

U.S. Department of Labor

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



BRB No. 20-0425 BLA

BILLY G. GAYLOR (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 07/19/2021
	)	
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 and Order Denying Motion for Reconsideration of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer.

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

PER CURIAM:

Employer appeals District Chief Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2017-BLA-05539) and Order Denying Motion for

Reconsideration rendered on a subsequent claim filed on August 6, 2015,<sup>1</sup> pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited the Miner with more than fifteen years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment, as Employer agreed. 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the rebuttable presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>2</sup> He further determined Employer did not rebut the presumption and awarded benefits. Employer filed a motion for reconsideration, which the administrative law judge denied as untimely filed.

On appeal, Employer argues the administrative law judge erred in finding its motion for reconsideration untimely. Employer's Brief at 3-5. Employer also challenges the administrative law judge's finding that it did not rebut the presumption. *Id.* at 5-15. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration if they are rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 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, 362 (1965).

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<sup>1</sup> The district director denied the Miner's initial claim, filed on April 23, 1991, for failure to establish any element of entitlement. Director's Exhibit 1. The Miner filed the current subsequent claim on August 6, 2015, and died on July 27, 2017, while it was pending. The Miner's widow is pursuing the Miner's subsequent claim on his behalf. Employer's Exhibit 12.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

<sup>3</sup> The Miner performed his last coal mine employment in either Tennessee or Kentucky. Director' Exhibits 4, 8; Hearing Transcript at 13. Accordingly, the Board will

We agree with Employer that the administrative law judge erred in finding it did not timely file its motion for reconsideration. Employer’s Brief at 3-5. The administrative law judge issued and served his Decision and Order Awarding Benefits on June 22, 2020. Employer electronically filed its motion for reconsideration with the administrative law judge on July 15, 2020.<sup>4</sup> The administrative law judge denied Employer’s motion as untimely because it was filed more than ten days after service of his Decision and Order. July 21, 2020 Order Denying Motion for Reconsideration at 1, *citing* 29 C.F.R. §18.93 (a motion for reconsideration of a Decision and Order must be filed no later than ten days after service of the decision on the moving party). The administrative law judge, however, applied the wrong regulation.

The regulation at 29 C.F.R. §18.93, contained within the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, governs the filing deadlines for motions for reconsideration only when no other Department of Labor regulation applies. 29 C.F.R. §18.10(a) (“To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply and these rules apply to situations not addressed in the governing regulation.”). The applicable regulation governing filing deadlines for reconsideration requests in federal black lung claims is 20 C.F.R. §725.479(b), which provides a thirty day time limit within which a party may seek reconsideration of an administrative law judge’s Decision and Order.<sup>5</sup> 20 C.F.R. §§725.479(b), 802.206(b)(2); *see Amax Coal Co. v. Director, OWCP [Oxendine]*, 892 F.2d 578, 580 (7th Cir. 1989).

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apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>4</sup> The certificate of service date on Employer’s motion for reconsideration is July 13, 2020, but Employer’s cover letter enclosing its motion for reconsideration is dated July 15, 2020. The cover letter indicates it was electronically mailed to the administrative law judge at the Office of Administrative Law Judges in Newport News, Virginia.

<sup>5</sup> The regulation at 20 C.F.R. §725.479(b) states:

Any party may, within 30 days after the filing of a decision and order under [20 C.F.R.] §725.478, request a reconsideration of such decision and order by the administrative law judge. The

The Board's Rules of Practice and Procedure also clarify that in black lung claims:

[A] timely motion for reconsideration . . . is one which is filed not later than 30 days from the date the decision or order was served on all parties by the administrative law judge and considered filed in the [office of the district director].

20 C.F.R. §802.206(b)(2).<sup>6</sup>

Contrary to the administrative law judge's determination, Employer had thirty days, or until at least July 22, 2020, to request reconsideration of his June 22, 2020 Decision and Order. Employer timely filed its motion for reconsideration on July 15, 2020. *See* 20 C.F.R. §§725.479 (b), 802.206(b)(2). We therefore vacate the administrative law judge's denial of Employer's reconsideration request.

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procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

20 C.F.R. §725.479(b).

<sup>6</sup> The filing date of the Decision and Order with the district director is not ascertainable from the record. However, as that date can only be June 22, 2020 or later, it does not affect our conclusion that Employer timely filed its motion for reconsideration.

Accordingly, the administrative law judge's Order Denying Motion for Reconsideration is vacated and this case is remanded for the administrative law judge to consider the merits of Employer's motion for reconsideration consistent with this opinion. Employer's appeal of the administrative law judge's Decision and Order Awarding Benefits is dismissed without prejudice as premature.<sup>7</sup>

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

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<sup>7</sup> Where a timely motion for reconsideration of an administrative law judge's decision has been filed, "any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature." 20 C.F.R. §802.206(f). A new notice of appeal must be filed with the Board by any party who wishes to appeal the administrative law judge's decision addressing Employer's motion for reconsideration on remand. 20 C.F.R. §802.206(f).