

BRB No. 07-0343 BLA

A.W.)	
)	
Claimant)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 01/31/2008
c/o ACORDIA EMPLOYERS SERVICE)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Order Granting Employer Westmoreland Coal Company's Motion for Summary Judgment and Decision and Order Denying Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Granting Employer Westmoreland Coal Company's Motion for Summary Judgment and Decision and Order Denying Motion for Reconsideration (2006-BLA-0036) of Administrative Law Judge Paul H. Teitler (the administrative law judge). In both of these dispositions, the administrative law judge determined that the district director's failure to conduct the hearing that claimant requested with respect to a claim filed on October 3, 1983, deprived employer of its right to defend that claim. Accordingly, the administrative law judge granted employer's request to be dismissed as the operator responsible for the payment of benefits awarded in the 1983 claim.

The Director argues on appeal that the administrative law judge erred in finding that employer's right to due process was violated, and dismissing employer from liability for the payment of benefits with respect to the 1983 claim. Employer has responded, urging affirmance of the administrative law judge's Order and Decision and Order on Reconsideration. Claimant has not responded to the Director's appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The procedural history relevant to the issues in this case is as follows: Claimant filed an application for benefits on October 3, 1983. Director's Exhibit 1. Employer was notified of the claim and began to develop evidence. On December 7, 1983, Dr. Daniel performed an examination of claimant at the request of the Department of Labor (DOL) and read the x-ray obtained on that date as positive for complicated pneumoconiosis. The district director submitted the x-ray to Dr. Gaziano, who also interpreted the x-ray as positive for complicated pneumoconiosis. In correspondence dated June 11, 1984, the district director informed claimant and employer that the application for benefits was denied, as the objective studies obtained by Dr. Daniel did not support a finding of total disability and Dr. Daniel indicated that claimant was able to do his usual coal mine work. Claimant requested a hearing in a letter dated June 25, 1984.

On August 26, 1984, employer submitted a letter to the district director in which it indicated that because it had not received any communication from the district director, it assumed that claimant had not requested a hearing or submitted additional evidence. Accordingly, employer asked the district director to issue "a letter of abandonment." Director's Exhibit 1. In response, the district director issued "Operator Notification Form 1," informing employer that claimant "has contested our decision." *Id.* The district

director also notified employer that it had thirty days within which to controvert the claim and an additional thirty days within which to submit evidence. Employer replied on September 20, 1984, stating that it continued to controvert the claim. Employer also requested that the district director inform employer if claimant submitted any new evidence or if claimant indicated that he did not intend to pursue his claim. Employer further stated that it was in the process of developing additional medical evidence. Subsequently, employer asked the district director to send the x-ray obtained by Dr. Daniels on December 7, 1983 to Dr. Hayes for rereading. According to a certified mail receipt, Dr. Hayes received the film on October 15, 1984. Employer next submitted claimant's answers to a second set of interrogatories on January 8, 1985. No further action was taken with respect to the 1983 claim.

On November 19, 2003, claimant filed a second application for benefits. Director's Exhibit 2. Employer was notified of this claim, but no mention was made of the 1983 claim. In a Proposed Decision and Order issued on July 18, 2004, the district director found that claimant was entitled to benefits based upon the fact that an x-ray obtained on February 11, 2004 was interpreted as positive for complicated pneumoconiosis. Employer requested a hearing, but later withdrew its request and accepted liability for the payment of benefits on the 2003 claim. The district director informed employer that it was responsible for the payment of benefits beginning November 1, 2003. Claimant filed a letter in which he stated that because a hearing was never held with respect to his 1983 claim, that claim was still pending, and he was entitled to benefits beginning October 1, 1983. The district director agreed and informed employer that it was also liable for the payment of benefits on the 1983 claim. Employer contested the district director's finding and requested a hearing.

The case was transferred to the Office of Administrative Law Judges, but before a hearing was conducted, employer submitted a motion for summary judgment, requesting that the administrative law judge transfer liability for the benefits awarded in the 1983 claim to the Black Lung Disability Trust Fund (Trust Fund). Neither the Director nor claimant responded to employer's motion. The administrative law judge determined that the district director's failure to hold the hearing requested by claimant on his 1983 claim violated employer's right to due process, as employer should have been able to presume that the 1983 claim was closed after nearly twenty years had elapsed. Order at 3-4. The administrative law judge also indicated that employer was prejudiced by DOL's loss of the December 7, 1983 x-ray that had been read as positive for complicated pneumoconiosis, and provided the basis for the award of benefits on the 1983 claim. *Id.* at 3. Accordingly, the administrative law judge dismissed employer as the operator responsible for payment of the award of benefits with respect to that claim and transferred liability to the Trust Fund. *Id.* at 4.

The Director requested reconsideration of the administrative law judge's Order. The administrative law judge declined to alter his disposition of employer's motion for summary judgment, indicating that even if DOL was not responsible for the loss of the x-ray, the passing of approximately twenty years with no action on claimant's request for a hearing had deprived employer of a meaningful opportunity to defend the 1983 claim. Decision and Order at 2. The administrative law judge continued to find, therefore, that the Director's lack of action provided an appropriate basis for transferring liability for the payment of benefits on the 1983 claim to the Trust Fund. *Id.* at 3.

On appeal, the Director asks the Board to reverse the administrative law judge's finding, as the administrative law judge erred in determining that employer was deprived of its right to due process. The Director contends specifically that the administrative law judge was incorrect in attributing responsibility for the disappearance of the December 7, 1983 x-ray to DOL, as employer's expert, Dr. Hayes, was the last person known to be in possession of the film. The Director also asserts that because employer was informed of claimant's request for a hearing and continued to develop evidence thereafter, employer was not deprived of its ability to defend against the 1983 claim.

In assessing the merit of an employer's allegation that DOL violated its right to due process, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has indicated that an employer need not prove actual prejudice to succeed.¹ Rather, the standard to be applied is whether DOL deprived the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-322 (4th Cir. 1998). In *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), the Fourth Circuit applied this standard to facts analogous to the present case. In *Borda*, the claimant filed an application for benefits in 1978. Without notifying the named employer, DOL denied benefits in August of 1980. In July of 1981, claimant submitted additional documentation, but received no response from DOL other than a form letter notifying him that his file had been transferred from one Office of Workers' Compensation Programs location to another. Believing that DOL had lost his file, claimant filed a second application for benefits in 1988. Employer was notified of this claim. At the hearing, claimant asserted that his 1978 claim was still pending based upon the 1981 submission to which DOL never responded. The administrative law judge found that claimant's 1988 claim merged into the 1978 claim and applied the more lenient

¹ Claimant's coal mine employment occurred entirely in West Virginia. Director's Exhibits 1, 3. Therefore, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

regulations set forth in 20 C.F.R. Part 727 in determining that claimant established entitlement to benefits. The administrative law judge found employer liable for the payment of these benefits. The Fourth Circuit held that DOL's failure to timely notify the employer of the 1978 claim and the 1981 request for modification was the direct cause of the employer's inability to obtain rebuttal evidence and, therefore, mount a meaningful defense. Accordingly, the court vacated DOL's designation of the employer as the operator responsible for the payment of benefits. *Id.*

Upon considering the facts of this case, the arguments of the parties on appeal, and the applicable law, we hold that the administrative law judge acted within his discretion in transferring liability for the payment of benefits on the 1983 claim from employer to the Trust Fund. Our disposition ultimately rests upon the fact that the district director failed to perform the duties placed upon him by the regulations governing the adjudication of black lung claims, and employer was negatively affected by this failure. Pursuant to 20 C.F.R. §725.421(a), (b), the district director is required to timely schedule any hearings by the parties and to transmit a complete record to the Office of Administrative Law Judges. 20 C.F.R. §725.421(a), (b). Because the district director did not schedule the hearing, the 1983 claim was never fully adjudicated, and the absence of the December 7, 1983 x-ray from the record went undetected for nearly twenty years. As a result, when claimant filed his claim in 2003, employer became potentially liable for an additional twenty years of benefits and employer's ability to meaningfully challenge entitlement was compromised, as the evidence supporting the award of benefits on the 1983 claim was no longer available. If a hearing had been timely scheduled, it is possible that the x-ray would not have been lost or, at a minimum, that the loss would have been detected and remedied so that employer could have attempted to rebut the positive readings for complicated pneumoconiosis that were in the record. In light of these circumstances, the administrative law judge rationally determined that the district director's error deprived employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Lockhart*, 137 F.3d at 807, 21 BLR at 2-322.

Contrary to the Director's assertions, employer's knowledge of claimant's decision to contest the initial denial of benefits in his 1983 claim and employer's subsequent attempts to develop additional evidence do not alter the fact that the district director, acting as DOL's agent, failed to discharge the duties assigned to him under the regulations. They also do not alter the fact that the district director's errors negatively affected employer's ability to defend the 1983 claim when claimant filed another claim twenty years later. We affirm, therefore, the administrative law judge's decision to dismiss employer as the operator responsible for the payment of the benefits awarded on the 1983 claim and the transfer of liability for these benefits to the Trust Fund. *Borda*, 171 F.3d 175, 21 BLR 2-545; *Lockhart*, 137 F.3d 799, 21 BLR 2-302.

Accordingly, the administrative law judge's Order Granting Employer Westmoreland Coal Company's Motion for Summary Judgment and Decision and Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's decision to relieve employer from liability for this claim. The record does not support the administrative law judge's determination that the Director's failure to schedule a hearing on claimant's 1983 claim denied employer a meaningful opportunity to defend itself and thereby denied employer its right to due process.

This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which declared in *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 807, 21 BLR 2-302, 320 (4th Cir. 1998): "In this core due process context, we require a showing that the notice [of a claim] was received too late to provide a fair opportunity to mount a meaningful defense." Employer cannot make that showing on the basis of the record in this case.

The record reflects that the Director notified employer of the claim three days after it was filed. Employer promptly controverted its liability and began developing evidence. On June 11, 1984, the district director denied benefits because claimant had failed to prove he was totally disabled, even though the record contained uncontradicted evidence of complicated pneumoconiosis in the form of two readings of a December 7, 1983 x-ray. On appeal, the Director acknowledges that the district director erred in denying benefits on that ground. Brief for Director at 2 n.2. The law is clear that a miner with

complicated pneumoconiosis need not prove total disability because a finding of complicated pneumoconiosis entitles a miner to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976)(“The presumption operates conclusively to establish entitlement to benefits.”). On September 18, 1984, employer was notified that claimant contested the district director’s decision and employer would have thirty days within which to accept or controvert the claim, and if it controverted, it would have an additional thirty days within which to submit evidence. In its letter of controversion dated September 20, 1984, employer indicated it was “in the process of developing additional . . . medical evidence” and requested to be notified if claimant either submitted new evidence or indicated an intent to abandon the claim. Director’s Exhibit 1. Employer requested on October 8, 1984, that the claims examiner forward the 1983 x-ray to employer’s expert, Dr. Hayes, for re-reading. This action can be reasonably interpreted as reflecting employer’s recognition that if a hearing were held, the denial would be reversed unless employer were able to discredit the x-ray readings of complicated pneumoconiosis. The claims examiner forwarded the x-ray four days later, and a certified mail receipt shows that Dr. Hayes received it on October 15, 1984. Employer submitted additional evidence in the form of interrogatories on January 8, 1985.

The record reflects no further action until claimant filed a second claim for benefits on November 19, 2003. Employer was promptly notified and controverted liability. Claimant’s evidence included a current x-ray read as positive for complicated pneumoconiosis; the district director awarded benefits on July 28, 2004. Employer expressed its disagreement with that decision and requested a hearing, but on June 29, 2005, employer accepted liability for the claim.

Initially, the district director instructed employer to pay benefits commencing as of November, 2003, but when claimant protested that because his original claim was still open, benefits should commence as of October 1983, based upon the x-ray readings for complicated pneumoconiosis, the district director found employer liable for payment of these benefits. Employer requested a hearing and filed a motion for summary judgment contending that the failure of the Department of Labor (DOL) to schedule a hearing deprived it of a meaningful opportunity to defend the claim. The administrative law judge found merit in this contention:

[I]t is reasonable to find that silence for approximately twenty years qualifies as an “indication that the Claimant does not intend to pursue this claim.” It indicates finality, and allows one to reasonably conclude that they are no longer open to liability from such a claim.

Decision and Order, Denying Motion for Reconsideration at 2.

The administrative law judge's decision reflects a misunderstanding of the law and a lack of understanding of the relevant facts. Failure to schedule a hearing is not equivalent to failure to provide notice of a claim. DOL did nothing to prevent or even to discourage employer from preparing a meaningful defense. Employer was on notice since September 18, 1984, that claimant challenged the district director's determination. Employer could not have been shocked and surprised to be found liable for benefits dating back to 1983, because employer had known since 1984 that claimant's benefits had been erroneously denied and because employer had appreciated, since 1984, the significance of the x-ray evidence which establishes the entitlement date, and which was last known to be in the possession of employer's expert. Employer has failed to make the requisite showing: "that the notice was received too late to provide a fair opportunity to mount a meaningful defense." *Lane Hollow Coal Co.*, 137 F.3d at 807, 21 BLR at 2-320. The delay in scheduling a hearing in no way prevented employer from preparing its defense to the claim in the case at bar. The record affirmatively shows that employer acted promptly to have the crucial evidence examined. Its disappearance in the hands of employer's expert cannot logically be blamed on DOL's failure to schedule a hearing timely.

Employer was well aware of the outstanding claim and the existence of evidence demonstrating claimant's entitlement to benefits. Moreover, employer had represented that it had begun the process of developing medical evidence. If employer had wondered whether it needed to continue to develop medical evidence, it could have inquired of the district director whether the claim had been abandoned. Employer did not do so because employer did not want to remind the district director of the existence of the claim. If employer was unable to mount a meaningful defense to the 1983 claim, it was the result of employer's strategic choice not to inquire about the status of the claim. Since 1984, employer has been well aware that it could, and probably should, be held liable to pay claimant's black lung benefits. Unlike an employer that is unaware of the existence of a claim, employer could have acted to protect its evidence and its case. Its failure to do so cannot be attributed to any act or omission of DOL. Hence, the administrative law judge erred in finding that DOL, rather than employer, was responsible for employer's inability to mount a meaningful defense.

Accordingly, I would vacate the administrative law judge's decision and hold employer liable for payment of claimant's benefits as of November 1983.

REGINA C. McGRANERY
Administrative Appeals Judge