



BRB No. 16-0205 BLA
Case No. 10-BLA-5592

LORETTA I. MEADE)	
(Widow of JAMES MEADE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
TALMAN, INCORPORATED)	
)	
and)	
)	
AMERICAN RESOURCES INSURANCE)	DATE ISSUED: 04/30/2018
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	ORDER on
)	RECONSIDERATION and
Party-in-Interest)	AWARD of FEES

On July 18, 2017 employer/carrier (employer) filed a motion for reconsideration of the Board's decision in *Meade v. Talman, Inc.*, BRB No. 16-0205 BLA (Dec. 13, 2016) (unpub.), affirming the award of benefits. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in opposition to employer's motion, asserting it is untimely. Employer filed a reply brief to claimant's response. We deny the motion and affirm the Board's decision.

In its motion for reconsideration, employer argues that it did not receive a copy of the Board's December 13, 2016 decision until June 20, 2017. Employer's Brief at 1.

Employer acknowledges that a copy of the decision was sent to employer by certified mail on December 15, 2016, but asserts that the decision was never delivered to employer.¹ Employer asserts that “when the Board issues a decision, it is incumbent to deliver the decision to the parties,” to afford proper notice. Employer’s Reply Brief at 1-2. Because it did not receive delivery, and thus notice, of the decision, employer contends that the Board should grant employer’s request for reconsideration and enter an order revising the issuance date of the decision to reflect that employer never received the December 13, 2016 decision.² *Id.*

We agree with claimant and the Director that employer’s motion for reconsideration is untimely and, therefore, we deny the relief requested. The regulation pertaining to issuance and service of Board decisions directs, in pertinent part:

The original of the decision shall be filed with the Clerk of the Board. A copy of the Board’s decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director.

20 C.F.R. §802.403(b). The regulation governing reconsideration of Board decisions provides:

Any party-in-interest may, within 30 days from the *filing* of a decision . . . pursuant to 20 C.F.R. §802.403(b), request reconsideration of such decision by those members who rendered the decision.

20 C.F.R. §802.407(a) (emphasis added). Thus the regulation specifies that the thirty-day period for reconsideration begins with the *filing* of the decision.

Further, as claimant correctly asserts, in interpreting an analogous regulation governing judicial review of Board decisions, the courts of appeals have held that it is the date the decision is filed with the Clerk of the Board, not the date of service, that triggers the time for seeking review. For example, in *Butcher v. Big Mountain Coal, Inc.*, 802 F.2d 1506, 9 BLR 2-121 (4th Cir. 1986), the United States Court of Appeals for the Fourth

¹ Employer asserts that tracking documents from the United States Postal Service demonstrate that “the Board’s decision was mailed on December 15, 2016, [but] it was not delivered” and “[i]nstead, on December 16, 2016, it was returned to the Board, arriving, inexplicably, on January 30, 2017.” Employer’s Reply Brief at 2.

² Employer asserts that it has also filed an appeal of the Board’s decision with the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. Employer’s Brief at 1.

Circuit considered whether to accept an appeal where the claimant conceded that it filed its appeal with the Fourth Circuit outside of the sixty-day appeal period, but contended that its appeal was not untimely, in part because the Board's decision was not properly served on all the parties.³ *Butcher*, 802 F.2d at 1507, 9 BLR at 2-123. The Fourth Circuit rejected that argument relying on the decision of the Second Circuit in *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977) to find the petition untimely.

Subsequently, in *Mining Energy v. Director, OWCP [Powers]*, 391 F.3d 571, 23 BLR 2-202 (4th Cir. 2004), the Fourth Circuit court elaborated on its decision in *Butcher*. In *Powers*, the employer, Mining Energy, did not receive the Board's decision but, instead, was served with the Board's decision in an unrelated case. Once Mining Energy discovered that the Board had issued a decision in its case, it filed a petition for review with the Fourth Circuit court. Mining Energy argued that, because it did not receive the decision of the Board when it was issued, and had no knowledge of the issuance of the decision, the court should find that Mining Energy's appeal, filed within sixty days of the date it received *actual notice* of the Board's decision, was timely. The court rejected Mining Energy's argument, holding that it was not necessary that the Board's decision be served on the parties in order for the decision to be issued. Rather, the court reasoned that:

Because [20 C.F.R.] § 802.403(b) addresses how the Clerk of the Board is to handle both “filing” and “service,” [20 C.F.R.] § 802.410(a)'s selection of one of those terms (filing), and not the other (service), makes it plain that the sixty-day [period for filing an appeal] begins to run with the *filing* of a Board opinion with the Clerk of the Board.

Powers, 391 F.3d at 575, 23 BLR at 2-209. The court further noted that other circuits addressing this issue have reached the same conclusion. *Id.* at 576, 2-210, *citing Clay v. Dir., OWCP*, 748 F.2d 501, 502 (8th Cir.1984) (rejecting petitioner's contention that the Board's decision was never “issued” because the decision was not served on all parties, as required by 20 C.F.R. §802.403(b)); *Dellaventura*, 544 F.2d at 43–44 (the time for seeking review starts to run with the entry of the agency's order). Applying the court's reasoning to the regulation governing reconsideration, 20 C.F.R. §802.407(b)'s reference to the “filing,” of the decision, and not to when the decision is sent or served, makes it plain that the thirty-day period for seeking reconsideration begins to run with the *filing* of a Board

³ The regulations provide that a party adversely affected by a decision of the Board may file a petition for review with the appropriate circuit court “within 60 days after a decision by the Board has been filed pursuant to [20 C.F.R.] § 802.403(b)” 20 C.F.R. §802.410(a).

decision with the Clerk of the Board, regardless of whether proper service occurs. *See Pifer v. Florence Mining Co.*, 8 BLR 1-498 (1986) (the time period for seeking reconsideration begins when the decision is filed with the Clerk of the Board).

Here, it is undisputed that the Board's decision was properly filed with the Clerk of the Board on December 13, 2016 and that copies of the decision were sent to the parties by certified mail. While employer may be able to demonstrate defective service of the Board's decision in this case, service of the decision is simply not required for a decision to be considered properly filed and thus issued. As claimant and the Director assert, because no party moved for reconsideration of the Board's decision within thirty days, or filed a petition for review with the United States Court of Appeals for the Sixth Circuit within sixty days, the Board's decision became final. *See* 20 C.F.R. §§802.403(b), 802.406, 802.407(a), 802.410(a); *Stevedoring Servs. of America v. Director, OWCP [Mattera]*, 29 F.3d 513, 516, 28 BRBS 65, 69-70 (CRT) (9th Cir. 1994) (holding that "issuance" of Board's decision in 33 U.S.C. §921(c) "means filed with the Clerk of the Board"); *Butcher*, 802 F.2d at 1507-08, 9 BLR at 2-122-24; Claimant's Brief at 2; Director's Brief at 2. Moreover, as the Director asserts, nothing in the Board's regulations authorizes the "reissuance" of a properly filed and issued decision. Director's Brief at 2. Therefore, we hold that employer's motion for reconsideration, filed on July 18, 2017, is untimely. 20 C.F.R. §802.407(a). Accordingly, employer's motion for reconsideration is denied.

Attorney Fee Award

Counsel for claimant has filed a complete, itemized statement requesting a fee for services performed before the Board in this case pursuant to 20 C.F.R. §802.203. Counsel requests a fee of \$5,700.00 representing 19.0 hours of legal services at an hourly rate of \$300.00. No objections to the fee petition have been received.

The Board finds the fee requested to be reasonable and commensurate with the necessary services performed in defending claimant's award of benefits. Accordingly, the

Board approves a fee of \$5,700.00 to be paid directly to claimant's counsel by employer.
33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge