



BRB No. 20-0083 BLA

ANGELENE DAVIS	)	
(Widow of PAUL G. DAVIS)	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 03/26/2021
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Claimant’s Request for Reconsideration of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens’ Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

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

BUZZARD, Administrative Appeals Judge:

Claimant<sup>1</sup> appeals Administrative Law Judge Jerry R. DeMaio’s Decision and Order and Order Denying Claimant’s Request for Reconsideration (2018-BLA-05316) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The Benefits Review Board’s scope of review is defined by statute. We

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<sup>1</sup> Claimant is the widow of the miner, who died on August 1, 2012. Director’s Exhibit 35 at 17. She is pursuing the miner’s claim on his estate’s behalf.

must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

The path to benefits in this case has been tortured. Through a painful combination of referrals, appeals, modifications, remands, and slow processing, Claimant's appeal of the onset date for the commencement of the miner's benefits is finally before us -- twenty-seven years after he first filed for benefits, nineteen years after the district director first determined he was entitled to them, and nearly nine years after he died from acute respiratory failure.

To briefly recount its long history, the miner filed his first claim for benefits in 1994; the district director administratively denied it in 1995. Director's Exhibit 1. The miner did not appeal, and it became final. He filed his first subsequent claim in February 2001, Director's Exhibit 1 at 942; in November 2002, the district director determined his condition had changed and he was entitled to benefits. Director's Exhibit 1. Employer requested a hearing, which did not result in a final decision until the district director denied modification of the claim nearly a decade later.<sup>2</sup>

Notably, in that denial, the district director incorrectly applied the Section 411(c)(4) presumption -- which did not apply based on the 2001 filing date of the first subsequent claim -- and found it rebutted. *See* 20 C.F.R. §718.305(a). Based on the statutory language, the date of the filing of a claim, and not the date of the filing of a request for modification of it, controls whether the 411(c)(4) presumption can be invoked. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.310. The presumption did not apply to the miner's modification request because he filed his first subsequent claim before January 1, 2005. 30 U.S.C. §921(c)(4). The miner, however, did not appeal.<sup>3</sup>

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<sup>2</sup> After a series of twists and slow processing, including a remand due to a flawed Department of Labor-sponsored pulmonary examination, Administrative Law Judge Jeffrey Tureck denied the first subsequent claim in February 2010. *See* Director's Exhibit 1 at 92. Claimant filed for modification of that denial, which the district director denied in November 2010, revising an earlier denial he issued about a month prior. Director's Exhibit 1 at 6.

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis, in claims filed after January 1, 2005, if the miner establishes fifteen or more years of underground coal mine employment, or employment in conditions

Undaunted, however, he filed the present, second subsequent claim on August 1, 2012. He died the same day, and his widow pursued the claim on his behalf. Director's Exhibits 3, 34 and 35 at 17. It unfortunately would crawl along a similarly snail-like path. In June 2013, the district director denied it. Director's Exhibit 37 at 2. Claimant timely appealed, and it sat in the Office of Administrative Law Judges (OALJ) for nearly another three full years, until the Director, Office of Workers' Compensation Programs (the Director), moved in March 2016 to remand it for payment in light of Employer's bankruptcy. Director's Exhibit 54 at 2. In his May 2016 decision awarding benefits payable by the Black Lung Disability Trust Fund, the district director set an onset date of August 2012, the month in which the second subsequent claim was filed. 20 C.F.R. §§725.309(c)(6), 725.503; Director's Exhibit 56 at 3.<sup>4</sup>

Claimant then moved for modification of the onset date determination, which the district director denied. After another referral to the OALJ, the case stalled for nearly two more years. The administrative law judge's eventual August 2019 modification decision upheld August 1, 2012 as the date the miner became totally disabled due to pneumoconiosis -- which is the same day the miner died from acute respiratory failure -- resulting in the payment of one month of benefits.

Claimant's appeal requests a revised onset date of December 2010, the month after the miner's first subsequent claim became final. In her Petition, Claimant presents a good faith argument the administrative law judge committed error, citing *Coleman v. Christen Coleman Trucking*, 784 F. App'x 431 (6th Cir. 2019),<sup>5</sup> and arguing the December 2010 date fulfills the purpose of 20 C.F.R. §725.309(c)(6). Claimant points out the district director's mistaken application of the 411(c)(4) presumption in denying modification of the miner's first subsequent claim in November 2010, noting the Director did not acknowledge the mistake in attempting to distinguish *Coleman* below. The Director has not responded, either completely neglecting the appeal or intentionally deciding not to file an opposition.<sup>6</sup>

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substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018).

<sup>4</sup> Notably, this subsequent claim, unlike the 2001 claim, *was* subject to the fifteen year presumption based on its filing date. *See* 20 C.F.R. §718.305(a).

<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.

<sup>6</sup> There does not appear to be any problem with service in this case. On January 15, 2020, before Claimant's Petition for Review and brief was filed, the Director filed with the

While the Board’s procedural rules do not require a response brief, 20 C.F.R. §802.212, a party to any litigation who wholly disregards an appellant’s non-frivolous allegation of error risks the relief requested will be granted as unopposed. *See, e.g., Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (an appellee who simply ignores arguments has forfeited his response because “an outright failure to join in the adversarial process would ordinarily result in waiver.”); *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 437 n.11 (3d Cir. 2005) (a non-responding appellee forfeits all responses to the appellant’s argument that are not “obvious.”); *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (an appellee failing to respond to a good faith argument “acquiesces” to it).

Under the unique and regrettable facts of this case -- in which no fault can be attributed to Claimant -- we modify the onset date without further reaching the merits of Claimant’s argument.<sup>7</sup>

The administrative law judge’s decision is modified to reflect an onset date of December 2010.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

I concur:

JONATHAN ROLFE  
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues’ decision to modify the administrative law judge’s decision. In my view, the facts here are different from those in *Coleman*. I would

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Board a notice of a change of counsel. The Director was served by U.S. Mail with Claimant’s Brief on January 27, 2020 (use of 2019 is typographical error). His response brief was due 30 days after his receipt of Claimant’s brief. 20 C.F.R. §802.212.

<sup>7</sup> The Board’s decision in this matter is of no precedential value given that Claimant’s appeal is unopposed.

affirm the administrative law judge's finding that August 2012 is the date of onset of benefits. 20 C.F.R. §725.503(b).

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

