U.S. Department of Labor

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

BRB No. 24-0068 BLA

CHARLES A. PENNINGTON, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	**NOT-PUBLISHED**
	)	
NORTH BRANCH COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 12/31/2024
	)	
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 of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2020-BLA-05499) rendered on a claim filed on August 9, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially rejected Employer's assertion that it was denied due process because Claimant did not attend a deposition and it was unable to obtain a medical examination of Claimant. On the merits, she credited Claimant with twenty years of qualifying coal mine employment based on the parties' stipulation and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding it was not denied its right to a full and fair hearing based on Claimant's refusal to attend medical examinations and a deposition Employer requested, thus preventing it from presenting an effective defense. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Benefits Review Board to reject Employer's due process arguments and affirm the award of benefits.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is 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 (1965).

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is total disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[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 18.

Procedural History

While the claim was before the district director, Employer attempted to arrange a medical examination and deposition with Claimant following his Department of Labor complete pulmonary evaluation. Hearing Transcript at 8-9; Employer's Motion to Dismiss for Lack of Prosecution (Motion to Dismiss); Employer's Brief at 11-13; Director's Exhibits 27-29, 40, 41. Employer scheduled a medical evaluation on October 2, 2019. In response, Claimant notified Employer that he would not attend the evaluation because it was located more than 100 miles from his home, the regulations do not require him to travel more than 100 miles for an evaluation, and he was unable to travel that distance due to his health and age.[3] Director's Exhibits 27-29; *see* 20 C.F.R. §725.414(a)(3)(i).[4] Employer scheduled a deposition of Claimant for October 22, 2019. It was canceled at Claimant's request to provide him an opportunity to first seek legal counsel. Director's Exhibits 40, 41.

On January 27, 2020, the district director issued a Proposed Decision and Order Awarding Benefits, and Employer requested a hearing. Director's Exhibits 47, 52. Meanwhile, Employer scheduled additional evaluations of Claimant for March 11, 2020, April 15, 2020, and October 1, 2020. They were canceled due to Claimant's concerns regarding the COVID-19 pandemic and his heightened risk of contracting the illness. *See* Employer's Brief at 3-5. Employer also scheduled another deposition for September 29, 2020. Although Claimant appeared at the deposition, he refused on religious grounds to take an oath and the deposition was cancelled. *See* Employer's Brief at 2-5; Claimant's Response to Employer's Motion to Dismiss at 2-3; August 27, 2020 Notice of Deposition.

On October 30, 2020, Employer filed a Motion to Dismiss with the Office of Administrative Law Judges based on Claimant's failure to participate in discovery. The Director responded, disagreeing with the motion and asserting that the case could not be dismissed without the Director's agreement pursuant to 20 C.F.R. §725.465(d) because

[3] On September 19, 2019, Employer filed a Motion to Compel Claimant's attendance at the October 2, 2019 evaluation with the district director. Director's Exhibit 28. While the district director never ruled on Employer's motion, in his Proposed Decision and Order he acknowledged Dr. Miller's October 9, 2019 note indicating Claimant could not travel. Director's Exhibits 29; 47 at 8.

[4] Section 725.414(a)(3)(i) provides that an employer "may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by [20 C.F.R. §]725.406 of this part, whichever is greater[.]" 20 C.F.R. §725.414(a)(3)(i).

interim benefits were being paid to Claimant by the Black Lung Disability Trust Fund. *See* Director's Response to Employer's Motion to Dismiss dated November 3, 2020. Claimant responded to Employer's motion explaining why he did not attend the medical evaluations or testify at the deposition and requested a conference with the ALJ to discuss Claimant's religious objection to testifying under oath.[5] Claimant's Response to Employer's Motion to Dismiss at 2-3.

On March 23, 2022, the ALJ issued a Notice of Assignment, Notice of Hearing, and Prehearing Order, which set the hearing schedule and explained the regulatory procedures for discovery, motions, and subpoenas.[6] Employer scheduled a medical evaluation of Claimant for June 16, 2022, but was unable to have Claimant examined because he was in hospice care. *See* Hearing Transcript at 11-12; Employer's Brief at 4-5, 13. Prior to the hearing, Employer submitted its evidence summary form and designated as its two affirmative medical opinions the reports of Drs. Tuteur and Rosenberg, who reviewed Claimant's medical records. Employer's Exhibits 1, 3; Employer's Evidence Summary Form.

At the July 26, 2022 hearing before the ALJ, Employer renewed its Motion to Dismiss the claim on the grounds that it was unable to obtain a medical evaluation of Claimant. Hearing Transcript at 8-9. The ALJ did not rule on Employer's motion at the hearing but gave the parties the opportunity to brief the issue post-hearing. *Id.* at 11-12. At the hearing itself, Claimant was called to testify but refused to be sworn in, explaining his belief that it is "against the law of God to swear an oath." *Id.* at 14. Taking Claimant's beliefs into consideration, the ALJ qualified Claimant to testify without taking an oath.

[5] There is no record of the ALJ holding a conference to discuss Claimant's concerns about testifying under oath; however, the ALJ addressed these concerns at the hearing. Hearing Transcript at 14-17.

[6] In her Notice of Assignment, Notice of Hearing, and Prehearing Order, the ALJ noted: "The basic statutory and regulatory provisions governing this case are set forth in 5 U.S.C. §554, 30 U.S.C. § 901 *et seq.*, 20 C.F.R. Parts 718 and 725, 29 C.F.R. Part 18 Subpart A, and the Federal Rules of Civil Procedure" and that "[f]ormal discovery is to commence immediately and be conducted pursuant to 29 C.F.R. §§18.50-18.65[.]" She further noted that all motions and other requests for relief from the ALJ must be filed pursuant to 29 C.F.R. §18.33 and requests for subpoenas must be in writing pursuant to the provisions of 29 C.F.R. §18.56. Finally, she noted "[f]ailure to comply with the provisions of this prehearing order may result in the imposition of sanctions including, but not limited to, the following: the exclusion of evidence, the dismissal of the claim . . . . 29 C.F.R. §§18.12(b), 18.35(c), 18.57 and 18.87."

Employer raised no objection and was afforded the opportunity to cross-examine him. *Id.* at 14-17. On October 18, 2022, Claimant and Employer timely filed closing briefs to the ALJ.

In her Decision and Order, the ALJ determined Employer was not prejudiced by Claimant's refusal to take an oath at the hearing or its inability to depose Claimant prior to the hearing. Decision and Order at 4 & n.6. The ALJ found that Employer was not prejudiced because it did not object to the manner in which the ALJ secured Claimant's understanding that he must testify truthfully and it was given the opportunity to cross-examine him. She also determined Claimant established "good cause" for not attending the scheduled October 2, 2019[7] medical evaluation because it was more than 100 miles from his home and the October 1, 2020 medical evaluation due to his documented respiratory problems and reasonable concerns "about the risks of the COVID-19 pandemic." *Id.* at 4. She also noted Employer submitted Drs. Tuteur's and Rosenberg's medical opinions in opposition to Claimant's entitlement and determined Employer had "a fair opportunity to mount a meaningful defense" and therefore failed to show a due process violation. *Id.* at 4-5.

Analysis and Conclusion

Employer contends the ALJ's evidentiary rulings and conclusions were erroneous, it has been deprived of its due process right to a full and fair hearing, and Claimant's actions set a "dangerous precedent."[8] Employer's Brief at 8-16.

An ALJ is granted broad discretion in resolving procedural and evidentiary issues. *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 (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).

We are not persuaded Employer was denied process based on the ALJ's finding that Claimant established "good cause" for not attending its scheduled medical evaluations. Nor do we agree that Claimant's alleged inaction was "tantamount to an abandonment of

[7] The ALJ refers to this as the September 9, 2019 evaluation; however, September 9, 2019 was the date Claimant notified Employer that he would not attend the October 2, 2019 evaluation. *See* Decision and Order at 4; Director's Exhibits 27-29; Employer's Brief at 3.

[8] Employer incorporated by reference the arguments from its Motion to Dismiss. Employer's Brief at 8.

the claim." Employer's Brief at 13, 16-17; Employer's Motion to Dismiss; Employer's Post-Hearing Brief at 11 (contending the case should be dismissed due to abandonment pursuant to 20 C.F.R. §725.409).[9] Claimant notified Employer that he would not attend the October 2, 2019 examination because it would have required him to travel over 100 miles from his home. Director's Exhibit 27, 29. The ALJ correctly rejected Employer's argument that the "distance" to the examination was only 86.4 miles "as the crow flies" because Claimant would still be required to "travel" over 100 miles and the regulations state an employer "may not require the miner to *travel* more than 100 miles from his or her place of residence." Decision and Order at 4 (quoting 20 C.F.R. §725.414(a)(3)(i)) (emphasis added); Employer's Post-Hearing Brief at 12; Employer's Brief at 12, 17.

With respect to the October 1, 2020 scheduled examination, the ALJ determined "it was not unreasonable for Claimant to refuse to participate in a medical examination based on concerns that he had about the risks of the COVID-19 pandemic" and his documented history of respiratory problems. Decision and Order at 4. Employer generally alleges Claimant's refusals were "nothing more than an obstruction of justice and due process[,]" that the pandemic "was well on its way to being declared over," and that the ALJ's good cause findings were "irrational." Employer's Brief at 16-17. However, it fails to actually explain why the ALJ abused her discretion in determining, based on the facts, that Claimant established good cause not to participate in the scheduled examinations.[10] *Id.* at 16-17; *see Blake*, 24 BLR at 1-113; Decision and Order at 3-4. Accordingly, we affirm that determination.

We note, moreover, that although Employer moved to dismiss the claim in its entirety based in part on Claimant not attending the medical examinations,[11] it did not move

[9] "A claim may be denied at any time by the district director by reason of abandonment where the claimant fails . . . to undergo a required medical examination without *good cause*[.]" 20 C.F.R. §725.409(a)(1) (emphasis added).

[10] For the first time on appeal, Employer also questions the veracity of Claimant's reasons for not attending the March 11, 2020, April 15, 2020, and June 16, 2022 evaluations. Employer's Brief at 3-5, 13. Employer has forfeited these arguments by failing to raise them to the ALJ. *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); Employer's Post-Hearing Brief at 2, 12-14.

[11] The Director contends that the ALJ did not have a basis to grant Employer's Motion to Dismiss and that its motion could not provide a proper remedy for the parties' discovery disputes. Director's Brief at 3. The regulations provide that an ALJ "may, at the request of any party . . . dismiss a claim" when (1) a claimant fails to attend a hearing

to compel an examination through proper procedures available under the regulations and set forth by the ALJ.[12] *See* Notice of Assignment, Notice of Hearing, and Prehearing Order; *see, e.g.*, 29 C.F.R. §§18.50-18.57, 18.60-18.65.[13] With respect to Claimant's testimony, the ALJ qualified Claimant as a witness at the hearing, Employer was given the opportunity to question him, and it did not object to the manner in which the ALJ secured his assurances to testify truthfully. Hearing Transcript at 14-17; Decision and Order at 3-4 (citing *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969)).

We cannot say the ALJ abused her discretion in finding that, under the facts and circumstances presented, Employer was not deprived of due process. *See Blake*, 24 BLR at 1-113. Because the ALJ acted within her discretion in rendering her procedural rulings, and Employer does not raise any additional arguments regarding the elements of entitlement, we affirm the ALJ's finding that Claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23.

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without good cause; (2) a claimant fails to comply with an ALJ's lawful order; or (3) there has been a prior final adjudication of the claim or defense and no new evidence was submitted. 20 C.F.R. §725.465(a)(1)-(3). Employer has not explained how Claimant's actions demonstrate a "failure to prosecute" his claim or how any of the specific regulatory provisions apply.

[12] At the hearing Employer stated only that, based on Claimant's health condition, it did not "expect" the ALJ to "order" Claimant to attend an independent medical evaluation. Hearing Transcript at 9. In its post-hearing brief, Employer merely notes Claimant was unable to attend the June 16, 2022 scheduled examination because he was in hospice care. Employer's Post-Hearing Brief at 2, 12.

[13] A party seeking discovery may move for an order compelling an answer, designation, production, or inspection, and "[f]or good cause, the judge may order discovery of any matter relevant to the subject matter involved in the proceeding." 29 C.F.R. §§18.33, 18.51, 18.57(a)(2)(ii). Moreover, pursuant to 29 C.F.R. §18.64(g), an ALJ may order sanctions, in accordance with 29 C.F.R. §18.57, "if a party who, expecting a deposition to be taken, attends in person or by an attorney, and the noticing party failed to . . . [a]ttend and proceed with the deposition[.]"

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge