U.S. Department of Labor

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

BRB No. 18-0367 BLA

ROBERT LEE BURGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T & W SERVICES, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 07/10/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Corrected Decision and Order Awarding Benefits and the Order Denying Employer's Motion for Reconsideration of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Corrected Decision and Order Awarding Benefits and the Order Denying Employer's Motion for Reconsideration (2016-BLA-05974) of Administrative Law Judge Scott R. Morris, rendered 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 miner's subsequent claim filed on July 21, 2015.[1]

The administrative law judge issued a Decision and Order Awarding Benefits on January 30, 2018, finding claimant established complicated pneumoconiosis and invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).[2] The decision identified two dates for the commencement of benefits - February 2013, the month in which the radiographic evidence first revealed complicated pneumoconiosis, and July 2015, the month in which claimant filed this subsequent claim. On February 28, 2018, the administrative law judge issued a Corrected Decision and Order Awarding Benefits, which was identical in all respects to the original decision, except he identified February 1, 2013 as the commencement date for benefits. On March 30, 2018, employer filed a motion for reconsideration, which he denied on April 19, 2018.

On appeal, employer argues the administrative law judge erred in admitting Claimant's Exhibit 1, Dr. Crum's March 2013 positive reading for complicated pneumoconiosis of the February 22, 2013 x-ray, without giving employer the opportunity to submit a rebuttal reading of that film. Based on this alleged evidentiary error, employer challenges his finding that claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). Employer further contends the administrative law judge erred in relying on

[1] Claimant filed a prior claim on May 18, 1993, which was denied by Administrative Law Judge Joseph Kane on January 13, 1999. Director's Exhibit 1.

[2] The administrative law judge also found claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Corrected Decision and Order at 17, 17 n. 23.

Dr. Crum's reading in determining the commencement date for benefits. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to affirm the administrative law judge's evidentiary ruling and his finding that claimant is entitled to benefits as of February 2013.[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.[4] 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016).

Employer's sole argument on appeal is that it was improperly denied the opportunity to obtain and submit a post-hearing rebuttal reading of Dr. Crum's interpretation of the February 22, 2013 x-ray. Employer's allegation of error is without merit.

On March 8, 2017, the administrative law judge issued a Notice of Hearing and Pre-Hearing Order, advising that "[e]xcept for good cause shown or with the consent of the parties, no evidence will be admitted unless it is identified and presented to the other parties [twenty] calendar days or more before the hearing." March 8, 2017 Order, *citing* 20 C.F.R.

[3] We reject the Director's assertion that employer's appeal may be dismissed as untimely because the May 16, 2018 notice of appeal states that employer appeals the Decision and Order "issued on January 30, 2018." Director's Brief at 9, *citing* 20 C.F.R. §802.205(a) (requiring appeals to be filed no more than thirty days from the date the decision being appealed from is filed in the district director's office). Employer's brief clearly indicates that employer appeals the Corrected Decision and Order issued on February 28, 2018, and the Order Denying Employer's Motion for Reconsideration, issued on April 19, 2018. *See* 20 C.F.R. §802.208(b) ("[A]ny written communication which reasonably permits identification of the decision from which an appeal is sought . . . shall be sufficient notice for purposes of §802.205."). We consider employer's May 16, 2018 appeal to have been timely filed within thirty days of the April 19, 2018 Order Denying Employer's Motion on Reconsideration.

[4] Because claimant's most recent coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

§ 725.456(b)(2).[5] On August 11, 2017, claimant submitted an evidence summary form and a copy of Dr. Crum's x-ray reading, marked as Claimant's Exhibit 1. It is undisputed that employer received Claimant's Exhibit 1 on August 18, 2017, twenty-three days before the hearing. Hearing Transcript at 8.

Employer requested at the September 11, 2017 hearing that it be given the opportunity to obtain and submit a rebuttal x-ray reading post-hearing. Employer argued that it was entitled to a rebuttal reading because the February 22, 2013 x-ray "was from a prior claim" and it was "unaware that [claimant would be] using this [x-ray] until we received their evidence summary form."[6] Hearing Transcript at 8. The administrative law judge denied employer's request, noting it made no effort to obtain its rebuttal reading for submission before the hearing and was aware it would not be permitted post-hearing development of evidence absent a showing of good cause, as stated in the Notice of Hearing and Pre-Hearing Order. *Id.*

In denying employer's request for reconsideration, the administrative law judge explained that employer had not shown good cause for failing to develop its rebuttal evidence before the hearing.[7] Order Denying Employer's Motion for Reconsideration at 3. He specifically noted that "employer only alleged at the hearing that it did not know of [c]laimant's intent to use Dr. Crum's February 2013 [x]-ray [reading] as affirmative evidence" and "did not allege that it was [unaware] of the existence of this [film], which may have suggested good cause under the disclosure requirements of [20 C.F.R.] § 725.413." *Id*.

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[5] Pursuant to 20 C.F.R. §725.456(b)(2), documentary evidence not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2).

[6] As noted by the administrative law judge, employer did not specify the prior claim it was referencing, but the x-ray was not developed in connection with claimant's 1999 federal black lung claim. Order Denying Employer's Motion for Reconsideration at 3 n.3.

[7] The administrative law judge also properly rejected employer's argument on reconsideration that 20 C.F.R. §725.309(c)(6) foreclosed February 1, 2013 as a proper commencement date. The regulation prevents an award of benefits in a subsequent claim "for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(6). Because claimant's prior claim was denied on August 31, 1999, the regulation only limits an award of benefits prior to that date. Order Denying Employer's Motion for Reconsideration at 3-4.

Citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc),[8] employer argues that the administrative law judge's evidentiary ruling violates its due process right to a fair hearing. We disagree. In *Shedlock*, the claimant underwent an examination with Dr. Mastrine on February 25, 1985, approximately fifty days before the hearing scheduled for April 18, 1985. *See Shedlock*, 9 BLR at 1-200. On March 25, 1985, having received a copy of Dr. Matstrine's report, employer scheduled the claimant for an examination with Dr. McQuillan on April 1, 1985. *Id.* at 1-200-01. Employer received a copy of Dr. McQuillan's report on April 16, 1985, and offered it into evidence at the hearing. *Id*. at 1-200. The claimant objected to the admission of the report, citing the twenty-day rule at 20 C.F.R. §725.456(b)(2), and the administrative law judge excluded employer's evidence. *Id*. On appeal, the Board held claimant's submission of an examination report "just prior to the deadline imposed by the [twenty]-day rule for submitting documentary evidence into the record, coupled with the administrative law judge's refusal to allow employer the opportunity to respond to the claimant's introduction of this 'surprise' evidence, constituted a denial of employer's due process right to a fair hearing." *Id*.

Here, the facts differ materially from *Shedlock*. As the administrative law judge found, employer does not assert it was unaware of the February 22, 2013 x-ray prior to claimant's submission of his evidence summary form and thus was not "surprised" by its existence nor denied the opportunity to timely obtain a reading of it.[9] Further, even after employer became aware that claimant intended to submit Dr. Crum's reading, it took no action to obtain a rebuttal reading until it raised the issue at the hearing. Under these circumstances, we discern no abuse of discretion by the administrative law judge in finding

[9] During claimant's August 3, 2016 deposition, employer's counsel asked claimant whether he had ever been diagnosed with pneumoconiosis. Claimant and his wife described that he was told three years or four years earlier that an x-ray showed a 37.7 millimeter nodule of complicated pneumoconiosis in his lung. Employer's Exhibit 1 at 34-36. Their testimony is consistent with Dr. Crum's February 22, 2013 x-ray reading. Thus, while employer was aware in 2013 that claimant had a positive x-ray reading for complicated pneumoconiosis, it did nothing during the thirteen month period from the time of the deposition to the September 11, 2017 hearing to obtain rebuttal evidence. Based on these facts, we agree with the Director that the administrative law judge's evidentiary ruling does not violate the purposes of the twenty-day rule at 20 C.F.R. §725.456(b), which is "to expedite the claims process, eliminate surprise and require the parties to undertake timely development of their positions." Director's Brief at 3, *quoting* 43 Fed. Reg. 36798 (Aug. 18, 1978).

that employer did not establish good cause for post-hearing development and submission of a rebuttal reading of the February 2013 x-ray. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Moreover, we reject employer's contention that the administrative law judge acted inconsistently in granting claimant's request to obtain post-hearing evidence. At the hearing, claimant's lay representative requested to obtain and submit two additional x-ray readings post-hearing as Claimant's Exhibits 2 and 3. Hearing Transcript at 9. She explained that she was unable to obtain the x-rays from the district director despite repeated attempts. *Id*. at 9-10. In agreeing to hold the record open, the administrative law judge found that claimant's lay representative was diligent in attempting to obtain the x-rays and her inability to comply with the twenty-day rule was beyond her control, "failing only for lack of access to the x-ray film." Order Denying Employer's Motion for Reconsideration at 3. In contrast, the administrative law judge found "[e]mployer did not indicate that it made any attempt to develop a rebuttal x-ray interpretation [of Claimant's Exhibit 1] prior to the hearing."[10] *Id*. at 3.

Because the administrative law judge acted rationally and did not abuse his discretion in denying employer's request to submit post-hearing evidence, we affirm his determination.[11] As employer raises no other specific allegation of error regarding the

[10] Claimant did not submit additional evidence post-hearing. Corrected Decision and Order at 5 n.5. Thus, even if the administrative law judge had erred in granting claimant's request, employer has not demonstrated harm. *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").

[11] We also reject employer's contention that Dr. Crum's x-ray reading should have been disclosed to employer upon enactment of 20 C.F.R. §725.413(c) (requiring each party to "disclose medical information the party . . . receives by sending a complete copy to all other parties in the claim within 30 days after receipt"). Employer's Brief at 6. As noted by the Director, the regulation applies only to medical evidence "that a party develops in connection with a claim for benefits." Director's Brief at 5. The February 22, 2013 x-ray read by Dr. Crum is dated subsequent to the denial of claimant's 1999 prior claim and before he filed his current claim in 2015. Because the record does not indicate that claimant had a pending claim at the time the x-ray reading was performed, employer has not established claimant was required to disclose it under the regulation. Moreover, we agree with the Director that employer forfeited the disclosure issue by failing to raise it before the administrative law judge at the hearing, in its post-hearing brief, or in its motion for reconsideration. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984).

administrative law judge's finding that claimant established complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a), it is affirmed.[12] Thus, we affirm the administrative law judge's overall determination that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis.[13] Corrected Decision and Order at 17. Further, because we reject employer's evidentiary challenge, we also affirm the administrative law judge's finding that claimant is entitled to benefits commencing February 1, 2013. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989); Corrected Decision and Order at 17.

[12] The administrative law judge found that there is no biopsy evidence for consideration at 20 C.F.R. §718.304(b). We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established complicated pneumoconiosis based on the CT scans and treatment records at 20 C.F.R. §718.304(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Corrected Decision and Order at 16.

[13] We also affirm as unchallenged the administrative law judge's finding that claimant's complicated pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. §718.203(b); *Skrack*, 6 BLR at 1-711; Corrected Decision and Order at 17.

Accordingly, the administrative law judge's Corrected Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge