

U.S. Department of Labor

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



BRB No. 19-0163 BLA

JOHN E. HYDER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SIMMONS FORK MINING, INCORPORATED)	DATE ISSUED: 03/23/2020
)	
and)	
)	
BRICKSTREET MUTUAL INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

James W. Heslep (Jenkins Fenstermaker, PLLC), Clarksburg, West Virginia, for carrier.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals the Decision and Order Awarding Benefits in an Initial Claim (2016-BLA-05883) of Administrative Law Judge Larry S. Merck filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on April 27, 2015.

The administrative law judge found, and the parties do not contest, claimant has complicated pneumoconiosis arising out of coal mine employment. He therefore determined 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) and awarded benefits, commencing May 2011. These findings are affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Carrier's sole contention on appeal is that the administrative law judge erred in finding it is the responsible insurance carrier liable for the payment of benefits on behalf of employer. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Claimant responds in support of the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's decision must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.¹ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The insurance carrier on the risk when complicated pneumoconiosis is proven is responsible for the payment of benefits. *See Swanson v. R.G. Johnson Co.*, 15 BLR 1-49, 1-51 (1991). Because the district director must conclusively identify the responsible operator or carrier *before* referring a case to the Office of Administrative Law Judges (OALJ), the regulations require, absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §§725.407(d), 725.414(d) ("no

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Employer's Exhibit 1 at 9.

documentary evidence pertaining to liability may be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director”), 725.456(b)(1) (documentary evidence not submitted to the district director “shall not be admitted into the hearing record in the absence of extraordinary circumstances.”); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000); *see also Brickstreet Mutual Ins. Co. v. Director, OWCP*, 767 Fed. Appx. 491, 503-05 (4th Cir. 2019) (carriers are subject to the liability evidence disclosure rules).

The district director issued a Notice of Claim on May 6, 2015, identifying employer as a potentially liable operator and carrier as the responsible carrier. Director’s Exhibits 23-25. The Notice of Claim informed employer and carrier they had thirty days from receipt to accept or contest employer’s identification as a potentially liable operator. *Id.* If they contested that issue, they had ninety days to submit supporting documentary evidence. *Id.* Alternatively, they could request an extension of time to submit documentary evidence based on a showing of good cause. *Id.* Although employer disputed that it was a potentially liable operator, neither employer nor carrier submitted documentary evidence in response to the Notice of Claim or sought an extension of time to submit documentary evidence. Director’s Exhibit 26; *see* Decision and Order at 8.

The district director subsequently issued a Schedule for the Submission of Additional Evidence (SSAE) on December 15, 2015, preliminarily designating employer as the responsible operator. Director’s Exhibit 31. The district director sent the SSAE to both employer and carrier and notified them they could no longer submit evidence contesting liability on the grounds that employer is not a potentially liable operator. *Id.* The SSAE further notified the parties they had until February 12, 2016 to submit any additional documentary evidence relevant to liability, and until March 13, 2016 to submit documents responsive to evidence submitted by another party. *Id.* The district director further informed the parties they could request an extension of time to submit documentary evidence based on a showing of good cause. *Id.* The SSAE explained the consequences of failing to submit a timely response, stating “[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 [OALJ].” *Id.*

Employer responded to the SSAE on December 18, 2015, on behalf of itself and carrier, noting the importance of investigating the earliest diagnosis of complicated pneumoconiosis, and indicating it might request additional time to develop evidence on this issue. Director’s Exhibit 32. By letter dated December 28, 2015, employer requested a sixty-day extension, through April 12, 2016, to compile evidence relating to liability. Director’s Exhibit 33. The district director granted its request, but the record does not contain any evidence subsequently submitted on the liability issue. Director’s Exhibit 34; *see* Decision and Order at 8. The district director issued a Proposed Decision and Order

awarding benefits on May 10, 2016 and naming employer/carrier as responsible for the payment of benefits. Director's Exhibit 40. Employer/carrier timely requested a formal hearing on June 9, 2016, and the case was transferred to the OALJ. Director's Exhibits 42, 44.

On July 8, 2016, after employer requested a hearing before the OALJ, carrier submitted a motion to the district director to be dismissed as the responsible carrier. Carrier Exhibit 3. It also submitted a June 28, 2017 motion to the administrative law judge similarly asking to be dismissed from the claim. Carrier Exhibit 4. At the October 30, 2017 hearing, carrier continued to contest its designation as the responsible carrier, arguing the district director failed to consider evidence showing its policy did not take effect until after claimant was diagnosed with complicated pneumoconiosis in May 2011.² Hearing Transcript at 9, 13-17; Claimant's Post-Hearing Brief at 2-3. After the hearing, carrier submitted an insurance policy showing a coverage date beginning on December 13, 2013; a January 11, 2016 notice of appearance letter to the district director claims examiner; its July 8, 2016 motion to the district director; and its June 28, 2017 motion to the administrative law judge.

As accurately summarized by the administrative law judge, carrier filed its July 8, 2016 motion with the district director after the April 12, 2016 deadline for submitting its liability evidence and after the district director's May 10, 2016 Proposed Decision and Order deeming carrier liable.³ Decision and Order at 9; Director's Exhibits 33-34, 40, 42. Further, he found that although carrier attached Dr. Ahmed's May 19, 2011 x-ray reading to its motion to the district director, it did not include documentation concerning its policy coverage period.⁴ *Id.*, referencing Carrier's Exhibits 1, 3. Moreover, he found no evidence

² All five x-ray readings submitted by the parties were positive for complicated pneumoconiosis. Decision and Order at 5. The administrative law judge relied on Dr. Ahmed's uncontradicted reading of the earliest x-ray of record, dated May 19, 2011, to find claimant had complicated pneumoconiosis and was entitled to benefits as of that date. *Id.* at 10; Director's Exhibit 10.

³ The administrative law judge found carrier was served with and received the Notice of Claim and the SSAE containing the relevant due dates for contesting liability and submitting liability evidence. Decision and Order at 8-9. As carrier does not dispute this finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

⁴ The administrative law judge noted that employer's motion specifically references Dr. Ahmed's x-ray as "Exhibit A," but does not identify any attachments to support its

that the document marked as Carrier's Exhibit 1, a policy Information Page showing carrier's dates of policy coverage, was submitted to the district director or filed in compliance with the deadlines provided in the Notice of Claim and the SSAE.⁵ Decision and Order at 9. The administrative law judge concluded, therefore, that carrier failed to timely submit documentation establishing it is not the properly designated carrier and its failure did not constitute "extraordinary circumstances" warranting consideration of untimely evidence. *Id.*; see 20 C.F.R. §725.456(b)(1). Consequently, he determined the evidence did not justify transfer of liability to the Trust Fund. Decision and Order at 9.

On appeal, carrier generally asserts evidence establishing it did not insure employer until December 13, 2013 was "presented . . . to the [district director] during the investigatory stage of this claim" but that "the [district director] took no heed of this information and undertook no apparent action to put the proper carrier on notice."⁶ Carrier's Brief at 7; see Carrier's Exhibit 1. Carrier, however, has not provided any support for its assertion or set forth any basis for overturning the administrative law judge's finding that carrier failed to submit its evidence to the district director or file it in accordance with the deadlines in the Notice of Claim and SSAE. See Decision and Order at 9. Moreover, carrier has not identified any error in the administrative law judge's finding that it did not

contention that its insurance coverage did not begin until December 2013. Decision and Order at 9.

⁵ The administrative law judge also found carrier's policy Information Page only establishes that it issued a policy beginning in December 2013, but does not establish it did not cover employer's coal mine employees prior to that date or that another insurer covered the employees at the time claimant was first diagnosed with complicated pneumoconiosis. Decision and Order at 9 n.6.

⁶ Carrier also states this evidence was "admitted into evidence by the administrative law judge." Carrier's Brief at 6. At the hearing, the administrative law judge gave carrier thirty-days to submit any evidence it might have provided to the district director and gave the other parties thirty days to respond to any submissions. Hearing Transcript at 16-17. Carrier subsequently filed four exhibits and neither claimant nor employer filed an objection so the exhibits were admitted into evidence. See Decision and Order at 2 n.2. This does not negate, however, carrier's obligation to timely submit this evidence to the district director or demonstrate extraordinary circumstances for its consideration by the administrative law judge. 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000).

argue let alone establish “extraordinary circumstances” excuse its untimely submission.⁷ Thus, we reject carrier’s contention that the district director failed to consider timely-submitted evidence relevant to liability.

For similar reasons, we reject carrier’s related argument that its due process rights were violated because it did not receive a full and fair hearing on liability when relevant evidence was not considered in assigning liability. *See Carrier’s Brief at 6.* An administrative law judge 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 an administrative law judge’s disposition of a procedural or evidentiary issue must establish that the administrative law judge’s action represented an abuse of discretion. *See V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The administrative law judge reasonably found carrier failed to comply with the time requirements for submitting evidence relating to liability, despite several notifications and an extension of time from the district director. *See Smith v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 22 BRBS 46, 50 (1989) (holding that the party seeking to admit evidence must exercise due diligence in developing its claim prior to hearing); *accord Sam v. Loffland Bros.*, 19 BRBS 229, 230 (1987). Moreover, the record indicates carrier was aware of the potential issue of onset date of complicated pneumoconiosis at the time it controverted its liability for the claim. *See Director’s Exhibit 32.* From that point, it was carrier’s responsibility to take action by timely submitting relevant evidence to the district director, which it failed to do. *See Brickstreet*, 767 Fed. Appx. at 503-05.

Due process requires that a party be allowed to exercise its rights at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 997, 23 BLR 2-302, 2-315 (7th Cir. 2005). Because carrier was given the opportunity to submit its liability evidence before the district director and did not argue that extraordinary circumstances warrant untimely admission before the administrative law judge, its due process rights were not violated. We therefore affirm the administrative law judge’s designation of carrier as the responsible carrier.

⁷ The administrative law judge stated carrier argued only that it *did* submit evidence to the district director, not that extraordinary circumstances justify its failure to do so. Decision and Order at 8.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in an Initial Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge