U.S. Department of Labor

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

BRB No. 24-0156 BLA

MICKEY J. BENTLEY Claimant-Respondent v. QUEST ENERGY, INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 06/16/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

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:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2021-BLA-05076) rendered on a claim filed on February 15, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Quest Energy, Incorporated (Quest Energy), is the properly designated responsible operator. He accepted the parties' stipulation that Claimant is entitled to benefits as he suffers from complicated pneumoconiosis arising out of his coal mine employment. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §§718.304, 718.203. Thus, he awarded benefits. He further found that benefits should commence as of July 12, 2017, based on the parties' stipulations and the evidence of record.

On appeal, Employer argues the ALJ abused his discretion in finding extraordinary circumstances did not exist to admit its untimely liability evidence. Employer further contends that the Benefits Review Board should reverse the ALJ's finding that Quest Energy is the responsible operator as he found that Claimant's complicated pneumoconiosis developed prior to his employment with Quest Energy.[1] Claimant responds in support of the award of benefits and the onset date for the commencement of his benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the ALJ acted within his discretion in excluding Employer's untimely liability evidence and properly found Quest Energy is the correctly named responsible operator.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence,

[1] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant is entitled to benefits as of July 2017. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-3.

and in accordance with applicable law.[2] 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).

Exclusion of Liability Evidence

The only argument on appeal is whether the ALJ erred in excluding Employer's Exhibits 1, 2, 4, and 5 relevant to Employer's liability and thus erred in finding Quest Energy is the properly designated responsible operator.[3] 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).

Generally, the responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year. 20 C.F.R. §725.495(a)(1). However, where the evidence establishes that a miner's complicated pneumoconiosis predates the commencement of his coal mine employment with an employer, the Board has recognized that the latter employer should not be liable for the payment of the miner's black lung benefits. 20 C.F.R. §725.494(a); *see Swanson v. R.G. Johnson Co.*, 15 BLR 1-49, 1-51 (1991); *Truitt v. N. Am. Coal Corp*., 2 BLR 1-199, 1-204 (1979). Regardless, the designated responsible operator must submit documentary evidence relevant to its liability before the district director and must notify the district director of any potential witnesses whose testimony pertains 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).

Proceedings Before the District Director

On July 9, 2019, the district director issued a Notice of Claim, identifying Quest Energy as the potentially liable operator and Kentucky Employers' Mutual Insurance

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 33 at 5.

[3] While Employer challenges the exclusion of Employer's Exhibit 3, it voluntarily withdrew this evidence. Hearing Transcript at 21.

(Kentucky Mutual) as the potentially liable carrier.[4] Director's Exhibit 35. The notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id*. Employer responded on July 26, 2019, denying liability but did not submit any liability evidence at that time. Director's Exhibits 38, 46.

On March 25, 2020, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), designating Quest Energy as the responsible operator and Kentucky Mutual as its insurer. Director's Exhibit 41. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until May 25, 2020, to do so and provided that the date could be extended for good cause. *Id*. at 3. The district director further advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id.*, *citing* 20 C.F.R. §725.456(b)(1). On April 1, 2020, Employer challenged Quest Energy's designation as the responsible operator and Claimant's entitlement to benefits, but it did not submit any liability evidence or request an extension of the deadline to submit such evidence. Director's Exhibits 43, 44.

On May 22, 2020, in response to the SSAE, Employer requested an extension to submit Dr. Dahhan's report and Claimant's 2020 deposition transcript. Director's Exhibit 55. The district director extended the deadline to July 6, 2020. Director's Exhibit 56. Employer timely submitted Claimant's deposition transcript. Director's Exhibit 53. The district director issued a Proposed Decision and Order on August 19, 2020, awarding benefits and designating Quest Energy and Kentucky Mutual as the responsible operator and carrier, respectively. Director's Exhibit 57. On September 6, 2020, Employer requested reconsideration or a hearing and on October 13, 2020, the case was transferred to the OALJ. Director's Exhibits 58, 61, 63.

Proceedings Before the ALJ

The case was referred to the OALJ on December 14, 2022, and was reassigned to the ALJ.[5] On June 23, 2023, Employer submitted the following -- all of which diagnosed

[4] A notice of claim from March 25, 2019, identifies Travelers Property & Casualty as the potentially liable carrier; however, subsequent documents identify Kentucky Employers' Mutual Insurance as the carrier. Director's Exhibit 34; *see* Director's Exhibits 36, 37.

[5] On January 6, 2022, the case was originally assigned to ALJ Larry S. Merck, who issued a Notice of Hearing for April 25, 2022, but subsequently remanded the case back to the district director for a supplemental medical opinion. On November 16, 2022, while the

Claimant with complicated pneumoconiosis: Dr. Adcock's interpretations of x-rays dated July 12, 2017, and November 14, 2017; Dr. Adcock's interpretation of a CT scan conducted on September 1, 2021; a serial reading of the films by Dr. Adcock; and a report from Dr. Dahhan in which he reviewed the objective testing. Employer's Exhibits 1-5. At the November 14, 2023 formal hearing the Director objected, asserting that the evidence relates to liability, it was not submitted before the district director, and extraordinary circumstances did not exist for its untimely admission. Hearing Transcript at 13. Employer responded that it had no reason to know of the existence of the films because Claimant did not inform Employer of the 2017 films and testing during his deposition despite having testified to prior treatment.[6] *Id.* at 9-10, 14-15. Consequently, Employer argued the timeline for submitting this liability evidence was too short to enable it to obtain the 2017 films and testing results. *Id*. Employer further asserted that it did not become aware of the evidence until it requested Claimant's treatment records from Whitesburg Appalachian Regional Healthcare Hospital (ARH) after becoming Employer's counsel in November 2022. *Id*. at 15.

The ALJ found that Employer could have obtained the x-ray "upon a diligent search" to obtain Claimant's treatment records from ARH because Claimant disclosed at his 2020 deposition that he was treated at ARH where the 2017 x-ray film was taken. Hearing Transcript at 16. Noting that the regulations provide strict timelines for submission of liability evidence, that Employer had months to obtain the evidence it untimely submitted, and there is nothing extraordinary in Claimant forgetting that he underwent diagnostic testing at ARH when asked about it during his deposition, the ALJ found Employer failed to establish extraordinary circumstances for the submission of the evidence. *Id*. at 16-21. He therefore excluded Employer's Exhibits 1, 2, 4, and 5 for the purposes of establishing liability, and Employer voluntarily withdrew Employer's Exhibit 3. *Id*. at 21. The ALJ reiterated his findings in his Decision and Order. Decision and Order at 2. Thus, the ALJ concluded that no evidence demonstrated the onset of Claimant's

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case was pending before the district director for the second time, Employer's counsel withdrew from representing Employer. Director's Exhibit 75. On November 30, 2022, Mr. Thomas L. Ferreri and Matthew J. Zanetti entered their appearance as Employer's counsel. Director's Exhibit 76.

[6] Claimant testified that he was referred to Dr. Alam at Whitesburg Appalachian Regional Healthcare Hospital for his "breathing." Director's Exhibit 53 at 43. He stated he does not remember when he had treatment, but when asked by counsel if it was 2018 or 2019, he thought 2019 was correct. *Id*. Later Employer's counsel asked for Claimant to clarify, and Claimant agreed that he failed a physical examination in 2016, which caused him to start seeing Dr. Branham, who then referred him to Dr. Alam. *Id*. at 43-44.

complicated pneumoconiosis occurred before he began his employment with Quest Energy and Employer failed to demonstrate that another coal mine employer more recently employed Claimant. Decision and Order at 2-3; Hearing Transcript at 27-28.

Extraordinary Circumstances

On appeal, Employer argues that extraordinary circumstances exist for the admission of its liability evidence for the following reasons: 1) it could not have been aware of the x-rays because during Claimant's 2020 depositions he did not identify the treatment he received at ARH; 2) Employer was not able to obtain medical evidence until the 2020 SSAE was issued in accordance with DOL rules; 3) without knowledge of the films, Employer would have to submit blanket requests for extensions of time contrary to the district director's general requirement that the parties identify the evidence for which they seek an extension of time to submit; and 4) not admitting this evidence will result in unnecessary delays to request all treatment records in future complicated pneumoconiosis cases.[7] Employer's Brief at 5-9. The Director responds that the ALJ acted within his discretion in excluding Employer's liability evidence because Employer had nearly a year before the SSAE deadline to investigate Claimant's medical history, yet it made no attempt to obtain Claimant's treatment records from ARH despite its knowledge of the 2019 x-rays diagnosing complicated pneumoconiosis and Claimant's testimony that he had received prior treatment at ARH. Director's Brief at 6-8. We agree with the Director's argument.

Settled law establishes the ALJ did not abuse his discretion by concluding that Employer failed to establish extraordinary circumstances. *See Marfork Coal Co. v. Weis*, 251 Fed. App'x 229, 236 (4th Cir. 2007) (no extraordinary circumstances for the untimely admission of liability evidence when an x-ray showing complicated pneumoconiosis was "waiting to be found," but employer failed to investigate until after the claim was referred to the OALJ); *Dempsey*, 23 BLR at 1-63; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-152 (1989) (en banc). Regardless of Employer's assertion that the regulations functionally require it to continuously request extensions of time at the district director level, it does not explain how this constitutes extraordinary circumstances for its failure to request Claimant's treatment records until two years after his 2020 deposition. 20 C.F.R. §725.456(b)(1) ("[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

[7] Employer also argues the COVID-19 pandemic made it more difficult to obtain Claimant's treatment records. Employer's Brief at 2. However, Employer did not raise this argument before the ALJ and instead stated the treatment records were not requested until two years after the deposition, when Employer's current counsel was retained. Hearing Transcript at 15. Consequently, we reject this argument.

district director shall not be admitted into the hearing record in the absence of extraordinary circumstances."); *Weis*, 23 BLR at 1-191-92.

Employer knew that Claimant has complicated pneumoconiosis based on the March 28, 2019 x-ray, which Dr. DePonte read as showing small opacities of pneumoconiosis in a r/q shape and in a 3/3 profusion throughout the lungs, with the coalescence of small opacities, and large Category "B" opacities of pneumoconiosis. Director's Exhibit 25 at 38. Employer further was informed at Claimant's 2020 deposition that he previously had failed an x-ray examination in 2016, and that he was treated for breathing problems at ARH but could not remember the date. Director's Exhibit 53 at 47.

As the ALJ accurately found, while Claimant did not recall the 2017 x-rays that Employer later obtained from ARH, he testified at his 2020 deposition that he had been treated there in the past for a respiratory condition. Hearing Transcript at 15-16; Director's Exhibit 53 at 53. Moreover, Employer admitted that it obtained the 2017 x-rays when it requested Claimant's treatment records from ARH related to his 2019 hospitalization. Hearing Transcript at 15. Thus, Claimant's testimony at his 2020 deposition led to the discovery of the x-rays that Employer wishes to rely upon and submit as its liability evidence and supports the ALJ's finding that a diligent search would have revealed their existence earlier. Hearing Transcript at 16.

The ALJ further found there is no evidence that Claimant deliberately attempted to mislead Employer, but rather forgot he underwent diagnostic testing at ARH, which the ALJ reasonably found did not constitute an extraordinary circumstance. Hearing Transcript at 16. Moreover, despite having several months to obtain this evidence, Employer did not do so. *Id.* at 17. We also note that Employer did not seek an additional extension of time to submit liability evidence based on the deposition transcript, despite having previously requested and been granted such an extension of time. Director's Exhibits 53, 55.

Thus, we find the ALJ reasonably excluded Employer's liability evidence and acted within his discretion in concluding that extraordinary circumstances did not exist to allow for the untimely submission of Employer's Exhibits 1, 2, 4, and 5. 20 C.F.R. §725.456(b)(1); *Weis*, 251 Fed. App'x at 236; *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-153; Decision and Order at 2-3. Consequently, there is no evidence supporting a finding that another employer is the coal mine operator responsible for the payment of Claimant's benefits. We therefore affirm the ALJ's determination that Quest Energy is the properly designated responsible operator. 20 C.F.R. §§725.407, 725.494(a)-(e), 725.495(a)(1); Decision and Order at 3.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge