

BRB No. 91-0470 BLA

LEONARD CLARK)
)
 Claimant-Petitioner)
)
 v.)
)
 ISLAND CREEK COAL 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 on Remand of G. Marvin Bober,
Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon and Kelley), Madisonville, Kentucky, for
claimant.

Jennifer Sartor Smart (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER,
Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order on Remand (80-BLA-2842) of
Administrative Law Judge G. Marvin Bober denying benefits 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). This case is on appeal before the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Board for the third time. The Board vacated the original Decision and Order of Judge Joyner, and remanded this case for further findings in compliance with the terms of 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), 30 U.S.C. §932(a). Subsequently, while on remand, Judge Joyner left the Office of Administrative Law Judges, and Judge Bober issued an order notifying the parties that unless they objected, he would adjudicate the case based on the administrative record. Claimant submitted new evidence, consisting of a medical report of Dr. Calhoun dated August 25, 1985, and employer filed an objection to the admission of this evidence. In a Decision and Order signed "G. Marvin Bober for Robert E. Joyner" issued on November 19, 1985, the administrative law judge credited claimant with twenty-eight years of qualifying coal mine employment, and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(4), but further found rebuttal of that presumption established pursuant to 20 C.F.R. §727.203(b)(4). Accordingly, benefits were denied.

On appeal, the Board vacated the Decision and Order and remanded this

case for Judge Bober to consider the evidence of record de novo, independent of Judge Joyner's findings, and to determine whether entitlement had been established. The Board further instructed the administrative law judge to determine whether claimant's post-hearing evidence was admissible into the record, and if so, to allow employer at least thirty days within which to submit rebuttal evidence. On remand, the administrative law judge found invocation established pursuant to Section 727.203(a)(4), but rebuttal established pursuant to Section 727.203(b)(3) and (b)(4), and consequently denied benefits. Claimant appeals, contending that he was denied procedural due process, and challenging the administrative law judge's rebuttal findings. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that he was denied the opportunity to fully and fairly present his case by way of argument, proof and cross-examination pursuant to the provisions at 5 U.S.C. §556(d). A review of the record reveals that on remand, by

Order dated April 15, 1990, the administrative law judge found that good cause existed to admit Dr. Calhoun's 1985 post-hearing report into the record, and granted employer and the Director forty-five days within which to submit rebuttal evidence. On May 31, 1990, employer filed a motion seeking exclusion of Dr. Calhoun's report or in the alternative an additional forty-five days to submit rebuttal evidence, which would include a full pulmonary evaluation. By Order issued on June 13, 1990, the administrative law judge denied employer's motion to exclude Dr. Calhoun's report, but granted employer an additional forty-five days within which to submit evidence, and ordered claimant to undergo a physical examination which would include x-rays but not a pulmonary function study or blood gas study.¹ On July 9, 1990, claimant filed an Objection to employer's submission of any further evidence, or in the alternative, claimant requested that he be allowed an opportunity to submit medical evidence. The administrative law judge did not respond to claimant's Objection. Claimant therefore maintains that he was denied procedural due process. We agree. In addition to a report invalidating claimant's 1985 pulmonary function study results and four re-readings of the 1985 x-ray obtained in conjunction with Dr. Calhoun's report, employer submitted, and the administrative law judge admitted into evidence, three interpretations of a 1989 x-ray and four interpretations of a 1990 x-ray, as well as Dr. Wilhelmus' pulmonary evaluation based on an examination of

¹ On July 6, 1990, employer requested an additional twenty days within which to submit evidence, but by Order of July 13, 1990, the administrative law judge found that good cause did not exist to hold the record open beyond July 30, 1990.

claimant in 1990, and four consultative opinions. Decision and Order on Remand at 1, 2. Inasmuch as employer was permitted to develop new medical evidence which exceeded the scope of rebuttal evidence contemplated by the Board, see generally Owens v. Jewell Smokeless Coal Corp., 14 BLR 1-47 (1990), and since the administrative law judge did not comply with the requirements of the APA and respond to claimant's objection to the admission of employer's significantly more recent evidence, or rule on claimant's request to submit his own rebuttal evidence, claimant's due process rights were violated. See generally Richardson v. Perales, 402 U.S. 389 (1971); North American Coal Co. v. Miller, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Consequently, we must vacate the administrative law judge's Decision and Order on Remand, and again remand this case for the administrative law judge to determine the extent of post-hearing evidence admissible herein by each party, and to readjudicate the merits of this claim.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge