U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0243 BLA

TERRY PERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 01/24/2023
	)	
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 of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2018-BLA-05528) rendered on a subsequent claim filed on March 10, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) the responsible carrier. She credited Claimant with thirty-four years of underground or substantially similar coal mine employment, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and demonstrated a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.204(b)(2), 725.309(c). She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a

[1] Claimant filed an initial claim for benefits on April 15, 2013, which was denied by the district director on January 22, 2014 because Claimant did not establish any element of entitlement. Decision and Order at 2, 42; Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement in order to have his current claim reviewed on the merits. 20 C.F.R. §725.309(c); Decision and Order at 2, 42.

manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also asserts the duties the district director performs create an inherent conflict of interest that violates its due process rights. It further contends the ALJ erred in finding Peabody Energy is the liable carrier and in applying a page limit to its Post-Hearing Brief. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's arguments.[5]

The 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Due Process Challenge - Page Limit

Employer first argues the ALJ denied it due process by applying a twenty-page limit to its Post-Hearing Brief. Employer's Brief at 1, 7-8. Employer asserts the page limit was

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a change in an applicable condition of entitlement and is entitled to benefits because he invoked the Section 411(c)(4) presumption, which Employer failed to rebut. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§718.305, 725.309; Decision and Order at 40-43, 47, 63-64.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6; Hearing Transcript at 28; Director's Exhibit 14 at 16.

arbitrary and capricious because it required all parties to abide by this limit, without considering Claimant only had to brief entitlement issues and the Director only had to brief liability issues, whereas Employer had to brief both entitlement and liability issues. *Id*. We disagree.

This case was initially assigned to ALJ Drew A. Swank, who issued a Notice of Hearing and Pre-Hearing Order that provided: "No brief shall exceed twenty (20) pages, except with prior permission of the undersigned. If a brief exceeding twenty (20) pages is submitted without prior permission, the excess pages may be returned to the author." September 12, 2018 Notice of Hearing and Pre-Hearing Order at 4, paragraph 8. The case was subsequently reassigned to ALJ Daum ("the ALJ"). November 9, 2018 Order of Reassignment. After several extensions, the ALJ advised the parties to submit briefs on or before July 15, 2019. June 26, 2019 Order Granting Employer's Motion for Extension of Time to Submit Post-Hearing Brief; Decision and Order at 4. The Order reiterated the 20-page limitation on briefs and warned that violation of this limitation without advance permission to exceed it could result in the return of excess pages to the author. *Id.* The parties were also advised that any request to exceed the page limitation should be filed before the briefing deadline to allow for a ruling, and that any motion to file a brief in excess of the page limitations filed contemporaneously with a brief might be summarily denied. June 26, 2019 Order Granting Employer's Motion for Extension of Time to Submit Post-Hearing Brief; Decision and Order at 4.

On July 15, 2019,[7] the last day to file a timely post-hearing brief, Employer filed a fifty-five-page brief contemporaneously with a motion seeking authorization to exceed the twenty-page limit. July 18, 2019 Order Denying Motion to Submit Brief in Excess of Page Limitation. The ALJ denied Employer's motion as untimely and returned the pages of the brief past the first twenty pages.[8] *Id.* She found Employer did not show good cause for exceeding the page limit or for filing an untimely motion and that it ignored her June 26, 2019 Order, by not giving a reasonable period of time before the brief due date to consider

[7] As noted in the ALJ's July 18, 2019 Order, Employer's motion and brief were dated July 12, 2019 and received on July 15, 2019.

[8] In considering the liability issue, the ALJ noted that "[t]he portion of the Employer's post-hearing brief substantively addressing the legal theories relied upon to dispute imposition of liability was returned to the Employer's Counsel as exceeding the page limitations." Decision and Order at 8 n.18. However, the ALJ also stated that "a review of the Director's exhibits and the motions practice before and after the hearing reveals the theories relied upon by the Employer which are addressed herein." *Id*. at 8-9 n.18.

and decide the request. *Id.* She also denied Employer's request for reconsideration. July 30, 2019 Order Denying Reconsideration.

Employer has not shown an abuse of discretion in the ALJ's procedural rulings or a due process violation. Due process requires that a party be given notice and the opportunity to respond. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). Employer was given notice that briefs had a page limitation. *See Lockhart*, 137 F.3d at 807; September 12, 2018 Notice of Hearing and Pre-Hearing Order at 4, paragraph 8; June 26, 2019 Order Granting Employer's Motion for Extension of Time to Submit Post-Hearing Brief. Moreover, Employer was given the opportunity to exceed the twenty-page limitation with "prior permission" and was specifically advised that requests to exceed the limitation should be submitted sufficiently far in advance to allow for their reasonable consideration. *Id.* Employer acted at its peril by submitting its request to exceed the twenty-page limitation, with its brief, the day its brief was due. We therefore reject Employer's assertion that the ALJ abused her discretion in denying Employer's motions and returning the pages of Employer's closing argument in excess of twenty pages. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).[9]

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and that it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus we affirm these findings.[10] *Skrack v. Island Creek Coal Co.*, 6

[9] Employer argues in the alternative that the other parties' briefs should be limited to twenty pages. Employer's July 2019 Motion for Reconsideration. The ALJ considered the argument that the other parties' briefs exceeded twenty pages and rejected it on the basis that those briefs were within the page limitation and any additional material submitted was not argument. July 30, 2019 Order Denying Reconsideration. Employer neither specifically disputes that determination nor shows that it was erroneous. Moreover, nowhere does Employer argue that it could not have adequately addressed the issues in twenty pages.

[10] Employer also states it wants to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 51. Generally, Employer argues Bulletin No. 16-01 contradicts liability rules under the BLBA, was issued without notice and comment, and violates the Administrative Procedure Act (APA). *Id.* Employer's one sentence summary of its arguments does not set forth sufficient detail to permit the Board to consider the merits of these issues. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20

BLR 1-710, 711 (1983); *see* 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 8-16. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund). Employer's Brief at 2-54.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibits 30-32. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. *Id.* That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id*. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. *Id.* Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of its liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund is responsible for the payment of benefits:[11] (1) the district director is an inferior officer not properly appointed under the Appointments Clause; (2) the DOL released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5)

C.F.R. §802.211(b). To the extent Employer argues its contentions regarding the Bulletin were improperly not considered by the ALJ we address them below.

[11] Employer argues the time limitation for its submission of liability evidence at 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act (Longshore Act) and the APA, 5 U.S.C. §556(d), because it divests the ALJ of authority under those Acts to receive evidence and adjudicate issues de novo. Employer's Brief at 53-54. We reject this argument. As the Director correctly argues, 30 U.S.C. §932(a) incorporated the provisions of the Longshore Act and the APA into the BLBA "except as otherwise provided . . . by regulations of the Secretary." 30 U.S.C. §932(a). Thus, even if we were to accept Employer's interpretation of the regulation, the Secretary of Labor has the "authority to adopt regulations that differ from the APA and the Longshore Act." Director's Brief at 18, *citing Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001), *rev'd in part on other grounds*, *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002).

the Director is equitably estopped from imposing liability on Peabody Energy; (6) the regulatory scheme, whereby the district director, a DOL employee, determines the liability of a responsible operator and its carrier, while the DOL administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; and (7) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to monitor Patriot's financial health.[12] Employer's Brief at 2-54. Moreover, it maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id.* at 26-31, 34.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co*, 25 BLR 1-289, 1-295-99 (2022). Thus, for the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.

We also reject Employer's arguments that the ALJ erred in excluding liability evidence – the depositions of David Benedict and Steven Breeskin, two former DOL Division of Coal Mine Workers' Compensation employees.[13] Employer's Brief at 2-7. In

[12] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 49-51. It neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[13] Employer notes that the ALJ was assigned to this case based on its assertion that the initial ALJ, ALJ Swank, was not properly appointed as an inferior officer pursuant to *Lucia v. SEC*, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018). Employer's Brief at 2-7. Because *Lucia* entitled it to a new hearing, it argues the ALJ erred in giving deference to ALJ Swank's exclusion of the deposition testimony of Messrs. Benedict and Breeskin and contends her decision to exclude the deposition testimony was "tainted" by ALJ Swank's earlier participation in the case. Employer's Brief at 2-7; *see* ALJ Swank's October 23, 2018 Order Denying Employer's Subpoena Request; ALJ's March 20, 2019 Order Denying Admission of Former DOL Representatives Benedict and Breeskin Deposition Testimony; Hearing Transcript at 14-15, 18-20. We note that the ALJ issued her own order analyzing the issue and independently concluded the testimony is not admissible in this case; and while she summarized ALJ Swank's order and indicated agreement with his rationale, she reached her own conclusion. ALJ's March 20, 2019 Order Denying Admission of Former DOL Representatives Benedict and Breeskin Deposition Testimony at 8. More importantly, however, based on Board precedent that this evidence, even if admitted, would not support Employer's argument, *see Bailey*, BLR , BRB No. 20-

Bailey, the same depositions were admitted, and the Board held they do not support Employer's argument the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit Patriot financed under Peabody Energy's self-insurance program.[14] *Bailey*, BLR , BRB No. 20-0094 BLA at 15 n.17. Given that the Board has previously held this evidence does not support Employer's argument, any error in excluding this evidence in this case is harmless. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-278. Thus, we reject Employer's assertions on appeal and hold Employer is the responsible operator and is liable for this claim.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

0094 BLA at 15 n.17, it is not necessary for us to further address Employer's contentions concerning *Lucia*. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[14] This determination was necessary to the conclusion that Peabody Energy was liable for benefits. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17.