BRB No. 96-0603 BLA

CALVIN E. CLINE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WESTMORELAND COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	D
IRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION AND ORDER

Appeal of the Order Denying Motion to Compel, Decision and Order - Denying Benefits and Order Denying Motion for Reconsideration of George A. Fath, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen (Cohen, Abate & Cohen, L.C.), Fairmont, West Virginia, for claimant.

Douglas A. Smoot and Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Jeff Goldberg and Helen H. Cox (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Motion to Compel, Decision and Order-Denying Benefits and Order Denying Motion for Reconsideration (94-BLA-1240) of Administrative Law Judge George A. Fath 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). On February 27, 1997, the Board granted employer's request to schedule oral argument on this case. The Director, Office of Workers' Compensation Programs (the Director), submitted the Director's Oral Argument Brief. Claimant, who recently acquired counsel, submitted Claimant's Supplemental Brief in Support of Petition for Review. Oral argument was held in Charleston, West Virginia on July 16, 1997.

The procedural background of this case is as follows: Claimant filed for black lung benefits on January 28, 1980. Director's Exhibit 33. The district director awarded benefits. Director's Exhibit 28. Employer contested the award. The case ultimately came before Administrative Law Judge Victor J. Chao who denied benefits on July 5, 1990. Applying the 20 C.F.R. Part 727 regulations, Judge Chao found the interim presumption invoked at 20 C.F.R. §727.203(a)(2), but found rebuttal established at Section 727.203(b)(2)-(4). Accordingly, he denied benefits. Claimant's appeal to the Board was dismissed as untimely on February 13, 1991. *Cline v. Westmoreland Coal Co.,* BRB No. 90-2207 BLA (Feb. 13, 1991) (unpublished). Claimant submitted a petition for modification on July 1, 1991 which was denied by the district director on October 11, 1991. Director's Exhibit 33. Claimant took no further action on his 1980 claim. On July 27, 1993, claimant filed the instant duplicate claim for benefits. Director's Exhibit 1. The district director awarded benefits on January 6, 1994. Director's Exhibit 20. The case was forwarded to the Office of Administrative Law Judges on May 2, 1994, for a formal hearing. Director's Exhibit 35.

Prior to the hearing, Administrative Law Judge George A. Fath (the administrative law judge) issued an Order Denying Motion to Compel disclosure of medical opinions of employer's experts who were not expected to testify at the hearing. In his Decision and Order - Denying Benefits, the administrative law judge found that the responsible operator issue was not subject to review and reaffirmed Judge Chao's finding that employer is the responsible operator. The administrative law judge credited claimant with thirty years of coal mine employment, based on stipulation. As the duplicate claim was filed after March 31, 1980, the administrative law judge properly applied the regulations at 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.1, 725.309. He considered the evidence submitted since the prior adjudication and found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits on the duplicate claim. He subsequently summarily denied claimant's Motion for Reconsideration.

On appeal, claimant and the Director urge, *inter alia*, that the Board vacate the administrative law judge's Order Denying Motion to Compel, Decision and Order-Denying Benefits and Order Denying Motion for Reconsideration and remand the case to the administrative law judge with instructions to obtain the medical evidence which employer has suppressed, before reconsidering the claim on its merits. Employer urges affirmance of the administrative law judge's Motion to Compel, Decision and Order-Denying Benefits and Order Denying Motion for Reconsideration.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We note initially that, subsequent to issuance of the administrative law judge's Decision and Order - Denying Benefits, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc,* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied,* 117 S. Ct. 763 (1997), the Director's "one element" standard for determining whether a material change in conditions has been established pursuant to Section 725.309.[1] The administrative law judge in the instant case did not address the question of whether the newly submitted evidence established a totally disabling respiratory impairment. Judge Chao, in the first claim, which was governed by the 20 C.F.R. Part 727 regulations, found rebuttal was established at Section 727.203(b)(2). Therefore, because Judge Chao found no total respiratory disability established in the prior decision and order, claimant may prove total respiratory disability based on the evidence developed since the prior claim to establish a material change in conditions at Section 725.309 under *Rutter.*[2] On remand, if the administrative law judge

[1]The Director's "one-element" standard requires the claimant to prove, in light of all of the probative medical evidence of his condition after the prior denial, at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc,* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied,* 117 S. Ct. 763 (1997).

[2]In making his findings at Section 718.204(c), the administrative law judge must determine claimant's usual coal mine employment and compare the exertional requirements of that job with his impairment . *See Scott v. Mason Coal Co.,* 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds*, 14 BLR 1-37 (1990) (*en banc*); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 1-104

finds that the newly submitted evidence has established an element of entitlement not previously established, the administrative law judge should weigh all the evidence of record and consider the claim on the merits. We therefore remand the case to the administrative law judge to make a finding on the issue of a material change in conditions pursuant to *Rutter.*

(1986).

Next addressed are those evidentiary issues raised by the parties. Claimant initially urges the Board to reopen the first claim which was filed on January 28, 1980, for consideration of Dr. Zaldivar's report, Director's Exhibit 11. Dr. Zaldivar's report was generated during the period when the first claim was viable, but was introduced into evidence during the pendency of the second claim.[3]

[3]On April 11, 1989, when the first claim was before Administrative Law Judge John S. Patton, employer advised claimant's lay representative, Jack McVey, that an examination was scheduled with Dr. Zaldivar for April 19, 1989. Director's Exhibit 58. On that date, Dr. Zaldivar examined claimant at employer's behest and authored a report diagnosing, *inter alia,* simple pneumoconiosis and complicated pneumoconiosis. Director's Exhibit 58. Claimant did not request a copy of Dr. Zaldivar's report at that time as he was entitled to do. *See* 29 C.F.R. §18.19(b)(4), which references FED. R. CIV. P. 35(b). Nor did employer submit a copy of Dr. Zaldivar's report into evidence. After the filing of the second claim, claimant requested and received from employer, a copy of Dr. Zaldivar's report which he submitted into evidence. Employer also did not submit into evidence with the first claim Dr. Fino's May 6, 1989 report, which referred to, and rebutted, Dr. Zaldivar's diagnoses of simple and complicated pneumoconiosis. While employer admitted other reports generated by Dr. Fino with the first claim, it did not submit the May 6, 1989 report until the second claim was filed.

In making his threshold determination of whether there was a material change in conditions pursuant to Section 725.309, the administrative law judge properly declined to consider any evidence that was in existence at the time the first claim was decided on the grounds that such evidence "is not applicable in determining whether there has been a change in condition since the denial." Decision and Order at 4; *see Rutter, supra.* Claimant's argument that the first claim should be reopened since employer withheld the results of Dr. Zaldivar's report in violation of 20 C.F.R. §725.414, which requires that all evidence be submitted to the district director when the case is pending before the district director, *see infra*, has no merit since Dr. Zaldivar's report was generated on April 19, 1989 when the case was before Judge Patton, not before the district director. We agree with the Director's position on this issue, that neither the Act nor the regulations provides grounds for reopening the first claim.[4] We, therefore, affirm the administrative law judge's exclusion from consideration of Dr. Zaldivar's report with respect to the first claim and decline to reopen that claim.[5]

We next address claimant's challenges to the administrative law judge's Order Denying Motion to Compel. Claimant filed his second claim on July 27, 1993. An abbreviated history of communications between employer and claimant with respect to the second claim is as follows: On September 2, 1994, employer filed a set of interrogatories and request for production of documents in which employer asked claimant, *inter alia,* whether he or his attorney were "in possession of any chest x-ray interpretations including rereadings,...which have not been submitted into evidence into this case". Employer asked for a description of such reports and asked claimant to produce such reports. Interrogatories 16, 17, 26. Claimant, without counsel, responded to the interrogatories. On October 3, 1994 claimant's lay representative, John Cline, "by

[4]Claimant agrees that the administrative law judge's handling of Dr. Zaldivar's examination report was proper under *Rutter, supra,* and concedes he is unable to cite any legal authority for reopening the first claim so that the administrative law judge might revisit the evidence. Claimant's Supplemental Brief at 11; Oral Argument Transcript at 6.

[5]If on remand the administrative law judge finds that claimant has established the threshold requirement of a material change in conditions at Section 725.309 in accordance with the standard in *Rutter*, he should consider the entirety of the evidentiary record, including Dr. Zaldivar's 1989 report.

way of discovery" requested all medical records and production of documents in employer's possession. On January 4, 1995, employer declined to turn over reports of certain experts as "privileged information" and not subject to discovery under the Federal Rules of Civil Procedure. On January 10, 1995, claimant, through recently acquired counsel, requested production of documents, including "expert opinions." On January 13, 1995, employer turned over the April 21,1989 report of Dr. Zaldivar and declined to submit other medical evidence as privileged under the expert provision of Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure. On January 24, 1995, claimant's attorney filed a "Motion to Compel Discovery on Behalf of Claimant..., all medical reports in the related matter in employer's possession." On February 8, 1995, the administrative law judge denied the Motion to Compel which is now at issue.

Claimant , through the Motion to Compel Discovery, sought production of medical information obtained by employer which employer did not intend to introduce into evidence and considered "privileged". Employer advised the administrative law judge, *inter alia,* that in its investigation of the instant claim and in preparation for the hearing, it had several x-rays and CT scans read by roentgenographic experts to determine whether these films reveal the presence or absence of complicated pneumoconiosis. Employer considered this evidence to be privileged. [1995] Employer's Response to Claimant's Motion to Compel Discovery and Request for Protective Order at 1. Claimant contends, *inter alia*, that by sending only negative x-rays or reports that favor its position to other experts for an evaluation of its evidence, employer skews or "pyramids" the evidence because the reviewing expert predicates his report on an incomplete record. Employer states that it provides its experts "with the medical evidence that is of record." Oral Argument Transcript at 46.

In denying the Motion to Compel Discovery, the administrative law judge relied on Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure which provides for discovery of opinions of experts who are not expected to be called as witnesses. He found that Rule 35(b), entitled "Physical and Mental Examination of Persons; Report of Examiner," which is referenced in Rule 26(b)(4)(B), was not applicable in this instance. He further found that it was not impracticable for claimant to obtain x-rays and CT scans from employer and have them read by his own experts. Order Denying Motion to Compel at 1-2.

We agree with the position of claimant and the Director that the Federal Rules of Civil Procedure do not govern the scope of discovery in black lung cases. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), contains no provision for pretrial discovery in the administrative process and the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings, unless specifically provided by statute or regulation. *See Frilette v. Kimberlin*, 508 F.2d 205 (3d. Cir. 1974).; 4 Jacob Stein, Glenn Mitchell, Basil Mezines, *Administrative Law* §22.01[3] (1997). Furthermore, 29 C.F.R. §18.14 of The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges does not reference the Federal Rules of Civil Procedure in defining the scope of discovery. *Cf.* 29 C.F.R. §18.19(c)(4).

Thus, the absence of a specific reference to the Federal Rules of Civil Procedure or to Rule 26 (b)(4)(B) permits an interpretation that the framers of Section 18.14 did not intend for the rule to apply to the scope of discovery. Moreover, pursuant to 20 C.F.R. §725.455(b), which applies specifically to black lung hearings, "[t]he administrative law judge shall at the hearing inquire fully into all matters at issue and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure except as provided by 5 U.S.C. 554 and this subpart."[6] *Compare, e.g.,* 20 C.F.R. §702.338. We therefore vacate the administrative law judge's Order Denying Motion to Compel. On remand, the administrative law judge should reconsider his Order Denying Motion to Compel in accordance with the standard for the scope of discovery provided at 29 C.F.R. §18.14 in conjunction with the provisions of 20 C.F.R. §725.455. We reject, however, as overbroad, claimant's interpretation of Section 725.455 that an "ALJ has an obligation to fully develop the record, develop the evidence, get all the evidence in." Oral Argument Transcript at 17; see generally *Scott v. Bethlehem Steel Corp.*, 6 BLR 1-760 (1984); *Somonick v. Rochester and Pittsburgh Coal Co.,* 6 BLR 1-892 (1984).

We also reject the position of claimant and the Director that the provision of 20 C.F.R. §725.414, which requires the operator to submit evidence obtained to the district director[7] and all parties, is extended to the administrative law judge. The provisions at 20 C.F.R. §§725.410-725.421 are titled: " Adjudication by the Deputy Commissioner." Subsections 725.414(e)(1) and (e)(2) provide sanctions for failure to make a good faith effort to develop evidence before the district director within certain time constraints. They are designed to protect the due process rights of the operator while expediting the processing and adjudication of claims to ensure prompt payment to eligible claimants in the early stage of adjudication. 43 Fed. Reg. 36,794 (1978).

On remand, the administrative law judge should take into consideration 30 U.S.C. §923(b), which provides: "In determining the validity of claims under this part, all relevant evidence shall be considered....". In remanding for the administrative law judge's reconsideration of the Order Denying Motion to Compel, we are not unmindful of the administrative law judge's discretionary authority provided at 29 C.F.R. §18.14 and 20 C.F.R. §725.455. *See Martiniano v. Golten Marine Co.,* 23 BRBS 363 (1990).

---

[6]20 C.F.R. §725.455 supersedes 20 C.F.R. §725.460 (1976), which provided for application of the Federal Rules of Civil Procedure.

[7]Formerly "deputy commissioner," *see* 20 C.F.R. §725.101(a)(11); 55 Fed. Reg. 28606 (July 12, 1990).

With respect to the weighing of the medical evidence, if on remand, the administrative law judge relies on the evidence that is presently in the record, he may credit the opinions of Drs. Renn and Stewart, that claimant did not have pneumoconiosis, over the opinions of Drs. Rasmussen and Daniel, based on the expertise of Drs. Renn and Stewart, and because "[e]ach of them supported their respective conclusions with medical data and explained their determinations in a logical manner." Decision and Order at 11;*Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc); Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We agree with the position of the Director that the none of the physicians on whom employer relies, Drs. Fino, Renn, Stewart and Crisalli, opined that coal dust could not cause an obstructive lung disease. Thus, their opinions cannot be discredited under the standard in *Stiltner v. Island Creek Coal Co.,* 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

In the event the administrative law judge awards benefits, he must address the responsible operator issue which employer raised below. Employer correctly argues that the administrative law judge erred in finding that employer could not challenge its designation as the responsible operator because it did not appeal Judge Chao's Decision and Order wherein he found that employer was the responsible operator. Because claimant's appeal from Judge Chao's denial of benefits was untimely filed and dismissed by the Board, employer was not an aggrieved party. The district director denied claimant's petition for modification in 1991. When Judge Fath adjudicated claimant's instant appeal in a *de novo* hearing, employer had its first opportunity to litigate the responsible operator issue. *See generally Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1997); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993).

Accordingly, the administrative law judge's Order Denying Motion to Compel, Decision and Order - Denying Benefits and Order Denying Motion for Reconsideration are affirmed in part, vacated in part and the case is remanded to the administrative law judge for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

Deskbook Section III.F.2.

With respect to the admission of evidence regarding the threshold determination of a material change in conditions in a duplicate claim pursuant to 20 C.F.R. §725.309, the Board held that the administrative law judge properly declined to consider any evidence that was in existence at the time of the first claim, and was not admitted into evidence until the time of the duplicate claim, on the grounds that such evidence "is not applicable in determining whether there has been a change in conditions since the denial," *see* ***Lisa Lee Mines v. Director, OWCP [Rutter]***, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). The Board held, however, that if on remand, the administrative law judge finds that claimant has established the threshold requirement of a material change in conditions pursuant to Section 725.309 in accordance with the standard in ***Rutter***, he should consider the entirety of the evidentiary record including that evidence that was in existence at the time of the first claim and was not admitted into evidence until the pendency of the second claim. ***Cline v. Westmoreland Coal Co.***, BLR , BRB No. 96-0603 BLA (Oct. 17, 1997).

Deskbook Section IV.C.2.

The Board vacated the administrative law judge's Order Denying Motion to Compel Discovery of opinions of employer's experts based on his finding that the information was not subject to discovery under the Federal Rules of Civil Procedure. The Board agreed with the Director that the Federal Rules of Civil Procedure do not govern the scope of discovery in black lung cases. The Board remanded the case for the administrative law judge to reconsider his Order Denying Motion to Compel Discovery pursuant to the standard for the scope of discovery provided in 29 C.F.R. §18.14 in conjunction with the provisions of 20 C.F.R. §725.455. The Board also instructed the administrative law judge to take into consideration the provision of 30 U.S.C. §923(b), which provides: "In determining the validity of claims under this part, all relevant evidence shall be considered...." In conclusion, the Board noted the discretionary authority given to the administrative law judge in the provisions at 29 C.F.R. §18.14 and 20 C.F.R. §725.455. ***Cline v. Westmoreland Coal Co.***, BLR , BRB No. 96-0603 BLA (Oct. 17, 1997).