U.S. Department of Labor

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

BRB No. 23-0176 BLA

JACKIE D. YATES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION, c/o HEALTHSMART CASUALTY CLAIMS	)	
	)	DATE ISSUED: 04/18/2024
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 Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Awarding Benefits (2019-BLA-05646) rendered on a claim filed May 27, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant timely filed his claim, and Employer was correctly designated the responsible operator. He credited Claimant with eighteen years of underground coal mine employment and found he established complicated pneumoconiosis. 20 C.F.R. §718.304. Thus he found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2,[1] and the removal provisions applicable to ALJs render his appointment unconstitutional. Employer further challenges its designation as the responsible operator and the ALJ's finding that Claimant timely filed his claim.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Benefits Review Board

[1] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[2] We affirm, as unchallenged on appeal, the ALJ's crediting Claimant with eighteen years of underground coal mine employment, and his findings that Claimant established the existence of complicated pneumoconiosis and that the disease arose out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

to reject Employer's constitutional challenges, and its arguments concerning the responsible operator and timeliness of this claim.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018).[4] Employer's Brief at 14-21. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[5] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* It also challenges the

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 13.

[4] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[5] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Camp.

constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 17-21. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* In addition, it relies on the United States Supreme Court's holding in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492-93 (2010), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970, 1982-83 (2021). *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.[6]

Evidentiary Issue

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The designated responsible operator must submit documentary evidence relevant to its liability to the district director and must notify the district director of any potential witnesses whose testimony pertain to its liability. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1). Failure to do so renders such documentary evidence and testimony inadmissible before the ALJ unless "extraordinary circumstances" exist to excuse the untimely submission. 20 C.F.R. §§725.414(c), (d), 725.456(b)(1).

[6] As for Employer's arguments with respect to ALJ removal protections, the Board rejected similar arguments in *Howard v. Apogee Coal Co.*, in part, because the employer did not sufficiently allege "it suffered any harm due to the ALJ's removal protections." 25 BLR 1-301, 1-307 (2022) (applying *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022)). Subsequently, in *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 145 (4th Cir. 2023), the United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, held that "the Board has no authority to remedy the alleged separation-of-powers violation." The court nevertheless denied the employer's request for a new hearing because, as in *Howard*, the employer did not show that the alleged "constitutional violation caused [it] harm." *Id.* at 149. So too here. Thus, even if the Board had authority to remedy the violation that Employer's removal protections arguments present, we would decline to do so because Employer has failed to identify any harm that it suffered.

Employer argues it established extraordinary circumstances permitting untimely admission of liability evidence, and the ALJ therefore erred in excluding it. Employer's Brief at 6-13. We disagree.

The district director issued a Notice of Claim to Employer on April 4, 2018, stating it had been identified as a potentially liable operator. Director's Exhibit 24. The notice of claim informed Employer of its opportunity to "contest [its] liability for payment of benefits on any of the grounds set forth in 20 C.F.R. §725.408(a)(2),"[7] and that Employer had ninety days from receipt of the notice to submit documentary evidence supporting its response. *Id.* at 2. It further stated that, "[a]bsent extraordinary circumstances, no documentary evidence relevant to the assertions set forth in 20 C.F.R. 725.408(a)(2) . . . may be admitted in any further proceedings unless it is submitted within 90 days of your receipt of this notice or an extended period authorized by the District Director." *Id.*

Employer responded on April 10, 2018, generally asserting it is not the responsible operator and contending the claim was "untimely based upon claimant's pre-employment examination by Dr. Forehand dated February 23, 2013, and claimant's waiver executed on or about March 4, 2013." Director's Exhibit 22 at 3. However, Employer did not submit any evidence supporting its contentions or request an extension of time to submit evidence. *Id.*

On August 23, 2018, the district director issued the Schedule for Submission of Additional Evidence (SSAE) identifying Employer as the responsible operator. Director's Exhibit 29. The district director stated Claimant was most recently employed by Revelation Energy LLC (Revelation) since April 30, 2016, and was still working at the time he filed his claim in May 2016. The district director also noted he was previously employed by SANW Inc. (SANW) from February 26, 2013, to March 25, 2016, and by Employer from 2001 to 2003. *Id.* at 9.

In addition, the district director noted Revelation and SANW submitted a February 20, 2013 pre-employment medical report and x-ray reading from Dr. Forehand indicating

[7] An operator that wishes to contest its identification as a potentially liable operator in a Notice of Claim must timely file a response in which it either admits or denies each of the following assertions: (1) that it was an operator for any period after June 30, 1973; (2) that it employed the miner for a cumulative period of not less than one year; (3) that the miner was exposed to coal mine dust while working for the operator; (4) that the miner's employment included at least one working day after December 31, 1969; and (5) that the operator is capable of assuming liability for the payment of benefits. 20 C.F.R. §725.408(a)(2)(i)-(v).

Claimant had complicated pneumoconiosis prior to his employment with their companies. Director's Exhibit 29 at 9; *see* Director's Exhibit 23. Thus, the district director identified Employer as the responsible operator because it is the potentially liable operator to most recently employ Claimant prior to his being diagnosed with complicated pneumoconiosis. Director's Exhibit 29 at 9; *see* 20 C.F.R. §725.494(a) (requiring that a miner's disease arise at least in part out of employment with an operator for it to be designated a potentially liable operator). The district director also noted Employer had not timely submitted any documentary evidence concerning its liability. Director's Exhibit 29 at 9.

In response to the SSAE, Employer again generally contested its designation as the responsible operator but still did not submit any liability evidence or request an extension of time to do so. Director's Exhibit 30. Employer repeated its assertion that the claim was not timely on the grounds Claimant "received a communication of complicated disease on or about February 20, 2013." *Id.* at 3. On January 22, 2019, the district director issued the Proposed Decision and Order awarding benefits and naming Employer as the responsible operator. Director's Exhibit 33. Employer requested a hearing on the issues of its liability and Claimant's entitlement to benefits, and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 39, 41.

On November 26, 2019, while the claim was pending before the ALJ, Employer filed a motion to compel Claimant to produce his medical and treatment records, or an authorization permitting release of those records, and to produce the original image of the February 20, 2013 chest x-ray read by Dr. Forehand. Employer's November 26, 2019 Motion to Compel. In a pre-hearing conference with the ALJ to discuss the motion to compel, Employer stated it had made requests to SANW, Revelation, Claimant, and the district director to obtain the image of the February 20, 2013 x-ray, but had been unable to obtain it. Hearing Transcript at 4-6. Employer stated it had first requested the image in January 2018. January 13, 2020 Hearing Transcript at 5.[8]

Subsequently, Employer received the February 20, 2013 x-ray image and obtained readings of it. February 27, 2020 Hearing Transcript at 6-7. It submitted readings by Drs. Simone and Siegler, which it designated as Employer's Exhibits 2 and 4, respectively.

[8] Employer requested a continuance of the March 3, 2020 hearing due to its difficulty in obtaining the February 20, 2013 x-ray. *See* Employer's February 10, 2020 Motion for Continuance. The ALJ denied Employer's Motion but kept the record open for sixty days following the hearing to allow Employer to obtain and submit interpretations of the x-ray. March 3, 2020 Hearing Transcript at 40-41. The Director does not contest Employer's characterization of its requests for the x-ray and for an authorization to release medical records.

Employer's Revised Evidence Summary Form. Neither Dr. Simone nor Dr. Siegler read the x-ray as showing complicated pneumoconiosis. *Id*. In addition, Employer submitted Drs. Simone's and Siegler's credentials as physicians dually-qualified as Board-certified radiologists and B readers, which it designated as Employer's Exhibits 3 and 5. *Id*. Employer specified the exhibits "address[ed] the responsible operator issue and [were] not subject to evidentiary limitations." *Id*.

In its post-hearing brief, Employer argued the negative readings of the February 20, 2013 x-ray by Drs. Simone and Siegler establish that the x-ray is negative for complicated pneumoconiosis overall, as they are better-qualified than Dr. Forehand. Employer's Post-Hearing Brief at 16-18. It thus argued the evidence does not establish the Miner had complicated pneumoconiosis as of February 20, 2013, and therefore that either Revelation or SANW were the properly designated responsible operators, as they more recently employed Claimant for a least one year. *Id*. The ALJ refused to admit the readings as they were untimely liability evidence.[9] Decision and Order at 13.

On appeal, Employer contends it established extraordinary circumstances permitting the admission of its liability evidence due to the delays it faced in obtaining the February 20, 2013 chest x-ray and the ALJ therefore erred in denying the admission and consideration of that evidence. Employer's Brief at 13. We disagree.

The ALJ noted Employer did not submit the readings by Drs. Simone and Siegler or any other evidence pertaining to its liability to the district director, and the readings were therefore inadmissible absent extraordinary circumstances. 20 C.F.R. §725.456(b)(1); Decision and Order at 13. In this regard, the ALJ noted Employer was aware of the February 20, 2013 x-ray when it filed its response to the Notice of Claim, as it argued the x-ray established the claim was untimely. Decision and Order at 12. The ALJ found that, despite its awareness of the x-ray, Employer did not raise its responsible operator argument beyond its general denial of liability, indicate it was contesting Dr. Forehand's positive reading or requesting to submit responsive evidence, or seek an extension of time to submit additional evidence while the claim was before the district director. *Id*. at 12-13. Thus, contrary to Employer's argument, the ALJ permissibly found Employer failed to establish extraordinary circumstances and thus could not first submit its liability evidence to the ALJ. 20 C.F.R. §§725.414(d), 725.456(b)(1); Decision and Order at 13. Consequently,

[9] The ALJ also refused to admit Employer's Exhibits 3 and 5, which consisted of the curriculum vitaes of the interpreting physicians, Drs. Simone and Siegler, respectively. Decision and Order at 2.

we affirm the ALJ's exclusion of Employer's Exhibits 2 and 4.[10] *Blake*, 24 BLR at 1-113. Further, as Employer raises no additional arguments concerning the ALJ's consideration of the x-ray evidence, we affirm the ALJ's determination that the February 20, 2013 x-ray supports a finding of complicated pneumoconiosis. Decision and Order at 17.

Timeliness

Section 422(f) of the Act provides that "[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 medical determination must have "been communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308(a). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(b). To rebut this presumption, 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 Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 668 (4th Cir. 2017). The Board has held that only medical opinions using the phrase "total disability due to pneumoconiosis" or otherwise clearly indicating a medical determination of total disability due to pneumoconiosis should be found sufficient to trigger the time limit for filing a claim. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-43 (1993) ("terminology used in the medical determination must be such that the miner was aware, or in the exercise of reasonable diligence, should have been aware that he was totally disabled due to pneumoconiosis arising out of coal mine employment").

Employer argues the record evidence establishes Claimant received sufficient communication that he was totally disabled due to pneumoconiosis, and the ALJ erred in finding to the contrary. In support, it points to Dr. Forehand's February 20, 2013 medical report and x-ray reading indicating Claimant had complicated pneumoconiosis; Claimant's testimony about his conversations with Dr. Forehand; and Claimant's signed waiver of liability for Virginia workers' compensation claims. Employer's Brief at 7-10. We disagree.

Dr. Forehand conducted a pre-employment examination of Claimant on behalf of SANW on February 21, 2013, which included a chest x-ray he read as positive for complicated pneumoconiosis with category A large opacities. Director's Exhibit 23. At the hearing for this claim, Claimant testified Dr. Forehand informed him he had

[10] As we affirm the ALJ's exclusion of Drs. Simone's and Siegler's interpretations of the February 20, 2013 x-ray, we also affirm the ALJ's exclusion of Employer's Exhibits 3 and 5, which consist of the physicians' curriculum vitaes. Decision and Order at 2.

complicated pneumoconiosis, gave him information for finding a lawyer to assist him in filing a claim, and provided him a document to sign waiving his right to file for Virginia workers' compensation benefits against SANW. Hearing Transcript at 16-20. Claimant testified he received a copy of Dr. Forehand's report and test results but did not know how to read them. *Id*. at 21. When asked about his understanding of the waiver, Claimant stated he believed he had to sign it to be able to work for SANW. *Id*. at 19-20. He further testified he was never told it was inadvisable for him to return to coal mine work, and that Dr. Forehand did not tell him he was disabled from black lung disease. *Id*. at 20-21.

The ALJ credited Claimant's testimony and found Dr. Forehand never communicated to Claimant that he was totally disabled, and that Claimant did not understand Dr. Forehand's report or the waiver as implying he was disabled. Decision and Order at 8-10. Further, the ALJ found Claimant credibly testified he had signed the waiver to engage in further underground coal mine work, and while the waiver addressed Virginia workers' compensation benefits, it made no mention of disability or that he may be eligible for black lung benefits, federal or otherwise. *Id*. at 9-10; *see* Director's Exhibit 23 at 4.

The question of whether the evidence is sufficient to establish rebuttal of the presumption of timeliness involves factual findings that are appropriately made by the ALJ. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). The ALJ permissibly found the evidence insufficient to trigger the statute of limitations because Dr. Forehand did not communicate to Claimant that he was totally disabled. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); Decision and Order at 10. Employer's arguments to the contrary amount to a request that we reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

As Employer raises no further argument, we affirm the ALJ's finding that Employer did not rebut the presumption that Claimant's claim was timely filed. 20 C.F.R. §725.308(b); Decision and Order at 10.

Commencement Date for Benefits

The commencement date for benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). When a miner suffers from complicated pneumoconiosis, the factfinder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If it does not, the commencement date is the month in which the claim was filed, unless the evidence establishes the miner had only simple pneumoconiosis for any period subsequent to the

date of filing. In that case, the date for the commencement of benefits follows the period when the miner had only simple pneumoconiosis. *Williams*, 13 BLR at 1-30.

Employer contends that because the ALJ found Dr. Forehand's reading of the February 20, 2013 x-ray finding complicated pneumoconiosis did not constitute a communication to Claimant that he was totally disabled, it cannot establish the month of onset of Claimant's disability. Employer's Brief at 9-10. Employer's contention is without merit.

The ALJ accurately found Dr. Forehand's reading of the February 20, 2013 x-ray was the first evidence of complicated pneumoconiosis, and there was no other evidence of record establishing when Claimant's complicated pneumoconiosis first developed. Decision and Order at 20. Because the onset date for a claimant whose entitlement is established pursuant to Section 411(c)(3) of the Act is established by proof of the onset of complicated pneumoconiosis, we find no error in the ALJ's conclusion that Claimant's benefits commence in February 2013, the month and year in which he was first diagnosed with the disease. 20 C.F.R. §725.503(b); *see Williams*, 13 BLR at 1-30.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge