BRB No. 11-0570 BLA

FRANKLIN D. SCOTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRANHAM & BAKER COAL COMPANY	)	DATE ISSUED: 05/10/2012
	)	
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 Awarding Benefits and the Order Denying Motion for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration (2008-BLA-5150) of Administrative Law Judge

Linda S. Chapman rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with twenty years of coal mine employment, and adjudicated this claim,[1] filed on December 12, 2002, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish both simple and complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's award of benefits on procedural grounds. Employer contends that the administrative law judge abused her discretion in admitting Dr. DePonte's interpretation of a January 23, 2010 x-ray into the record, because the original film was not filed with the Department of Labor (DOL), in violation of the regulatory provisions at 20 C.F.R. §718.102(d). Alternatively, employer asserts that, if this evidence is admissible, the administrative law judge must re-open the record for the admission of Dr. Wheeler's rebuttal interpretation, and readjudicate the merits of entitlement. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the administrative law judge's evidentiary ruling and the award of benefits.

[1] This case has a lengthy procedural history. Following the district director's denial of the claim on December 15, 2003, the case was forwarded to the Office of Administrative Law Judges for hearing on March 31, 2004. Director's Exhibits 20, 38. On January 30, 2006, Administrative Law Judge Thomas F. Phalen remanded the case to the district director for a complete pulmonary evaluation, and the Board affirmed the Order of Remand and the Order Denying Employer's Petition for Reconsideration. Director's Exhibit 41; *Scott v. Branham & Baker Coal Co.*, BRB No. 06-0446 BLA (Dec. 29, 2006)(unpub.). After obtaining "clarification" of Dr. Hussain's medical opinion, the district director forwarded the case to the Office of Administrative Law Judges on November 16, 2007. Director's Exhibit 42. On April 11, 2008, Administrative Law Judge Larry S. Merck determined that Dr. Hussain's "clarification" of his medical opinion was insufficient to comport with the regulatory guidelines, and remanded the case to the district director for a new pulmonary evaluation. Director's Exhibit 45. Following the development of evidence, on September 22, 2008, the claim was forwarded to the Office of Administrative Law Judges for hearing. Director's Exhibit 46. The parties subsequently agreed to cancel the hearing, and requested a decision on the record.

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.[2] 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 an abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Employer contends that the administrative law judge abused her discretion in admitting Dr. DePonte's interpretation of the January 23, 2010 x-ray into the record, since the original film was not filed with DOL, as required by 20 C.F.R. §718.102(d).[3] Employer asserts that "the very purpose of this regulation was violated" because employer had difficulty locating the film and having it re-read prior to the date set by the administrative law judge for the final submission of evidence. Thus, employer maintains that the award of benefits should be vacated and the case remanded to the administrative law judge for the exclusion of Dr. DePonte's interpretation from the record and a reweighing of the remaining evidence. Alternatively, employer requests that Dr. Wheeler's rebuttal interpretation be admitted into the record. Employer's Brief at 8-10. Employer's arguments lack merit.

The record reflects that, by Order dated July 8, 2010, the administrative law judge admitted Dr. DePonte's x-ray interpretation into the record as claimant's second affirmative x-ray reading, and allowed employer forty-five days within which to submit a rebuttal interpretation. On July 15, 2010, employer requested that DOL forward the original x-ray to Dr. Wheeler, and on July 26, 2010, DOL responded that it did not have the x-ray. By Order dated September 21, 2010, the administrative law judge closed the record, noting that the forty-five day period had expired and that employer had not filed a rebuttal interpretation or requested an extension of time. On September 28, 2010,

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[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 15.

[3] Section 718.102(d) states, in pertinent part, that:

> The original film on which the x-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties.

20 C.F.R. §718.102(d).

employer advised the administrative law judge that it had been unable to obtain the x-ray from DOL, and requested either that Dr. DePonte's interpretation be stricken from the record, or that employer be allowed an additional forty-five days to submit a rebuttal interpretation. By Order dated October 6, 2010, the administrative law judge granted employer an additional forty-five days to obtain the x-ray and have it re-read. By letter dated October 19, 2010, employer requested that claimant's counsel forward the x-ray for re-reading, and by letter dated October 28, 2010, counsel responded that the x-ray was located at the Mountain View Regional Hospital in Norton, Virginia. On December 1, 2010, employer requested that claimant execute and return a medical authorization form. On the same day, citing undue difficulties in obtaining the film, employer filed a motion with the administrative law judge, requesting that Dr. DePonte's interpretation be stricken from the record. By Order dated January 10, 2011, the administrative law judge denied employer's motion to strike, but allowed employer until the close of business on January 28, 2011 to submit a rebuttal interpretation. Employer subsequently obtained the x-ray and forwarded it to Dr. Wheeler on January 18, 2011, requesting an expedited report. Dr. Wheeler read the x-ray and prepared his report on January 21, 2011. Employer's Proposed Exhibit 10. On February 23, 2011, the administrative law judge issued her Decision and Order, noting therein that employer had not submitted a rebuttal interpretation, and that the record had closed. Decision and Order at 2. By letter dated March 9, 2011, employer transmitted Dr. Wheeler's interpretation to the administrative law judge, requesting that it be admitted into the record. Employer also filed a motion for reconsideration on March 16, 2011, requesting that the administrative law judge set aside her decision, and either strike Dr. DePonte's x-ray interpretation from the record or admit Dr. Wheeler's x-ray interpretation into the record, and readjudicate the merits of the claim.

In her Order Denying Motion for Reconsideration, the administrative law judge rejected employer's assertion that the original x-ray film must be filed with DOL before an x-ray interpretation submitted by a party may be considered as evidence. The administrative law judge found that, "even accepting employer's argument that it had undue difficulty obtaining [the January 23, 2010 film]," employer had "more than enough time" to locate the film, obtain a medical authorization from claimant, and submit Dr. Wheeler's interpretation, dated January 21, 2011, prior to the January 28, 2011 deadline. Order on Reconsideration at 3, 4. Finding no basis to disturb her prior evidentiary rulings or her Decision and Order Awarding Benefits, the administrative law judge denied employer's motion for reconsideration.

Contrary to employer's contention, it was not an abuse of discretion for the administrative law judge to admit Dr. DePonte's x-ray interpretation into the record, since the original film was "otherwise available" to employer for a rebuttal reading as contemplated by Section 718.102(d). *See* 20 C.F.R. §718.102; *Clark*, 12 BLR at 1-153. Moreover, after denying employer's motion to strike, the administrative law judge

granted employer an opportunity to submit rebuttal evidence, and extended the filing deadline on several occasions. Since the administrative law judge left the record open until January 28, 2011, over six months from the date of her July 8, 2010 order admitting claimant's evidence into the record, we find no abuse of discretion in the instant case. *Clark*, 12 BLR at 1-153. As employer raises no substantive challenge to the administrative law judge's findings on the merits of entitlement, we affirm her finding that claimant established simple and complicated pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b), and is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge