

U.S. Department of Labor

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



BRB No. 22-0170 BLA

CHRISTOPHER J. HURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAMP CREEK SERVICE CENTER, LTD.	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS’	)	DATE ISSUED: 01/19/2023
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Motion to Set Aside and Reissue Decision of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Order Denying Motion to Set Aside and Reissue Decision (2019-BLA-06333) rendered on a claim filed pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on January 2, 2018.

In an October 29, 2021 Decision and Order Awarding Benefits, the ALJ found Claimant established 15.09 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309. She further found Employer did not rebut the presumption and awarded benefits.

On October 29, 2021, the Office of Administrative Law Judges (OALJ) served the ALJ's Decision and Order Awarding Benefits via email on Employer's counsel of record at the time, Andrea Berg (Ms. Berg) of Jackson Kelly PLLC (Jackson Kelly).<sup>1</sup> Ms. Berg filed notices of appearance on behalf of Employer on May 3, 2018, and on August 18, 2020, and was present on Employer's behalf at the hearing on February 2, 2021. *See* Director's Exhibit 21; Hearing Tr. at 5. Ms. Berg, however, left Jackson Kelly before the ALJ issued her decision.

On December 10, 2021, another Jackson Kelly attorney, Ashley Harman (Ms. Harman), filed her notice of appearance on behalf of Employer and filed a Motion to Set Aside and Reissue Decision and Order Awarding Benefits. Employer represented that it had not actually received the ALJ's Decision and Order Awarding Benefits until December

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<sup>1</sup> There is no indication the Office of Administrative Law Judges (OALJ) served the decision on any other representative of Employer or that the decision was served on Employer by registered or certified mail. Director's Response at 2.

8, 2021, because Ms. Berg's email address was no longer active when it was served.<sup>2</sup> Accordingly, Employer requested the ALJ reissue her merits decision so it could file a timely notice of appeal.

On December 20, 2021, while its motion to the ALJ was still pending, Employer filed a Notice of Appeal with the Benefits Review Board purporting to appeal the ALJ's October 29, 2021 Decision and Order Awarding Benefits.<sup>3</sup> On January 5, 2022, the ALJ issued an Order Denying Motion to Set Aside and Reissue Decision. On January 25, 2022, Employer filed another Notice of Appeal with the Board purporting to appeal both the ALJ's January 5, 2022 Order Denying Motion to Set Aside and Reissue Decision and her October 29, 2021 Decision and Order Awarding Benefits.<sup>4</sup>

On March 29, 2022, the Board determined Employer's initial appeal of the ALJ's Decision and Order Awarding Benefits was untimely, issued an Order denying Employer's Motion to Accept Notice of Appeal as Timely Filed, and dismissed that appeal. 33 U.S.C. §921(c), 30 U.S.C. §932(a); 20 C.F.R. §802.205. In the same Order, the Board acknowledged Employer's second appeal, filed within thirty days of the ALJ's Order Denying Motion to Set Aside and Reissue Decision, as timely.

On appeal, Employer argues the ALJ abused her discretion in denying its Motion to Set Aside and Reissue Decision and Order Awarding Benefits.<sup>5</sup> The Director, Office of

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<sup>2</sup> On December 3, 2021, by first-class mail, Employer received a November 20, 2021 pay order issued by the district director. Employer's Brief at 1-2. After receiving the pay order, Employer retrieved a copy of the ALJ's Decision and Order Awarding Benefits from the OALJ website on December 8, 2021. *Id.* On the same day, it also requested and received a complete copy of the Decision and Order Awarding Benefits, along with the service sheet, from ALJ Boucher's office. *Id.*

<sup>3</sup> Employer simultaneously filed a motion requesting the Board accept the appeal as timely filed.

<sup>4</sup> Employer again simultaneously filed a motion requesting the Board accept the appeal as timely filed.

<sup>5</sup> Employer's current appeal is only timely as to the ALJ's Order Denying Motion to Set Aside and Reissue Decision. Although Employer raises numerous arguments in both its initial and reply briefs concerning the ALJ's underlying merits decision and Claimant's entitlement to benefits, Employer's Brief at 5-18; Employer's Reply Brief at 2-11, there is no timely appeal of that decision as of the date of our decision and order here. Thus, the

Workers' Compensation Programs, filed a limited response urging the Board to vacate the ALJ's Order Denying Motion to Set Aside and Reissue Decision.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *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 the disposition of a procedural or evidentiary issue must establish 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).

Employer argues the ALJ abused her discretion in denying its Motion to Set Aside and Reissue Decision and Order Awarding Benefits. Employer's Brief at 19-23. Specifically, it contends that because the ALJ did not serve her Decision and Order Awarding Benefits by registered or certified mail, and because electronic transmission of the decision did not reach the person intended to be served, actual receipt should have triggered Employer's deadline to move for reconsideration or appeal the decision. *Id.* We are persuaded by its argument.

As the Director correctly stated, decisions must be served by registered or certified mail. *See* 33 U.S.C. § 919(e) (merits decisions "shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each); 20 C.F.R. § 725.478 ("On the date of issuance of a decision and order . . . the [ALJ] shall serve the decision and order on all parties to the claim by certified mail."); Director's Response Brief at 3-4. The regulations also state that when there is a "defect in service, *actual receipt* of the decision is sufficient to commence the 30-day period for requesting reconsideration or appealing the decision." 20 C.F.R. § 725.479(d) (emphasis added); Director's Response Brief at 4.

Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,<sup>6</sup> has provided that the thirty-day deadline to appeal "does not

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Board will not now address those arguments, but will only address whether the ALJ abused her discretion in denying Employer's Motion to Set Aside and Reissue Decision.

<sup>6</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4 n.3 (unpaginated); Director's Exhibits 5, 7; Hearing Tr. at 19.

begin to run until service is made according to the strictures of section 919(e) and the governing regulations.” *Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 369 (4th Cir. 1989) (quoting *Patton v. Dir., OWCP*, 763 F.2d 553, 557 (3d Cir. 1985)); Director’s Response Brief at 4. However, the Fourth Circuit also stated that, in an instance when there is no proper service, the deadline to appeal may begin to run when the appealing party has “actually received” the decision. *Id.*

Moreover, due to the COVID-19 pandemic, in April 2020 the OALJ issued an administrative notice making certain exceptions to service by certified mail and allowing for electronic service by email.<sup>7</sup> *See* Admin. Notice, No. 2020-MIS-00007 (Apr. 16, 2020); Director’s Response Brief at 4. The notice stated “[s]ervice is deemed made upon transmission of the email notice *unless OALJ learns that it did not reach the person to be served.*”<sup>8</sup> *Id.* at 1 (citing 29 C.F.R. § 18.30(a)(2)(ii)(E)) (emphasis added); Director’s Response Brief at 4.

In this case, the OALJ learned that its email did not reach the person intended to be served.<sup>9</sup> *See generally* ALJ’s Order Denying Motion to Set Aside and Reissue Decision;

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<sup>7</sup> Employer also contends that to the extent the OALJ’s administrative notice conflicts with the statutory and regulatory provisions requiring service by certified or registered mail, the notice violates the Administrative Procedure Act. Employer’s Brief at 22. Because the administrative notice recognizes electronic service is not effective upon transmission when the OALJ learns that the transmission did not reach the person intended to be served, the Board need not reach this argument. *See* Director’s Response Brief at 5 n.2.

<sup>8</sup> The notice also recognized that “the 30-day period for requesting reconsideration would appear to commence upon *actual receipt* of the decision” when it is served electronically. Admin. Notice, No. 2020-MIS-00007 at 2 n.3 (Apr. 16, 2020) (emphasis added); Director’s Response Brief at 4.

<sup>9</sup> The record is not clear as to when the OALJ first learned its email did not reach Ms. Berg. Employer contends Ms. Berg’s address was no longer active, and the sender would have received an automatic response stating the email message had been blocked and the target address no longer existed. *See* Employer’s Brief at 21. The ALJ rejected this argument, noting the OALJ sent the email to the address of the only attorney who had entered a notice of appearance on behalf of Employer at that time and, moreover, that the OALJ serves decisions using an automated and unmonitored email address. *See* ALJ’s Order Denying Motion to Set Aside and Reissue Decision at 2. Regardless of the OALJ’s sending it to the proper email address, the ALJ’s rationale overlooks the notice’s provision stating the “OALJ will record transmission of the email notice and the opening of the

Employer’s Brief at 21. Accordingly, under the terms of the OALJ’s administrative notice and applicable law, service of the decision upon Employer was not effective until actual receipt. *See* 20 C.F.R. § 725.479(d); *Looney*, 892 F.2d at 369; Admin. Notice, No. 2020-MIS-00007 at 1, 2 n.3. Thus, the thirty-day deadline for Employer to appeal or move for reconsideration did not begin to run until Employer actually received the ALJ’s Decision and Order Awarding Benefits. Employer actually received the ALJ’s Decision and Order on December 8, 2021, when it retrieved a copy from the OALJ website and received a complete copy with the service sheet from the ALJ’s office. Employer’s Brief at 1-2. Two days later, on December 10, 2021, Employer filed its motion requesting the ALJ reissue the Decision and Order Awarding Benefits.

Based on the foregoing, and without excusing Employer’s failure to timely file a notice of appearance,<sup>10</sup> we conclude the ALJ abused her discretion by denying Employer’s Motion to Set Aside and Reissue Decision and Order Awarding Benefits. *See Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63. Thus, we vacate the ALJ’s Order Denying Motion to Set Aside and Reissue Decision and remand the case for her to reissue her Decision and Order Awarding Benefits to provide Employer the appropriate time to file an appeal with the Board.

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document being served – in effect mirroring electronically what happens with conventional hard-copy certified mail.” Admin. Notice, No. 2020-MIS-00007 at 2.

<sup>10</sup> Pursuant to Section 18.22 of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, each representative must file a notice of appearance *when first making an appearance*. (emphasis added).

Accordingly, the ALJ's Order Denying Motion to Set Aside and Reissue Decision is vacated, and the case is remanded to the ALJ to set aside and reissue her Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge