



BRB No. 21-0008 BLA

| | | |
|-------------------------------|---|-------------------------|
| KERNEY SLONE |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| DYNASTY MINING, INCORPORATED |) | |
| |) | |
| and |) | |
| |) | |
| KENTUCKY EMPLOYERS MUTUTAL |) | DATE ISSUED: 09/16/2021 |
| INSURANCE |) | |
| |) | |
| 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 Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits (2017-BLA-06142) rendered on a claim filed on May 17, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 22.41 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).¹ He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the award must be vacated because the ALJ did not consider all of its evidence. Employer also argues the ALJ erred in finding Claimant is totally disabled, in invoking the Section 411(c)(4) presumption, and in finding the presumption un rebutted. Alternatively, Employer argues the ALJ erred in determining the onset date for the commencement of benefits. 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 ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Employer argues the ALJ erred in finding Claimant totally disabled because he did not consider Employer's Exhibits 1 through 7, which included Claimant's deposition testimony and Dr. Jarboe's medical report and deposition testimony.³ Employer alleges it timely submitted the exhibits and also submitted them together as a packet along with its

¹ Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 8.

³ Employer's Brief does not identify the contents of the remaining four exhibits.

Post-Hearing Brief to the ALJ⁴ on November 13, 2018, by registered mail. Employer's Petition for Review and Brief (Employer's Brief) at 4-5. While the ALJ acknowledged receipt of Employer's Post-Hearing Brief, he specifically noted that neither Employer nor Claimant submitted additional evidence beyond the Director's Exhibits he considered in rendering his findings in this case. Decision and Order at 2.

The administrative law judge issued an order on August 13, 2018, giving the parties 75 days to complete discovery, including Claimant's deposition. Employer alleges it submitted the last of its seven exhibits within this timeframe, but does not provide any documentation to support that assertion, nor can we identify any in the limited record before us.⁵ However, Employer provides a cover letter and registered mail receipt to support its assertion that it submitted its Evidence Summary Form and Exhibits 1 through 7 as attachments to its Post-Hearing Brief on November 13, 2018.⁶ Employer's Brief, Exhibits A, B; see https://www.oalj.dol.gov/OALJ_Case_Status.html (last visited Aug. 24, 2021) (search "2017-BLA-06142") (indicating ALJ's receipt of these documents on November 16, 2018).

We make no assessment of the admissibility or timeliness of Employer's submissions, as that is within the discretion of the administrative law judge. However, because it appears the ALJ was unaware of Employer's submissions, which it alleges were timely submitted, when he rendered his Decision and Order and did not otherwise address their admissibility, we are compelled to vacate the award and remand this case for further consideration of this evidentiary issue.⁷ See *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (ALJ's failure to discuss relevant evidence requires remand). On remand, the ALJ must address the admissibility of Employer's Exhibits 1 through 7. He

⁴ On July 17, 2018, the ALJ granted Claimant's request for a Decision on the Record. Decision and Order at 2.

⁵ The record reveals, however, that when the matter was before the district director, Employer submitted notice on March 3, 2017, that it had scheduled medical evaluations with Dr. Jarboe on March 30, 2017, and Dr. Dahhan on April 10, 2017. Director's Exhibit 46.

⁶ Employer's cover letter also alleges it had previously submitted the exhibits, but does not indicate when. Employer's Brief, Exhibit A.

⁷ Because the record could change on remand, we decline to address, as premature, Employer's remaining arguments on appeal with respect to the ALJ's findings on total disability, invocation and rebuttal of the Section 411(c)(4) presumption, and the proper commencement date for benefits, if awarded. Employer's Brief at 3-8.

must adequately explain any of his evidentiary rulings. If any new exhibits are admitted, he must render new findings on the merits of Claimant's entitlement to benefits based on his review of all the evidence properly submitted into the record, as the Administrative Procedure Act requires.⁸ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). If he deems all of Employer's exhibits inadmissible, however, he may reinstate his award of benefits, in which case any aggrieved party may appeal the decision.

Accordingly, the ALJ's Decision and Order Granting Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

⁸ The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).