



BRB Nos. 21-0089 BLA  
and 21-0090 BLA

ELSIE DOTSON )  
(o/b/o and Widow of RAYMOND DOTSON) )

Claimant-Respondent )

v. )

HERITAGE COAL COMPANY, LLC )

and )

PEABODY ENERGY CORPORATION )

Employer/Carrier- )  
Petitioners )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED: 6/22/2022

DECISION and ORDER

Appeal of the Decision and Order Granting Motion to Dismiss Request for Hearing in Miner's Case and Decision and Order Awarding Benefits on Survivor's Claim of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Granting Motion to Dismiss Request for Hearing in Miner's Case and Decision and Order Awarding Benefits on Survivor's Claim (2017-BLA-05788 and 2020-BLA-05568) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on March 15, 2016<sup>1</sup> and a survivor's claim filed on December 5, 2019.

The ALJ found Employer failed to timely request a hearing after the district director issued a Proposed Decision and Order (PDO) awarding benefits in the miner's claim. Thus he found the PDO awarding benefits became final, 20 C.F.R. §725.419(a), (d), and dismissed Employer's request for a hearing. He further found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018),<sup>2</sup> based on the award of benefits in the miner's claim.

On appeal, Employer asserts the ALJ erred in finding it did not timely request a hearing in the miner's claim. In the alternative, it argues the ALJ should have construed its request for a hearing as a timely request for modification. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's finding that Employer failed to timely request a hearing. The Director agrees, however, that Employer's request

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<sup>1</sup> The Miner died on November 1, 2019, while his claim was pending. Miner's Claim (MC) Director's Exhibit 10. Claimant, the Miner's widow, is pursuing the miner's claim and her survivor's claim.

<sup>2</sup> Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

for a hearing may be construed as a timely request for modification and urges the Board to remand the case to the district director for further proceedings.

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

### **Miner's Claim - Timeliness of Hearing Request**

An ALJ 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 the disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *See V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

A party may request a hearing before the Office of Administrative Law Judges (OALJ) within thirty days after the date of issuance of a district director's PDO. 20 C.F.R. §725.419(a). If no response to a PDO is sent to the district director within the period described, the PDO shall become final, and all rights to further proceedings with respect to the claim shall be considered waived, except as provided in 20 C.F.R. §725.310. 20 C.F.R. §725.419(d).

The Miner filed his claim on March 15, 2016. (Miner's Claim) MC Director's Exhibit 2. The district director awarded benefits in a January 19, 2017 PDO. MC Director's Exhibit 29. Employer requested a hearing by letter dated February 23, 2017. MC Director's Exhibit 33. The district director forwarded the claim to the OALJ, where it was assigned to ALJ Jason A. Golden. MC Director's Exhibit 47. Prior to scheduling a hearing, ALJ Golden *sua sponte* remanded the case to the district director to cure defects in the Department of Labor-sponsored complete pulmonary evaluation of the Miner. MC Director's Exhibits 34, 36.

The district director again awarded benefits to the Miner on December 30, 2019. Survivor's Claim (SC) Director's Exhibit 13. Employer requested a hearing by letter dated on January 8, 2020. SC Director's Exhibit 16. The district director once more forwarded

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3.

the claim to the OALJ, which assigned the case to ALJ Bell (the ALJ). MC Director's Exhibit 47. On August 15, 2010, ALJ Bell issued a Notice of Hearing setting a hearing date of December 2, 2020. Aug. 15, 2020 Notice of Hearing. On October 13, 2020, Claimant moved to dismiss Employer's request for a hearing on the grounds that its initial February 23, 2017 request was untimely pursuant to 20 C.F.R. §725.419.

ALJ Bell found the district director issued the initial PDO on January 19, 2017. Decision and Order at 3. He found Employer was required to submit its request for a hearing on or before Tuesday, February 21, 2017.<sup>4</sup> *Id.* at 2-3. Because Employer requested a hearing on February 23, 2017, the ALJ found Employer's request untimely and granted Claimant's motion to dismiss. 20 C.F.R. §725.419; Decision and Order at 3. He thus found the PDO awarding benefits became final and Claimant established entitlement to benefits in the miner's claim. *Id.* at 3-4.

Employer does not directly challenge the ALJ's computation method or his calculation. Rather, Employer contests the date that the PDO was issued. Employer's Brief at 2-3. Its arguments have no merit.

As the ALJ noted, the PDO is dated January 19, 2017, and the district director, through a claims examiner, provided written certification stating the PDO was filed and mailed that same date.<sup>5</sup> Decision and Order at 3 n.10; *see* MC Director's Exhibit 29. The ALJ also noted the record contains a certified mail "green card" indicating the PDO was delivered on January 21, 2017, further corroborating the January 19, 2017 issue date. Decision and Order at 3 n.10; *see* MC Director's Exhibit 27. He noted Employer offered no evidence or argument to rebut this evidence or to support its argument that the January 19, 2017 issuance date is incorrect. Contrary to Employer's argument, the ALJ acted within his discretion as the factfinder to conclude January 19, 2017, is the date of issuance

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<sup>4</sup> The ALJ used the computation method set forth at 29 C.F.R. §18.32 of the Rules of Practice and Procedure for Administrative Hearings before the OALJ. Decision and Order at 2-3. Because the day of an event that triggers a period is not included in the computation, the ALJ calculated thirty days from the next day, Friday, January 20, 2017. 29 C.F.R. §18.32(a)(1)(i). *Id.* He further found that, because the thirtieth day, February 18, 2017, was a Saturday, and Monday, February 20, 2017 was Presidents' Day, the first day after February 18 that was not a Saturday, Sunday, or legal holiday was Tuesday, February 21, 2017.

<sup>5</sup> The date of issuance has been determined to be the date the Proposed Decision and Order (PDO) was sent. *W.L. [Lentz] v. Director, OWCP*, 24 BLR 1-99, 1-104-105 (2008) (the date of issuance was the date the claimant proved the PDO was sent).

of the PDO. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); Decision and Order at 3.

Employer next contends Claimant forfeited this issue by failing to raise it when the case was initially before ALJ Golden. Employer’s Brief at 2. This argument is without merit.

The regulatory requirement that a party request a hearing before the OALJ within thirty days after issuance of a PDO is a mandatory claims-processing rule that may be forfeited if the party asserting the rule fails to timely raise it before the ALJ. *See Boechler, P.C. v. Comm’r of Internal Revenue*, U.S. , 142 S. Ct. 1493, 1497 (2022); *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849-50 (2019); 20 C.F.R. §725.419. We conclude Claimant timely argued Employer failed to comply with this regulation.

As the ALJ correctly noted, the Rules of Practice and Procedure for Administrative Hearings before the OALJ instruct the parties that a written motion, including a motion to dismiss, must be filed “at least [twenty-one] days before the time specified for the hearing” before the ALJ. 29 C.F.R. § 18.33(c)(1); *see* Decision and Order at 3. As ALJ Golden did not set a hearing date and *sua sponte* remanded this case, Claimant did not have an opportunity to raise the underlying argument before him. The ALJ, however, set the date of the first hearing for this claim to be held on December 2, 2020. Aug. 15, 2020 Notice of Hearing. Claimant moved to dismiss Employer’s request for a hearing on October 13, 2020, well before the twenty-one day deadline. Claimant’s Motion to Dismiss.<sup>6</sup> Other than generally arguing “Claimant could have raised this issue while this matter was

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<sup>6</sup> We disagree with the Director that the time limit contained in 20 C.F.R. §725.419 is jurisdictional and therefore may be raised at any point during the litigation by any party or the reviewing court and cannot be waived. Director’s Brief at 3. A procedural requirement is jurisdictional only if Congress “clearly states” it is, by limiting a court’s authority to hear cases. *Boechler, P.C. v. Comm’r of Internal Revenue*, U.S. , 142 S. Ct. 1493, 1497 (2022), *quoting Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006). Congress did not limit an ALJ’s authority to hear cases under the Act by requiring a timely request for a hearing from an adverse PDO. Thus 20 C.F.R. §725.419 is a “nonjurisdictional” regulation promulgated by the Department of Labor that “promote[s] the orderly progress of litigation” but does not bear on an ALJ’s jurisdiction. *Boechler, P.C.*, 142 S. Ct. at 1497. Such “mandatory claim-processing rule[s]” must be enforced if timely raised, but may be forfeited “if the party asserting the rule waits too long to raise the point.” *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849-50 (2019). As discussed above, however, Claimant did not forfeit this issue.

previously pending before [ALJ] Golden,” Employer cites no authority or support for its contention that Claimant forfeited this issue. Employer’s Brief at 2. Employer has the burden to establish the ALJ abused his discretion in this case, and it fails to do so because it identifies no error in the ALJ’s application of 29 C.F.R. §18.33(c)(1) and disposition of this issue. *See Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63. We therefore affirm his dismissal of Employer’s request for a hearing and his finding the award of benefits in the miner’s claim became final.<sup>7</sup>

### **Survivor’s Claim**

ALJ Bell determined Claimant established all the necessary elements for automatic entitlement to survivor’s benefits. 30 U.S.C. §932(l); Decision and Order at 4. As we have affirmed the ALJ’s finding the PDO awarding benefits became final, and Employer raises no specific challenge to the award of benefits in the survivor’s claim, we affirm it. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

### **Employer’s Request for Modification**

Finally, Employer argues, and the Director concedes, its February 23, 2017 letter requesting a hearing can be construed as a request for modification.<sup>8</sup> 20 C.F.R. §725.310; *see* Employer’s Brief at 3; Director’s Brief at 3-4. We agree. Employer filed its letter within one year of the PDO’s issuance date and requested that it be deemed to have requested modification if its hearing request was found untimely. MC Director’s Exhibit 33. Consequently, Employer’s February 23, 2017 letter is deemed to be a timely request for modification.<sup>9</sup>

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<sup>7</sup> As the PDO became final, we need not address Employer’s underlying challenges to the PDO. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *See generally* Employer’s Brief at 2-3.

<sup>8</sup> Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. 20 C.F.R. §725.310(a).

<sup>9</sup> We note any request for modification filed by an operator after May 26, 2016 “must be denied unless the operator proves that at the time of the request, the operator has ... paid to the Claimant all monetary benefits... due under any effective order.” 20 C.F.R. §725.310(e)(2)(i), (7).

Accordingly, the ALJ's Decision and Order Granting Motion to Dismiss Request for Hearing in Miner's Case and Decision and Order Awarding Benefits on Survivor's Claim is affirmed, and the case is remanded to the district director for modification proceedings.

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge