U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0268 BLA

BETTY INGRAM (o/b/o KENNETH O. INGRAM) Claimant-Respondent v. MIDWEST COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/31/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Ann Marie Scarpino (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: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5725) of Administrative Law Judge Alice M. Craft (the administrative law judge), rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner[2] with thirty-three years of surface coal mine employment in conditions substantially similar to those in underground mines, and adjudicated this claim, filed on June 1, 2010, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found the new evidence submitted in support of the miner's subsequent claim sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and found the miner was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's various evidentiary rulings pursuant to 20 C.F.R. §§725.456 and 725.414, and her determination that claimant established at least fifteen years of surface coal mine employment in conditions substantially similar to underground employment entitling the miner to invocation of the 411(c)(4) presumption. Employer also challenges the administrative law judge's determination that employer failed to rebut the presumption. Claimant responds, urging

[1] The miner's initial claim for benefits, filed on June 11, 1998, was finally denied by the district director on September 28, 1998 for failure to establish any element of entitlement. Director's Exhibit 1.

[2] Claimant, the widow of the miner who died on July 15, 2012, is pursuing the miner's claim on his behalf. Hearing Transcript at 21; Order dated June 27, 2013.

[3] Congress enacted amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Once the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that the miner has neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

affirmance of the administrative law judge's award of benefits. The Director has filed a limited response, urging affirmance of the award of benefits.[4] Employer has filed a reply brief in support of its position.[5]

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.[6] 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).

Turning first to the evidentiary issues, employer argues that the administrative law judge abused her discretion in finding "good cause" established for the admission into the record of Claimant's Exhibits 4, 5, and 6 submitted by claimant in violation of the twenty-day requirement imposed by 20 C.F.R. §725.456.[7] Employer also asserts that the administrative law judge erred in allowing the post-hearing submission of Claimant's Exhibit 7, a rebuttal reading of a 2010 x-ray, arguing that claimant's failure to obtain an interpretation during the three years the claim was on appeal constitutes "surprise evidence" that is contrary to Section 725.456. Employer further objects to the post-hearing submission of "additional" evidence to Drs. Houser and Rasmussen for review prior to their respective depositions, arguing that it was submitted without notice to employer and without express permission from the administrative law judge in violation

[4] The Director declined to address the administrative law judge's evidentiary rulings. Director's Brief at 1 n.1.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence was sufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Employer's Brief at 19.

[6] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner was last employed in the coal mining industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

[7] Any evidence developed after a formal hearing is requested must be exchanged with all other parties at least twenty days prior to the hearing in order to be admissible at the hearing. 20 C.F.R. §725.456(b). If the twenty-day rule is violated, the evidence must be excluded unless the other parties waive the noncompliance or good cause is shown for failure to comply. 20 C.F.R. §725.456(b)(3).

of Section 725.456. Lastly, employer maintains that the administrative law judge should have found that "good cause" existed to admit into the record Employer's Exhibit 3 on the grounds that it was developed as rebuttal evidence to an exhibit exchanged by claimant's representative prior to the hearing, but was withdrawn at the last minute. Employer asserts that because claimant withdrew her affirmative evidence at the hearing and because Employer's Exhibit 3 provided a basis for the experts' medical opinions, good cause exists for its admission. Employer's Brief at 6-15. Employer's arguments lack merit.

At the hearing held on July 8, 2014, claimant sought to admit into evidence, *inter alia*, rebuttal readings of the March 19, 2009 and June 2, 2012 computed tomography scans (Claimant's Exhibits 4 and 5) and Dr. Rasmussen's medical report dated June 30, 2014 (Claimant's Exhibit 6), asserting that there was a delay in obtaining the evidence due to costs and that the reports were received the day before the hearing. Hearing Transcript at 11-12. The administrative law judge overruled employer's objection and admitted Claimant's Exhibits 4, 5, and 6, explaining that it was her usual practice to allow late exhibits, particularly in this circumstance where claimant's counsel only recently entered her appearance on June 11, 2014, and that she would allow employer an opportunity to respond to the evidence. Hearing Transcript at 12. The administrative law judge further stated:

> [G]iven the nature of black lung and the ability for parties to file for modification, . . . it just doesn't make sense to exclude [the evidence] even though it's late. I see no other really practical alternative since the claimant could file for modification and submit it timely. So I'm going to allow it, but I will allow you to try to obtain response to [the] evidence.

Hearing Transcript at 14.

Next, the administrative law judge sustained claimant's objection to Employer's Exhibit 3 as excessive rebuttal x-ray evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii),[8] finding that because claimant had not designated any affirmative x-ray evidence, good cause did not exist for its admittance. Hearing Transcript at 16-17. The administrative law judge further explained:

[8] Claimant also objected to Employer's Exhibit 15 on the same grounds, and employer withdrew the exhibit. Hearing Transcript at 16.

> I think the problem with things being submitted and then withdrawn, and in this case submitted by a different representative, is that that's a hazard for both parties; that when the party finally designates twenty days in advance of the hearing, sometimes it turns out that rebuttal readings were obtained which have become unnecessary.

Hearing Transcript at 18.

In her evidentiary Order dated January 20, 2015, the administrative law judge noted that post-hearing evidence had been proffered by both parties, namely, a rebuttal x-ray reading of the September 27, 2010 film (Claimant's Exhibit 7), the deposition of Dr. Rasmussen (Claimant's Exhibit 8), and the deposition of Dr. Houser (Joint Exhibit 1). After considering employer's objection to claimant's "late-submitted evidence" the administrative law judge found good cause established and admitted Claimant's Exhibits 7 and 8 and Joint Exhibit 1 into evidence. Order at 2.

An administrative law judge is given broad discretion in resolving procedural matters, including evidentiary issues. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark*, 12 BLR at 1-153. Accordingly, a party seeking to overturn an administrative law judge's evidentiary ruling must prove that the administrative law judge's action represented an abuse of his or her discretion. In granting the admission of claimant's late-submitted evidence and post-hearing evidence, the administrative law judge considered employer's arguments and permissibly determined that claimant exhibited good cause pursuant to Section 725.456, in light of the recent appearance of claimant's counsel, and appropriately allowed time for employer to respond to the evidence. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

We also reject employer's contention that the administrative law judge erred in excluding from the record Employer's Exhibit 3 as rebuttal evidence. The pertinent regulation at Section 725.414(a)(3)(ii) does not provide employer with an opportunity to rebut a film when claimant has not designated any affirmative x-ray evidence, and the administrative law judge permissibly determined that good cause did not exist for its submission. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297, 23 BLR 2-430, 2-460 (4th Cir. 2007); *see also Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003). Accordingly, we affirm the administrative law judge's evidentiary rulings.[9]

[9] We disagree, however, with the administrative law judge's statements equating "good cause" with claimant's ability to *request* modification, which is an equitable remedy and not available as a matter of right. Furthermore, we note that when

Employer next contends that the administrative law judge erred in finding claimant established that the miner had at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer's argument lacks merit.

In order to establish invocation, a claimant must establish at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he suffers from a totally disabling respiratory or pulmonary impairment.[10] 30 U.S.C. §921(c)(4). The United States Court of Appeals for the Seventh Circuit has held that, while a claimant bears the burden of establishing comparability, he is required only to produce "sufficient evidence of the surface mining conditions under which he worked." *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

Claimant provided uncontradicted testimony regarding the miner's exposure to coal mine dust in his surface coal mine work as a drill operator and heavy equipment operator. Claimant testified that the miner's face and clothes were black and dirty when he came home from his shift, and that he was covered in coal dust a lot of the times. Hearing Transcript at 28-29. Claimant testified that she visited the miner at various mines, and "the dust was everywhere," "[the dust] was all around," and "it was just foggy." She noted that the miner worked on a drill with an open cab and did not wear a mask. Hearing Transcript at 23-24, 25-26, 27. Based on claimant's uncontradicted testimony and Dr. Rasmussen's opinion that drill operators are probably the most intensely exposed individuals to coal dust,[11] the administrative law judge found that

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information is exchanged twenty days in advance of the hearing, as the regulations provide, a party has some time in which to adjust its strategy, make arrangements for supplementary admissible evidence, and develop any objections or motions with some forethought.

[10] The Department of Labor's (DOL) implementing regulation, 20 C.F.R. §718.305(b)(2), provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

[11] Dr. Rasmussen testified:

> I believe the rock driller, at least in the days before cabs, was probably the most intensely exposed individual above or below ground. Even though

claimant established that the miner was regularly exposed to coal mine dust and worked in conditions substantially similar to those in an underground coal mine. Decision and Order at 4-5. Because substantial evidence, in the form of credited testimony as to the miner's work conditions, supports the administrative law judge's determination, we affirm the administrative law judge's finding that claimant established that the miner had at least the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[12] 30 U.S.C. §921(c)(4); *see Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Leachman*, 855 F.2d at 512-13; Decision and Order at 32.

In light of our affirmance of the administrative law judge's findings that claimant established that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, we affirm the administrative law judge's determination that the miner was entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

To rebut the presumption employer must affirmatively establish that the miner has neither legal[13] nor clinical[14] pneumoconiosis, or that "no part of [the miner's] respiratory

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> below ground you had very poor ventilation, but above ground you have such intense exposure.

Claimant's Exhibit 8 at 13.

[12] Because the administrative law judge based her finding on the statutory standard, rather than on the regulatory provision, it is unnecessary for us to address employer's argument that the DOL's implementing regulation, 20 C.F.R. §718.305(b)(2), is invalid.

[13] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or *substantially aggravated by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

[14] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149 (2015) (Boggs, J., concurring and dissenting).

Employer argues that the implementing regulation at 20 C.F.R. §718.305 is invalid because it conflicts with the statute at 30 U.S.C. §921(c)(4). Employer asserts that the rebuttal standard and the administrative law judge's interpretation of the preamble precludes the possibility of rebuttal. Employer's Brief at 34-35. We disagree. The Board has held that the regulation at Section 718.305 is a rational means of assigning rebuttal burdens and that it is not inconsistent with the statutory language. *Minich*, 25 BLR at 1-155; *see also Bender*, 782 F.3d at 137. Furthermore, the administrative law judge permissibly consulted the preamble as a statement of medical science studies found credible by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). We, therefore, reject employer's arguments.

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, arguing that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Houser over those of Drs. Repsher and Zaldivar on the issues of legal pneumoconiosis and disability causation. Employer asserts that the administrative law judge misrepresented the opinions of employer's experts, failed to analyze all medical opinion evidence of record, and applied an erroneous standard on rebuttal. Employer's Brief at 19-34.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge accurately summarized the conflicting medical opinions of record and the physicians' explanations for their conclusions, and determined that Drs. Houser and Rasmussen diagnosed legal pneumoconiosis, whereas Drs. Repsher and Zaldivar opined that there is insufficient evidence of legal pneumoconiosis and that the miner's disabling chronic obstructive pulmonary disease (COPD) was caused by the miner's advanced age and emphysema due to cigarette smoking. Decision and Order at 24-27; Employer's Exhibits 4, 5, 6, 7. The administrative law judge found that Drs. Repsher and Zaldivar failed to provide

creditable bases for concluding that coal mine dust exposure did not contribute to, or aggravate, the miner's disabling impairment.

Specifically, the administrative law judge discounted Dr. Repsher's opinion, that the miner did not have pneumoconiosis and that his obstructive impairment was due to cigarette smoking, on the ground that it was not adequately explained. Decision and Order at 37-38. The administrative law judge found that Dr. Repsher's view that "cigarette smoking causes centrilobular emphysema, but that coal mine dust does not," was contrary to the findings of scientific studies found credible by the DOL in the preamble to the 2001 regulations,[15] that "centrilobular emphysema (the predominant type observed) was significantly more common among the coal workers." Decision and Order at 25, 38; Employer's Exhibit 6; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Similarly, the administrative law judge was not persuaded by Dr. Zaldivar's opinion, that smoking is the only explanation for the miner's emphysema, as Dr. Zaldivar did not credibly explain why he excluded coal dust as a contributing factor to the miner's obstructive disease, and because his opinion was inconsistent with the DOL's discussion of prevailing medical science in the preamble, which recognizes that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis.[16] Decision and Order at 37, 38; 65 Fed. Reg. at 79,941; *see* 20 C.F.R. §718.201(a)(2).

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[15] Dr. Respsher testified:

> Q. – Would someone who is only a coal miner but potentially not a smoker, do nonsmokers develop centrilobular emphysema?
>
> A. – No, they don't.

Employer's Exhibit 6 at 17.

[16] The administrative law judge specifically noted Dr. Zaldivar's testimony:

> Well, the fact that there was no coal dust in the lungs makes the position – makes the supposition that coal dust caused impairment to be not valid on the face of his smoking habit and the general course of his disease, as we said here – mild going on to more severe and the smoking habit and so forth. But even, you know, in some cases one may find the [computed tomography] scan to show some reaction to the coal dust. This is not seen radiographically by regular chest x-ray. But in this context, even if there were some macules found by a pathologist, should there be a histological examination of his lungs, in this context, the smoking is the only

The administrative law judge permissibly found that the reasons given by Drs. Repsher and Zaldivar for finding that the miner did not have legal pneumoconiosis were inconsistent with scientific studies found credible by the DOL in the preamble to the 2001 regulations. Decision and Order at 36-38; *see* 65 Fed. Reg. at 79,940-41. Thus, the administrative law judge acted within her discretion in finding that the opinions of Drs. Repsher and Zaldivar were not well-reasoned and were entitled to little weight. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-104; *Summers*, 272 F.3d at 483, 22 BLR at 2-280; *Obush*, 24 BLR at 1-117.

Contrary to employer's arguments, the administrative law judge did not apply an incorrect legal standard on rebuttal; rather, she determined that the opinions of Drs. Repsher and Zaldivar were not credible. Decision and Order at 38. As substantial evidence supports the administrative law judge's determinations, we affirm her finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis. Because employer has failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), we need not address employer's arguments regarding the administrative law judge's weighing of the evidence relevant to the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

Lastly, the administrative law judge properly found that the same reasons that she provided for discrediting the opinions of Drs. Repsher and Zaldivar on the issue of pneumoconiosis also undercut their opinions that no part of the miner's disabling respiratory impairment was caused by pneumoconiosis. Decision and Order at 39; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm her conclusion that the opinions of Drs. Repsher and Zaldivar were insufficient to establish rebuttal of the presumed fact of total disability causation, and that employer failed to establish rebuttal of the Section 411(c)(4) presumption.[17] 30 U.S.C. §921(c)(4); 20 C.F.R.

> explanation for the emphysema that he [had]. And the reason why I say that is that a few particles of retained dust [are] not capable of producing this generalized abnormality of his lungs.

Decision and Order at 27; Employer's Exhibit 7 at 22.

[17] We decline to address employer's allegation that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Houser that the miner had legal pneumoconiosis. Because employer bears the burden of rebutting the Section 411(c)(4) presumption, and the administrative law judge did not use their opinions in determining that employer had failed to rebut the presumption, error, if any, in the administrative law

§718.305(d)(1)(i), (ii). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the majority's decision to affirm the award of benefits. However, I write to express concern regarding the administrative law judge's evidentiary rulings. Because the administrative law judge's affirmable findings regarding claimant's entitlement to benefits do not rest on the evidence at issue, employer has failed to show prejudice, and any error is harmless. Therefore, I concur with the majority that remand is not warranted. Nonetheless, employer has raised legitimate questions as to whether the administrative law judge adequately considered employer's arguments and properly

judge's weighing of their opinions is harmless. *See* 30 U.S.C. §902(b); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

exercised her discretion in determining whether good cause was demonstrated by the parties, pursuant to 20 C.F.R. §725.456.

First, with respect to the admission into the record of Claimant's Exhibits 4, 5, and 6, submitted by claimant in violation of the twenty-day rule, the administrative law judge failed to articulate a valid basis for finding good cause established.[18] Thus, the administrative law judge's admission of this evidence does not comport with the requirements of the Administrative Procedure Act (APA), that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Moreover, the administrative law judge failed to consider whether claimant had acted properly in failing to submit this evidence in a timely manner.[19] As the record reflects that the late-submitted exhibits are dated at least a week before the hearing, it is concerning that claimant waited until the actual hearing itself to provide them to employer.

Regarding the post-hearing submission of Claimant's Exhibit 7, which the administrative law judge admitted for "good-cause" in her evidentiary Order dated January 20, 2015, again, the administrative law judge failed to articulate any basis for her ruling, as required by the APA.

The explanation given by the administrative law judge for denying admission of Employer's Exhibit 3, which claimant objected to as excessive rebuttal x-ray evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii), did not address the situation before her. Employer explained that Employer's Exhibit 3 was developed as rebuttal evidence to an exhibit that was exchanged by claimant's representative prior to the hearing, but was withdrawn *at the hearing*. Employer asserted that because its experts had reviewed and developed their opinions utilizing Employer's Exhibit 3, the acceptance of its experts'

[18] While the administrative law judge stated that it did not make sense to exclude late-submitted evidence, because the proffering party could simply submit the evidence with a request for modification, as noted by the majority, the availability of modification is not a substitute for the necessary finding of good cause.

[19] Even where good cause for some delay in submission of evidence exists, it is incumbent on the party submitting its evidence late to mitigate harm to the other party by providing the evidence as promptly as possible. Any failure to do so should be considered by the administrative law judge in determining whether, under the circumstances, good cause for excusing the untimely exchange and submission of evidence exists.

opinions was placed in jeopardy by the exclusion of Employer's Exhibit 3.[20] In sustaining claimant's objection and excluding Employer's Exhibit 3, the administrative law judge stated that it was a hazard of litigation that "when [a] party finally designates [its evidence] twenty days in advance of the hearing," sometimes the evidence which was obtained in response to the designated evidence may later become unnecessary. Hearing Transcript at 18. Here, however, employer was not seeking to respond to evidence that was "designate[d] twenty days in advance of the hearing," but rather was seeking to mitigate its reliance on evidence which was withdrawn by claimant *at the hearing.* Thus, the administrative law judge both mischaracterized the context in which employer was seeking to submit its rebuttal evidence, and failed to give due consideration to employer's basis for asserting that good cause existed for its admission.

An administrative law judge is given broad discretion in resolving procedural matters, *see Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc), but the judge must properly exercise that discretion. Employer has raised legitimate questions as to the administrative law judge's evidentiary rulings. However**,** because the administrative law judge's affirmable findings regarding claimant's entitlement to benefits do not rest on the evidence at issue, employer has ultimately failed to show how it was prejudiced. Consequently any error in the administrative law judge's rulings is harmless, and I concur with the majority that a remand is not warranted.

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JUDITH S. BOGGS
Administrative Appeals Judge

[20] The regulations provide that any chest X-ray interpretations, pulmonary function studies, blood gas studies, autopsy, biopsy, and physicians' opinions that appear in a medical report must each be admissible under the evidentiary limitations. *See* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (en banc); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (J. McGranery and J. Hall, concurring and dissenting). Thus, parties may not rely on any evidence not properly admitted under the limitations in that claim.