U.S. Department of Labor

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

BRB No. 17-0342 BLA

TINSLEY MAGGARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	DATE ISSUED: 03/29/2018
	)	
Employer-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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05710) of Administrative Law Judge John P. Sellers, III, on a claim filed on September 12, 2013,

pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined that the claim was timely filed and that employer is the properly designated responsible operator. He then credited claimant with thirty-one years of coal mine employment and found that at least twenty-nine years were at an underground coal mine. The administrative law judge concluded that claimant has complicated pneumoconiosis and is, therefore, entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis. Thus, the administrative law judge awarded benefits.

On appeal, employer challenges its designation as the properly named responsible operator. Employer further argues that the administrative law judge erred in excluding Dr. Dahhan's reading of a December 2, 2010 x-ray as positive for complicated pneumoconiosis which, employer argues, indicates that claimant was totally disabled due to pneumoconiosis prior to the start of his work for employer. In addition, employer asserts that the administrative law judge erred in finding that the claim was timely filed. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting that the administrative law judge properly refused to admit Dr. Dahhan's interpretation of the 2010 x-ray and correctly found that employer is the responsible operator.[1]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

---

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has at least twenty-nine years of underground coal mine employment and invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, 30 U.S.C. §411(c)(3) (2012). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 10-12. We further affirm, as unchallenged, the administrative law judge's award of benefits. *See Skrack*, 6 BLR at 1-711.

[2] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction 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 3.

I. Responsible Operator

The regulations set forth the criteria for determining a responsible operator. Pursuant to 20 C.F.R. §725.495, the responsible operator "shall be the potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." The regulation at 20 C.F.R. §725.494 sets forth the criteria for identifying a potentially liable operator: (a) the *miner's disability or death arose out of employment with that operator*; (b) the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; (c) the miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year; (d) the miner's employment included at least one working day after December 31, 1969 and (e) the operator is financially capable of assuming liability for the claim. 20 C.F.R §725.494(a)-(e) (emphasis added). The identification of the responsible operator or carrier must be finally resolved by the district director before a claim is referred to the Office of Administrative Law Judges (OALJ). 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1), 725.457(c)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). The regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §725.414(c).

Employer contends that because Dr. Dahhan's reading of the December 2, 2010 x-ray establishes that claimant had complicated pneumoconiosis prior to becoming its employee on December 10, 2010, claimant's disability did not arise out of employment with it. *See* 20 C.F.R. §725.494(a). Therefore, employer maintains that the district director erred in identifying it as a potentially liable operator.

A. Procedural History

On September 27, 2013, the district director issued a Notice of Claim identifying employer as a potentially liable operator and BrickStreet Mutual Insurance Company (BrickStreet) as the responsible carrier. Director's Exhibit 16. On December 2, 2014, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) which designated employer as the responsible operator and notified employer that it had until January 1, 2015 to submit any evidence or identify any witnesses relevant to liability. Director's Exhibit 24. The SSAE further provided that:

> 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 the case is referred to the Office of Administrative Law Judges.

Id. Employer did not submit any additional evidence concerning its liability to the district director.

On February 3, 2015, claimant completed his responses to interrogatories from BrickStreet and submitted additional documents requested by BrickStreet.[3] Director's Exhibit 13. The district director received a copy of claimant's responses on February 10, 2015. *Id*. In his responses, claimant checked "yes" when asked whether he had ever been diagnosed with complicated pneumoconiosis, indicating that he first received this diagnosis in December 2010. *Id*.

On May 6, 2015, the district director issued a Proposed Decision and Order awarding benefits based on Dr. Willis's reading of an x-ray dated December 2, 2013, as positive for complicated pneumoconiosis and Dr. Rasmussen's opinion diagnosing the disease. Director's Exhibit 36. The district director named employer as the operator responsible for the payment of benefits. *Id*. In a response dated May 12, 2015, employer contested the proposed decision, including its status as the responsible operator, and requested that the claim be transferred to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibit 37. The district director sent the claim to the OALJ on June 25, 2015.[4] In its brief on appeal, employer states that it "did not become aware of the existence of Dr. Dahhan's x-ray until it received a copy of the Director's exhibits on or about July 6, 2015," in conjunction with the transfer of the claim to the OALJ. Employer's Brief at 3.

On August 10, 2015, BrickStreet, which was represented by counsel separate from employer's counsel, filed a motion with the administrative law judge, arguing that it should be dismissed as the responsible carrier in this claim because claimant's diagnosis of complicated pneumoconiosis predated its coverage of employer.[5] In response to

[3] The request for production of documents included a request for a signed release to permit BrickStreet Mutual Insurance Company (BrickStreet) to obtain claimant's medical records, but no medical records were submitted by either party to the district director at that time. Director's Exhibit 13.

[4] Although claimant responded in the interrogatories and on his state workers' compensation claim that he was diagnosed with complicated pneumoconiosis in December 2010, Dr. Dahhan's positive interpretation of the December 2, 2010 x-ray was not admitted into the record while the claim was before the district director. Director's Exhibits 1-42.

[5] BrickStreet alleged that Dr. Dahhan diagnosed complicated pneumoconiosis based on a chest x-ray taken on December 2, 2010, and that the diagnosis and x-ray predated its

BrickStreet's motion, employer filed a motion on May 26, 2016, requesting that the administrative law judge remand the claim to the district director for a determination as to the correct responsible operator and responsible carrier. Employer stated in its motion that information concerning Dr. Dahhan's December 2, 2010 diagnosis of complicated pneumoconiosis "was not available to [e]mployer until the claim was before the OALJ." Employer's Motion to Remand at 3.

On June 7, 2016, the administrative law judge issued an order directing employer to file a copy of Dr. Dahhan's x-ray report within fifteen days, which employer complied with on June 10, 2016. The administrative law judge also gave claimant and the Director thirty days to respond to employer's motion to remand.[6] On August 16, 2016, the administrative law judge issued an Order Denying Employer's Motion for Remand, finding that employer did not show that it timely submitted Dr. Dahhan's interpretation of the December 2, 2010 x-ray to the district director as required by 20 C.F.R. §725.456(b)(1). Decision and Order at 4-5. Thus, the administrative law judge determined that the x-ray reading was not part of the record and could not be introduced as liability evidence at this stage in the proceedings. *Id*. at 5. The administrative law judge also determined that employer did not prove that extraordinary circumstances existed to allow for the admission of the x-ray reading. *Id*.

At the hearing, employer again requested that it be allowed to submit Dr. Dahhan's x-ray interpretation into the record. Employer argued that the x-ray's existence "should have been apparent" to the district director, as it was referenced in the settlement agreement of claimant's state workers' compensation claim and in claimant's response to BrickStreet's interrogatories, which were part of the Director's Exhibits. Hearing Transcript at 10. Employer also contended that it was unaware of this x-ray until BrickStreet, who was represented by separate counsel, filed its motion to be dismissed as the responsible carrier. *Id*. at 11. The administrative law judge stated that his August 16, 2016 order would stand, but that he was open to re-examining the issue, particularly whether extraordinary circumstances existed for admitting the x-ray report. *Id*. at 12. The administrative law judge asked the parties to brief the issue. *Id*. Both parties submitted post-hearing briefs.

---

coverage of employer for liability. The record does not contain any evidence of a response to BrickStreet's motion for dismissal.

[6] Claimant responded that he did not object to remanding the claim but that he objected to the dismissal of employer and carrier until the issue was resolved. The Director, Office of Workers' Compensation Programs, also responded, asserting that employer's motion to remand should be denied.

B. The Administrative Law Judge's Decision

By Decision and Order, dated March 22, 2017, the administrative law judge concluded that he was "not persuaded" by employer's argument that it did not learn of Dr. Dahhan's x-ray interpretation until it received a copy of the Director's Exhibits, observing that employer hired Dr. Dahhan to examine claimant as part of a pre-employment physical in December 2010. Decision and Order at 5. He also noted claimant's testimony that he was informed that he passed the physical conducted by Dr. Dahhan and that employer hired him shortly thereafter. *Id.*, *citing* Hearing Transcript at 24-25. The administrative law judge therefore determined that "because Dr. Dahhan's interpretation of the December 2, 2010 x-ray was developed by, and in the custody of, the Employer, [it] was in a better position than any other party to produce it into evidence when this claim was pending before the district director." Decision and Order at 5. Referencing his previous August 16, 2016 Order, the administrative law judge also found that employer did not introduce this evidence before the district director as required by 20 C.F.R. §§725.408, 725.410, and did not show that extraordinary circumstances existed for its admission pursuant to 20 C.F.R. §725.456(b)(1). *Id.* The administrative law judge therefore excluded Dr. Dahhan's x-ray interpretation from the record. *Id.* Consequently, the administrative law judge found that employer is the properly designated responsible operator in this claim. *Id.*

On appeal, employer initially contends that extraordinary circumstances exist for the admission of Dr. Dahhan's x-ray interpretation pursuant to 20 C.F.R. §725.456(b)(1). Employer states that Black Mountain Resources (Black Mountain) ordered claimant's pre-employment physical and that Black Mountain and employer did not become subsidiaries of Alpha Natural Resources until after the physical was performed.[7] Therefore, employer argues it cannot be faulted for having no knowledge of the x-ray.

---

[7] The record is unclear about the relationship between employer and Black Mountain Resources (Black Mountain). However, claimant testified that he was examined by Dr. Dahhan as part of a pre-employment physical by Black Mountain, which later became part of Alpha Natural Resources, and was told after the x-ray was read that he had "advanced black lung." Hearing Transcript at 23-24, 29. In its post-hearing brief, however, employer noted testimony by claimant that he underwent the December 2, 2010 x-ray prior to his employment with it, and acknowledged that claimant's employment began on December 10, 2010. [Post-hearing] Brief on Behalf of Employer at 7. Further, the administrative law judge observed that he referred to employer, Black Mountain, and Alpha Natural Resources collectively as "employer" for the sake of clarity in the decision,

Employer's allegation has no merit. An administrative law judge is given broad discretion in resolving procedural and evidentiary matters.[8] *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish that the administrative law judge's action represented an abuse of her discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009), *citing Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-17 n.1 (2007) (en banc recon.) (McGranery & Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting).

As the Director asserts, the issue in this case is not whether employer was aware of Dr. Dahhan's 2010 x-ray reading, but whether it could have discovered the report by exercising due diligence. *See Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46, 50 (1989) (party seeking to admit evidence must exercise due diligence in developing its claim prior to hearing); *Sam v. Loffland Bros. Co*., 19 BRBS 229, 230 (1987) (party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing). Employer made no showing that it could not have discovered Dr. Dahhan's reading of the December 2, 2010 x-ray if it had investigated the liability issue after receiving the SSAE.[9] Therefore, the administrative law judge rationally determined that extraordinary circumstances do not exist to allow for the submission of Dr. Dahhan's December 2, 2010 x-ray. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc) (McGranery & Boggs, JJ., dissenting), *aff'd Marfork Coal Co. v. Weis*, 251 Fed. App'x 229, 236 (4th Cir. 2007) (extraordinary circumstances for the untimely admission of liability evidence not shown where "x-ray was waiting to be found," but employer failed to investigate until after the claim was referred to the OALJ).

---

based on the evidence in the record supporting that Black Mountain and North Fork both became part of Alpha Natural Resources. Decision and Order at 3 n.2.

[8] The Administrative Procedure Act provides that "[s]ubject to published rules of the agency and within its powers," 5 U.S.C. §556(c), administrative law judges have the power to, among other things, "dispose of procedural requests or similar matters." 5 U.S.C. §556(c)(9).

[9] For example, BrickStreet discovered the existence of Dr. Dahhan's 2010 x-ray through interrogatories. Employer should have been able to obtain the same information through similar action. Employer stated that it submitted interrogatories to claimant as early as October 2013. Director's Exhibit 17. The record does not contain a copy of those interrogatories or the response, if any, to them.

Employer further argues that because the district director did not properly develop evidence concerning the correct responsible operator, the administrative law judge's decision to exclude Dr. Dahhan's positive interpretation of the December 2, 2010 x-ray must be reversed. Employer also maintains that the district director erred in failing to provide a copy of claimant's interrogatory responses to employer and in failing to investigate whether claimant had complicated pneumoconiosis prior to working for employer. As the Director asserts, there is no merit to employer's contentions.

Dr. Dahhan's x-ray interpretation was not included with claimant's response to BrickStreet's interrogatories nor was it submitted in connection with the responsible operator issue. In addition, the district director did not receive a copy of the completed interrogatories until February 2015, which was more than a month after the date on which employer's evidence challenging its designation as responsible operator was due under the SSAE. Director's Exhibits 13, 24. Consequently, under the facts of this case, the administrative law judge reasonably concluded that employer failed to establish "extraordinary circumstances" to justify admission of Dr. Dahhan's interpretation of claimant's December 2010 x-ray. 20 C.F.R. §725.456(b)(1); Decision and Order at 5; *see Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR 1 at 1-153. Thus, the administrative law judge properly determined that Dr. Dahhan's reading of this x-ray could not be relied upon by employer to establish that it is not liable for the payment of claimant's benefits. We therefore affirm the administrative law judge's designation of employer as the responsible operator.

II. Timeliness of the Claim

Pursuant to Section 422(f) of the Act, "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The implementing regulation, set forth at 20 C.F.R. §725.308, requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the presumption of timeliness, employer must show, by a preponderance of the evidence, that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001). In the current claim, the administrative law judge found that employer did not meet its burden of rebutting the presumption of timely filing. Decision and Order at 4.

Employer states, "[t]he fact that [c]laimant subsequently went to work does not change th[e] fact that the irrebuttable presumption [of complicated pneumoconiosis] would have existed at the time of his diagnosis in 2010." Employer's Brief at 5-6. Employer asserts that claimant was diagnosed with complicated pneumoconiosis on December 2, 2010 and Dr. Dahhan clearly communicated this to him, triggering the running of the statute of limitations for filing his federal black lung claim.

At the hearing, claimant testified as follows:

> [Claimant's counsel]: When you were seen and examined by Dr. Dahhan, was that a pre-employment physical?
>
> [Claimant]: Yes, I was applying for a job at Black Mountain Resources.
>
> [Claimant's counsel]: Okay and he did an examination?
>
> [Claimant]: Yes.
>
> [Claimant's counsel]: Okay. Were you ever made aware of his findings?
>
> [Claimant]: Well, after he x-ray [sic], he pulled me into a room, just me and him, and he had an x-ray up on a wall and he pointed at it and he said, "Do you know that you have advanced black lung." I told him I did not know that.
>
> [Claimant's counsel]: Did you ever actually see a report?
>
> [Claimant]: Never did see a report. I didn't know I had complicated on that report until after we had filed, maybe two years later.
>
> [Claimant's counsel]: The state claim?
>
> [Claimant]: Yes.
>
> JUDGE SELLERS: Who told you that you had advanced, was that Dr. Dahhan?
>
> [Claimant]: Dr. Dahhan did. He didn't tell me if it was complicated. He just called it advanced black lung.
>
> [Claimant's counsel]: Okay.

[Claimant]: The first time I was ever aware that I had black lung [was] on that date, December 2, 2010.

[Claimant's counsel]: And since you were employed or since that was a pre-employment physical, I'm sure you assumed that report was – whatever it was – went to your prospective employer. Is that correct?

[Claimant]: Yes.

[Claimant's counsel]: And you were hired?

[Claimant]: Yes, I was hired.

[Claimant's counsel]: Okay.

[Claimant]: They said I passed my physical so ———

[Claimant's counsel]: Okay.

Hearing Transcript at 23-25.

As an initial matter, even if the December 2, 2010 conversation between Dr. Dahhan and claimant constituted the communication of a medical determination of total disability due to pneumoconiosis, claimant filed his claim on September 12, 2013, which was less than three years later. *See* 30 U.S.C. §932(f). Moreover, contrary to employer's contention, the administrative law judge permissibly determined that this conversation was insufficient to trigger the running of the statute of limitations because: (1) Dr. Dahhan did not communicate to claimant that he was totally disabled due to pneumoconiosis; (2) Dr. Dahhan did not tell claimant he had complicated pneumoconiosis; (3) claimant was subsequently hired to work; and (4) claimant did not realize he had complicated pneumoconiosis until approximately two years after Dr. Dahhan's evaluation.[10] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989);

[10] The question of whether the evidence is sufficient to rebut the presumption of timeliness involves factual findings that are to be made by the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc). Additionally, the weight to accord hearing testimony is within the sound discretion of the administrative law judge. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999).

Decision and Order at 3-4. Because it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to satisfy its burden to rebut the presumption that claimant timely filed his claim pursuant to 20 C.F.R. §725.308(c). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge