BRB No. 08-0625 BLA

J.H.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERES PROCESSING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/30/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The West Virginia Coal Workers' Pneumoconiosis Fund (carrier) appeals the Decision and Order – Awarding Benefits (2005-BLA-05907) of Administrative Law Judge Michael P. Lesniak rendered on a subsequent claim filed pursuant to the provisions

of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] In his Decision and Order issued on May 13, 2008, the administrative law judge found that employer is the properly named responsible operator and that carrier is liable for the payment of benefits. The administrative law judge credited claimant with at least thirty years of coal mine employment and accepted carrier's concession that claimant is totally disabled. Thus, the administrative law judge found that claimant satisfied his burden to establish a change in one of the applicable conditions of entitlement, which served as the basis for the denial of his prior claim, pursuant to 20 C.F.R. §725.309. The administrative law judge further determined that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby entitling claimant to the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Carrier appeals, asserting that the administrative law judge erred in finding that it is liable for benefits. Carrier contends that the administrative law judge also erred in his consideration of the evidence as to the existence of simple and complicated pneumoconiosis at 20 C.F.R. §§718.202(a), 718.304, and that he erred in failing to render findings pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to affirm the administrative law judge's determination that carrier is liable for benefits. The Director asserts that if the Board holds that substantial evidence supports the administrative law judge's finding of complicated pneumoconiosis at Section 718.304, the Board must conclude that it was unnecessary for the administrative law judge to render findings at Section 718.204(c), as the element of disability causation will have been established by invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant filed a prior claim for benefits on March 20, 2000, which was denied by the district director on October 18, 2000, because the evidence was insufficient to establish that claimant was totally disabled. Director's Exhibit 1. Claimant filed a subsequent claim on August 10, 2004, which is the subject of this appeal. Director's Exhibit 3.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

A. Liability of Carrier

Carrier asserts on appeal that the administrative law judge erred in finding that it is liable for benefits. In order to address carrier's arguments on appeal, it is necessary that we summarize the procedural history of this case.

Claimant filed this subsequent claim on August 10, 2004. Director's Exhibit 3. In a Notice of Claim dated August 19, 2004, the district director designated carrier as potentially liable for benefits based on claimant's employment records and the computerized insurance records maintained by the Department of Labor, indicating that claimant last worked for employer in 1992 and that employer was insured by carrier from October 16, 1987 through June 15, 1995. Director's Exhibits 4, 6, 14, 15. The record reflects that carrier did not file a response to the Notice of Claim. On December 14, 2004, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), which identified carrier as liable for the payment of benefits. Director's Exhibit 16. On December 27, 2004, Attorney Robert Weinberger responded to the SSAE, on behalf of carrier, and stated as follows:

> Our client has advised us the coverage period for [employer] in the WV CWP Fund was effective 6/13/84 and terminated 12/11/84, Policy #84000114-302, which was several years prior to when the claimant would have worked for this company. Social Security records indicate the claimant worked for [employer] from 1991 through 1992, and the claimant noted working for this company from 1/90 through 9/92 on his federal black lung application.

Director's Exhibit 18. On March 28, 2005, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 19. Carrier requested a hearing and began paying interim benefits. Director's Exhibits 21, 24. The case was then transferred to the Office of Administrative Law Judges (OALJ). Director's Exhibit 25.

On June 28, 2006, Administrative Law Judge Richard A. Morgan issued a Notice of Hearing for October 24, 2006, but that hearing was continued at claimant's request, in order that he might obtain legal representation. On April 10, 2007, carrier filed a motion requesting that the case be remanded for modification proceedings before the district director. In a Supplemental Motion for Modification dated April 16, 2007, carrier noted that it "possesses documentary evidence proving that [the district director] mistakenly found coverage to be in effect for [employer] on the [c]laimant's last date of coal mine employment." Supplemental Motion at 3. Therefore, carrier asserted that modification

proceedings were necessary to have the district director correct a mistake in a determination of fact with regard to carrier's liability. *Id*.

On May 23, 2007, Judge Morgan denied carrier's motion to remand. Ruling and Order Denying Employer's Motion for Remand for Mistake of Fact on Responsible Operator Identity (Judge Morgan's Ruling and Order) at 5. The administrative law judge found that since carrier failed to timely submit its documentary evidence regarding employer's insurance policy before the district director, carrier was precluded from "using modification procedures to cure that dereliction" pursuant to 20 C.F.R. §725.414(d). *Id*. at 4. The administrative law judge also found that carrier failed to demonstrate "extraordinary circumstances" to justify the admission of carrier's evidence into the record. *Id*.

The record reflects that on July 3, 2007, Attorney Frederick Muth advised the OALJ that he had been retained to represent claimant. The case was then reassigned to Administrative Law Judge Michael P. Lesniak (the administrative law judge) and a hearing was held on January 15, 2008. The administrative law judge issued his Decision and Order – Awarding Benefits on May 13, 2008. The administrative law judge specifically found that "[b]ased on Judge Morgan's determination and the evidence of record," employer is the properly named responsible operator and carrier is liable for the payment of benefits. Decision and Order at 3.

Carrier asserts that the administrative law judge erred in denying its request to remand the case for modification proceedings and in finding that it is the responsible carrier. The Director urges the Board to affirm the administrative law judge's finding. The Director asserts that "carrier [can] not escape the consequences of its failure to timely develop evidence on the responsible–carrier issue by use of the modification provisions" as "[t]he evidence-limiting rules mandate the submission of all liability evidence while a claim is before the district director." Director's Letter Brief at 4. We agree with the Director.

Section 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*." 20 C.F.R. §725.456(b)(1) (emphasis added); *see also* 20 C.F.R. §725.414(d). Section 725.414(d) further states, in pertinent part, that "no documentary evidence pertaining to liability shall be admitted *in any further proceeding* conducted with respect to a claim unless it is submitted to the district director . . . ." 20 C.F.R. §725.414(d) (emphasis added). The Director asserts that "any further proceeding" referenced in Section 725.414(d), includes a modification proceeding under 20 C.F.R. §725.310. Director's Brief at 5.

In this case, the district director identified carrier as liable for benefits based on its own computerized insurance records, indicating that carrier had an insurance policy with employer in effect as of the last date of claimant's coal mine employment. As noted by Judge Morgan, "the Department of Labor's records are *prima facie* evidence of insurance coverage" pursuant to 20 C.F.R. §725.495(d). Judge Morgan's Ruling and Order at 4. Judge Morgan correctly observed that carrier failed to present any evidence to the district director to document its general contention that it was not liable for benefits. *Id*. It was only after the case was forwarded to the OALJ that carrier submitted documentary evidence purporting to establish that employer's insurance policy had been cancelled before the date of claimant's last exposure. Because carrier's evidence was first submitted to OALJ and not the district director, carrier was required to demonstrate extraordinary circumstances for the admission of that evidence into the record.[3] An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). We hold that, under the facts of this case, Judge Morgan permissibly concluded that carrier failed to establish "extraordinary circumstances" to justify late admission of its documentary evidence pursuant to 20 C.F.R. §725.456(b)(1).

We also agree with Judge Morgan's finding that the modification procedures are not an avenue by which carrier may circumvent the requirements of Section 725.456(b)(1) or Section 725.414(d), in order to have evidence considered on the responsible carrier issue that was not timely submitted to the district director. We defer to the Director's reasonable interpretation of Section 725.414(d), as precluding carrier from submitting additional liability evidence on modification. *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62 (1994). Thus, we conclude that Judge Morgan properly denied carrier's request to remand this case for further proceedings pursuant to Section 725.310,

[3] Carrier argued before Judge Morgan that because Attorney Weinberger was employed by the Attorney General's Office of the State of West Virginia, his representations regarding carrier's insurance policy dates should have been accepted as accurate business records, and that the district director erred in finding that carrier was liable. Carrier, therefore, asserts in this appeal that the district director has failed to explain why carrier was not dismissed based on the representations of Attorney Weinberger. We agree with the Director, however, that Attorney Weinberger's January 20, 2005 letter is not evidence, in and of itself, that carrier did not have a policy in effect with employer on the date of claimant's last coal mine employment. Director's Exhibit 18. That letter establishes only that carrier had informed its attorney that coverage with employer had been cancelled. *See* Carrier's Brief In Support of Petition for Review at 34 n.10; Director's Brief at 4; Director's Exhibit 18. Carrier did not submit documentary evidence to substantiate the statements of Attorney Weinberg until the claim was forwarded to the Office of Administrative Law Judges.

in order for carrier to submit additional documentary evidence to correct an alleged mistake in fact regarding its identification as the responsible carrier. We therefore affirm the administrative law judge's reliance on Judge Morgan's findings and the evidence of record to conclude that carrier is liable for the payment of benefits in this claim.

B. Merits of Entitlement

Carrier maintains that the administrative law judge erred in finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. We conclude, however, that based on the facts of this case, claimant is entitled to benefits as a matter of law.

The revised regulations set forth specific procedures to be followed in the processing and adjudication of claims filed under the Act. *See* 20 C.F.R. §725.2(a). They include provisions for identifying the contested issues to be resolved at the hearing. For example, when an operator is first notified of a claim after the district director has made findings regarding entitlement, the named operator must "indicate its agreement or disagreement with each such finding" proposed by the district director. 20 C.F.R. §725.413(a). If an optional, informal conference is held, the district director must prepare a stipulation of contested and uncontested issues for signature by the parties and the district director, and must place the stipulation in the record. *See* 20 C.F.R. §725.417(a). Regardless of whether an informal conference is held, in any case that is referred to the OALJ for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The regulations further provide that "the hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). An administrative law judge may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." 20 C.F.R. §725.463(b).

In this case, the record establishes that carrier did not challenge claimant's entitlement to benefits[4] while the case was pending before the district director and that

[4] In fact, carrier submitted evidence to the district director that supported a finding that claimant suffered from complicated pneumoconiosis, including: a reading of a September 8, 2004 x-ray by Dr. Binns, a Board-certified radiologist and B reader, as showing Category A large opacities for pneumoconiosis, and an examination report by Dr. Zaldivar dated January 7, 2005, diagnosing that claimant suffered from simple and complicated pneumoconiosis and was totally disabled. Director's Exhibits 11, 12. Dr. Zaldivar, a B reader, also read a December 29, 2004 x-ray as showing Category B large opacities for pneumoconiosis. Director's Exhibit 12.

the only issues identified by the district director to be resolved at the hearing were whether employer was the responsible operator and whether carrier was liable for benefits. On December 27, 2004, counsel for carrier responded to the SSAE issued by the district director, which found that claimant was entitled to benefits based on a finding of complicated pneumoconiosis. Counsel for carrier stated:

> ***Please note the WV CWP Fund is not contesting the entitlement of benefits in this claim, but is contesting the designation as being the Insurer for employer during the time period claimant worked for this company.*** The [CWP] Fund believes the evidence does not support this designation, and thereby, requests the matter be scheduled for hearing before an Administrative Law Judge.

Director's Exhibit 18 (emphasis added). Furthermore, on April 4, 2005, counsel for carrier responded to the Proposed Decision and Order awarding benefits, and stated:

> In response to the Proposed Decision and Order Award of Benefits issued on March 28, 2005, ***[carrier] disagrees with the Findings of Fact and Conclusions of Law listed below.***
>
> ***1. No. 5 – Designation of Peres Processing Inc. as responsible operator***.
>
> Please refer this claim to the Office of Administrative Law Judges for a formal hearing.

Director's Exhibit 24 (emphasis added). Carrier subsequently completed an Agreement to Pay Benefits, under protest, on April 5, 2005. Director's Exhibit 21. On April 11, 2005, the district director notified carrier that it should begin the payment of benefits to claimant within thirty days, and further advised, that "THIS CLAIM IS BEING FORWARDED TO THE ADMINISTRATIVE LAW JUDGE ON THE RESPONSIBLE OPERATOR ISSUE." Director's Exhibit 23 (emphasis in the original). The case was then transferred to the OALJ on May 13, 2005, and the only issue that was identified on Form CM-1025 (List of Contested Issues) for hearing was whether carrier was liable for benefits. Director's Exhibit 25. After the case was sent to the OALJ, by letter dated July 19, 2006, Attorney Hunter, with the law firm of Jackson and Kelly, advised that he had been retained to represent carrier. Counsel stated:

> [Employer/Carrier] continues to contest all issues marked at Director's Exhibit 25; and Issues No. 1, Timeliness; Issue No. 5, Pneumoconiosis; Issue No. 7, Total Disability; Issue No. 9, Disability Causation; Issue No. 13, Insurance; Issue No. 14, Subsequent Claims; and Issue No. 18, Others Issues remain contested issues.

Carrier Letter dated July 19, 2006.[5] Claimant subsequently obtained legal counsel, Attorney Muth, who appeared on his behalf at the hearing held on January 15, 2008. Claimant's counsel pointed out to the administrative law judge that carrier had not contested claimant's entitlement to benefits before the district director:

> MR. MUTH: Your Honor, I believe we need to look at Director's [E]xhibit 25 which is the listing of issues. I really don't see anything contested on it other than the responsible operator issue and then issue 18 [which] is other issues.
>
> JUDGE LESNIAK: Apparently the insurance company is trying to get off the case.
>
> MR. MUTH: Yes, Your Honor. But they are also offering evidence that goes to medical eligibility.
>
> JUDGE LESNIAK: How many witnesses are you calling? [not responding to claimant's objection].

Hearing Transcript at 14-15. The administrative law judge subsequently issued his Decision and Order, noting therein that carrier contested all of the requisite elements of claimant's entitlement to benefits. Decision and Order at 3.

Based on our review of the record, we conclude that the administrative law judge erred in considering claimant's entitlement since none of the entitlement issues was identified by carrier as being contested, and the issues were reasonably ascertainable at the district director level. *See* 20 C.F.R. §§725.421(b)(7); 725.463(a); *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Thornton v. Director, OWCP*, 8 BLR 1-277, 1-279 (1988); *Simpson v. Director, OWCP*, 6 BLR 1-49, 1-50 (1983). However, we also consider the administrative law judge's error to be harmless insofar as he found that claimant is entitled to benefits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, because carrier did not initially contest the district director's determination that claimant is totally disabled due to pneumoconiosis, we affirm the administrative law judge's award of benefits and reject carrier's arguments on appeal with regard to the administrative law judge's findings pursuant to Sections 718.202, 718.304, and 718.204(c).

[5] Attached to the letter was correspondence dated December 11, 1984, addressed to employer from carrier, which advised employer that its insurance coverage was cancelled due to its failure to pay the appropriate premiums. There was also a computer print out sheet indicating that, according to the carrier's records, employer's policy became effective on June 13, 1984 and was terminated on December 11, 1984. *Id.*

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge