

PART V

BENEFITS REVIEW BOARD POLICIES AND PROCEDURES

A. SCOPE OF REVIEW

2. Timeliness

Among the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) that are applied to those claiming black lung benefits under the incorporation provision of the Black Lung Benefits Act, 30 U.S.C. §932(a), are 33 U.S.C. §§921(a) and 919(e). Section 921(a) fixes a thirty-day time period within which an appeal of an adverse decision must be taken or lost. The running of that period is triggered by the filing of the administrative law judge's decision "as provided in section 919." 33 U.S.C. §921(a); see 20 C.F.R. §802.205. A timely motion for reconsideration of a decision and order of any administrative law judge or district director, however, shall suspend the running of the time for filing a notice of appeal. 20 C.F.R. §805.205A. Section 919(e) governs both the submission of the administrative law judge's decision to the district director and the notice that must be provided to the parties. It states that "[t]he order rejecting the claim or making the award. . . shall be sent by registered mail or by certified mail to the claimant and employer at the last known address of each." 33 U.S.C. §919(e).

The regulation governing the service of compensation orders states that "[o]n the date of the issuance of a decision and order. . . the administrative law judge shall serve the decision and order on all parties to the claim." 20 C.F.R. §725.478. A separate regulation provides that "[n]otice given to any party of any. . . determination. . . shall be sent to the representative of such party and such notice. . . shall have the same force and effect as if it had been sent to the party represented." 20 C.F.R. §725.364.

Errors in service will not toll the time for filing an appeal pursuant to the Longshore Act, following *Insurance Co. of North America v. Gee*, 702 F.2d 411 (2d Cir. 1983) and *Jeffboat, Inc. v. Mann*, 875 F.2d 660 (7th Cir. 1989), but the appeal period for cases arising under the Black Lung Act will not begin to run until proper service is effected, following *Patton v. Director, OWCP*, 763 F.2d 553 (3d Cir. 1985) and *Youghiogheny and Ohio Coal Co. v. Benefits Review Board*, 745 F.2d 380 (6th Cir. 1984). *Ray v. Associated Electric Cooperative, Inc.*, 14 BLR 1-162 (1990); see also 20 C.F.R. §§702.349, 725.478.

CASE LISTINGS

[Sixth Circuit held Sections 802.210 and 802.217 do not empower Board to enlarge time period to file an appeal; also, modification provision of Longshore Act, 33 U.S.C. §922, does not permit Board to review appeals filed late] **Blevins v. Director, OWCP**, 683 F.2d 139, 4 BLR 2-104 (6th Cir. 1982).

[Sixth Circuit affirmed Board's dismissal of appeal as untimely; fact-finder may not re-date Decision and Order because claimants' attorney did not receive a copy where claimant properly served and attorney was aware decision issued] **Wellman v. Director, OWCP**, 706 F.2d 191, 5 BLR 2-81 (6th Cir. 1983).

[Second Circuit held LHWCA requires only that parties receive notice; 20 C.F.R. §702.349, which requires notification of representatives, is inconsistent] **Insurance Co. of North America v. Gee**, 702 F.2d 411, 15 BRBS 107 (CRT)(2d Cir. 1983).

[Third Circuit held that while Section 802.217 does not mandate dismissal where Petition for Review is untimely filed and decision to dismiss the appeal is discretionary, Board's decision to dismiss claimant's appeal here was abuse of discretion] **Kephart v. Director, OWCP**, 701 F.2d 22, 5 BLR 2-58 (3d Cir. 1983).

[Seventh Circuit affirmed dismissal of *pro se* appeal; no statutory, constitutional, or other authority to enlarge time limits for appeal to Board, though noting that fairness to uneducated or unrepresented claimants would be better served if fact-finders routinely included notice of appeal rights in decisions] **Bennett v. Director, OWCP**, 717 F.2d 1167, 6 BLR 2-2 (7th Cir. 1983).

[party that elects to file motion for reconsideration rather than its appeal before Board cannot thereafter abandon motion and have appeal time to Board extended by abandoned motion] **Niswander v. Director, OWCP**, 7 BLR 1-88 (1984).

[motion for reconsideration considered filed on date mailed] **Tobrey v. Director, OWCP**, 7 BLR 1-407 (1984).

[Eleventh Circuit held that fact-finder's failure to notify claimant of appeal rights would not justify failure to timely file appeal, particularly since represented by counsel] **Townsend v. Director, OWCP**, 743 F.2d 880, 7 BLR 2-32 (11th Cir. 1984).

[Sixth Circuit held that thirty-day period to file appeal with Board does not begin until fact-finder's decision is served on parties; inaction by employer prior to receipt of decision and potential prejudice to miner not proper reasons for Board to refuse to hear the appeal] **The Youghioghny & Ohio Coal Co. v. Benefits Review Board [Sullivan]**, 745 F.2d 380, 7 BLR 2-34 (7th Cir. 1984); see also **Harris v. Nacco Mining Co.**, 12 BLR 1-115 (1989).

[Seventh Circuit, citing **Bennett v. Director, OWCP**, 717 F.2d 1167, 6 BLR 2-2 (7th Cir.

1983), affirmed Board's decision dismissing claimant's appeal as untimely filed] **Dawe v. Old Ben Coal Co.**, 754 F.2d 225, 7 BLR 2-118 (7th Cir. 1985).

[Third Circuit held that thirty-day period to file appeal with Board does not begin until fact-finder's decision served on parties' counsel] **Patton v. Director, OWCP**, 763 F.2d 553, 7 BLR 2-216 (3d Cir. 1985).

[Sixth Circuit held that fact-finder's decision not considered "filed" or "effective," and time within which appeal must be taken does not commence until order is issued and served on parties in accordance with statute and regulations] **Evans v. Michael Coal Co.**, Nos. 84-3740 *et al* (6th Cir. Aug. 30, 1985)(unpub.).

[Sixth Circuit held that appeal of Board decision is due within sixty days of when decision is *filed* by Board] **Johnson v. Benefits Review Board**, No. 85-3429 (6th Cir. Aug. 31, 1985)(unpub.).

[Fourth Circuit held that Board's regulations clearly establish that sixty-day appeal period begins on date Board's decision is filed, not when it is mailed to parties] **Uphold v. Director, OWCP**, No. 85-1491 (4th Cir. Aug. 14, 1985)(unpub.); **DeAngelis v. Director, OWCP**, No. 85-1787 (4th Cir. Nov. 26, 1985)(unpub.).

[Board held in longshore case following **Gee**, 703 F.2d 411 (2d Cir. 1983) that time for filing appeal began when claimant was served with fact-finder's order, notwithstanding that claimant's counsel might not have been served] **Benschoter v. Brady-Hamilton Stevedore Co.**, 18 BRBS 15 (1985).

DIGESTS

The Board dismissed claimant's Motion for Reconsideration as untimely where it was not filed within ten days allotted to parties for the filing of Motions for Reconsideration under 20 C.F.R. §802.407(a). "Filing" date is the date the Decision and Order is filed with the Clerk of the Board. 20 C.F.R. §802.403(b). **Pifer v. Florence Mining Co.**, 8 BLR 1-498 (1986).

The Board held that it had no authority, by virtue of 20 C.F.R. §802.216(a), to extend the time for the filing of a notice of appeal. **Cross v. Consolidation Coal Co.**, BRB No. 85-2926 (Feb. 13, 1986)(unpub.).

The Fourth Circuit held that the thirty day period in which to file an appeal with the Board does not begin to run until the administrative law judge's decision is served on the parties. **Pendleton v. Director, OWCP**, No. 85-1692 (4th Cir. Jan. 31, 1986) (unpub.).

The Fourth Circuit held that Fed. R. App. P. 26, which extends the appeal period when

the party “is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail,” has no bearing on the appeal period under 33 U.S.C. §921(c), which runs from the date the decision is issued, not the date it is served. **Securo v. Director, OWCP**, No. 85-1505 (4th Cir. Feb. 25, 1986)(unpub.).

The Third Circuit held that sixty day period for petitioning the Court for review of a Board decision may not be tolled by an untimely motion for reconsideration of the Board’s decision when the Act is silent as to whether the period may be tolled at all. **Murphy v. Director, OWCP**, No. 85-3286 (3d Cir. Jan. 14, 1986)(unpub.).

Section 802.205A(e) is strictly construed to dismiss employer’s premature appeal filed before the Director’s reconsideration request below. The Board analogized this regulation to the Federal Rule of Appellate Procedure 4(a)(4) even though employer’s appeal was not acknowledged and dismissed as premature until after the time for filing a second appeal to the decision on reconsideration had expired. **Hillsman v. Buckeye Coal Co.**, 10 BLR 1-16 (1986).

In cases arising in the Sixth Circuit the Board will follow the Sixth Circuit’s holding in **Youghiogheny and Ohio Coal Co. v. Benefits Review Board**, 745 F.2d 380, 7 BLR 2-34 (6th Cir. 1984) that the thirty day period within which to file appeals with the Board does not begin to run until the administrative law judge’s decision has been served on the parties. **Harris v. Nacco Mining Co.**, 12 BLR 1-115 (1989).

The Board held that in all circuits where the petitioner has advised the Board of the date the administrative law judge’s decision was filed by the district director the Board would apply the Third Circuit’s holding in **Trent Coal, Inc. v. Day**, 739 F.2d 116, 6 BLR 2-77 (3d Cir. 1984), that the thirty day period for filing an appeal with the Board begins to run on the day the administrative law judge’s Decision and Order is actually filed in the Office of the District Director, rather than on the date the administrative law judge issued the decision. **Harris v. Nacco Mining Co.**, 12 BLR 1-115 (1989).

Relying on **Amax Coal Co. v. Oxendine**, 892 F.2d 578, 14 BLR 2-12 (7th Cir. 1989), the Board held that an administrative law judge’s Decision and Order becomes final thirty days after it is filed in the district director’s office and that an administrative law judge is without authority to extend the thirty day period. **Mecca v. Kemmerer Coal Co.**, 14 BLR 1-101 (1990).

Although the Director should have ascertained prior to the administrative hearing level, when Dr. Scattergia’s opinion was admitted, that the opinion was incomplete and, therefore, insufficient to fulfill the Department of Labor’s statutory obligation, see generally **Crabtree v. Bethlehem Steel Corp.**, 7 BLR 1-354 (1984), the fair adjudication of claimant’s case cannot be undermined by such lapse on the part of the Director, see **Hodges v. BethEnergy Mines, Inc.**, 18 BLR 1-84 (1994); see generally **Beckett v. Raven Smokeless Coal Co.**, 14 BLR 1-43, 1-45 (1990).

Errors in service will not toll the time for filing an appeal pursuant to the Longshore Act, following ***Insurance Co. of North America v. Gee***, 702 F.2d 411 (2d Cir. 1983) and ***Jeffboat, Inc. v. Mann***, 875 F.2d 660 (7th Cir. 1989), but the appeal period for cases arising under the Black Lung Act will not begin to run until proper service is effected, following ***Patton v. Director, OWCP***, 763 F.2d 553 (3d Cir. 1985) and ***Youghioghney and Ohio Coal Co. v. Benefits Review Board***, 745 F.2d 380 (6th Cir. 1984). ***Ray v. Associated Electric Cooperative, Inc.***, 14 BLR 1-162 (1990); see also 20 C.F.R. §§702.349, 725.478.

Even though the district director initially determined that claimant was not entitled to benefits, the Director is not precluded from later taking a different position, see ***Pavesi v. Director, OWCP***, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); moreover, the Director's request that claimant be provided an opportunity to substantiate his claim pursuant to Section 413(b) is not tantamount to urging that claimant has established entitlement to benefits. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

A Director's Motion to Remand for a complete pulmonary evaluation may be raised at any stage of the adjudicatory proceedings. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

Although the Board initially dismissed employer's appeal as untimely, it determined on reconsideration that a notice of appearance filed by employer at the Office of the Solicitor of Labor prior to the deadline for appeal was sufficient to constitute a timely notice of appeal pursuant to 20 C.F.R. §§802.205, 802.207(a)(2), 802.208. Thus, the Board rejected claimant's contention that it lacked jurisdiction over employer's appeal. ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

The Board denied employer's motion to dismiss the appeal in the survivor's claim on the ground that it was untimely filed. In so doing, the Board noted that case law interpreting 20 C.F.R. §§725.364 and 725.478 requires that the parties and their counsel be served with an administrative law judge's decision by certified or registered mail. After noting that all parties and attorneys were served with the administrative law judge's decision by regular mail, the Board determined that proper service had not been effected and the 30-day period for filing an appeal did not commence at the time the decision was filed. Because the appeal in the survivor's claim was filed within 30 days of the date that the administrative law judge's decision was received by claimant's counsel, the Board held that it was timely filed. ***Keene v. Consolidation Coal Co.***, BRB (2013).

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