U.S. Department of Labor

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

BRB No. 19-0261 BLA

GARY W. COOK	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WELLMORE ENERGY COMPANY, LLC c/o UNITED COAL COMPANY	)	DATE ISSUED: 05/27/2020
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Russell Vern Presley, II (Street Law Firm, LLP), Grundy, Virginia, for employer/carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2013-BLA-05420) of Administrative Law Judge Paul R. Almanza[1] rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on January 4, 2012.

The administrative law judge credited claimant with twenty-eight years of coal mine employment and determined employer is the responsible operator. Based on employer's concession, he further found claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), 20 C.F.R. §718.304.[2] The administrative law judge also determined claimant

[1] This claim was initially assigned to the Office of Administrative Law Judges (OALJ) in Washington, D.C. On October 13, 2015, the claim was transferred to the Covington, Louisiana office. The claim was then assigned to Administrative Law Judge Lee J. Romero, Jr. On December 18, 2015, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Partial Summary Judgment, asserting that there was no issue of fact as to whether employer is the responsible operator. Administrative Law Judge Exhibit 2. Judge Romero issued an Order Denying Motion for Partial Summary Decision on February 11, 2016. Administrative Law Judge Exhibit 4. He found there was a genuine issue of material fact regarding employer's designation as responsible operator and whether extraordinary circumstances existed to admit the x-ray interpretation employer relied on to oppose the Director's motion. *Id*. On March 23, 2016, the case was transferred back to the OALJ in Washington D.C. and was assigned to Administrative Law Judge Paul R. Almanza (the administrative law judge).

[2] The regulation at 20 C.F.R. §718.304 provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304.

was entitled to the rebuttable presumption[3] that his complicated pneumoconiosis arose out of his coal mine employment and employer did not rebut it. 20 C.F.R. §718.203(b). He therefore awarded benefits.

On appeal, employer does not challenge the award of benefits, but asserts the administrative law judge erred in excluding from the record an x-ray reading purportedly establishing claimant already had complicated pneumoconiosis at the time he began working for employer. Employer therefore contends the administrative law judge erred in finding it is the responsible operator and in determining the onset date for the commencement of benefits is October 1, 2006. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that the administrative law judge's designation of the responsible operator should be vacated and the case remanded for further consideration. Employer filed a reply brief, reiterating its argument that it timely submitted x-ray evidence showing claimant already had complicated pneumoconiosis when he began working for employer.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

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[3] The regulation at 20 C.F.R. §718.203(b) provides: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment."

[4] We affirm as unchallenged the administrative law judge's findings that claimant established twenty-eight years of coal mine employment and invocation of the irrebuttable presumption of total disability due to pneumoconiosis through employer's concession, and is entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 1, 8, 12; Employer's Brief at 2; Hearing Tr. at 5-6, 10. We therefore affirm the award of benefits.

[5] The Board applies the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in Tennessee. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Responsible Operator

Generally, the responsible operator is the potentially liable operator that most recently employed the miner for at least one year. *See* 20 C.F.R. §§725.494, 725.495(a)(1). However, in cases in which the onset of a miner's complicated pneumoconiosis predates the miner's coal mine employment with an employer, that employer is relieved of liability as the responsible operator. 20 C.F.R. §725.494(a); *see Rowan v. Lewis Coal and Coke Co.*, 12 BLR 1-31, 1-33 (1988); *Truitt v. North American Coal Co.*, 2 BLR 1-199, 1-205 (1979), *appeal dismissed sub nom. Director, OWCP v. N. Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980) (it is irrational to hold employer liable for benefits when claimant was totally disabled due to complicated pneumoconiosis prior his employment with employer).

Because the district director must finally resolve identification of the responsible operator or carrier before a case is referred to the Office of Administrative Law Judges, the regulations require that absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Thus, "no documentary evidence pertaining to liability may be admitted in any further proceeding . . . unless it is submitted to the district director . . . ." 20 C.F.R. §725.414(d). If documentary evidence pertaining to the identification of a responsible operator or carrier is not submitted to the district director, it "shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1).

In this case, after employer responded to the Notice of Claim controverting its designation as the responsible operator, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) on April 24, 2012. Director's Exhibit 16. The district director informed the parties that the preliminary analysis of the claim supported an award of benefits based on Dr. DePonte's determination that the x-ray dated February 14, 2012, is positive for complicated pneumoconiosis. *Id*. The district director further indicated employer met the regulatory requirements to be designated a responsible operator. *Id*. The district director informed employer it had until June 23, 2012, to submit evidence relevant to its liability as the responsible operator, and indicated failure to timely respond precluded the admission of such evidence before the Office of Administrative Law Judges (OALJ), absent extraordinary circumstances. *Id*.

The record before the administrative law judge reflects employer submitted Dr. Meyer's rereading of the October 17, 2006 pre-employment x-ray to the district director on September 21, 2012. Director's Exhibit 18. Although the initial reading of the x-ray

was positive for only simple pneumoconiosis,[6] Dr. Meyer interpreted it as showing a Category A large opacity consistent with complicated pneumoconiosis. *Id*. Employer argued because this x-ray interpretation showed that claimant already had complicated pneumoconiosis when he applied for a job with employer, employer should be dismissed as the responsible operator. *Id*.

On October 31, 2012, the district director issued a Proposed Decision and Order (PDO) designating employer as the responsible operator and finding claimant entitled to benefits. Under the Summary of Medical and Employment Evidence section of the PDO, the district director stated:

> The Schedule for the Submission of Additional Evidence (SSAE) was issued on April 24, 2012, giving all parties to this claim an opportunity to submit additional evidence. *On two separate occasions, the responsible operator requested and was granted extensions of time. The operator did submit additional evidence, however, the evidence submitted was for the sole purpose of rebutting their alleged liability in this claim*. Although the operator submitted a written report, the actual digital x-ray was never submitted to the Department of Labor.

Director's Exhibit 19 (emphasis added). The district director further reported communicating with claimant regarding the October 17, 2006 x-ray. *Id*. According to the district director, claimant indicated he was aware he had to pass a physical examination before employer would hire him and that no one informed him the x-ray taken in conjunction with the examination was read as positive for complicated pneumoconiosis. *Id*. The district director questioned why, if employer was aware claimant had complicated pneumoconiosis, it did not inform him he had a "serious disease" and why he was not advised of his rights under federal law as a miner who continued to work in the mines after a diagnosis of pneumoconiosis. *Id*. The district director concluded employer had not submitted substantial evidence to rebut its liability for this claim. *Id*. By letter dated December 3, 2012, employer submitted a compact disc containing the October 17, 2006 digital x-ray and Dr. Patel's initial reading, and requested reconsideration of the PDO or transfer to the OALJ for a formal hearing. Director's Exhibit 20. The district director transferred the case to the OALJ on January 24, 2013. Director's Exhibit 23.

[6] In a report bearing the designation "Wellmore Physical," Dr. Patel classified the October 17, 2006 x-ray as 1/0, p/s. Director's Exhibit 20. He also noted a "larger density in the right upper lung field" but did not indicate it was a large opacity consistent with complicated pneumoconiosis. *Id*.

In his Decision and Order,[7] the administrative law judge noted the district director's acknowledgment of employer's requests for extensions of time to submit evidence, but determined there was "nothing in the record or in the arguments of the parties supports this statement, or even indicates in any way that any extensions of time referred to in the PDO concerned Dr. Meyer's August 8, 2012 x-ray reading of the October 17, 2006 x-ray." Decision and Order at 4 n.3; Director's Exhibit 19. The administrative law judge therefore found employer failed to timely submit Dr. Meyer's x-ray interpretation before the district director and was precluded from submitting it before the administrative law judge for the purpose of challenging its designation as responsible operator. Decision and Order at 6. In addition, the administrative law judge found employer failed to establish extraordinary circumstances to excuse the untimely submission and concluded employer is the properly designated responsible operator. *Id*. at 6-7, *citing* 20 C.F.R. §725.456(b)(1).

Employer argues that contrary to the administrative law judge's finding, it requested and was granted two extensions of time to submit Dr. Meyer's interpretation of the October 17, 2006 x-ray. Employer's Brief in Support of Petition for Review at 3-9. Employer states "it is unclear" why the extension requests and letters granting employer additional time to submit evidence were not in the record before the administrative law judge, but the record demonstrates that employer submitted Dr. Meyer's x-ray interpretation to the district director prior to the issuance of her PDO. *Id.* at 8. Thus, employer asserts the administrative law judge erred in finding employer's x-ray evidence was untimely submitted and in requiring it to prove extraordinary circumstances for its submission. Employer's Brief at 7-9. In her response brief, the Director concurs with employer's position, stating the extension requests and orders granting them have been located "after a diligent search," and attached copies to her brief. Director's Brief at 5.

The Director's submission of the documents previously absent from the record establishes that in response to the SSAE dated April 24, 2012, employer sent a letter dated June 22, 2012, to the district director requesting an extension of the date for the submission of its affirmative evidence to July 23, 2012, and an extension until August 23, 2012, for the submission of its responsive evidence. On June 28, 2012, the district director granted

[7] At the hearing, the Director argued Dr. Meyer's x-ray reading was inadmissible because employer did not submit it to the district director by the deadline set forth in the Schedule for Submission of Additional Evidence and did not request an extension of time. Hearing Tr. at 6-11. The Director also cited employer's failure to submit the original digital x-ray until after the issuance of the Proposed Decision and Order (PDO). *Id*. at 14. Employer responded, alleging the district director's consideration of the x-ray reading in the PDO effectively made the reading part of the record. *Id*. at 11-13. He further asserted employer submitted the original digital x-ray to the district director before the case was transferred to the Office of Administrative Law Judges. *Id*. at 16.

employer's request in part, permitting "the submission of evidence" until July 23, 2012, and allowing until August 22, 2012, for "evidence submitted in response by other parties to the claim." By letter dated July 22, 2012, employer requested "an additional extension of time for the submission of the operator's evidence" to August 23, 2012, contending additional time was needed to have its physicians review "the actual diagnostic images and chest CT scans which were the subject of reports submitted by claimant's representative under a cover letter dated June 15, 2012." The district director granted employer's request, allowing until August 23, 2012, "for the submission of evidence" and until September 22, 2012, for "evidence submitted in response by the other parties to the claim." Employer submitted Dr. Meyer's x-ray interpretation on September 21, 2012.

While these documents do not appear in the record and therefore were not considered by the administrative law judge, the Director provided copies on appeal and does not dispute that the district director granted employer's requests for extensions to submit evidence challenging its designation as the responsible operator. Director's Brief at 5-6. An administrative law judge must base his or her findings of fact on a consideration of all relevant evidence, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because he did not have the opportunity to address the evidence regarding employer's requests for extensions of time to submit evidence and the district director's responses, we vacate the administrative law judge's determination employer did not timely submit Dr. Meyer's x-ray rereading and remand the case to the administrative law judge for reconsideration in light of a review of the omitted evidence. On remand, the administrative law judge must reconsider the admissibility of Dr. Meyer's reading of the October 17, 2006 x-ray based on a review of the documents the Director provided and must reconsider the procedural history of the

responsible operator issue before the district director.[8] When rendering this finding, the administrative law judge should be mindful that the regulations pertaining to the development of evidence before the district director do not contain the "extraordinary circumstances" standard that appears in the regulations governing the admission of liability evidence after the claim is transferred to the OALJ. 20 C.F.R. §§725.414(d), 725.456(b)(1); *see* 20 C.F.R. §§725.404(d) (the district director informs the claimant when additional evidence is necessary and sets a deadline for the submission of such evidence which may be extended for good cause), 725.423 (except for the time limit for responding to a PDO, any of the time periods for the development of evidence before the district director set forth in Subpart D of Section 725 of the regulations, may be extended for good cause).[9]

If the administrative law judge determines Dr. Meyer's x-ray reading was submitted to the district director (as the regulation requires the administrative law judge to consider it regarding the responsible operator issue) he must dismiss employer as the responsible operator. Otherwise, he may reinstate his finding that employer failed to

[8] The Director maintains employer's submission of the x-ray reading on September 21, 2012, was untimely despite the extensions it was granted, as the district director set August 23, 2012, as the deadline for employer to proffer evidence, while the other parties had until September 22, 2012, to submit evidence in response to employer's submissions. Director's Brief at 6. The Director also alleges the fact that Dr. Meyer's x-ray reading and the accompanying letter to employer were dated August 8, 2012, establishes employer could have met the August 23, 2012 deadline for submitting its affirmative evidence. *Id*. In contrast, employer contends the administrative law judge should have considered Dr. Meyer's x-ray reading on the responsible operator issue based on: employer's consistent and timely challenges to its designation as responsible operator; the district director's consideration of the reading in the PDO; the lack of objections from the Director and claimant while the case was before the district director; the presence of the reading in the record transferred to the OALJ; and the submission of the original digital x-ray before the case was transferred to the OALJ. Employer's Brief in Support of Petition for Review at 8-9; Employer's Reply Brief at 2-3.

[9] There is no specific time limit for the submission of evidence establishing a date for a claimant's entitlement to benefits prior to beginning his or her employment with employer (i.e., evidence establishing employer cannot be the responsible operator because claimant developed complicated pneumoconiosis before becoming employer's employee) in 20 C.F.R. Part 725. However, absent extraordinary circumstances, evidence pertaining to liability of an employer's designation as responsible operator must be submitted to the district director. 20 C.F.R. § 725.456(b)(1).

establish extraordinary circumstances[10] allowing for the admission of the reading before him on the responsible operator issue and that employer did not refute its designation as the responsible operator.

Commencement of Benefits

Employer also challenges the administrative law judge's determination that claimant is entitled to benefits commencing October 1, 2006, rather than January 1, 2012, the date of filing of this claim. Once entitlement to benefits is established, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In a case where a claimant is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the fact-finder must consider whether the evidence of record establishes the onset date of the claimant's complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If not, the commencement date is the month in which the claim was filed, unless the evidence establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing. 20 C.F.R. §725.503(b); *Williams*, 13 BLR at 1-30.

Relying on Dr. Meyer's positive interpretation of the October 17, 2006 x-ray for complicated pneumoconiosis, the administrative law judge found the date of commencement of benefits to be October 1, 2006. Decision and Order at 13. Employer argues this finding must be vacated because the administrative law judge could not refuse to consider Dr. Meyer's x-ray reading on the responsible operator issue yet use it to determine the date of commencement of benefits. Employer's Brief at 9-10. We disagree.

An administrative law judge 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 administrative law judge's disposition of a procedural or evidentiary issue must establish that the administrative law judge's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). In this case, the administrative law judge stated that although he deemed Dr. Meyer's x-ray reading "inadmissible for the purpose of disproving responsible operator liability, [employer] has permissibly designated the interpretation on its medical evidence summary

[10] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding employer failed to establish extraordinary circumstances for the admission of Dr. Meyer's reading relevant to its liability as the responsible operator. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6-7.

form[11] and it is therefore admissible on the issue of entitlement." Decision and Order at 13 n.13. Because employer designated Dr. Meyer's x-ray reading as affirmative medical evidence before the administrative law judge and did not indicate it was to be considered only on the issue of responsible operator liability, we affirm the administrative law judge's finding as within his discretion. *See Blake*, 24 BLR at 1-113; Decision and Order at 14.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[11] On November 8, 2016, employer designated Dr. Meyer's August 8, 2012 interpretation of the October 17, 2006 digital x-ray as a part of its affirmative medical evidence. Employer's Evidence Summary Form dated November 8, 2016.