FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JAN 18 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2015-187
v.	:	A.C. No. 46-07191-362763
POCAHONTAS COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Althen, Commissioners

ORDER

BY: Jordan, Chairman; Young, and Althen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 21, 2014, the Commission received from Pocahontas Coal Company, LLC ("Pocahontas") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on September 25, 2014, and became a final order of the Commission on October 27, 2014. Pocahontas asserts that the mine had been shut down and placed in "nonproducing" status six months prior to receiving the proposed assessment, and that the mine's personnel were reallocated. As a result, the proposed assessment was not properly processed and sent to counsel for the operator. The Secretary does not oppose the request to reopen. However, he urges Pocahontas to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Pocahontas's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I believe that Pocahontas Coal Company, LLC has not established good cause to reopen this civil penalty case.

As grounds to reopen the proceeding, Pocahontas asserts that Josephine No. 2 mine was placed on "Non-Producing" status on March 31, 2014, six months before the proposed assessment was delivered on September 25, 2014. The operator contends that personnel and job duties were reallocated following the mine closure. These changes resulted in the operator's failure to properly process the assessments and send them to the operator's counsel. The operator submits this failure was the result of "inadvertence" or "mistake" within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. Operator's Motion to Reopen, at 2.

In my view, Pocahontas' contention that its failure to timely file the contest form was the result of excusable inadvertence or mistake is woefully insufficient, and the operator has not established good cause to reopen the proceeding.

As my colleagues note, when considering motions to reopen, the Commission is guided by Federal Rule of Civil Procedure 60(b). Courts applying Rule 60(b)(1) have consistently held that the burden of proof is on the party seeking relief from judgment to establish that such relief is warranted. See *Williams v. Virginia, State Bd. of Elections*, 524 Fed. Appx. 40 (4th Cir. 2013); *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2nd Cir. 2004); *Williams v. Meyer*, 346 F.3d 607, 612-613 (6th Cir. 2003); *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002); *Helm v. Resolution Trust Corp.*, 684 F.3d 874, 878 (7th Cir. 1996); and *U.S. v. Proceeds of Sale of 3, 888 Pounds Atlantic Sea Scallops*, 857 F.2d 46, 48 (1st Cir. 1988). As the Sixth Circuit put it succinctly, "[t]he burden is upon the [movant] to bring himself within the provisions of Rule 60(b)." *In re Salem Mortg. Co.*, 791 F.2d 456, 149 (6th Cir. 1986); see also *U.S. for Use and Benefit of Fischbach & Moore v. Leeth Const., Inc.*, 988 F.2d126 (9th Cir. 1993)("The [movants] bear the burden of proving Rule 60(b) relief is justified."). This is true whether the final decision to be set aside was determined on the merits or was the result of a default. *See In re Wallace*, 499 Fed. Appx. 870, 873 (10th Cir. 2004) ("The defaulting party has the burden of establishing that the default judgment should be set aside."); and *North Cent. Illinois Laborers' Dist. Council v. S.J. Groves & Sons Co., Inc.*, 842 F.2d 164, 167-68 (7th Cir. 1988).

Therefore, in the instant matter, Pocahontas bears the burden of showing that its failure to answer the Petition for Assessment was the result of mistake or inadvertence. In order to carry that burden, Pocahontas is required to establish a factual evidentiary foundation as the basis for its claim. *See e.g. Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970) ("the trial court ought not reopen a default judgment simply because a request is made by the defaulting party; rather, that party must show that there was good reason for the default . . ."). When a movant fails to provide a solid evidentiary basis for believing that mistake, excusable neglect, or inadvertence occurred, a court is justified in rejecting a motion to reopen. *See Mitchell v. Sikorsky Aircraft*, 533 Fed. Appx. 354, 359-60 (5th Cir. 2013); *Vela v. Western Elec. Co.*, 709 F.2d 375, 377 (5th Cir. 1983); *S.E.C. v. Bilzerian*, 729 F. Supp. 2d 9, 17-18(D.D.C. 2010); *In re A.H. Robins Co., Inc.*, 221 B.R. 166 (E.D.Va 1998).

For example, in *Smith v. Johnson*, the Fifth Circuit considered the case of federal prisoner who claimed that he failed to file his habeas application in a timely manner because he was mentally incompetent. 247 F.3d 240 (5th Cir. 2001). In considering that claim under Rule 60(b)(1), the court noted that the prisoner's motion failed to demonstrate a right to relief because, "he never alleged facts sufficient to support his contention that he is mentally incompetent." *Id.* The fact that the prisoner had "mentioned [his incompetence claim] in supporting memoranda" at the district court was not adequate. *Id.* Similarly, it was not enough to simply state in his Rule 60(b) motion that he had an IQ of 75 and an educational level of 3.9, because "he never verified, for example through affidavit, that these facts were reliable." *Id.* at n. 2. In short, the prisoner never demonstrated "his claim of incompetence was anything more than a bald assertion." *Id.*

Other circuits have also required more than a mere claim of mistake, inadvertence, or excusable neglect to support a reopening under Rule 60(b)(1). In *Ben Sager Chemicals Intern., Inc. v. E. Targosz & Co.*, the Seventh Circuit refused to provide relief from judgement on a theory that movant's counsel made justifiable mistakes or engaged in "excusable neglect" because he was "preoccupied with personal matters." 560 F.2d 805, 809 (7th Cir. 1977). In making that determination, the court stated that there was "nothing in the record to support [movant's] contentions . . ." *Id.* As the court put it, "a party cannot have relief under Rule 60(b)(1) merely because he is unhappy with the judgment. Instead he must *make some showing* of why he was justified in failing to avoid mistake or inadvertence." *Id. quoting* Wright and Miller, Federal Practice & Procedure, § 2858, p. 170 (emphasis added); see also *Williams v. Borg-Warner Automotive Electronics & Mechanical System Corp.*, 97 F.3d 1457 (8th Cir. 1996) (court refused to grant relief under 60(b) when there is no factual basis to support movant's claims). In *Chavez v. Public Defender Dept. State of N.M.*, the Tenth Circuit refused to reopen a case based on counsel's alleged "inadvertence" in leaving out a page and a half of a response to a summary judgement motion because the movant's evidence consisted of a "bald assertion" with "no explanation for the reasons why mistake or inadvertence occurred." 946 F.2d 900 (10th Cir. 1991).

Even if a movant provides some evidence, courts will look into the substance of that evidence to determine whether the evidence sufficiently supports the movant's claim. For example, the Eleventh Circuit found that when an affidavit in support of a motion to reopen failed to establish "good cause" for an attorney's failure to meet a deadline, it was inappropriate to set aside the default judgment. *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291, 1297-98 (11th Cir. 2003). In a district court case, *In re FEMA Trailer Formaldehyde Products Liability Litigation*, the judge rejected evidence produced by a movant to establish that she could not stay in contact with the court because of a medical issue. __F. Supp 2d.__, 2011 WL 6748489 (E.D. La. 2011). While the movant had produced an affidavit regarding the medical condition, the court ruled that this evidence was insufficient because it consisted primarily of hearsay and did not provide sufficient details regarding the medical treatment to substantiate the claim. *Id.* Similarly, in *Timbisha Shoshone Tribe v. Kennedy*, the movant claimed that counsel's failure to file necessary documents was the result of "inadvertence." 267 F.R.D. 333, 336 (E.D.Ca 2010). While the movant submitted "declarations" explaining that counsel had inadvertently sent incomplete draft documents, those declarations "provide[d] no explanation as to how or why

[counsel] filed an unfinished version of the document by mistake" and the court refused to grant relief. *Id.* at 336-37.

In short, when a party seeks to reopen a matter under Rule 60(b) that party has an obligation to prove, with competent evidence, that there is good reason to set the judgment aside.

Looking at the situation here, Pocahontas has manifestly failed to meet its obligation. The entirety of the relevant portion of Pocahontas's submission is the following:

> In this case, the Josephine No. 2 mine was placed in "NonProducing" status on March 31, 2014, six (6) months before the proposed assessment. Because of the mine's closure, personnel and job duties were reallocated. Due to the changes these changes (sic) and in personnel and job duties, the Proposed Assessment was not properly processed and sent to counsel.

Pocahontas Mot. at 2. Not only is this representation lacking in detail, but it is an assertion by a lawyer, without any supporting evidence. The operator, represented by experienced counsel, has provided no foundation for its motion. Its only exhibit consists of copies of the assessment and citations. There are no affidavits or declarations from persons with first-hand knowledge of the operation. In fact, there is nothing in the record that can be considered evidence that substantiates the operator's bald assertion that it failed to act because of disruption in the mine office as a result of the mine closure.

It does not appear that finding such evidence would have been particularly difficult. The sparse record here shows that the assessment was delivered to and signed for by "L. Claypool." L. Claypool accepted the document on September 29, 2014, less than two months before the operator filed its Motion to Reopen. Presumably L. Claypool could have furnished an affidavit or declaration explaining what happened with the assessment and why it was not processed in the correct manner. Even if L. Claypool could not recall that particular penalty assessment, he/she could have provided a statement explaining the operator's general mail-handling procedures after the mine was placed in "non-producing status. It is, of course, possible that the operator was unable to find L. Claypool for one reason or another. However, if that was the case, the operator should have provided the Commission with that information. Beyond L. Claypool, there were doubtless other employees and officers at Pocahontas who could have provided the Commission with necessary information regarding the assessment processing procedure after the mine ceased production. Such information would have given the Commission a basis to evaluate the operator's assertions regarding disruption and confusion at the mine. Unfortunately, as it stands the Commission has no basis for assessing the operator's actions or excusing its failure to properly file its contest to the assessed penalty.

Given the absence of actual evidence in the motion and its sketchiness, the only reasonable conclusion is that the operator's excuse for failing to contest the proposed assessment is unacceptable. The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double*

Bonus Coal Co., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

In the instant matter, the operator was undoubtedly aware of the underlying order, because it had been served on Superintendent Jim Meadows on March 6, 2014 by Inspector Justin H. Crane. The operator also knew from that issuance that this was a section 104(d)(1) Order that was designated S&S. Pocahontas is a large operator with a large mine and an extensive history. While the operator may not have been aware that the Secretary would take six months to propose a penalty, it was undoubtedly aware that an assessment, very likely a substantial assessment, was going to be issued by MSHA in the future.[1] Despite those facts, the operator apparently took no action to ensure the proper processing of the assessment documents.

It may be that after the mine went into "non-producing" status, Pocahontas did create an adequate system to handle proposed assessments from MSHA, and this was a situation where the proposed assessment inadvertently slipped through the cracks. But we have no way of knowing it based on the operator's motion. We have not been given evidence of how this proposed assessment came to be inadvertently ignored, but only the cursory representations by counsel, a person with no first-hand knowledge.

I cannot conceive that a federal District Court would reopen a final judgment under Rule 60(b)(1) based on the pathetic motion Pocahontas has made here. Therefore, I respectfully dissent.

Robert F. Cohen, Jr., Commissioner

[1] The proposed penalty of $70,000 in this case was by way of a special assessment pursuant to 30 C.F.R. §100.5.

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