U.S. Department of Labor

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

BRB No. 18-0459 BLA

ROGER D. HALSTEAD Claimant-Respondent v. PINE RIDGE COAL COMPANY, Self-Insured Through PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/30/2019 DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

H. Brett Stonecipher and Cameron Blair (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.[1]

[1] After filing a petition for review and brief, employer's counsel withdrew from the case on May 21, 2019.

Jennifer L. Feldman (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2017-BLA-05009) of Administrative Law Judge Richard A. Morgan awarding benefits 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 claim filed on August 29, 2014.

The administrative law judge initially designated employer as the responsible operator, and credited claimant with at least nineteen years of coal mine employment.[2] He found the evidence established complicated pneumoconiosis, entitling claimant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He further found claimant's complicated pneumoconiosis arose out of his coal mine employment, and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also argues that he improperly found pneumoconiosis established. Employer finally contends that the administrative law judge erred in finding it responsible for the payment of benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had authority to decide the case. The Director further responds

[2] Claimant's coal mine employment was in West Virginia. Hearing Transcript at 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

in support of the administrative law judge's determination that employer is liable for benefits.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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).

Appointments Clause

After the administrative law judge issued his Decision and Order, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution.[4] *Lucia*, 138 S.Ct. at 2055. The Court further held that, because the petitioner timely raised his challenge to the constitutional validity of the appointment of the administrative law judge, the petitioner was entitled to a new hearing before a properly appointed administrative law judge. *Id*.; *see also Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

Employer contends that, because the administrative law judge was not properly appointed until December 21, 2017,[5] three months after he issued a Notice of Hearing, his

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established nineteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] 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, 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.

Art. II, § 2, cl. 2.

[5] The Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor administrative law judges on December 21, 2017. Employer concedes that the

Decision and Order must be vacated and the case remanded for a new hearing before a new administrative law judge. Employer's Brief at 5-7. We disagree.

The Supreme Court has held that the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official. *Lucia*, 138 S.Ct. at 2055, *citing Ryder v. United States*, 515 U.S. 177, 182-83 (1995). That official must be able to consider the matter as though he had not adjudicated it before. *Lucia*, 138 S.Ct. at 2055. For the reasons that follow, we determine that issuance of a Notice of Hearing did not render the administrative law judge in this case an official who "cannot be expected to consider the matter as though he had not adjudicated it before." *Id.*

The Notice of Hearing here reiterates the statutory and regulatory requirements governing the hearing procedures. The administrative law judge took no merits-related action and expressed no merits-related views in formulating and issuing it. Thus, unlike the situation in *Lucia*, in which the judge had presided over a hearing and issued an initial decision while he was not properly appointed, the Notice of Hearing in this case would not be expected to affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before."[6] *Lucia*, 138 S.Ct. at 2055. As employer raises no other arguments in support of its position that the adjudication of this claim was tainted by the administrative law judge's appointment, we reject employer's argument that this case should be remanded for a new hearing before a new administrative law judge.[7]

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administrative law judge was properly appointed as of his ratification. Employer's Brief at 2, 6-7.

[6] Moreover, we note that the initial hearing was canceled and rescheduled for March 20, 2018. The new hearing was governed by a Notice of Hearing and Prehearing Order the administrative law judge issued on January 25, 2018, after his appointment was ratified, and set forth new deadlines for discovery and evidence development and submission. Thus, if the administrative law judge's initial improper appointment required a new hearing before an appropriately appointed administrative law judge, employer received that remedy. As previously noted, employer concedes that the administrative law judge was properly appointed as of the ratification.

[7] We also reject employer's argument that this case should be remanded because the Chief Administrative Law Judge was not properly appointed when he assigned this case to the administrative law judge. Employer's Brief at 5-6. The assignment of this case to the administrative law judge did not affect his ability, post-ratification, "to consider the matter as though he had not adjudicated it before." *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018).

Entitlement to Benefits

Employer contends the administrative law judge "improperly weighed the medical evidence with respect to the issue of . . . pneumoconiosis . . . ." Employer's Brief at 5. The Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Employer does not identify any specific error with regard to the administrative law judge's determination the evidence established complicated pneumoconiosis. Claimant therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). 30 U.S.C. §921(c)(3). We further affirm, as unchallenged on appeal, the administrative law judge's determination that claimant's complicated pneumoconiosis arose out of coal mine employment, and thus affirm the award of benefits. 20 C.F.R. §718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Responsible Insurance Carrier

Employer does not directly challenge its designation as the responsible operator.[8] Rather, it asserts "the issue . . . is one of liability and not a specific responsible operator issue." Employer's Brief at 7. Employer specifically contends the administrative law judge erred in not allowing it to submit evidence that purportedly establishes liability should be transferred to the Black Lung Disability Trust Fund (Trust Fund). *Id.* at 8-11. The Director argues the administrative law judge properly excluded employer's liability evidence because it was not timely submitted to the district director and there were no extraordinary circumstances to excuse employer's failure. Director's Brief at 23-25.

Background Information

The district director issued a Notice of Claim on December 7, 2015, informing Pine Ridge, self-insured through Peabody Energy Corporation (Peabody), that it was identified

[8] Pine Ridge Coal Company (Pine Ridge) qualifies as a potentially responsible operator because (1) claimant's disability arose at least in part out of employment with Pine Ridge; (2) Pine Ridge operated a mine after June 30, 1973; (3) Pine Ridge employed claimant for a cumulative period of at least one year; (4) claimant's employment included at least one working day after December 31, 1969; and (5) Pine Ridge is capable of assuming liability for the payment of benefits through Peabody Energy Corporation (Peabody's) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Pine Ridge was the last potentially liable operator to employ claimant, the administrative law judge designated Pine Ridge as the responsible operator. Decision and Order at 5. Pine Ridge concedes that Peabody has the ability to pay benefits in this claim. Employer's Brief at 7.

as a "potentially liable operator." Director's Exhibit 45. By letter dated December 14, 2015, Underwriters Safety and Claims (Underwriters) responded as the third-party administrator for Peabody. Director's Exhibit 43. It denied Peabody's liability, asserting that Patriot Coal Corporation (Patriot) should be designated the potentially liable operator. *Id.* Underwriters did not provide any documentary evidence to support its contention.

On March 14, 2016, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Pine Ridge as the responsible operator. Director's Exhibit 49. The district director informed employer it had until May 13, 2016 to submit additional documentary evidence relevant to liability, and could identify witnesses relevant to liability it intended to call if the case was referred to the Office of Administrative Law Judges (OALJ). *Id*. Moreover, the district director stated "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 6-7, *citing* 20 C.F.R. §725.456(b)(1).

On April 26, 2016, employer submitted a letter to the district director, acknowledging the Pine Ridge site where claimant worked "was previously self-insured through Peabody." Director's Exhibit 36. Employer, however, asserted "this liability was subsequently transferred by a contract to Patriot." *Id*. Employer further stated that in light of Patriot's bankruptcy, the Trust Fund is liable for any benefits.[9] *Id.* Employer indicated it would submit the contract between Pine Ridge/Peabody and Patriot. *Id.* It also designated a Peabody representative, Robert Fenley, "as an individual who will provide live testimony regarding the contractual relationship between [the parties]." *Id.* Employer further designated as a potential witness "the Secretary of Labor, or [his] representative who will have current knowledge of the Patriot bankruptcy, self-insurance, and status of the surrendered bond." *Id.* Employer, however, did not submit any documents or identify any other specific liability witnesses from the Department of Labor by the May 13, 2016 deadline set forth in the SSAE. Although the district director granted employer an extension until July 12, 2016 to submit its liability evidence, employer did not submit any evidence by this deadline. Director's Exhibit 66.

On July 27, 2016, the district director issued a Proposed Decision and Order, finding Pine Ridge, self-insured through Peabody, the responsible operator liable for benefits. Director's Exhibit 67. The district director noted that employer failed to timely submit any

[9] Employer explained that Patriot Coal Corporation (Patriot) surrendered a substantial bond to the Black Lung Disability Trust Fund, which the Director found sufficient to guarantee anticipated self-insurance requirements. Director's Exhibit 36.

evidence relevant to its liability. *Id.* On August 19, 2016, employer requested a formal hearing. Director's Exhibit 71.

Approximately a month later, on September 20 2016, employer submitted a letter to the district director with two attached liability-related documents: a March 4, 2011 letter from Stephen Breeskin of the Division of Coal Mine Workers' Compensation (DCMWC) to Patriot, and the first page of DCMWC's decision granting Patriot's authorization to act as a self-insurer.[10] Director's Exhibit 74. On October 3, 2016, the district director forwarded the case to the OALJ for a formal hearing. Director's Exhibit 75.

On December 7, 2017, employer moved to file documentary evidence related to its liability with the administrative law judge. This evidence included the March 4, 2011 Breeskin letter and the Patriot Self-Insurance Authorization, as well as evidence not previously submitted. On January 2, 2018, employer requested an extension of time to take and submit deposition testimony relevant to its liability.

By Order dated January 3, 2018, the administrative law judge noted that because the identification of the responsible operator or carrier must be finally resolved by the district director before a case is referred to the OALJ, the regulations require that absent extraordinary circumstances, all liability evidence must be submitted to the district director.[11] January 3, 2018 Order at 2-4; *see* 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). He excluded employer's liability evidence because employer failed to timely submit it to the district director and

[10] Employer also designated Stephen Breeskin and David Benedict from the Department of Labor, as well as Rob Meade from Patriot, as potential witnesses at the formal hearing. Director's Exhibit 74.

[11] In addition, while the claim is before the district director, "all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c). In the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

failed to establish extraordinary circumstances warranting its late admission. *Id.* at 4-7. He denied employer's motion to take and submit deposition testimony on liability for the same reasons. *Id.* at 7. By Order dated March 8, 2018, the administrative law judge denied employer's request for reconsideration.

Discussion

Employer initially argues that the identification of the proper carrier is a "coverage issue" rather than a liability issue, and therefore the evidence pertaining to the carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1). Employer's Brief at 7. The administrative law judge rejected employer's argument, noting that "both responsible operator and carrier issues are liability issues because they address who is responsible for payment of awarded benefits." January 3, 2018 Order at 3. He noted that [i]f a carrier were not required to submit its evidence to the district director . . . there would be no reasonable basis for the district director to make [a] final decision regarding liability for payment of the claim . . . because [he] would not have all of the relevant evidence before him." *Id.* at 4. We agree with the administrative law judge.

A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations thus specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant.[12] 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. Moreover, the Board has consistently held that the rules and regulations regarding liability evidence apply to carriers as well as to operators. *See Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, slip op. at 4 (Sept. 19, 2012) (unpub.); *J.H.B.* [*Boyd*] *v. Peres Processing, Inc.*, BRB No. 08-0625 BLA, slip op. at 5 (June 30, 2009) (unpub.). Because the identification of the responsible operator or carrier must be finally resolved by the district director before a case is referred to the OALJ, the administrative law properly found the regulations require that absent extraordinary circumstances, liability evidence pertaining to the responsible carrier must be timely submitted to the district director. 20 C.F.R. §725.456(b)(1).

Employer next argues that the administrative law judge erred in finding it failed to establish extraordinary circumstances for not submitting its liability evidence when the

[12] In his Schedule for the Submission of Additional Evidence, the district director granted "*any party* that wishes to submit liability evidence or identify liability witnesses" until May 13, 2016 to submit evidence in support of its position . . . ." Director's Exhibit 49 at 3 (emphasis added).

case was before the district director.[13] Employer's Brief at 8-11. Because an administrative law judge 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 an administrative law judge's disposition of a procedural or evidentiary issue must establish the administrative law judge's action represented an "abuse of . . . discretion." *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer asserts it conducted a "thorough search" for the Peabody-Patriot Separation Agreement for several months dating back to early 2016. Employer's Brief at 9. Employer further notes that, after an "exhaustive search," it located the Agreement "on approximately [August 30, 2016], as well as the confirmation from the Department approving Patriot as a self-insurer . . . ." *Id.* Employer states its difficulty in obtaining the evidence establishes extraordinary circumstances. *Id.* at 10. The administrative law judge rejected this argument, noting that although employer "may have had difficulty in obtaining the liability evidence," it did not provide any explanation for why it failed to request an extension of time to submit its evidence to the district director.[14] January 3, 2018 Order at 6. He also noted the evidence employer sought to offer into evidence existed "for at least four to six years prior to the filing of [the] claim." *Id.*

Employer argues its delay in obtaining its liability evidence was due to the Director's failure to respond to its request for the production of documents in a "concurrent pending claim." Employer's Brief at 8. Employer notes it did not receive the Director's response in that claim until March of 2017, after its claim in this case had been forwarded to the OALJ. *Id.* However, as the Director accurately notes, employer refers to discovery in a claim that was not before the administrative law judge and is not before the Board.[15]

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[13] Although employer designated the Secretary of Labor and Robert Fenley as potential witnesses regarding liability before the district director, the administrative law judge denied the request to submit their depositions after the formal hearing, noting that employer's request was untimely and that the time for discovery had passed. *Halstead v. Pine Ridge Coal Co.*, OALJ Case No. 2017-BLA-05009 (Mar. 8, 2018) (Order) (unpub.). As employer does not challenge this finding on appeal, we affirm it. *Skrack*, 6 BLR at 1-711.

[14] The administrative law judge noted that, even after employer obtained the documents on August 30, 2016, it did not attempt to offer them into evidence for twenty-one days. January 3, 2018 Order at 6.

[15] The Director notes that, even in the "concurrent pending claim," employer did not seek discovery until January 17, 2017. Director's Brief at 24, *see* Exhibit D.

In the case currently before the Board, employer did not file its discovery request until November 4, 2017.

Employer next asserts "extraordinary circumstances" exist because the Director was in possession of the liability evidence but did not provide it to employer. Employer's Brief at 10. Employer's contention has no merit. The Director has no duty to produce documents employer requested after the deadline for submitting liability evidence. Moreover, it is employer's responsibility, not the Director's, to submit any documentation relevant to its liability by the deadline set forth in the SSAE.[16] Based on these facts, we hold the administrative law judge did not abuse his discretion finding employer failed to establish extraordinary circumstances to justify the late admission of its liability evidence.[17] *Blake*, 24 BLR at 1-113.

[16] Contrary to employer's additional contention, the fact that the Director was not surprised by the evidence does not qualify as an "extraordinary circumstance" to justify employer's failure to meet the unambiguous requirements of the applicable regulations. Employer's Brief at 10. Interpreting the former 20 C.F.R. §725.456(d), the Fourth Circuit held that "[r]eading the regulation to allow the admission for [this] reason[] . . . of medical evidence withheld by a party until after the claim is forwarded to the [OALJ] absent extraordinary circumstances 'would render meaningless the "extraordinary circumstances" exception.'" *Doss v. Director, OWCP*, 53 F.3d 654, 658 (4th Cir. 1995), *quoting Adams v. Island Creek Coal Co.*, 6 BLR 1-677, 1-680 (1983).

[17] We reject employer's argument that its due process rights were violated by "the denial of discovery and the failure of the Department to maintain proper records." Employer's Brief at 11. Employer has not shown that it was deprived of a fair opportunity to mount a meaningful defense when it did not request an extension of time or request discovery until after the deadlines to submit liability evidence had passed. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge