

JANICE M. TURNER v. U.S. General Accounting Office

Docket No. 94-07

Date of Decision: May 12, 1995

Cite as: Turner v. GAO, Docket No. 94-07 (5/12/95)

Before: Leroy D. Clark, Administrative Judge

Headnotes:

Discovery

Evidence

Hearing Procedures

Motions Practice

ORDER

"Undisputed Facts" in Petitioner's brief, arguing that the parties did not stipulate to these facts and several of them were, and continue to be, disputed by Respondent.

In a May 10, 1995 response to these objections, Petitioner argues that the depositions are part of the record and can be relied upon as evidence in this case because they were submitted by Petitioner as part of her motion for summary judgment. Similarly, Petitioner's counsel argues that Petitioner's statement of "Undisputed Facts" was also made part of the record, without objection by Respondent, during the consideration of the motion for summary judgment. Therefore, Petitioner urges against sustaining Respondent's objections to her brief.

After careful consideration of the argument of both parties, the Administrative Judge finds cause to sustain Respondent's objections to Petitioner's brief. With regard to the deposition testimony, it is found that despite the fact that these depositions are part of the record on the motion for summary judgment, they have not been made part of the evidence in this case, which can be relied upon in rendering a judgment on the merits. To be used at trial, deposition testimony must be introduced into evidence and subject to whatever objections the law allows. A contrary rule would deny the opposing party the opportunity to challenge the admissibility of a deposition under Rule 32 of the Federal Rules of Civil Procedure. See Salsman v. Witt, 466 F.2d 76 (10th Cir. 1972); Processteel, Inc. v. Mosley Mach. Co., 421 F.2d 1074 (6th Cir. 1970). See also, Moore's Federal Practice, §32.04. In the present case, Petitioner failed to offer the disputed depositions into evidence at the hearing and allow Respondent to lodge whatever objections it might have had to their admission under Rule 32. Therefore, it is found that

it would be improper for the Administrative Judge to consider the deposition testimony in arriving at his findings and conclusions on the merits of this case.

With regard to Petitioner's reliance upon her "Undisputed Facts," the Administrative Judge similarly sustains Respondent's objections. During consideration of a motion for summary judgment, Rule 56(d) of the Federal Rules of Civil Procedure allows the court the discretion to make specific findings about what facts appear without substantial controversy, even when denying the motion for summary judgment. However, such an order was not entered in this case. Moreover, the record does not reflect a formal stipulation between the parties as to certain undisputed facts. When the court denies the motion for summary judgment and does not specify which facts are not in good faith controverted, all of the issues, as framed by the pleadings, are open for trial. Hartmann v. American News Co., 171 F.2d 581, 584 (7th Cir. 1948), cert. denied 337 U.S. 907 (1949). See also, Moore's Federal Practice, § 56.20[2]. Therefore, all facts must be established from the evidence of record, and briefs should reflect that position.

In light of the Administrative Judge's decision to sustain Respondent's objections to portions of Petitioner's brief, and in the interests of justice, Petitioner's counsel is hereby ordered to rewrite and resubmit Petitioner's brief, to remove all references to deposition testimony not admitted into evidence or any "Undisputed Facts" not stipulated to by both parties, and replace them with appropriate references to the evidence of record. Petitioner's brief will be due no later than 4:30 p.m. on Friday, May 19, 1995. As Petitioner's brief will be resubmitted after having the opportunity to review Respondent's

brief submitted in this matter on May 1, Respondent will have the option of submitting a reply brief no later than 4:30 p.m. on Friday, May 26, 1995.

SO ORDERED.

DATE: 5/12/95

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LEROY D. CLARK
ADMINISTRATIVE JUDGE