U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0084 BLA

MARK A. VANDYKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY, LLC	)	
	)	
Employer	)	
	)	
and	)	DATE ISSUED: 12/21/2017
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	
	)	
Carrier-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 of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for carrier.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Brickstreet Mutual Insurance Company (carrier) appeals the Decision and Order Awarding Benefits (2014-BLA-05397) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on January 29, 2013.

The administrative law judge found that the medical evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[1] Consequently, the administrative law judge found that claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge also found that claimant established that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Further, the administrative law judge found that carrier is the properly named responsible insurance carrier liable for the payment of benefits. Accordingly, the administrative law judge awarded benefits.

On appeal, carrier asserts that the administrative law judge erred in finding that it is the responsible insurance carrier liable for the payment of benefits on behalf of Paramont Coal Company (Paramont/employer). Carrier argues that the administrative law judge erred in declining to consider evidence relevant to its liability that was properly admitted into evidence at the hearing. Claimant responds, urging affirmance of the administrative law judge's findings that carrier is the properly named responsible carrier and that claimant is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's determination that carrier is the responsible insurance carrier. Employer did not

[1] The administrative law judge noted that employer, Paramont Coal Company, presented no evidence or argument contesting claimant's entitlement to benefits based on the existence of complicated pneumoconiosis. Decision and Order at 2 n.2; Hearing Transcript at 9. However, employer further stated that they were not willing to stipulate to it. *Id*.

file a response brief in this appeal. Carrier submitted a reply brief reiterating its arguments on appeal.[2]

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.[3] 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).

In a case involving complicated pneumoconiosis, the insurance carrier at the time that complicated pneumoconiosis was established is responsible for the payment of benefits, regardless of continued coal mine employment and any subsequent change in employer's insurance carrier. *See Swanson v. R.G. Johnson Co.*, 15 BLR 1-49, 1-51 (1991); *Truitt v. North American Coal Corp.*, 2 BLR 1-199, 1-204 (1979), *appeal dismissed sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). Carrier argues that the administrative law judge erred in declining to consider certain medical evidence that it asserts establishes that claimant's complicated pneumoconiosis was present before carrier's insurance coverage began. In order to address carrier's arguments on appeal, it is necessary that we summarize the procedural history of this case.

Claimant's last day of coal mine employment was with Paramont on December 14, 2012, and he filed this claim on January 29, 2013.[4] Director's Exhibit 2; Hearing Transcript at 20. In a Notice of Claim dated January 29, 2013, the claims examiner designated Paramont Coal Company c/o Wells Fargo Disability Management (Wells

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3), 30 U.S.C. §921(c)(3), and established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 7; Hearing Transcript at 21.

[4] While claimant initially indicated that his last day of employment was December 18, 2012, he later clarified that it was December 14, 2012. Director's Exhibit 2; Hearing Transcript at 20.

Fargo) and self-insured through Alpha Natural Resources as the responsible operator and carrier potentially liable for benefits. Director's Exhibit 21. By letter dated February 11, 2013, Wells Fargo informed the claims examiner that Brickstreet Mutual Insurance Company (carrier) insured employer as of December 13, 2012. Director's Exhibit 22. In light of this information, the claims examiner issued a new Notice of Claim dated February 20, 2013 naming Paramont as the responsible operator potentially liable for benefits and naming carrier as its insurer. Director's Exhibit 24; *see* 20 C.F.R. §725.407(b). The Notice of Claim informed the parties that:

> Within 30 days of receipt of the Notice of Claim, you (or your insurer) must file a response pursuant to 20 C.F.R. [§]725.408 indicating your intent to accept or contest your identification as a potentially liable operator.[5] This time period may be extended for good cause shown if you file an extension request with the District Director prior to expiration of the 30 days.

Director's Exhibit 24. The record contains postal receipts indicating that the February 20, 2013 Notice of Claim was sent to and received by both employer and carrier. *Id.*

On April 29, 2013, employer sent a Response to the Notice of Claim stating that it admitted to the five assertions under 20 C.F.R. §725.408 regarding liability. Employer did not concede, however, that it was the responsible operator because "the issue will not be decided for some months or years" and there was "uncertainty" about whether

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[5] The regulation at 20 C.F.R. §725.408(a)(2) provides:

> If the operator contests its identification, it shall, on a form supplied by the district director, state the precise nature of its disagreement by admitting or denying each of the following assertions. In answering these assertions, the term "operator" shall include any operator for which the identified operator may be considered a successor operator pursuant to §725.492.
>
> (i) That the named operator was an operator for any period after June 30, 1973;
> (ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;
> (iii) That the miner was exposed to coal mine dust while working for the operator;
> (iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and
> (v) That the operator is capable of assuming liability for the payment of benefits.

claimant had any subsequent coal mine employers. Director's Exhibit 26. Employer did not otherwise address the liability issue or submit evidence contesting liability as the responsible operator. The record contains no response from carrier to the Notice of Claim.

On August 20, 2013, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) to employer and carrier, which identified carrier as liable for the payment of benefits. Director's Exhibit 28. The SSAE notified employer and carrier that they could no longer submit evidence contesting liability on any of the grounds set forth at 20 C.F.R. §725.408(a)(2). *Id*. The SSAE further notified the parties that they had until October 19, 2013 to submit any additional documentary evidence and to identify any witnesses relevant to liability that they intended to call if the case was referred to the Office of Administrative Law Judges (OALJ). The SSAE explained the consequences of failure to submit a timely response, stating:

> Absent 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 Office of Administrative Law Judges.

Director's Exhibit 28, *citing* 20 C.F.R. §725.456(b)(1).[6] The record contains postal receipts indicating that the August 20, 2013 SSAE was sent to and received by both employer and carrier. Director's Exhibit 28.

On September 20, 2013, employer submitted the Operator Response to Schedule for Submission of Additional Evidence and checked a box indicating that it agreed that it is the responsible operator.[7] Director's Exhibit 29. The record contains no response from carrier to the SSAE. Neither employer nor carrier submitted any documentary evidence or named any witnesses pertaining to liability.

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[6] The regulation at 20 C.F.R §725.456(b)(1) provides, in pertinent part, that "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances."

[7] Attached to employer's response to the Schedule for Submission of Additional Evidence accepting liability was a pleading titled "Response to Schedule" in which employer denied liability. Director's Exhibit 29. However, the attachment did not contain any other specific information or argument. *Id*.

In a Proposed Decision and Order awarding benefits dated December 30, 2013, the district director found that the evidence established the existence of complicated pneumoconiosis and that, therefore, claimant established entitlement to benefits through the irrebuttable presumption at 20 C.F.R. §718.304. Director's Exhibit 38. The district director named Paramont, as insured by carrier, as the responsible operator liable for the payment of claimant's benefits. *Id*.

Employer and carrier jointly responded to the Proposed Decision and Order on January 7, 2014, contesting claimant's entitlement to benefits, but conceding that the evidence established that claimant's last employment of over one year was with Paramont, and that Paramont was capable of paying benefits.[8] Director's Exhibit 39. Employer requested that the Proposed Decision and Order be revised to deny benefits or that the claim be referred to the OALJ for a hearing.[9] *Id*. The case was transferred to the OALJ on February 27, 2014. Director's Exhibit 44.

While the case was pending at the OALJ, on April 24, 2014, carrier submitted a letter to the district director contesting its liability as the properly named insurance carrier. Carrier acknowledged that claimant's employment with Paramont, which ended on December 14, 2012, fell within the period covered by carrier.[10] Carrier Exhibit 2. Carrier asserted, however, that because claimant's complicated pneumoconiosis "appears

[8] Paramount stated, however, that it was reserving the right to contest liability if later evidence established that claimant returned to coal mine employment for another operator for a one year cumulative period. Director's Exhibit 39.

[9] On January 21, 2014, the district director issued an Initial Determination reaffirming claimant's entitlement to benefits and the liability of employer/carrier for payment of benefits. Director's Exhibit 40. On February 6, 2014, counsel, on behalf of employer and carrier, stated that he had received the district director's Initial Determination and while still contesting liability and entitlement, was submitting a Virginia Workers' Compensation Commission Order accepting a Settlement Agreement between claimant and employer in the amount of $25.79 a week for life. Director's Exhibit 42. The district director issued an Amended Award of Benefits on February 12, 2014, which included an offset of $111.75 per month based on the state settlement agreement. Director's Exhibit 43.

[10] Carrier's April 24, 2014 letter lists the dates of claimant's employment and carrier's coverage as December 2013. Carrier Exhibit 2. This appears to be a typographical error as the rest of the record indicates that the dates in question arose in December 2012.

to have arisen prior to [the start of carrier's] coverage" on December 13, 2012, carrier is not the properly named insurance carrier. *Id*. The record contains no response from the district director.

Upon transfer to the OALJ, the case was assigned to Administrative Law Judge Larry W. Price (the administrative law judge) who held a hearing on April 20, 2016. At the hearing, claimant appeared with his attorney, and employer and carrier each appeared through separate counsel. The Director's office did not attend the hearing. Carrier contested its liability as the responsible carrier and proffered the March 26, 2015 deposition testimony of Dr. Shrader, claimant's treating physician, which was admitted into the record as Carrier's Exhibit 1. Hearing Transcript at 7-8, 10-13. Carrier argued that Dr. Shrader's testimony clarified that his December 19, 2012 note diagnosing claimant with "advanced coal worker's pneumoconiosis with interstitial fibrosis," which was already contained in the record, was a diagnosis of complicated pneumoconiosis. Carrier asserted that it is not the correct insurance carrier because Dr. Shrader's deposition testimony establishes that claimant had complicated pneumoconiosis years prior to the start of carrier's coverage period. *Id*. at 13.

After the hearing, carrier asked to be dismissed from the case. Carrier's May 16, 2016 Closing Argument. The Director responded that carrier failed to submit its liability evidence when the case was before the district director and that "extraordinary circumstances" did not exist permitting the consideration of Dr. Shrader's deposition testimony for the first time at the hearing.[11] Director's July 22, 2016 Letter Brief. Carrier replied that, in essence, Dr. Shrader was already identified as a witness because Dr. Shrader's December 19, 2012 note diagnosing advanced coal worker's pneumoconiosis was designated as Director's Exhibit 18, and had been relied upon by the district director in finding that the evidence established the existence of complicated pneumoconiosis. Carrier's August 8, 2016 Letter Response. Carrier thus asserted it did not fail to comply with the regulations. *Id*.

On October 20, 2016, the administrative law judge issued his Decision and Order Awarding Benefits. The administrative law judge held that carrier could not rely on Dr. Shrader's deposition testimony because it was not properly submitted while the claim was before the district director. Decision and Order at 11. The administrative law judge stated that under 20 C.F.R. §725.456(b)(1), any documentary evidence pertaining to the

[11] The regulation at 20 C.F.R. §725.457(c)(1) provides, "[i]n the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director."

liability and/or identification of a potentially liable responsible operator/carrier that was not admitted to the district director cannot be admitted into the hearing record absent a showing of extraordinary circumstances. *Id*. at 10. The administrative law judge noted that carrier did not respond to the district director's Notice of Claim or to the SSAE. Instead, on April 24, 2014, sixteen months after claimant filed his claim, and almost two months after the case had been transferred to the OALJ, carrier sent a letter to the district director challenging its designation as carrier. *Id*.; Carrier's Exhibit 2. Carrier indicated that it was contesting the responsible carrier issue at the hearing and, for the first time, submitted Dr. Shrader's deposition as evidence relevant to the liability issue. Decision and Order at 11; Carrier's Exhibit 1. Because carrier did not timely submit evidence contesting its liability before the district director, the administrative law judge found that Dr. Shrader's deposition could not be considered for the purpose of determining carrier's liability. *Id*., *citing* 20 C.F.R. §725.456(b)(1).

The administrative law judge additionally found, moreover, that even if Dr. Shrader's deposition could be considered on the liability issue, it was insufficient to establish that claimant was diagnosed with complicated pneumoconiosis prior to January 15, 2012, the date of the first x-ray evidence of complicated pneumoconiosis. Decision and Order at 12. Consequently, it was also insufficient to establish that claimant's complicated pneumoconiosis existed prior to the date that carrier's insurance policy became effective. *Id*.

Carrier argues on appeal that neither the Notice of Claim nor the SSAE required an affirmative response from *carrier* regarding its liability. Carrier's Brief at 13, 21. Rather, carrier contends, they only required such a response from *operators*. *Id*. Carrier asserts that because the regulations failed to address this problem, they should be interpreted against the draftsman pursuant to a doctrine of contract law called *contra proferentem*.[12] *Id*. These arguments are without merit.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "the carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osbourne*], 895 F.2d 949, 951, 13 BLR 2-313, 2-319 (4th Cir. 1990). The Board has similarly held that rules and regulations regarding liability evidence apply to carriers as well as to operators. *See Olenick v. Olenick Brothers Coal Co*., BRB No.

[12] The doctrine of *Contra proferentem* is "used in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language." *Black's Law Dictionary* 296 (5th ed. 1979).

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.); Director's Brief at 5. For this reason, the regulations 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.[13] 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osbourne*, 895 F.2d at 949, 952, 13 BLR at 2-319-20. In addition, contrary to carrier's argument, the SSAE states that "*any party* that wishes to submit liability evidence or identify liability witnesses" must notify the district director's office within the appropriate time frames. Director's Exhibit 28 at 5 (emphasis added). Thus, we reject carrier's argument that the administrative law judge erred in applying the regulations regarding the identification and submission of liability evidence to carrier.

We also reject carrier's contention that the administrative law judge erred in finding that the regulations pertaining to liability evidence apply to Dr. Shrader's deposition testimony. The regulations require that any witness offering testimony relevant to the liability of the responsible operator, absent extraordinary circumstances, must have been identified as a potential witness while the case was still pending before the district director. 20 C.F.R. §725.457(c)(1). Likewise, 20 C.F.R. §725.414(c) provides that "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" and that 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) (emphasis added).

Further, contrary to carrier's contention, the inclusion of Dr. Shrader's December 19, 2012 note diagnosing "advanced coal worker's pneumoconiosis" in the record did not equate to prior identification of Dr. Shrader as a liability witness and fulfill carrier's obligations under the regulations. Carrier's Brief at 12. The August 20, 2013 SSAE, referenced by carrier, Carrier's Brief at 18, does not rely on Dr. Shrader's December 18, 2012 note in support of the district director's finding of complicated pneumoconiosis, or in its liability analysis. Director's Exhibit 28.

Thus, as the administrative law judge properly found, carrier was required to demonstrate extraordinary circumstances for the consideration of Dr. Shrader's testimony

[13] Here, the record contains postal receipts indicating that the February 20, 2013 Notice of Claim was sent to and received by carrier. Director's Exhibit 24.

on the issue of its liability.[14] *See* 20 C.F.R. §§725.457(c)(1), 725.414(c); Decision and Order at 10. The SSAE also emphasized this requirement, noting that liability evidence would not be admitted at the OALJ level absent a showing of extraordinary circumstances. Director's Exhibit 28. Yet carrier did not argue before the administrative law judge that its failure to provide notice regarding Dr. Shrader's deposition testimony should be excused due to extraordinary circumstances, and carrier makes no such argument before the Board.

In sum, carrier was properly notified of its potential liability for benefits in the February 20, 2013 Notice of Claim. Director's Exhibit 24. Finding that claimant was entitled to benefits based on complicated pneumoconiosis, the district director issued the SSAE, a Proposed Decision and Order, an Initial Determination, and then an Amended Award of Benefits, all naming carrier as the responsible insurance carrier. Director's Exhibits 28, 38, 40, 43. As the administrative law judge correctly found, despite repeated notification, carrier did not challenge the determination naming it the responsible carrier while the case was before the district director or provide the names of any witnesses it might rely on in challenging this determination. Decision and Order at 10. Consequently, the administrative law judge properly found that carrier was restricted from relying on the deposition testimony of Dr. Shrader regarding the issue of liability because this evidence was not timely submitted to the district director.[15] 20 C.F.R. §725.457(c)(1); Decision and Order at 10-11.

[14] Although the administrative law judge treated Dr. Shrader's deposition as documentary evidence governed by 20 C.F.R. §725.456, rather than as witness testimony governed by 20 C.F.R. §725.457, any error is harmless because the regulations similarly require that in the absence of extraordinary circumstances, documentary evidence pertaining to liability not submitted to the district director shall not be admitted into the hearing record. *Compare* 20 C.F.R. §725.456(b)(1) *with* 20 C.F.R. §725.457(c)(1); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 10-11; Director's Brief at 3 n.1.

[15] As the Director correctly asserts, contrary to carrier's arguments, the issue is not whether carrier had a right to depose Dr. Shrader. Director's Brief at 5; Carrier's Brief at 20. Rather, the issue is whether carrier could proffer and rely on Dr. Shrader's testimony for the first time before the administrative law judge for the purposes of challenging liability.

Moreover, despite carrier's arguments to the contrary, we see no error in the administrative law judge's reliance on *Marfork Coal Co. v. Weis*, 251 F. Appx. 229 (4th Cir. 2007), wherein the Fourth Circuit held that medical evidence cannot be used to

Moreover, after declining to consider Dr. Shrader's deposition relevant to carrier's liability in this claim, the administrative law judge alternatively found that Dr. Shrader's deposition testimony did not establish that claimant had complicated pneumoconiosis prior to the date that carrier's insurance policy became effective. *See* Decision and Order at 11-12. The administrative law judge noted that Dr. Shrader testified that he based his December 19, 2012 diagnosis of "advanced coal worker's pneumoconiosis" on an x-ray interpretation from 2007. Decision and Order at 12; Employer's Exhibit 1 at 9-10. Dr. Shrader stated that the x-ray report listed "extensive bilateral interstitial lung disease, large central hilar adenopathy, and extensive diffuse reticulonodular interstitial opacities." Decision and Order at 12; Employer's Exhibit 1 at 10. The administrative law judge correctly observed, however, that Dr. Shrader did not indicate that the x-ray specifically showed complicated pneumoconiosis, and the x-ray interpretation itself is not contained in the record. Decision and Order at 12; Employer's Exhibit 1 at 9-10. Thus, the administrative law judge permissibly found that his opinion is not sufficiently documented to establish the date of onset of the disease.[16] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); Decision and Order at 12; Employer's Exhibit 1 at 12. Rather, the administrative law judge found that the date of onset of complicated pneumoconiosis could not be established any earlier than

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challenge a party's liability for a claim, if not first submitted to the district director. *Weis*, 251 F. Appx. 229, 235-36 (4th Cir. 2007) *aff'g Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc) (McGranery & Boggs, JJ., dissenting); Decision and Order at 11.

[16] Although carrier asserts that the January 15, 2013 x-ray evidence of category B-sized opacities indicates that claimant's complicated pneumoconiosis preceded carrier's period of insurance coverage, the only medical evidence upon which it relies is Dr. Shrader's opinion. *See* Carrier's Reply Brief at 6-7. As we have affirmed the administrative law judge's determination that Dr. Shrader's opinion is insufficient to establish the existence of complicated pneumoconiosis, and carrier points to no other medical evidence establishing an earlier onset date, its arguments that "common sense" dictates an earlier onset date are rejected. *Id.* In addition, in light of our affirmance of the administrative law judge's treatment of Dr. Shrader's opinion, we find no merit to carrier's arguments that Dr. Shrader's opinion is entitled to controlling weight as that of the treating physician, or that the administrative law judge failed to give adequate consideration to Dr. Shrader's testimony. *See* 20 C.F.R. §718.104(d)(5); Carrier's Brief at 18.

January 15, 2013, the date of the first x-ray evidence of the disease. Decision and Order at 12.

In light of the administrative law judge's permissible alternative finding, carrier has not shown how the procedural errors it alleges made any difference.[17] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). For the foregoing reasons, we affirm the administrative law judge's finding that carrier is liable for the payment of benefits in this claim.

[17] Therefore, any error by the administrative law judge in "excluding" Dr. Shrader's deposition testimony without adequate notice, is also harmless, and we reject carrier's argument to the contrary. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni*, 6 BLR at 1-1278; Carrier's Brief at 19-21.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge