U.S. Department of Labor

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

BRB No. 20-0331 BLA

AARON A. MITCHEM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 12/19/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits (2018-BLA-05061) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on April 28, 2014.[1]

The ALJ found Eastern Associated Coal Corporation (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. Based on the parties' stipulations, he credited Claimant with twenty-one years of underground coal mine employment. He further determined Claimant suffers from complicated pneumoconiosis arising out of that employment. 20 C.F.R. §§718.304, 718.203. Thus, the ALJ found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, established a change in an applicable condition of entitlement,[2] and awarded benefits. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §725.309(c).

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 manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It

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[1] Claimant filed an initial claim for benefits on October 6, 2010, which the district director denied on December 2, 2011, because he failed to establish any element of entitlement. Director's Exhibit 1.

[2] 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 "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's prior claim was denied for failure to establish any element of entitlement, he had to establish at least one element in order to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

[3] 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,

also asserts the ALJ erred in finding Peabody Energy is the liable carrier. Further, it argues the ALJ erred in excluding evidence it submitted post-hearing. 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 constitutional arguments and to affirm the ALJ's determination that Peabody Energy is the responsible carrier. The Director also contends remand is not necessary due to the ALJ's exclusion of Employer's evidence.

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.[4] 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, 362 (1965).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus we affirm these findings.[5] *See Skrack v. Island Creek Coal Co.*,

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> 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.

[4] 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); Director's Exhibit 77 at 5.

[5] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 46-47. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, constitutes retroactive rulemaking, and violates the Administrative Procedure Act. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of the issues identified. *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 C.F.R. §802.211(b).

6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 27-31. 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).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 59. 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. Decision and Order at 27 n.34; Director's Exhibits 59. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 29-31.

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, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the district director is an inferior officer not properly appointed under the Appointments Clause; (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) 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; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on the company; (6) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act; and (7) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. Employer's Brief at 4-51. 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.* Furthermore, Employer asserts that allowing the district director to make an initial determination of the responsible carrier in instances involving potential Trust Fund liability violates its due process rights.[6] *Id*. at 7-15.

[6] Employer further "acknowledge[s] the prior rulings regarding the need for additional discovery" but states it wishes to preserve for appellate purposes its assertion that discovery was cut off prematurely. Employer's Brief at 44-45. Employer again has

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.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.[7]

Evidentiary Issue

Employer also argues the ALJ erred in excluding Employer's Exhibits 17 and 18,[8] consisting of Dr. Meyer's interpretations of Claimant's February 2, 2012 and July 21, 2011 CT scans, and erred in rendering his evidentiary rulings in his decision and order. Employer's Brief at 2-4. We disagree.

Documentary evidence that was not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Evidence not exchanged within the twenty-day time frame may still be admitted at the hearing with the written consent of the parties, or on the record at the hearing, or upon a showing of good cause. 20 C.F.R. §725.456(b)(3). If the parties do

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failed to set forth sufficient detail to permit the Board to consider the merits of the issues identified. *Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; 20 C.F.R. §802.211(b).

[7] Based on this holding, we need not address Employer's assertion that "[a]nticipated [r]eliance on 725.495(a)(2)(i) and 725.493(b)(2) is misplaced." Employer's Brief at 47-48. These regulations concern the responsible operator designation between a subsidiary company and a parent company if the subsidiary is insolvent or otherwise unable to pay. But as Employer conceded, Employer is the correct responsible operator and Peabody Energy and the Trust Fund are financially capable of paying benefits. *Id*.

[8] Employer further contends the ALJ erred in excluding Employer's Exhibit 14 which is Claimant's October 18, 2017 blood gas study. Employer's Brief at 3. However, the ALJ admitted this exhibit because Claimant did not object to its admission as a hospital record. Decision and Order at 5. Employer also argues the ALJ failed to address this exhibit in his decision. Employer's Brief at 3. Because the ALJ awarded benefits based on a finding of complicated pneumoconiosis, there was no need for him to address the total disability evidence, including the blood gas study evidence.

not waive the twenty-day requirement or good cause is not shown, the ALJ shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3). Because the ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn the disposition of an evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The ALJ held a hearing on November 7, 2018. Subsequently, on December 18, 2018, Employer submitted Employer's Exhibits 17 and 18.[9] Claimant responded on December 27, 2018, objecting to the admission of Exhibits 17 and 18 because they were not listed on the Joint Pre-Hearing Report or Employer's Evidence Summary Form offered at the hearing and there was no discussion at the hearing about submitting post-hearing CT scan reports.[10] Claimant's Objections to certain Employer post-hearing submission(s) of evidence at 2. Claimant also stated that these exhibits were not provided in compliance with the ALJ's June 14, 2018 Pre-Hearing Order requiring parties to exchange exhibits no later than twenty days prior to the hearing and specifically stating the ALJ "will not allow post-trial submissions, absent truly extraordinary circumstances." June 14, 2018 Notice of Assignment, Hearing, and Pre-Hearing Order at 2, 4; Claimant's Objections to certain Employer post hearing submission(s) of evidence at 2. In his Decision and Order, the ALJ excluded Employer's Exhibits 17 and 18 because Employer did not make a showing of good cause for the late submission of these exhibits. Decision and Order at 5, *citing* 20 C.F.R. §725.456(b)(3), *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006) (ALJ not required to conduct good cause inquiry *sua sponte*).

Employer asserts that by waiting until issuing his decision and order to render his evidentiary rulings, the ALJ violated Employer's due process rights because Employer did not have a clear understanding of the record when briefing its case. Employer's Brief at 2-3. It also argues that Employer's Exhibits 17 and 18 should be admitted because they are relevant to whether Claimant has complicated pneumoconiosis and because Employer discussed post-hearing evidence development with the ALJ prior to the hearing. *Id.* at 3-

[9] In its March 19, 2019 amended Evidence Summary Form, Employer designated Employer's Exhibits 17 and 18 as "Other medical evidence" under 20 C.F.R. §718.107.

[10] Employer also submitted Exhibit 16, Dr. Meyer's interpretation of the May 9, 2017 x-ray, which Claimant objected to as exceeding Employer's evidentiary limitation on x-ray evidence. Claimant's Objections to certain Employer post hearing submission(s) of evidence at 2. Employer has not challenged the ALJ's exclusion of Employer's Exhibit 16; therefore we affirm this finding. *Skrack*, 6 BLR at 1-711; Decision and Order at 5.

4. The Director responds, urging the Board to reject Employer's arguments and to affirm the ALJ's exclusion of these exhibits.

Contrary to Employer's contention, based on the facts of this case, we see no error in the ALJ rendering his evidentiary rulings in his decision and order. Employer received notice, via the ALJ's June 14, 2018 Pre-Hearing Order, that evidence would be excluded if it was not exchanged in compliance with the twenty-day rule. June 14, 2018 Notice of Assignment, Hearing, and Pre-Hearing Order at 2, 4. Further, Claimant's timely objection to this evidence should have indicated to Employer that these submissions could be excluded. However, nowhere in the record did Employer make arguments that the disputed evidence should be admitted for good cause prior to the ALJ making his evidentiary ruling in his decision. Therefore, because Employer was aware that Employer's Exhibits 17 and 18 were untimely submitted and had the opportunity to make a good cause argument for its late submission, there was no due process violation.[11] *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (due process requires that a party be allowed to exercise its rights at a meaningful time and in a meaningful manner).

Further, the ALJ permissibly excluded Employer's Exhibits 17 and 18 based on Claimant's objections. Absent consent of the parties or a showing of good cause, neither of which occurred in this case, an ALJ may properly exclude evidence that is not timely submitted. 20 C.F.R. §§ 725.456(b)(1), (3); 65 Fed Reg. 79, 920, 80,000 (Dec. 20, 2000) (showing of "good cause" is necessary when a party seeks to convince the ALJ that the specific facts of a case justify the submission of additional medical evidence). We are also not persuaded by Employer's argument that Exhibits 17 and 18 must be admitted because they are relevant to the issue of complicated pneumoconiosis. *See* Employer's Brief at 4. The Board has held that "mere reference to the relevance of the evidence" does not establish good cause for a party's failure to timely exchange evidence pursuant to 20 C.F.R. §725.456(b). *Conn v. White Deer Coal Co.*, 6 BLR 1-979, 1-982 (1984). Further Employer's assertion that it discussed the submission of post-hearing evidence off the record with the ALJ is not persuasive given Claimant's objection asserting that he did not

[11] Employer cites *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) to support its due process argument. Employer's Brief at 2-3. However, the current case is distinguishable from *Preston*, where the ALJ's failure to render a preliminary evidentiary ruling prevented the employer from re-designating its evidence pursuant to 20 C.F.R. §725.414's evidentiary limitations or from providing good cause for exceeding those limitations. *Preston*, 24 BLR at 1-63. Here, Employer was aware that its evidence was untimely submitted and therefore was aware that it should provide a good cause argument for its submission but declined to do so. *See* 20 C.F.R. §725.456(b)(3).

remember such a discussion. Claimant's Objections to certain Employer post hearing submission(s) of evidence at 2.

Employer has not otherwise challenged the ALJ's findings that Claimant established complicated pneumoconiosis arising out of coal mine employment, invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§ 718.203, 718.304(a), 725.309(c); Decision and Order at 9-24. We therefore affirm these findings. *Skrack*, 6 BLR at 1-711.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge