U.S. Department of Labor

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

BRB Nos. 18-0351 BLA
and 18-0351 BLA-A

BEVERLY HOLT (obo THOMAS HOLT, deceased miner)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/16/2020
and	)	
CONSOL ENERGY, INCORPORATED	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	ORDER on MOTION for RECONSIDERATION

On August 15, 2018, claimant filed a timely motion for reconsideration of the Board's Order in *Holt v. Consolidation Coal Co.*, BRB Nos. 18-0351 BLA/A (Aug. 9, 2018) (Order). 20 C.F.R. §802.407. Claimant challenges the Board's dismissal of his cross-appeal, BRB No. 18-0351 BLA-A.[1] He contends the Board did not fully address the

[1] The Board held that claimant's cross-appeal, dated and electronically filed on June 4, 2018, was untimely and should have been filed on or before April 27, 2018. Order at 2; *see* 20 C.F.R. §§802.205, 802.221(a).

appropriate appeal-filing deadline under 20 C.F.R. §802.205. Moreover, he avers the Board's cross-appeal deadline is not "jurisdictional," citing *Hamer v. Neighborhood Housing Services of Chicago*, 138 S.Ct. 13 (2017), and the Board erred in dismissing his cross-appeal. Employer responds, urging the Board to affirm its Order dated August 9, 2018, asserting the notice of cross-appeal was untimely filed and nothing in *Hamer* prevents an agency from enforcing its own regulations. Thus, employer urges the Board to deny claimant's motion for reconsideration. Claimant filed a reply brief in support of his motion for reconsideration. For the reasons that follow, we grant claimant's motion for reconsideration, but deny the relief requested.

> At issue is Section 802.205 of the Board's regulations, which states:
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> a) A notice of appeal, other than a cross-appeal, must be filed within 30 days from the date upon which a decision or order has been filed in the Office of the [District Director] pursuant to section 19(e) of the [Longshore and Harbor Workers' Compensation Act] ….
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> b) If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal by filing a notice of appeal *within 14 days of the date on which the first notice of appeal was filed, or within the time prescribed by paragraph (a) of this section, whichever period last expires*. In the event that such other party was not properly served with the first notice of appeal, such party may initiate a cross-appeal within 14 days of the date that service is effected.
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> c) Failure to file within the period specified in paragraph (a) or (b) of this section (whichever is applicable) shall foreclose all right to review by the Board with respect to the case or matter in question. Any untimely appeal will be summarily dismissed by the Board for lack of jurisdiction.

20 C.F.R. §802.205 (emphasis added).

Claimant first contends the Board did not fully address Section 802.205(b) with regard to the timeliness of the notice of his cross-appeal, as it held only that the cross-appeal should have been filed on or before April 27, 2018, which is 14 days from April 13, 2018, the date employer filed its notice of appeal. Order at 2. Claimant is correct. The regulation provides an alternate time limitation which should have been considered: whether the notice of cross-appeal was filed within 30 days of the date the administrative law judge's Order on Reconsideration was filed in the district director's office. A cross-appeal is timely if filed within 14 days of the date the first notice of appeal was filed or within 30 days of the date the administrative law judge's decision and order was filed,

"whichever period last expires." 20 C.F.R. §802.205(a), (b).

The administrative law judge's Order on Reconsideration was filed in the district director's office on April 5, 2018. Thirty days from that date was May 5, 2018. Claimant's notice of cross-appeal should have been filed on or before May 7, 2018, as May 5 was a Saturday. 20 C.F.R. §§802.205(a), (b), 802.221(a). Claimant's cross-appeal, filed with the Board on June 4, 2018, is not timely with respect to either employer's notice of appeal (deadline of April 27, 2018) or the date of filing of the administrative law judge's Order on Reconsideration (deadline of May 7, 2018). We therefore reaffirm our holding that claimant's notice of cross-appeal was untimely filed.

We next address claimant's argument that, pursuant to *Hamer*, 138 S.Ct. 13, the Board erred in dismissing, sua sponte, claimant's untimely cross-appeal. He asserts Section 802.205(b) is a non-jurisdictional, claim-processing rule that a party must raise in order to be implemented, and application of the rule may be waived or forfeited. As employer did not object to the timeliness of claimant's cross-appeal, he asserts the defense was forfeited and the Board must accept and address his cross-appeal. We disagree.

In *Hamer*, the petitioner filed two motions with the district court within the 30-day timeframe for filing an appeal of that court's decision to the court of appeals. The district court granted the petitioner's motions, allowing her attorney to withdraw from the case and giving her a two-month extension to file her appeal. The respondents did not move for reconsideration or enter any objections to the court's order. In the docketing statement filed with the United States Court of Appeals for the Seventh Circuit, the respondents stated the petitioner filed a timely notice of appeal from the district court's final order. However, the Seventh Circuit, on its own, questioned the timeliness of the notice of appeal and instructed the parties to address the issue. At that juncture, the respondents first raised untimeliness of the appeal as a defense. The court agreed with the respondents and dismissed the appeal for lack of jurisdiction. *Hamer*, 138 S.Ct. at 18.

Hamer involved whether the court of appeals erred in dismissing the notice of appeal for lack of jurisdiction. The United States Supreme Court held that the rule setting the time limit for extending the time to file a notice of appeal, Federal Rule of Appellate Procedure (FRAP) 4(a)(5)(C), is a non-jurisdictional claim-processing rule which may be waived or forfeited, clarifying that an appeal deadline prescribed by Congress is jurisdictional, but one set forth only in court rules, like the FRAP, is not.[2] *Hamer*, 138

[2] FRAP 4(a)(5)(C), which addresses motions for an extension of time to file an appeal, provides: "No extension under this Rule 4(a)(5) may exceed 30 days after the

S.Ct. at 17;[3] *Bowles v. Russell*, 551 U.S. 205 (2007); *Kontrick v. Ryan*, 540 U.S. 443 (2004). Therefore, the Supreme Court held the circuit court erred in dismissing the appeal for lack of jurisdiction and remanded the case for further proceedings.[4] *Hamer*, 138 S.Ct. at 21-22.

Initially, claimant is correct, and employer agrees: Section 802.205(b), which governs the filing of cross-appeals with the Board, is a claim-processing rule and is not jurisdictional. *Hamer*, 138 S.Ct. at 21-22; *Gunter v. Bemis Co., Inc.*, 906 F.3d 484, 492-493 (6th Cir. 2018) (FRAP 4(a)(3) is a mandatory claim-processing rule).[5] Only the time

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prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later."

[3] The Supreme Court held that "a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time," while "[a] time limit not prescribed by Congress ranks as a mandatory claim-processing rule…." *Hamer*, 138 S.Ct. at 17. The Court explained:

> This case presents a question of time, specifically, time to file a notice of appeal from a district court's judgment. In *Bowles v. Russell*, 551 U.S. 205, 210–213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), this Court clarified that an appeal filing deadline prescribed by statute will be regarded as "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal. But a time limit prescribed only in a court-made rule, *Bowles* acknowledged, is not jurisdictional; it is, instead, a mandatory claim-processing rule subject to forfeiture if not properly raised by the appellee. *Ibid.*; *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Because the Court of Appeals held jurisdictional a time limit specified in a rule, not in a statute, 835 F.3d 761, 763 (C.A.7 2016), we vacate that court's judgment dismissing the appeal.

Hamer, 138 S.Ct. at 16-17.

[4] The Court specifically reserved the issue of whether a mandatory claim-processing rule may be subject to equitable exceptions. *Hamer*, 138 S.Ct. at 18 n.3. It also did not address whether the respondents forfeited the defense by not objecting. *Id.* at 22. On remand, the circuit court determined the respondents admitted in their docketing statement that the appeal was timely filed and, thereby, waived their right to challenge its timeliness. *Hamer v. Neighborhood Housing Services of Chicago*, 897 F.3d 835 (7th Cir. 2018).

[5] Section 802.205(b) mirrors the FRAP. FRAP 4(a)(3) states: "*Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within

for filing an initial appeal with the Board, as set forth by statute at 33 U.S.C. §921(a), (b)(5), involves a jurisdictional deadline. *See Hamer*, 138 S.Ct. at 20; *Gunter*, 906 F.3d at 492. Although the Board dismissed claimant's cross-appeal because it was untimely filed and not for "lack of jurisdiction," *see* Order at 2, to the extent Section 802.205(c) implies the time for filing a cross-appeal under Section 802.205(b) is jurisdictional, the regulation is overbroad.[6]

As claimant correctly argues, Section 802.205(b) is a claim-processing rule and must be applied if properly invoked but may be waived or forfeited. Based on this premise, claimant asserts employer forfeited its right to challenge the timeliness of the cross-appeal by not objecting to it in its initial brief in support of its appeal, the first pleading it filed with the Board after claimant filed his notice of cross-appeal. Absent any objection, he asserts there has been no invocation of the rule and the Board must accept the cross-appeal. Claimant's logic is flawed; we do not read *Hamer* as rendering the Board powerless to enforce its own rules.

Where a mandatory claim-processing rule has been "properly invoked, [it] must be enforced. . . ." *Hamer*, 138 S.Ct. at 17. If employer had objected to the untimely filing of claimant's cross-appeal in its brief, the Board would have been compelled to dismiss the cross-appeal. Because employer did not invoke the time limitation as a defense at that time, we are not *compelled* to reach the same result. *Id.* at 18; *Eberhart v. United States*, 546 U.S. 12, 19 (2005). But this does not mean the only way to invoke a court's rule is for the parties to raise it.[7] Rather, "a party's failure to comply with a [non-jurisdictional rule] *may be* excused by the reviewing court." *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 472 (3d Cir. 2017) (emphasis added) (court excused untimely filing of cross-appeal; factors discussed); *see also Iopa v. Saltchuk-Young Bros., Ltd.*, 916 F.3d 1298 (9th Cir. 2019) (administrative law judge reasonably denied attorney's fee under the Longshore and Harbor Worker's Compensation Act where fee petition was untimely filed and counsel

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14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." FRAP 4(a)(1) contains the 30-day appeal deadline.

[6] We note the second sentence of Section 802.205(c) specifically states only that late "appeals" will be dismissed for lack of jurisdiction; however, in light of the first sentence of subsection (c) which references cross-appeals in subsection (b), there is potential for confusion.

[7] Indeed, accepting such an interpretation would leave the Board, or any court, in the unworkable situation of depending on the parties to control its own docket.

failed to establish excusable neglect). Thus, non-compliance with a non-jurisdictional rule need *not* be excused.

Section 802.217 gives the Board the discretion to accept late-filed papers, except notices of appeal. 20 C.F.R. §802.217. Claimant's notice of cross-appeal was untimely filed and he did not file a timely request for an extension of time to file his cross-appeal. 20 C.F.R. §802.217(b), (c). He also did not file an accompanying motion seeking acceptance of his cross-appeal out of time. 20 C.F.R. §802.217(e). As accepting a late-filed paper is within the Board's discretion, we address a party's reasons for such a late filing. 20 C.F.R. §802.217(c), (e);[8] *see Hamer*, 138 S.Ct. at 18 n.3 (Court reserved question of whether equitable considerations apply); *see also Nutraceutical Corp. v. Lambert*, 139 S.Ct. 710, 714 (2019) (question is whether language of rule leaves room for equitable tolling); *Mathias*, 876 F.3d at 472-473 (equitable factors considered in court's decision of whether to excuse late cross-appeal); *Networkip, LLC v. F.C.C.*, 548 F.3d 116 (D.C. Cir. 2008) (agency's power to waive a strict deadline for filing is substantial); *In re Wilkins*, 587 B.R. 97 (B.A.P. 9th Cir. 2018) (excusable neglect request failed).

In his various pleadings, claimant stated only that there was "procedural confusion" in this case due to nearly simultaneous filings with the Board and the administrative law judge. This does not excuse the late cross-appeal, as the parties could calculate the filing deadlines once the district director filed the administrative law judge's Order on Reconsideration. Moreover, claimant was served with employer's notice of appeal following the filing of the administrative law judge's Order on Reconsideration. Claimant also asserts employer would not be prejudiced if the Board accepted his cross-appeal. But lack of prejudice, alone is insufficient to excuse a late filing. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (to prove procedural default, party must show cause and prejudice). Claimant has given us no reason to conclude that accepting his untimely cross-appeal is warranted. 20 C.F.R. §802.217(e). Therefore, we deny claimant's motion to accept his cross-appeal as timely and reaffirm our dismissal of the untimely cross-appeal.[9] 20 C.F.R. §§802.205, 802.219.

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[8] The party seeking additional time to file documents must "specify the reasons for the request[.]" 20 C.F.R. §802.217(c). Where there has been no timely request for additional filing time, the "paper submitted to the Board outside the applicable time period . . . shall be accompanied by a separate motion stating the reasons therefor and requesting that the Board accept the paper although filed out of time." 20 C.F.R. §802.217(e).

[9] The issue raised in claimant's cross-appeal, the onset date of his benefits, is a question of fact which may be raised in a motion for modification. 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.310.

As we have denied the relief requested in claimant's motion for reconsideration, as well as the motion to accept his cross-appeal as timely filed, we also deny, as moot, employer's motions for leave to file a motion to dismiss claimant's cross-appeal, to dismiss claimant's cross-appeal, and to strike claimant's combined cross-appeal and response brief.

Employer has filed its Petition for Review and supporting brief in BRB No. 18-0351 BLA and we accept claimant's brief in response to employer's appeal. 20 C.F.R. §§802.211, 802.212.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge