U.S. Department of Labor

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

BRB No. 24-0258 BLA

HERMAN D. BAILEY Claimant-Respondent v. GREENBRIER MINERALS, LLC and BRICKSTREET MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 06/25/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration (2018-BLA-05066) rendered on a claim filed on July 20, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has at least twenty-three years of coal mine employment. Further, the ALJ found Claimant established complicated pneumoconiosis, thereby invoking 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); 20 C.F.R. §718.304. The ALJ also found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On April 20, 2021, Employer filed a Motion for Reconsideration, challenging evidentiary rulings made by the ALJ. The ALJ denied Employer's Motion. April 10, 2024 Order Denying Reconsideration.

On appeal, Employer contends the ALJ erred in excluding an x-ray reading and two physicians' deposition transcripts it submitted and in denying its motion for reconsideration. It therefore argues the ALJ erred in finding Claimant established that he is entitled to benefits. Claimant responds, contending the ALJ permissibly excluded evidence that exceeded the evidentiary limitations. The Acting Director, Office of Workers' Compensation Programs, has not filed a response. Employer has filed a reply, reiterating its prior contentions.[1]

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are rational, supported by substantial evidence, 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, 361-62 (1965).

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty-three years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[2] 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); Hearing Transcript at 36, 43.

Evidentiary Issues

An ALJ is granted broad discretion in resolving procedural and evidentiary issues. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (en banc). A party seeking to overturn an ALJ's resolution of an evidentiary issue must show that the ALJ's action was an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009).

The regulations set limits on the number of specific types of medical evidence the parties can submit into the record. *See* 20 C.F.R. §§725.414, 725.456(b)(1). In support of their affirmative case, each party may submit no more than two chest x-ray interpretations, two pulmonary function studies, two arterial blood gas studies, one autopsy report, one report of each biopsy, and two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). A physician who prepared a medical report submitted by the parties and admitted into the record may testify with respect to the claim as a supplement to the physician's initial opinion. 20 C.F.R. §725.414(c). If a party has not submitted a physician's medical report, that physician's testimony may nonetheless be submitted but will constitute a medical report subject to the evidentiary limitations. *Id.* To rebut the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest [x]-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Medical evidence that exceeds those limitations "*shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1) (emphasis added).

Employer designated on its evidence form and submitted its full complement of two affirmative chest x-ray interpretations: Drs. Basheda's and Meyer's interpretations of the September 7, 2017 x-ray. ALJ's Exhibit 2; Employer's Exhibits 2, 10. Employer also designated Dr. Crum's reading of a January 15, 2018 x-ray as a third affirmative x-ray reading offered as Employer's Exhibit 11 "for good cause, impeachment of Claimant's [e]vidence." ALJ's Exhibit 2; Employer's Exhibit 11. In addition, Employer designated on its evidence summary form two affirmative medical reports from Drs. Basheda and Green.[3] ALJ's Exhibit 2; Employer's Exhibits 2, 11. Finally, Employer separately listed the depositions from four physicians—Drs. Basheda, Green, Ammisetty, and Meyer—and designated them all as "[t]estimony." ALJ's Exhibit 2; Employer's Exhibits 3, 6, 7, 14.

At the hearing, Employer offered Dr. Crum's reading of the January 15, 2018 x-ray in Employer's Exhibit 11, which Employer's counsel acknowledged to be in excess of the

[3] Employer originally also designated Dr. Farney's report on its evidence summary form, but it withdrew this medical report at the hearing. Hearing Transcript at 23.

evidentiary limitations. Hearing Transcript at 26-27. However, he asserted that "if we are after the truth of the matter, I can't think of a better example for finding good cause," also arguing that "the evidence limitations set a floor, not a ceiling." *Id*. Claimant's counsel did not object out of "fair[ness]" because he sought to submit evidence outside of the deadlines. *Id.* at 27-28. Consequently, the ALJ admitted Employer's Exhibit 11. *Id.* The ALJ also admitted all four of the depositions (Employer's Exhibits 3, 6, 7, 14) at the hearing without analysis. *Id.* at 28.

In his Decision and Order, however, the ALJ found "Employer has not provided good cause for admitting an x-ray in excess of the evidence limitations," noting that it had not been clear to him as he had been presiding over this case that Employer had already designated two affirmative x-ray interpretations on its evidence summary form. Decision and Order at 3. The ALJ also found that, "contrary to Employer's argument, the evidentiary limitations do set a ceiling" and he is "obligated to enforce the evidentiary limitations, even if no party objects to the excessive evidence." *Id.* at 3. Further, he found Employer did not establish good cause and therefore excluded Employer's Exhibit 11. *Id.*

The ALJ also determined the deposition testimony of Dr. Ammisetty (Employer's Exhibit 6) and Dr. Meyer (Employer's Exhibit 14) to be in excess of the evidentiary limitations, as Employer had already designated two affirmative medical reports: Dr. Basheda's medical report (Employer's Exhibit 2) and deposition (Employer's Exhibit 7), and Dr. Green's medical report (Employer's Exhibit 11) and deposition (Employer's Exhibit 3). Decision and Order at 3-4. Because the ALJ noted that Employer had not argued good cause to submit medical reports in excess of the evidentiary limitations, he did not consider Employer's Exhibits 6 and 14, striking them from the record.[4] *Id.* at 4.

On April 20, 2021, Employer filed a Motion for Reconsideration requesting the ALJ vacate his Decision and Order and allow the parties to redesignate the evidence to be considered before the ALJ rendered a final decision. On April 10, 2024, the ALJ issued an Order Denying Employer's Motion for Reconsideration. In denying Employer's Motion, the ALJ found "[t]his is not the situation where the principles of fairness and administrative efficiency require the [ALJ] to sort out the evidence submitted before issuing a decision, but a situation where additional evidence was knowingly submitted in excess of the limitations and asked to be considered for good cause, but where good cause was never established." ALJ's Order at 2. The ALJ noted that Employer included the extra evidence, knowing and stating that it was in excess of the evidentiary limitations without ever

[4] The ALJ went on to find that the admissible x-ray evidence, computed tomography scan evidence, and medical opinion evidence established complicated pneumoconiosis. Decision and Order at 6-18.

establishing good cause, and should have moved for the ALJ to substitute evidence at the hearing rather than submitting evidence it knew exceeded the limitations. *Id.* at 3. Consequently, the ALJ denied Employer's Motion for Reconsideration. *Id.*

Employer argues the ALJ erred in "reversing the rulings made in open court at the 2018 hearing in the 2021 decision without prior notice or warning," thus denying it a full and fair hearing, erred in excluding its evidence, and erred in not addressing its challenges to Claimant's untimely evidence submission. Employer's Brief at 7. Employer's arguments are not persuasive.

Employer's Exhibit 11—Dr. Crum's reading of the January 15, 2018 x-ray

Employer does not dispute that it submitted Dr. Crum's interpretation of the January 15, 2018 x-ray in excess of the evidentiary limitations. Moreover, while Employer argues it was prejudiced by the ALJ admitting Dr. Crum's reading at the hearing but later excluding it in his Decision and Order, it fails to explain how the admission and consideration of Dr. Crum's x-ray reading would change the outcome of this case. That omission is critical given the ALJ's alternative finding that, even if Dr. Crum's reading were admitted and considered, the result would not change:[5]

> Even assuming, arguendo, that I considered and gave probative weight to Dr. Crum's interpretation of the x-ray taken on January 15, 2018, I would find the x-ray evidence, overall, inconclusive on complicated pneumoconiosis. I would still give more probative weight to the [computed tomography (CT)] scan evidence, which is more probative and more recent than the x-ray evidence. Therefore, I would still find the evidence, overall, positive for complicated pneumoconiosis.

Decision and Order at 17 n.28. Employer does not challenge these findings, which we therefore affirm. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, Employer has failed to demonstrate how the alleged error would make a difference in the outcome, and therefore any such error is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] The ALJ found the October 3, 2016 x-ray to be positive for complicated pneumoconiosis and the readings of the September 7, 2017 x-ray to be inconclusive. Decision and Order at 8. Thus, he found the x-ray evidence as a whole to be inconclusive. *Id*.

Employer's Exhibits 6 and 14—Drs. Ammisetty's and Meyer's depositions

Although it is preferable for an ALJ to rule on evidentiary objections before the issuance of the Decision and Order, *see LP* [*Preston*] *v. Amherst Coal Co*., 24 BLR 1-57, 1-63 (2008),[6] we are not persuaded that Employer was prejudiced by the ALJ's exclusion of the depositions of Drs. Ammisetty (Employer's Exhibit 6) and Meyer (Employer's Exhibit 14). For those depositions, Employer had the opportunity to present a good cause argument at the hearing or in its closing argument to the ALJ, but it did not do so. Under the facts of this case, we see no error in the ALJ's determination that the depositions of Drs. Ammisetty and Meyer must be excluded because Employer did not satisfy its burden under the regulations to show good cause for their admission into the record. 20 C.F.R. §725.456(b)(1); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-62 (2004) (en banc). We also see no error in the ALJ's denial of Employer's Motion for Reconsideration, in which

[6] In support of its argument that the ALJ did not provide adequate notice of his exclusion of evidence, Employer relies on a statement in *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), that an ALJ "should render his or her evidentiary rulings before issuing the Decision and Order." However, *Preston's* guidance must be read in context. The Board did not state that all evidentiary rulings must be done by interlocutory order in every case. Nor did the Board's statement undermine an ALJ's "broad discretion in dealing with procedural matters." *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc). The primary holding in *Preston* was that the ALJ improperly excluded evidence from the record, thus requiring remand. Then, guided by a "concern for fairness and the need for administrative efficiency," the Board addressed "another important matter" by stating, "[I]f the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order." *Preston*, 24 BLR at 1-63. The stated purpose of that guidance was to give the aggrieved party an opportunity to make a "good cause" argument for why the excess evidence should nevertheless be admitted into the record or to "otherwise resolve issues regarding the application of the evidentiary limitations[.]" *Id*. In this case, Employer sought to admit the depositions of Drs. Ammisetty and Meyer, notwithstanding the evidentiary limitations, by separately listing them on its evidence summary from as "testimony," rather than arguing good cause existed for the admission of the testimony as affirmative medical opinions in excess of the limitations. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003). Remanding this case to allow Employer to now argue good cause or to re-designate its evidence impedes, rather than promotes, fairness and administrative efficiency. *Preston*, 24 BLR at 1-63.

Employer once again did not argue good cause exists for the admission of this evidence in excess of the evidentiary limitations. 20 C.F.R. §725.456(b)(1); ALJ's Order at 2-3.

Further, an ALJ is not required to fill or redesignate evidentiary slots for a party when the proper designations are not made. *See* 20 C.F.R. §§725.414(a)(3)(i), 725.456(b)(3). Because Employer did not file a motion or make any attempt to amend its evidence summary form to substitute the depositions of Drs. Ammisetty and Meyer for one of its two affirmative medical reports prior to the issuance of the Decision and Order, or to designate Employer's Exhibit 11 as affirmative evidence, the ALJ acted within his discretion in excluding the entirety of this evidence. *See* 20 C.F.R. §§725.414, 725.456(b)(3), 725.455(b), (c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007) (en banc); *Harris Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-13 (2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

An ALJ is empowered to conduct formal hearings and is given broad discretion in resolving procedural and evidentiary matters. *See Clark*, 12 BLR at 1-153. Thus, a party seeking to overturn an ALJ's disposition of an evidentiary issue must establish that the ALJ's action represented an abuse of discretion. *Id*. We hold that Employer has not met its burden to show an abuse of his discretion in this case. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609 (4th Cir. 2006). We therefore affirm the ALJ's exclusion of Employer's Exhibits 6 and 14 from the record. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999) (en banc); *Clark*, 12 BLR at 1-153.

Claimant's Rebuttal Evidence

Employer also argues the ALJ erred in failing to address its objections to Claimant's evidence raised in its Motion for Reconsideration. Employer's Brief at 10-11. Specifically, Employer objected to the untimely submission of Dr. Crum's interpretations of the October 3, 2016 and September 7, 2017 x-rays, an objection which the ALJ did not address. *Id*.

However, as discussed above, the ALJ found the x-ray evidence to be less probative than the CT scan evidence, which he found to be positive for complicated pneumoconiosis, findings we affirmed above as unchallenged. Decision and Order at 17 n.28. Thus, Employer has not explained how the consideration of these x-rays made any difference in the outcome of the case. *Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278. Consequently, we reject its arguments.

As Employer raises no arguments on the merits of this case, we affirm the ALJ's findings that Claimant established complicated pneumoconiosis arising out of coal mine employment and thus invoked the irrebuttable presumption of total disability due to

pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.304; Decision and Order at 6-19.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge