



BRB No. 23-0062 BLA

TEDDY M. GIBSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
GREENBRIER MINERAL HOLDINGS)	
)	DATE ISSUED: 04/18/2024
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 on Modification of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

James W. Heslep (Jenkins Fenstermaker, PLLC), Clarksburg, West Virginia, for Employer.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits on Modification (2021-BLA-05601) rendered on a claim filed on July 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The issues raised on appeal concern whether Employer was properly designated as the responsible operator that is liable for benefits.

In an October 22, 2019 Proposed Decision and Order (PDO), the district director determined Claimant established complicated pneumoconiosis and is entitled to benefits beginning in May 2018, as that is the earliest date Claimant established he had the disease. Subsequently, Claimant filed a request for modification and the ALJ found the uncontested x-ray evidence Claimant submitted on modification – Dr. Crum's reading of a February 26, 2007 x-ray – establishes he developed complicated pneumoconiosis in February 2007. Thus, she granted his request to modify his award of benefits to reflect that benefits commence in February 2007, the month and year of the first x-ray establishing he has complicated pneumoconiosis. She further found Employer did not submit timely liability evidence to challenge its designation as the responsible operator.

On appeal, Employer argues the ALJ erred in holding it liable for benefits because the ALJ's findings demonstrate Claimant was not working for it in 2007 when he was first diagnosed with complicated pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the ALJ's determination that Employer is liable for the payment of Claimant's benefits.¹

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order 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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

¹ We affirm the ALJ's determination that Claimant is entitled to benefits from February 2007 as Employer is not contesting it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7; Hearing Transcript at 19.

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See*

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. See *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish that the ALJ's action represented an abuse of discretion. See *V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Proceedings Before the District Director

The district director issued a Notice of Claim on August 8, 2018, identifying Greenbrier Mineral Holdings (Employer or Greenbrier) as the potentially liable operator and Summitpoint Insurance Company (Summitpoint) as the potentially liable carrier. Director's Exhibit 23. This notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id.* On August 17, 2018, Employer denied liability but did not submit any liability evidence. Director's Exhibit 26.

Subsequently, Employer asked Claimant to respond to interrogatories and sign releases for access to his medical records. Director's Exhibit 40. On October 1, 2018, Claimant submitted to Employer, with a courtesy copy to the district director, the signed medical releases and answers to the interrogatories, enclosing Dr. DePonte's reading of an x-ray dated May 21, 2018, in which she concluded the x-ray is positive for a Category B large opacity of complicated pneumoconiosis; Dr. Smith's reading of the same x-ray as being positive for a Category C large opacity of complicated pneumoconiosis; and Dr. Groten's reading of a February 26, 2007 x-ray as showing a density in the right upper lobe that represented either chronic scarring or possibly acute pneumonia. Director's Exhibit 42 at 21-25.

On October 21, 2018, Dr. Green conducted the Department of Labor's complete pulmonary evaluation of Claimant. Dr. DePonte read an x-ray taken in conjunction with that examination as positive for complicated pneumoconiosis, Category B. Director's Exhibit 12 at 29.

On March 4, 2019, Employer's first counsel withdrew his representation. Director's Exhibit 29. On March 6, 2019, Employer's current counsel entered his notice of appearance, requesting Claimant sign additional medical releases and complete a second set of interrogatories. Director's Exhibit 20. On April 9, 2019, Claimant sent to Employer's counsel, with a courtesy copy to the district director, his answers to the interrogatories and certain medical records. Director's Exhibit 43. The records included

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6 at 6.

Dr. Crum's February 23, 2019 reading of the February 26, 2007³ x-ray as positive for a Category A large opacity; Dr. Ahmed's June 5, 2018 reading of the May 17, 2018 x-ray as positive for a Category B large opacity; Dr. Ahmed's May 21, 2018 reading of the x-ray taken that same day as positive for a Category B large opacity; Dr. Seaman's December 27, 2018 reading of the October 21, 2018 x-ray as positive for a Category B large opacity; Dr. Lintala's June 26, 2018 reading of a computed tomography scan administered that same day as positive for complicated pneumoconiosis (progressive massive fibrosis); and the three x-ray readings Claimant had previously submitted on October 1, 2018. *Id.*

On July 1, 2019, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), designating Employer as the responsible operator. Director's Exhibit 38. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until August 30, 2019, to do so and provided that the date could be extended for good cause shown. *Id.* at 3. The district director further advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id.* (citing 20 C.F.R. §725.456(b)(1)).

On July 10, 2019, Employer's counsel submitted evidence indicating that Claimant worked for Employer from August 19, 2016 through May 12, 2018. Director's Exhibit 5 at 2. On August 1, 2019, Claimant submitted to the district director and Employer's counsel an x-ray dated October 21, 2018, which Dr. Crum read as positive for complicated pneumoconiosis. Director's Exhibit 15.

The district director issued a PDO on October 22, 2019, awarding benefits from May 2018, the earliest date Claimant established he had complicated pneumoconiosis (i.e., the month of the x-rays Dr. Ahmed interpreted as positive for the disease). The district director also designated Greenbrier and Summitpoint as the responsible operator and carrier, respectively.⁴ Director's Exhibit 46.

³ The ALJ mistakenly refers to the February 26, 2007 x-ray as dated February 27, 2007. Decision and Order at 3.

⁴ The district director found that Employer is the last coal mine operator of at least one year because Claimant worked for it from May 2016 until May 2018, although Claimant subsequently worked for two other coal mine operators for less than one year: Lightning Contract (October 2018 until January 2019) and XMV Coal (May 2018 until October 2018). Director's Exhibit 46 at 10.

On December 4, 2019, Claimant sent to Summitpoint, with a courtesy copy to the district director, additional responses to interrogatories. In those responses, he identified the date he “first received” a diagnosis of complicated pneumoconiosis as December 21, 2018. Director’s Exhibit 44 at 7.

On April 7, 2020, after the district director’s award became final on November 21, 2019, Claimant requested modification of his award to reflect that benefits begin in February 2007 (not May 2018). In support of his request, he submitted the x-ray dated February 26, 2007, and read by Dr. Crum on February 23, 2019, as positive for complicated pneumoconiosis. Director’s Exhibit 56. On July 24, 2020, Employer opposed Claimant’s request for modification, asserting Claimant could not establish a mistake in a determination of fact or a change in conditions because he had possession of the February 26, 2007 x-ray (specifically, both Dr. Groten’s and Dr. Crum’s readings of it) prior to the district director’s PDO, “but chose not to present it as evidence.” Director’s Exhibit 59. Moreover, Employer requested that liability be assigned to the operator who employed Claimant in 2007, when Claimant was first diagnosed with complicated pneumoconiosis.⁵ *Id.*

On December 9, 2020, the district director issued a second PDO granting Claimant’s request to modify the date benefits commence from May 2018 to February 2007, payable by Employer. Director’s Exhibit 61. On December 15, 2020, Employer requested a hearing. Director’s Exhibit 50. The next day, Claimant requested additional dependents be added to the award. Director’s Exhibit 49. On April 14, 2021, the district director issued an amended PDO which continued to award benefits as of February 2007 payable by Employer, but included the additional dependents Claimant requested. Director’s Exhibit 67. On April 14, 2021, the case was referred to the OALJ. Director’s Exhibit 68.

Modification Proceedings before the ALJ

During a telephonic hearing on December 15, 2021, Employer stated it was “not questioning [Claimant’s] medical entitlement to benefits,” and that it did “not challenge the onset date, [but] only [its] designation as the R[esponsible] O[perator] with that date [February 26, 2007].” Hearing Transcript at 9, 19. Thus, the parties agreed the only contested issue was whether Employer is the properly designated responsible operator, and

⁵ Claimant was working for Chief Mining, Incorporated in 2007. Director’s Exhibits 3; 6 at 4-5.

the ALJ directed briefing on this issue.⁶ *Id.* at 18-20. Employer argued that it is not liable for the payment of Claimant's benefits because his modification evidence (Dr. Crum's reading of the February 26, 2007 x-ray) established he was first diagnosed with complicated pneumoconiosis prior to working for Employer from 2016 to 2018. Employer's Closing Brief at 3-4.

The Director argued that while Claimant's modification evidence was admissible as to the commencement date of benefits, it was inadmissible as liability evidence because Employer was aware of the February 26, 2007 x-ray but made no attempt to have it interpreted and did not timely submit it as liability evidence to support its assertion that it is not the responsible operator. Director's Closing Brief at 3-6.

In her November 16, 2022 Decision and Order Awarding Benefits on Modification, the ALJ held Dr. Crum's reading of the February 26, 2007 x-ray was admissible for purposes of determining the onset date of Claimant's complicated pneumoconiosis but did not constitute timely liability evidence because Employer neither submitted it to the district director as liability evidence nor asserted extraordinary circumstances existed for its failure to do so. *Id.* at 3-7. The ALJ thus held Employer liable for the payment of benefits beginning in February 2007. *Id.* at 7.

Responsible Operator

As discussed, Employer argued to the ALJ that it is not the responsible operator because the record shows Claimant was first diagnosed with complicated pneumoconiosis in 2007, prior to his employment with Employer. Employer's Brief at 8 (citing *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199, 1-203-04 (1979) (onset date in complicated pneumoconiosis cases is first date of diagnosis) and *Hendrick v. Sterling Smokeless Coal Co.*, 6 BLR 1-1029, 1-1031 (1984) (reciting legal principle that an employer cannot be held liable for benefits based on a claim of complicated pneumoconiosis when the claimant was diagnosed with the disease before he started working for it)). However, the ALJ agreed with the Director that Employer was foreclosed from relying on Dr. Crum's reading of the February 26, 2007 x-ray as liability evidence because it did not timely submit it to the

⁶ Claimant did not take a position on the responsible operator issue, asserting only that it was undisputed he was entitled to benefits from February 2007. Claimant's Closing Brief at 3.

district director. Director's Brief at 6-7 (citing *J.H.B. [Boyd] v. Peres Processing, Inc.*, BRB No. 08-0625 BLA (June 30, 2009) (unpub.)).⁷ We see no error in that determination.

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.⁸ 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). As Employer asserts, where the evidence establishes that a miner's complicated pneumoconiosis predates the commencement of his coal mine employment with an employer, the Board has recognized that the latter employer should not be liable for the payment of the miner's black lung benefits. *See Truitt*, 2 BLR at 1-203-04.

Employer is responsible for submitting evidence disputing its liability by the deadline set forth in the SSAE. 20 C.F.R. §§725.410, 725.412(a), 725.456(b)(1). Liability evidence pertaining to the responsible operator or carrier must be timely submitted to the district director and may not be first admitted to the ALJ absent extraordinary circumstances. 20 C.F.R. §§725.414(d), 725.456(b)(1) ("Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a

⁷ In *Boyd*, the employer attempted to modify an award of benefits and correct information in the record to show that it did not have an effective insurance policy on the last date of the claimant's employment with it. The Board agreed with the Director that 20 C.F.R. §725.414(d) "preclude[s] [the] carrier from submitting additional liability evidence on modification." *J.H.B. [Boyd] v. Peres Processing, Inc.*, BRB No. 08-0625 BLA, slip op. at 5 (June 30, 2009) (unpub.).

⁸ For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances.”).

Here, there is no dispute that Employer conceded liability for benefits when the case was before the district director. As Employer asserts in its brief on appeal, “The responsible operator, Greenbrier Mineral Holdings, did not challenge the Proposed Decision and Order [award of October 22, 2019] as it believed the medical evidence on record established that [Claimant] had complicated pneumoconiosis and that it had been properly named as the responsible operator.” Employer’s Brief at 3; *see also* Director’s Exhibit 63 (Employer’s February 11, 2020 letter to the district director stating, “my client and its insurer have accepted liability of [Claimant’s] claim.”).

It is also evident from the record that Employer was on notice of the existence of the February 26, 2007 x-ray while the case was pending before the district director because Claimant provided Dr. Groten’s reading of it to Employer on October 1, 2018, and Dr. Crum’s reading of it to Employer on April 9, 2019. *See* Director’s Exhibits 42 at 25; 43 at 13. However, Employer made no attempt to have that x-ray interpreted in order to challenge its liability.

We are unpersuaded by Employer’s explanation that if “[C]laimant [had only] relied upon the 2007 x-ray in support of his claim for benefits, [Employer] would certainly have raised this issue prior to the award of benefits” Employer’s Brief at 8. As the ALJ correctly found, absent a request for an extension of time to the district director and a showing of good cause, Employer was obligated to submit affirmative evidence to prove it was not liable prior to the SSAE-established deadline of August 30, 2019, not just prior to the PDO awarding benefits. 20 C.F.R. §§725.410(b), 725.456(b)(1); Decision and Order at 6; Employer’s Brief at 8; Director’s Exhibit 38. After the PDO was issued, Employer could submit untimely liability evidence to the ALJ only upon a showing of extraordinary circumstances. 20 C.F.R. §725.456(b)(1).

The record reflects that on April 9, 2019, Claimant sent copies of Dr. Crum’s February 23, 2019 reading of the February 26, 2007 x-ray diagnosing complicated pneumoconiosis to Employer’s current counsel. Director’s Exhibit 43 at 13-14. Thus, Employer had, at a minimum, from April 9, 2019, until August 30, 2019, to submit either Dr. Crum’s reading of the 2007 x-ray (or an interpretation by a physician of its choosing) as liability evidence before the SSAE-established deadline, but failed to do so. Director’s Exhibits 38; 43 at 13-14. We therefore affirm the ALJ’s finding Employer is unable to rely on the 2007 x-ray as liability evidence because it did not timely submit the x-ray to the district director. Decision and Order at 6; Director’s Exhibit 38.

Additionally, we affirm, as unchallenged on appeal, the ALJ's finding that Employer did not argue before her why "extraordinary circumstances" existed to excuse its failure to obtain and submit to the district director a reading of the February 26, 2007 x-ray as liability evidence. *Skrack*, 6 BLR at 1-711; Decision and Order at 6; Director's Exhibits 38, 46 59; Employer's Closing Argument; Hearing Transcript at 16; *see also Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc), *aff'd Marfork Coal Co. v. Weis*, 251 Fed. App'x 229, 236 (4th Cir. 2007) (extraordinary circumstances did not exist for the untimely admission of liability evidence when the employer was on notice that the claimant may have developed complicated pneumoconiosis before the date he was hired, but the employer failed to investigate until after the claim was referred to the OALJ).

We therefore affirm the ALJ's finding that Employer is the responsible operator and is liable for benefits, commencing February 2007, the month and year in which Claimant was first diagnosed with complicated pneumoconiosis.⁹ *Weis*, 23 BLR at 1-191-92; Decision and Order at 7.

⁹ We affirm as unchallenged on appeal the ALJ's determination that Employer satisfies the regulatory requirements for a potentially liable operator. 20 C.F.R. §725.494; *Skrack*, 6 BLR at 1-711; Decision and Order at 7; Director's Exhibit 46; Hearing Transcript at 16.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Modification.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge