U.S. Department of Labor

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

BRB No. 17-0401 BLA

JAY T. MULLINS Claimant-Respondent v. ROCKSTORE MINING Employer-Petitioner and KENTUCKY CENTRAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/17/2019 ORDER on RECONSIDERATION

Employer/carrier (employer) has filed a timely motion for reconsideration of the Board's decision in *Mullins v. Rockstore Mining*, BRB No. 17-0401 BLA (Apr. 26, 2018) (unpub.), affirming employer's designation as the responsible operator.[1] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the

[1] Chief Administrative Appeals Judge Betty Jean Hall was on the original panel but has since retired from the Board. 20 C.F.R. §802.407(a).

Director), responds in opposition to employer's motion. We deny the motion and affirm the Board's decision.[2]

Employer does not challenge claimant's entitlement to benefits. *Mullins*, BRB No. 17-0401 BLA at 2 n.2. The Board previously affirmed the administrative law judge's determination employer is the responsible operator, on alternative grounds, agreeing with the Director that employer waived its right to contest its designation by not timely responding to the Schedule for the Submission of Additional Evidence (SSAE).[3] 20 C.F.R.

[2] Employer argues for the first time on reconsideration that the manner in which Department of Labor administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Petition for Reconsideration at 6-7. Because employer first raised the Appointments Clause issue only after the Board issued its decision on the merits, employer forfeited the issue. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256-57 (6th Cir. 2018) (holding that the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[3] The regulation at 20 C.F.R. §725.412(a), governing the obligation of the parties to respond to the Schedule for the Submission of Additional Evidence states as follows:

> (a)(1) Within 30 days after the district director issues a schedule pursuant to §725.410 of this part containing a designation of the responsible operator liable for the payment of benefits, that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation.
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> (2) If the responsible operator designated by the district director does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim.

20 C.F.R. §725.412(a).

§725.412(a). Employer asserts the Director was precluded from arguing SSAE waiver to the Board because she did not expressly raise the issue before the administrative law judge and responded to employer's motion for summary judgment with detailed arguments regarding the merits of the responsible operator issues raised by employer in its motion. Employer's Petition for Reconsideration at 3.

We reject employer's argument. The facts of this case establish, as a matter of law, employer did not timely respond to the SSAE in accordance with 20 C.F.R. §725.412(a), and therefore waived its right to contest liability for benefits. *See Mullins*, BRB No. 17-0401 BLA, slip op. at 5. Moreover, as noted by the Director, "there is no basis to conclude that [employer] should be relieved of the consequences of its failure [to comply with the regulation] simply because the Director responded in kind to [employer's] liability merits arguments before the administrative law judge." Director's Brief at 5.

Accordingly, we deny employer's motion for reconsideration. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b); 802.407(a); 802.409.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge