claimant's counsel and claimant's testifying experts was permitted, and was necessary for a proper cross-examination of claimant's experts. Thus, the court remanded the case to the administrative law judge for further consideration. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

On remand from the Fourth Circuit, both claimant and employer moved to reopen the record. By motion dated July 3, 2007, employer asked that claimant be compelled to produce draft reports and communications between claimant's counsel and claimant's experts. By Order dated August 31, 2007, the administrative law judge granted employer's motion to compel. The administrative law judge also granted a July 9, 2007 request from claimant for discovery of communications between employer and its experts.

Both claimant and employer produced the communications between their respective counsel and their experts, and both parties introduced these communications into evidence. In addition, on October 1, 2007, claimant submitted an affidavit from claimant's counsel, Thomas E. Johnson, in which Mr. Johnson explained how he and his staff assisted Drs. Lenkey and Cohen in preparing their reports. Claimant's Exhibit 22.

By letter dated October 11, 2007, employer moved to strike Mr. Johnson's affidavit from the record. Employer requested that a hearing be convened to allow employer to cross-examine Mr. Johnson and Drs. Lenkey and Cohen if Mr. Johnson's affidavit were admitted into evidence. Employer's October 11, 2007 Objection to Claimant's Exhibit 22 (Mr. Johnson's affidavit).

By Order dated November 2, 2007, the administrative law judge denied employer's motion to strike Mr. Johnson's affidavit, and further denied employer's request to reopen the record for cross-examination of Drs. Lenkey and Cohen.[2] Order Denying Motion to Strike at 4.

In a decision dated March 4, 2008, which is the subject of the current appeal, the administrative law judge awarded benefits. The administrative law judge rejected employer's contention that claimant's counsel had gone beyond merely providing drafting assistance to Drs. Lenkey and Cohen, such that the opinions expressed were those of claimant's attorney, and not of the physicians. Instead, relying on Mr. Johnson's affidavit,[3] the administrative law judge found that claimant's counsel's assistance "did

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[2] However, the administrative law judge noted that Mr. Johnson had agreed to sit for a deposition regarding the contents of his affidavit, and he granted employer thirty days to depose the attorney. By letter dated November 30, 2007, employer declined to depose Mr. Johnson. Employer stated that it assumed Mr. Johnson's testimony would be consistent with his affidavit and that it believed his deposition was unnecessary without the opportunity to also cross-examine Drs. Lenkey and Cohen regarding the information in Mr. Johnson's affidavit and the draft reports.

[3] Mr. Johnson stated that when he had met with Dr. Lenkey to review the miner's medical records, Dr. Lenkey expressed his views on the miner's condition and stated that

not affect the substance of the reports or the conclusions drawn by the physicians," and concluded that the reports of Drs. Lenkey and Cohen were "reliable and credible." Decision and Order on Remand at 6. The administrative law judge then incorporated, by reference, his prior findings that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and that claimant further established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in admitting Mr. Johnson's affidavit into the record, and in denying employer's request to re-depose Drs. Lenkey and Cohen after claimant's counsel disclosed their draft reports. Employer also asserts that the administrative law judge erred in finding that the medical reports of Drs. Lenkey and Cohen meet the standards for reliability and credibility pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) and Federal Rules of Evidence 702 and 703. Finally, employer contests the administrative law judge's evaluation of the x-ray and medical opinion evidence on the merits of entitlement. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation

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he would be willing to file a report setting forth his reasoning in detail, but requested that Mr. Johnson write a draft report for him, as Dr. Lenkey lacked the time and the secretarial support to develop written medical opinions. According to Mr. Johnson, on February 28, 2002, he and his paralegal drafted a report that was consistent with Dr. Lenkey's views and submitted it to Dr. Lenkey, along with copies of all the relevant medical records so that Dr. Lenkey could review them again. On March 1, 2002, Dr. Lenkey sent a final report to Mr. Johnson, retaining the February 28, 2002 report date. With respect to Dr. Cohen, Mr. Johnson stated that his paralegal sent Dr. Cohen draft reports that included employment and smoking histories, summaries of the miner's medical testing and records, and "standard material (including a discussion of the medical literature on obstruction and coal mine dust) that Dr. Cohen had written and used in similar obstruction cases." Claimant's Exhibit 22 at 3. Mr. Johnson explained that "the drafts sought to summarize the record in the form that Dr. Cohen likes to use. Dr. Cohen then added to and revised the drafts to produce his opinion." Claimant's Exhibit 22 at 3. Mr. Johnson explained that the summaries of the evidence and draft reports that he and his paralegal provided were based on his communications with the doctors, and that this assistance was provided to both reduce the time these two busy doctors had to spend on the case, and to reduce the miner's litigation costs. Claimant's Exhibit 22 at 3. Mr. Johnson concluded by emphasizing that the doctors' opinions expressed in the resulting reports "were, in fact, the doctors' opinions of [the miner's] condition." Claimant's Exhibit 22 at 4.

Programs (the Director), has filed a response brief agreeing with employer that the administrative law judge erred in denying employer's request to re-depose Drs. Lenkey and Cohen.[4]

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

Initially, we address employer's contention that the administrative law judge erred in admitting Mr. Johnson's affidavit into the record.[5] Relying on Illinois Rule of Professional Conduct 3.7, governing lawyers acting as a witnesses, employer asserts that by filing an affidavit, Mr. Johnson compromised his role as advocate, and, therefore, either his affidavit should have been stricken from the record, or Mr. Johnson should have been required to withdraw from the case. Employer's Brief at 30. Employer also asserts that the statements contained in Mr. Johnson's affidavit are not "facts" suitable to an affidavit, and, moreover, are inadmissible hearsay evidence. Employer's Brief at 30-31. We disagree.

The administrative law judge generally is not bound by statutory rules of evidence or by technical or formal rules of procedure, except as provided by the Administrative Procedure Act (APA) and Part 725 of the regulations. 5 U.S.C. §556(d), 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); 20 C.F.R. §725.455(b); *Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-17 n.1 (2007) (*en banc recon.*) (McGranery & Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). Rather, as the adjudication officer empowered to conduct formal hearings and render decisions under the Act, an administrative law judge is granted broad discretion in resolving procedural issues, including the admission of hearsay evidence. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620, 23 BLR 2-345, 2-369 (4th Cir. 2006); *Harris*, 23 BLR at 1-108; *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). Thus, a party seeking

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[4] On December 9, 2008, the Board held oral argument in this case in Chicago, Illinois, to address certain issues raised on appeal. Employer, claimant, and the Director, Office of Workers' Compensation Programs, submitted oral argument briefs in support of their positions.

[5] This issue was not set for oral argument, but was raised by employer in its initial brief on appeal.

to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *Harris*, 23 BLR at 1-108.

After reviewing the administrative law judge's findings, and employer's arguments on appeal, we hold that employer has not shown that the administrative law judge abused his discretion in admitting Mr. Johnson's affidavit into the record. In his November 2, 2007 Order denying employer's motion to strike, the administrative law judge considered, and rejected, the same arguments now being raised by employer on appeal. The administrative law judge found that, even assuming the applicability of Illinois Rule of Professional Conduct 3.7, because requiring Mr. Johnson to withdraw as counsel would place undue hardship on claimant, this case fell within one of the specified exceptions to the rule.[6] Order Denying Motion to Strike at 3. In addition, the administrative law judge found that, because the statements made by Mr. Johnson related to matters about which he had personal knowledge, his statements were properly presented in an affidavit. Order Denying Motion to Strike at 3. Moreover, because the APA does not bar the consideration of hearsay evidence and because Mr. Johnson was available for cross-examination, the administrative law judge found that his affidavit was admissible. *See* 5 U.S.C. §556(d); Order Denying Motion to Strike at 3-4.

In considering employer's objections, and explaining his reasons for rejecting them, the administrative law judge permissibly concluded that because of Mr. Johnson's longstanding association with this case, and his familiarity with the facts and its procedural posture, requiring him to withdraw at this stage of the litigation would result in a substantial hardship to claimant. *See Dumon v. Pittway Corp.*, 442 N.E.2d 574, 591 (Ill. App. Ct. 1982). Moreover, as discussed above, the administrative law judge has wide latitude in the admission of documentary and testimonial evidence, including the admission of hearsay evidence. *See Williams*, 453 F.3d at 620, 23 BLR at 2-369. Therefore, given the posture and circumstances of this case, we are unable to conclude

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[6] Illinois Rule of Professional Conduct 3.7 states, in pertinent part:

> (a) A lawyer shall not accept or continue employment in contemplated or pending litigation if the lawyer knows or reasonably should know that the lawyer may be called as a witness on behalf of the client, except that the lawyer may undertake the employment and may testify:
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> . . .
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> (4) . . . if refusal to accept or continue the employment would work a substantial hardship on the client.

Ill. Comp. Stat. Ann., Rules of Prof'l Conduct R. 3.7 (West 2007).

that the administrative law judge abused his discretion in admitting Mr. Johnson's affidavit into the record. *See Harris*, 23 BLR at 1-108.

We hold that there is merit, however, to employer's assertion that, having admitted Mr. Johnson's affidavit, the administrative law judge erred in denying employer's request to re-depose Drs. Lenkey and Cohen. As noted above, in objecting to the admission of Mr. Johnson's affidavit, employer requested the opportunity to cross-examine Drs. Lenkey and Cohen if Mr. Johnson's affidavit concerning the preparation of their reports were admitted into evidence. Employer's October 11, 2007 Objection to Claimant's Exhibit 22 (Mr. Johnson's affidavit). In denying employer's request, the administrative law judge stated:

> The issue of the mechanics of the drafting of the expert opinions is tangential to the issue of whether the reports are well reasoned, well documented, and credible. Both Drs. Lenkey and Cohen have testified under oath and personally explained, in detail, the basis for their opinions. As such, Employer had ample opportunity to question both physicians, and the record will not be re-opened for cross-examination.

Order Denying Motion to Strike at 4.

As employer and the Director contend, the administrative law judge's denial of employer's request to re-depose Drs. Lenkey and Cohen, on the grounds that employer had already deposed them, is inconsistent with the Fourth Circuit court's holding in *Blake*. Employer's Oral Argument Brief at 39; Director's Oral Argument Brief at 8. In *Blake*, reasoning that claimant's expert witnesses could not "be properly and fully cross-examined in the absence of the draft reports and attorney-expert communications sought by [employer]," *Blake*, 480 F.3d at 301, 23 BLR at 2-467, the court held that "draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine." *Blake*, 480 F.3d at 303, 23 BLR at 2-470. Thus, we reject claimant's assertion that the court in *Blake* held only that disclosure of the physicians' draft reports and attorney-expert communications was "*potentially* important to a full and fair cross-examination," Claimant's Oral Argument Brief at 27-8, *quoting Blake*, 480 F.3d at 302, 23 BLR at 2-469 (emphasis in claimant's brief). Rather, the court premised its determination to allow discovery of the communications between claimant's experts and claimant's counsel on the principle that access to these communications was necessary to the proper cross-examination of claimant's experts. *Blake*, 480 F.3d at 301, 23 BLR at 2-467. Therefore, we agree with employer and the Director that the administrative law judge erred in rejecting employer's request to cross-examine Drs. Lenkey and Cohen following the completion of discovery. Consequently, we vacate the administrative law

judge's decision and remand this case for the administrative law judge to allow employer the opportunity to cross-examine Drs. Lenkey and Cohen.

Employer also asserts that the administrative law judge erred in finding that the medical reports of Drs. Lenkey and Cohen meet the standards for reliability and credibility pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) and Federal Rules of Evidence 702 and 703. In addition, employer asks the Board to adopt a "bright-line" rule requiring a physician to pen the initial draft of every medical report, without the benefit of written summaries of the medical evidence and testing prepared by counsel. Hearing Transcript at 5, 11, 18-9, 60, 73-4, 92-4. In light of our determination to remand this case to allow further development of the evidentiary record, we will not address employer's specific arguments regarding the administrative law judge's application of Federal Rule of Civil Procedure 26(a)(2)(B) and Federal Rules of Evidence 702 and 703. Moreover, we decline to adopt the "bright-line" rule suggested by employer. *See* Hearing Transcript at 62-3, 66, 80-2, 88. Rather, we hold that in reconsidering the evidence on remand, the administrative law judge must qualify all of the evidence as "reliable, probative, and substantial," including Mr. Johnson's affidavit, before relying upon it, pursuant to the standard set forth in *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999).[7]

Finally, employer asserts that the administrative law judge erred in his evaluation of the x-ray and medical opinion evidence on the merits of entitlement. As the additional evidentiary development on remand may impact the administrative law judge's evaluation of the evidence, we decline to address employer's arguments, as they are premature.

[7] In reconsidering the weight to be accorded to Mr. Johnson's affidavit, the administrative law judge should consider the extent to which Mr. Johnson had personal knowledge of each of the circumstances he described.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge