



BRB No. 24-0136 BLA

AMANDA MAYBERRY o/b/o KENNETH)
MAYBERRY)

Claimant-Petitioner)

v.)

PEABODY COAL COMPANY, LLC)

and)

PEABODY ENERGY CORPORATION)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 06/11/2025

DECISION and ORDER

Appeal of the Order of Remand to Pay Benefits; November 30, 2023 Order Denying Claimant's Motion for Reconsideration; and December 20, 2023 Order Denying Claimant's Motion for Reconsideration of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels and David W. Littrell III (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Jeffrey S. Goldberg (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting

Director, Office of Workers' Compensation Programs, United States
Department of Labor.

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

PER CURIAM:

Claimant¹ appeals Administrative Law Judge (ALJ) Jason A. Golden's Order of Remand to Pay Benefits, November 30, 2023 Order Denying Claimant's Motion for Reconsideration, and December 20, 2023 Order Denying Claimant's Motion for Reconsideration (2020-BLA-05875) rendered on a claim filed on November 7, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a Proposed Decision and Order Awarding Benefits dated January 19, 2020, the district director credited the Miner with at least fifteen years of qualifying coal mine employment and determined he had a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). He thus found the Miner invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act² and awarded benefits commencing as of November 2018, the month in which the Miner filed his claim. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §§718.305, 725.503(b). Employer requested a hearing and the district director transferred the case to the Office of Administrative Law Judges (OALJ).

In an October 26, 2022 Evidence Summary Form, Claimant indicated she would offer for admission into the record an arterial blood gas study dated November 27, 2016, from the Miner's treatment records as evidence of total disability. Claimant's Evidence Summary Form at 8. She additionally identified this blood gas study as an "argument for [an] earlier date of entitlement." *Id.*

¹ Claimant is the daughter of the Miner, who died on November 3, 2021. Notice of Death and Motion to Substitute Party. She is pursuing the claim on behalf of the Miner's estate. *Id.*

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

At the November 16, 2022 hearing, the ALJ admitted the Miner's treatment records, including the November 27, 2016 blood gas study, without objection from Employer or the Acting Director, Office of Workers' Compensation Programs (the Director). Hearing Transcript at 16-17. Claimant noted that she would argue for a date of entitlement based on the 2016 blood gas study, and the ALJ stated that Claimant gave "adequate notice" for the parties to address the issue in their briefs. *Id.* at 34-35. Neither Employer nor the Director objected to Claimant's request. *Id.* at 35. In her post-hearing brief, Claimant argued that the November 27, 2016 blood gas study established that the Miner was totally disabled due to pneumoconiosis at that time and therefore was entitled to benefits as of that date.³ Claimant's Post-Hearing Brief at 34-35.

On November 13, 2023, Employer filed a Notice of Withdrawal of Further Resistance and Motion to Remand to Initiate Payment Pursuant to PDO⁴ and Settlement (Motion to Remand). Employer's Motion to Remand stated that pursuant to an August 8, 2023 agreement (Agreement) between Employer and the Department of Labor (DOL), the Black Lung Disability Trust Fund (Trust Fund) would pay benefits in this claim and Employer would remain responsible for any attorney fees or additional compensation under 33 U.S.C. §914(f).⁵ Motion to Remand at 1-2. The Motion further stated that Employer's counsel "conferred with Claimant's counsel, who is in agreement with this motion." *Id.*

The next day, the ALJ granted Employer's motion to remand the claim to the district director for the payment of benefits by the Trust Fund pursuant to the Agreement.⁶ Order of Remand to Pay Benefits. Later the same day, Claimant filed a motion for reconsideration, requesting that the ALJ resolve the contested issue of the date of onset for

³ Neither Employer nor the Director addressed the issue in their post-hearing briefs.

⁴ The Board infers that "PDO" is an abbreviation for the district director's January 19, 2020 Proposed Decision and Order that awarded benefits to the Miner.

⁵ Employer attached a copy of the executed agreement as Exhibit A to its motion.

⁶ We affirm, as unchallenged on appeal, the ALJ's order to the extent it accepts the Agreement between Employer and the DOL. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the commencement of benefits before remanding the case to the district director.⁷ Neither the Director nor Employer filed a response to Claimant's motion.

The ALJ denied the motion on November 30, 2023, finding Claimant did not adequately explain why she agreed to Employer's Motion to Remand if she wanted the ALJ to determine the benefits onset date. Order Denying Claimant's Motion for Reconsideration at 2. Additionally, he noted that the lack of any response to Claimant's motion led him to question whether the party who will pay benefits "even disputes that the date of entitlement should be November 2016."⁸ *Id.* Finally, the ALJ indicated he was hesitant to decide who would pay the benefits from November 2016 to November 2018 without the benefit of the parties' positions on the issue. *Id.* at 3.

Claimant filed a second motion for reconsideration on December 6, 2023, stating that she did not change her position; rather, Claimant asserted Employer had "inadvertently, partially misconstrued it." Second Motion for Reconsideration at 4. Specifically, Claimant explained that she had no objection to Employer's withdrawing its opposition to the claim, but she still contested the onset date of entitlement to benefits. *Id.* Claimant further stated that, after the ALJ's denial of her initial motion for reconsideration, she conferred with the Director's counsel, who indicated that the Director would not agree to an earlier entitlement date. *Id.* The Director responded that Claimant's motion for reconsideration should be denied for the reasons set forth in the ALJ's November 30, 2023 Order. Director's Opposition to Reconsideration at 1. On December 20, 2023, the ALJ denied Claimant's second motion for reconsideration, finding she failed to demonstrate any material differences in fact or law from those presented to the ALJ that she "could not have known through reasonable diligence." Order Denying Claimant's Second Motion for Reconsideration at 2.

On appeal, Claimant argues the Benefits Review Board should set the benefits onset date as November 27, 2016, or, alternatively, remand the case for the ALJ to resolve the date of entitlement. The Director responds that Claimant forfeited her onset date argument and urges the Board to affirm the ALJ's order to remand the case to the district director for payment of benefits beginning as of November 2018. Claimant replies to the Director's

⁷ In her motion, Claimant reiterated her post-hearing brief argument that the Miner's November 27, 2016 blood gas study established the onset date of his total disability due to pneumoconiosis. Motion for Reconsideration at 1-3.

⁸ He also noted that failure to timely respond to a motion may result in the requested relief being granted; however, he did not make that finding. Order Denying Claimant's Motion for Reconsideration at 2 n.2 (citing 29 C.F.R. §18.33(d)).

brief, arguing she properly raised the issue before the ALJ and reiterating the arguments in her initial brief. Employer declined to file a response.

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.⁹ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Claimant argues the ALJ erred in denying its motions for reconsideration to consider the contested date of onset of benefits issue. Claimant's Brief at 7-9. For the first time before the Board, the Director argues Claimant forfeited her date of entitlement argument. Director's Brief at 2. Specifically, he asserts that because Claimant did not request revision or a hearing in response to the district director's Proposed Decision and Order that set the onset date of benefits as the month of the filing of this claim, the ALJ could not consider the issue under 20 C.F.R. §725.463(a).¹⁰ The Director's argument is unpersuasive.

In any case 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 "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 ALJ 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). Where an issue is not reasonably ascertainable, a party may raise it "at any time after a claim has been transmitted by the district director to the [OALJ] and prior to decision" and an ALJ may, "in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue." 20 C.F.R. §725.463(b).

The Board has observed that the purpose of 20 C.F.R. §725.463(a) is "to expedite cases by ensuring that the parties are not surprised by new issues at the hearing, and to force the parties to develop evidence prior to the hearing." *Carpenter v. E. Associated*

⁹ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 11; Hearing Transcript at 30.

¹⁰ We reject the Director's argument that Claimant failed to raise the issue before the ALJ, as Claimant's counsel specifically stated during the hearing that she would contest the issue and further noted the issue in her evidence summary form. Hearing Transcript at 34; Claimant's Evidence Summary Form at 8; see Director's Response at 2.

Coal Corp., 6 BLR 1-784, 786 (1984). We have emphasized the importance of intent and notice to the parties when applying the regulation to bar consideration of uncontested issues. *Id.*

In this case, Claimant did not forfeit her date of onset for the commencement of benefits argument at the district director level. Initially, none of the parties objected to Claimant's notation of the issue at the hearing, so the Director may not argue Claimant forfeited the argument for the first time on appeal. See *Joseph Forrester Trucking v. Director, OWCP [Davis]*, 987 F.3d 581, 587 (6th Cir. 2021); *Grant v. Director, OWCP*, 6 BLR 1-619, 1-621 (1983) (parties waive right to rely upon list of contested and uncontested issues when they fail to object to inclusion of issue at the hearing); *Mullins v. Jewell Ridge Coal Corp.*, 4 BLR 1-343, 346 (1981).

Further, adequate notice and an intent to litigate the onset date issue was provided when the district director identified total disability and causation in his statement of contested issues. Director's Exhibit 45. In addressing those issues, Claimant submitted new evidence without objection—specifically the qualifying November 27, 2016 arterial blood gas study before the ALJ. See Director's Exhibits 41, 45; Hearing Transcript at 16-17. As the ALJ permissibly admitted new evidence into the record to determine *whether* the Miner was totally disabled due to pneumoconiosis, the parties could reasonably expect litigating *when* he became totally disabled due to pneumoconiosis. See *Carpenter*, 6 BLR at 1-786; *Mullins*, 4 BLR at 346.

Moreover, the ALJ specifically stated that Claimant timely raised the issue and the parties had sufficient time to address it. Hearing Transcript at 34-35. As Claimant properly raised the issue, the ALJ erred in failing to address a timely¹¹ raised, contested issue, and

¹¹ The ALJ issued a Prehearing Order on December 2, 2021, in which he directed the parties to comply with the requirements of 29 C.F.R. §18.33(c)(3) in filing all motions, "not just prehearing motions." Under this order, the ALJ asserted Claimant should have conferred with the Director before filing her first motion for reconsideration; however, she obtained the Director's position before filing her second motion for reconsideration. Second Motion for Reconsideration at 4. In denying Claimant's second motion for reconsideration, the ALJ relied on an Administrative Review Board decision, which has no precedence in this case. December 20, 2023 Order Denying Reconsideration at 2; see also *Sharpe v. Director, OWCP*, 495 F.3d 125, 133, n.15 (4th Cir. 2007) (finality interests do not apply to black lung claims as they do in ordinary lawsuits). We also note in denying Claimant's second motion for reconsideration, the ALJ found Claimant identified no "material difference in fact or law," but Claimant specified Employer inadvertently had

we remand the case for the ALJ to determine the onset date for the commencement of benefits.¹²

On remand, the ALJ must address Claimant's request to determine the onset date for the commencement of benefits. In doing so, he may request briefing from the parties on procedural and evidentiary matters as well as the merits of the issue.¹³ *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). He must consider the relevant evidence and determine if it establishes the onset date of the Miner's total disability due to pneumoconiosis. 20 C.F.R. §725.503(b). If the evidence does not establish when the Miner became totally disabled due to pneumoconiosis, then the ALJ should set the onset date for the commencement of benefits as the month the claim was filed. *Id.*

misrepresented her position. December 20, 2023 Order Denying Reconsideration at 2; Second Motion for Reconsideration at 4; Claimant's Brief at 10.

¹² Because the onset date finding requires a fact-specific inquiry of when the Miner became totally disabled due to pneumoconiosis, we decline to revise the onset date. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (remand to fact-finder necessary where additional factual findings are needed as the Board does not have jurisdiction to make such findings); Claimant's Brief at 7; Claimant's Reply Brief at 5.

¹³ The ALJ expressed concern regarding liability if the Miner were found entitled to benefits at an earlier date, but the Agreement provides that the Trust Fund would accept any liability that would have been imposed on Employer, and Claimant's rights to entitlement are unimpaired by the Agreement, to which she was not party. *See* Motion to Remand; November 30, 2023 Order Denying Reconsideration at 3. Further, although the ALJ also noted concern with the evidentiary limitations imposed on the Director, the Motion to Remand stipulates that the Agreement merely shifts liability for any benefits that Employer would have owed; thus, we see no reason why the ALJ cannot determine the onset date based on the fully developed hearing record.

Accordingly, we affirm in part and vacate in part the ALJ's Order of Remand to Pay Benefits, November 30, 2023 Order Denying Claimant's Motion for Reconsideration, and December 20, 2023 Order Denying Claimant's Motion for Reconsideration, and we remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge