

BRB No. 08-0122 BLA

W.L.)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 09/30/2008
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 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Order Dismissing Claim of Adele Higgins Odegard,
Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank
James, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Order Dismissing Claim (2006-BLA-05499) of
Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to
the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as
amended, 30 U.S.C. §901 *et seq.* (the Act). The relevant procedural history of the case is
as follows. Claimant filed his claim for benefits on January 20, 2004. Director's Exhibit
3. In a Proposed Decision and Order dated October 14, 2005, the district director denied
benefits.¹ Director's Exhibit 28. By letter dated November 18, 2005, claimant requested

¹ A document entitled "Proof of Service," dated October 14, 2005, was attached to
the Proposed Decision and Order. This document was signed by the district director and

a hearing, and the district director forwarded the case to the Office of Administrative Law Judges. Director's Exhibit 30. The issues identified as being contested by the Director, Office of Workers' Compensation Programs (the Director), on Form CM-1025 were length of coal mine employment, the existence of pneumoconiosis, causation, and subsequent claim (whether claimant satisfied his burden to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309). Director's Exhibit 32.

A hearing was held on December 18, 2006. The record was held open for the submission of additional medical evidence and post-hearing briefs. The Director submitted a post-hearing brief on June 1, 2007, asserting only that the evidence was insufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309 or to establish claimant's entitlement to benefits. Thereafter, on June 30, 2007, the administrative law judge issued an "Order to Parties Requiring Responses on the Timeliness of the Claimant's Appeal."² The parties were directed to address: 1) whether claimant's hearing request was timely filed within the 30-day period prescribed by 20 C.F.R. §725.419; 2) if not, whether the case should be dismissed for lack of jurisdiction; and 3) whether the Director's failure to raise the timeliness of the hearing request waived the issue and, therefore, whether the administrative law judge retained jurisdiction to consider the merits of claimant's case. By letter dated July 9, 2007, claimant's counsel responded to the Order, arguing that the issue of the timeliness of the hearing request was not properly before the administrative law judge, as that issue had not been identified as being contested by the Director on Form CM-1025 pursuant to 20 C.F.R. §725.463. Claimant's counsel further asserted that claimant's November 18, 2005 hearing request was timely filed pursuant to Section 725.419, as it was made within thirty days of October 19, 2005, the date on which the Proposed Decision and Order was actually mailed to claimant.³ On July 31, 2007, the Director also responded to the

purported to certify that the Proposed Decision and Order was mailed to the parties and their representatives on that date. Director's Exhibit 28.

² The administrative law judge used the word "appeal," as opposed to hearing request, but for the purposes of this decision we reference claimant's hearing request.

³ Although the Certificate of Service for the Proposed Decision and Order indicated that it was mailed to the parties on October 14, 2005, claimant's counsel asserts that it was not sent out on that date. In support of her assertion, claimant's counsel submitted to the administrative law judge the envelope she received from the district director, containing the Proposed Decision and Order. It was postmarked October 19, 2005, not October 14, 2005, and had the return address of the United States Department

administrative law judge's June 30, 2007 Order. The Director alleged that because the time limit for filing a hearing request concerns an issue of jurisdiction, it cannot be waived by the parties. The Director maintained that claimant's hearing request was not timely filed within thirty days of the issuance of the Proposed Decision and Order denying benefits, on October 14, 2005. However, the Director argued that the case should not be dismissed as claimant's hearing request "effectively constituted a timely petition for modification." Director's July 31, 2007 letter (unpaginated). Therefore, the Director requested that the case be remanded to the district director for modification proceedings pursuant to 20 C.F.R. §725.310.

In an Order Dismissing Claim dated September 5, 2007, the administrative law judge ruled that 20 C.F.R. §725.463 barred consideration of substantive issues that were not identified by the district director, or raised by the parties at the hearing, but since the timeliness of claimant's hearing request involved a jurisdictional question, that issue was not subject to waiver and could be raised at any time. Order at 4. The administrative law judge determined that claimant's hearing request was untimely because it was not filed within thirty days of the *issuance* of the Proposed Decision and Order on October 14, 2005 (as evidenced by the Proof of Service). *Id.* at 3. The administrative law judge also rejected the Director's argument that the untimely hearing request should be construed as a modification request. *Id.* at 4. Accordingly, the administrative law judge dismissed the claim for lack of jurisdiction. *Id.* at 5.

Claimant appeals, challenging the administrative law judge's dismissal of his claim. Claimant contends that the administrative law judge erred in denying his due process right to a hearing, and that she abused her discretion in failing to find that the hearing request, even if untimely, should not be construed as a petition for modification pursuant to Section 725.310. Claimant asks that the Board reverse the administrative law judge's dismissal of the claim and either direct the administrative law judge to consider the merits of the claim or remand the case for modification proceedings before the district director. The Director responds and now agrees with claimant that his hearing request was timely filed and that the administrative law judge erred in dismissing the claim. The Director urges the Board to vacate the administrative law judge's Order of Dismissal and to remand the case for proper consideration on the merits of claimant's entitlement to benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

of Labor, Employment Standards Administration, Office of Workers' Compensation, Division of Coal Mine Workers' Compensation, Johnstown, Pennsylvania.

and in accordance with applicable law.⁴ 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 sole issue before the Board is whether the administrative law judge erred in concluding that she lacked jurisdiction to hear this case on the ground that claimant did not timely request a hearing. The Director notes that he took a contrary position before the administrative law judge as to the timeliness of the hearing request “without fully considering the ramifications of the district director’s late service of the proposed decision and order . . . which renders the hearing request timely.” Director’s Brief at 3 n.3. The Director apologizes for that omission. *Id.* After consideration of the procedural history of the case, the administrative law judge’s Order of Dismissal, and the briefs of the parties, we agree that the administrative law judge erred in finding that claimant did not timely request a hearing and, therefore, she erred in dismissing the claim.

Section 725.418 gives the district director the authority to issue a Proposed Decision and Order “which purports to resolve a claim on the basis of the evidence submitted to or obtained by the district director.” 20 C.F.R. §725.418(a). The Proposed Decision and Order must be “served on all parties to the claim by certified mail.” 20 C.F.R. §725.418(b). Section 725.419 sets forth the time limits for requesting a hearing after a Proposed Decision and Order is issued by the district director, and states in relevant part:

(a) Within 30 days after the *date of issuance* of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing. . . .

(d) If no response to a proposed decision and order is sent to the district director within the period described in paragraph (a) . . . the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period. Once a proposed decision and order . . . becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in §725.310.

20 C.F.R. §725.419(a), (d) (emphasis added).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant’s coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director’s Exhibit 1.

Although Section 725.419 does not specifically define the term *date of issuance* of a Proposed Decision and Order, the Director maintains that “the comments to 20 C.F.R. §725.311, which governs time computations with respect to claims, make clear that a proposed decision and order is not considered issued until it is served on the parties to the claim.” Director’s Letter Brief at 4. The Director notes that, “[i]n explaining why [thirty] days was a sufficient period of time for a party to respond to a proposed decision and order, the Department of Labor explicitly described the date on which the response period begins[.]” Director’s Brief at 4, or more simply, what constitutes the date of issuance for purposes of Section 725.419:

The regulations require that a party do no more within the initial 30-day period following the issuance of [a proposed decision and order] than indicate its agreement or disagreement with the assertions or findings contained in the document. The Department believes that this 30-day time period, *commencing with the date the document is sent*, provides ample time for the parties’ responses.

65 Fed. Reg. 79920, 79977 (Dec. 20, 2000) (emphasis added). In view of these comments, the Director maintains that “a proposed decision and order, is not issued, and the time period for filing a response does not commence, until it is served on the parties.” Director’s Brief at 4. The Director further explains:

Interpreting [S]ection 725.419 as making proper service of a proposed decision and order a prerequisite for commencing the response time makes sense because it insures that the parties’ response time will not be arbitrarily limited in cases, such as this one, where the document is inadvertently mailed late. In addition, it makes [S]ection 725.419 consistent with the regulations governing appeals from the administrative law judge decisions, which provide that the appeal period does not run until service is made on the parties.

Id., citing 20 C.F.R. §§725.478; 725.479; *Old Ben Coal Co. v. Director, OWCP [Jones]*, 897 F. 2d 900, 13 BLR 2-360 (7th Cir. 1990); *Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 13 BLR 2-177 (4th Cir. 1989); *Patton v. Director, OWCP*, 763 F.2d 553, 7 BLR 2-216 (3d Cir. 1985); *Youghioghney & Ohio Coal Co. v. Benefits Review Board [Sullivan]*, 745 F.2d 380, 7 BLR 2-34 (6th Cir. 1984).

The Director, as the agent of the Secretary of Labor, is the party responsible for the administration of the Act. Accordingly, deference is generally given to the Director’s reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). Because the Director’s

interpretation of Section 725.419 as requiring service of the Proposed Decision and Order in order to commence the running of the 30-day appeal period is reasonable, it is entitled to deference. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991).

Turning to the facts of this case, in order to determine whether claimant's hearing request was timely filed, it is necessary to first calculate the date of issuance of the Proposed Decision and Order based on when the document was served on the parties. The Director avers that "[p]roposed decisions and orders are intended to be mailed on the date they are signed by the district director," as evidenced by the proof of service that is typically attached to the decision. Director's Brief at 5 n.4. However, that procedure was not followed in this case. *Id.* Although the Proposed Decision and Order was signed on October 14, 2005, and proof of service was completed on that date by the district director, the record establishes that the Proposed Decision and Order was not actually mailed to the parties until October 19, 2005, as evidenced by the postmark on the envelope submitted by claimant's counsel. In light of the Director's reasonable interpretation of Section 725.419, as requiring service of the Proposed Decision and Order on the parties to the claim, we agree with the Director that "[t]he 30-day period [for requesting a hearing] did not begin to run until October 19, 2005, when the Proposed Decision and Order was mailed to the parties by certified mail." Director's Brief at 5.

Because claimant filed his request for a hearing on November 18, 2005, within thirty days of the date of issuance of the Proposed Decision and Order on October 19, 2005, we conclude that claimant's hearing request was timely filed in accordance with Section 725.419. To the extent that the administrative law judge erred in determining the date of issuance of the Proposed Decision and Order, she erred in finding that claimant's hearing request was not timely filed pursuant to Section 725.419. We therefore vacate the administrative law judge's Order Dismissing Claim for lack of jurisdiction, and remand the case to the administrative law judge for consideration on the merits of claimant's entitlement to benefits.

Accordingly, the administrative law judge's Order Dismissing Claim is vacated, and the case is remanded to the administrative law judge for consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge