U.S. Department of Labor

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

BRB No. 20-0062 BLA

MELISSA GOOSLIN (o/b/o OTIS D. GOOSLIN)	)	
Claimant-Respondent	)	
v.	)	
MATE CREEK TRUCKING, INCORPORATED	)	
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/25/2021
Employer/Carrier-Petitioners	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Michelle S. Gerdano (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven D. Bell's Decision and Order Awarding Benefits (2018-BLA-05889) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on August 30, 2016.[1]

The administrative law judge found Employer is the responsible operator. He credited the Miner with 20.92 years of underground coal mine employment and found he was totally disabled. He therefore found Claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] The administrative law judge further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges its designation as the responsible operator. In addition, it argues the destruction of the Miner's initial claim record constitutes a due process violation and thus liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). It also challenges the constitutionality of the Section 411(c)(4) presumption enacted as part of the Affordable Care Act (ACA).

[1] Claimant is the widow of the Miner, who died on May 16, 2017. She is pursuing the miner's claim on his estate's behalf. The Miner filed a claim for benefits in 1992, but the file related to that claim was destroyed and therefore is unavailable. Director's Exhibit 1. Because the Miner's prior claim is unavailable, the administrative law judge treated the instant claim as an initial claim and required the Claimant to prove all necessary elements. Decision and Order at 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

Alternatively, it argues the administrative law judge erred in finding it did not rebut the presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation (the Director), argues there is no merit to Employer's arguments that its due process rights have been violated or that the Section 411(c)(4) presumption is unconstitutional. He agrees, however, that the Benefits Review Board should vacate the administrative law judge's determination that Employer is the responsible operator and remand this case for further consideration of that issue.

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

Due Process

We reject Employer's argument that its due process rights have been violated because the Department of Labor Office of Workers' Compensation Programs (OWCP) destroyed the record from the Miner's 1992 claim.[4] Employer's Brief at 9-12; Director's Exhibit 1.

In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). As the United States Court of Appeals for the Tenth Circuit explained in *Oliver*, Employer must "demonstrate that the contents of [the] lost

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 10-11.

[4] The administrative law judge declined to address Employer's due process argument, concluding he lacks authority to rule on a constitutional issue. Decision and Order at 3 n.11.

claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met this burden.

Employer first argues the destruction of this evidence deprived it of the opportunity to adequately evaluate whether Claimant established a change in an applicable condition of entitlement in this subsequent claim. Employer's Brief at 9-11; 20 C.F.R. §725.309(c). As the Director correctly argues, however, the relevant threshold inquiry in a subsequent claim involves whether a claimant established a change in an applicable condition of entitlement based on the *newly submitted evidence* (the evidence submitted by the parties in the 2016 claim). Director's Brief at 3-4. In order to obtain review of the merits of the claim, a claimant bears the burden of first establishing through newly submitted evidence that one of the applicable elements of entitlement that defeated entitlement in the prior claim has changed since that denial. 20 C.F.R. §725.309(c); *see Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). As discussed below, Claimant established every element of entitlement based on the newly submitted evidence. Thus Claimant has established a change in an applicable condition of entitlement, entitling her to review of the merits of the claim.[5] *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c). Employer has not explained how the record from the Miner's 1992 claim is relevant to this initial inquiry. *Oliver*, 555 F.3d at 1222-23.

Employer next argues that destruction of the prior claim evidence precluded it from understanding the Miner's "medical condition as presented in that prior claim." Employer's Brief at 9-11. In evaluating the merits of the claim, however, the administrative law judge indicated he credited more recent evidence over older evidence in light of the progressive and irreversible nature of pneumoconiosis. *Mullins Coal Co. of Va. V. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than that submitted with a prior claim because of the progressive nature of pneumoconiosis); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 33, 36. Employer has not explained why the contents of the record from a claim denied twenty-three years before the instant subsequent claim could defeat

[5] While a claim can be denied for reasons unrelated to a claimant's physical condition, such as failure to establish that his work constitutes that of a miner (*see* 20 C.F.R. §725.309(c)(3)), Employer alleges only that the destruction of the prior claim file deprives it of the "opportunity to understand [the Miner's] medical condition as presented in that prior claim." Employer's Brief at 10.

entitlement to benefits when the administrative law judge stated he credited more recent evidence. *Oliver*, 555 F.3d at 1219.

Thus, Employer has not established it was deprived of a fair opportunity to mount a meaningful defense against the claim, and we reject its argument that it was deprived of due process.[6] *Borda*, 171 F.3d at 184; *Oliver*, 555 F.3d at 1219. We therefore reject Employer's assertion that liability for benefits should transfer to the Trust Fund.

Constitutionality of the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the ACA, which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 15-18. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

The United States Court of Appeals for the Fifth Circuit, however, held one aspect of the ACA unconstitutional (the individual requirement to maintain health insurance), but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from that requirement. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, 140 S.Ct. 1262 (2020). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Moreover, the United States Supreme Court upheld the constitutionality of the

[6] Employer's reliance on *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) is misplaced. In distinguishing *Holdman*, the United States Court of Appeals for the Tenth Circuit explained the OWCP "lost a critical part of the record (the transcript of the claimant's own testimony) during an ongoing adjudication, making it impossible to evaluate the [administrative law judge's] findings on appeal." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1221 (10th Cir. 2009) (internal quotations omitted). The Board had instructed the administrative law judge to reconstruct the record because it could not conduct meaningful review; moreover, the administrative law judge concluded the missing evidence "was critical to the resolution of the claim," and "the case could not fairly be resolved without it." *Id*. In contrast, the loss of a prior denied claim remote in time "cannot be said to be similarly critical to [the] adjudication" of a subsequent claim. *Oliver*, 555 F.3d at 1221.

ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

We further affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 20.92 years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 33-34.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither clinical nor legal pneumoconiosis,[7] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

Employer argues the administrative law judge erred in finding it did not rebut the presumption of clinical pneumoconiosis. Employer's Brief at 12-15. It does not challenge, however, the administrative law judge's determination that it failed to disprove legal pneumoconiosis. Decision and Order at 42. Thus we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 42. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

The administrative law judge also found Employer failed to establish "no part of [the Miner's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 42-43. We also affirm this finding as unchallenged on appeal. S*ee Skrack*, 6 BLR at 1-

[7] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

711; Decision and Order at 43. Because we have affirmed the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption by either method, we affirm the award of benefits.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the miner for a cumulative period of not less than one year.[8] 20 C.F.R. §725.494(c). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The district director identified Employer as the responsible operator, finding the Social Security Administration earnings records showed it was the last operator to employ the Miner for a cumulative period of not less than one year and that it was insured on the last date of his employment. Director's Exhibit 45. Although Employer challenged these findings before the administrative law judge, he found Employer failed to dispute them before the district director. Decision and Order at 4-5. Moreover, he found Employer did not submit any evidence to challenge that it is a potentially liable operator. *Id*. He therefore concluded Employer waived the responsible operator issue and declined to consider it. *Id*.

The administrative law judge's finding of waiver is erroneous. Employer's Brief at 5-7; Director's Brief at 2. The district director issued a Notice of Claim to Employer on September 23, 2016, identifying it as a potentially liable operator. Director's Exhibit 28. Employer timely responded and disputed its potential liability. Director's Exhibit 30; 20

[8] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

C.F.R. §725.408(a). It specifically denied it employed the Miner for a cumulative period of one year. *Id*. Thereafter the district director issued a Schedule for the Submission of Additional Evidence designating Employer the responsible operator. Director's Exhibit 35. Employer responded and "reserved the right" to contest the responsible operator issue.[9] Director's Exhibit 36. Thus Employer did not waive its argument that it is not a potentially liable operator, and the administrative law judge erred by failing to analyze the issue of whether Employer was properly designated the responsible operator. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill gaps in the administrative law judge's opinion).

The administrative law judge also erred by requiring Employer to submit evidence establishing it is not a potentially liable operator. The administrative law judge correctly found he was precluded, absent extraordinary circumstances, from considering documentary evidence on the responsible operator issue to the extent Employer did not timely submit this evidence to the district director.[10] Decision and Order at 4-5; 20 C.F.R. §§725.408(b), 725.414(b)(1), 725.456(b)(1). The Director, however, bears the burden of proving Employer is a potentially liable operator, including establishing that it employed Claimant for a cumulative period of not less than one year.[11] 20 C.F.R. §§725.407,

[9] The administrative law judge erred by finding Employer waived the responsible operator issue because it responded to the Schedule for the Submission of Additional Evidence and agreed that it is "the most recent coal mine employer." Decision and Order at 4; Director's Exhibit 36. Contrary to the administrative law judge's finding, Employer conceded it most recently employed the Miner, but did not concede it employed him for one year. *Id*. An operator must have employed a miner for a cumulative period of not less than one year to be a potentially liable operator. 20 C.F.R. §725.494(c).

[10] The district director informed Employer that it had ninety days from receipt of the Notice of Claim to submit documentary evidence relevant to its status as a potentially liable operator, or request an extension of time by showing good cause. Director's Exhibit 28; *see* 20 C.F.R. §§725.408(b), 725.414(b)(1), 725.456(b)(1). It also informed Employer that, absent extraordinary circumstances, any documentary evidence not timely submitted before the district director could not be considered in future proceedings on the issue of whether it is a potentially liable operator. *Id*. Although Employer sought and obtained an extension of the applicable deadline, it ultimately did not submit any documentary evidence relevant to its status as a potentially liable operator. *Id*.

[11] The Director argues the evidence establishes the Miner worked for Employer for at least one year. Director's Brief at 3 n.5; 20 C.F.R. §725.101. The Director asserts the Miner "stated on his employment history form that his [employment relationship with

725.410(c), 725.495(a), (b). Thus contrary to the administrative law judge's analysis, Employer was not required to submit evidence establishing it employed the Miner for less than one year. Decision and Order at 4-5. Based on the foregoing errors, and in light of the Director's concession, we vacate the administrative law judge's responsible operator determination and remand the case to him for further consideration of this issue.[12]

Employer] started in 1989 and continued to 1991." *Id*, *citing* Director's Exhibit 4. The Director argues the Miner's earnings as set forth in his Social Security Administration earnings records "establish that the miner worked a minimum of 229.10 [working] days" during this time, and Employer concedes this calculation. *Id*., *citing* Employer's Brief at 6-7. Employer disputes the evidence establishes the Miner worked for it for one calendar year, or partial periods totaling one year. Employer's Brief at 5-7.

[12] We decline to address the merits of Employer's arguments regarding whether it is a potentially liable operator as the administrative law judge must resolve the matter in the first instance. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Employer's Brief at 5-9. We note, however, that Employer does not allege that it is incapable of assuming liability for benefits or that the Miner subsequently worked for one year with another coal mine operator that is capable of assuming liability. Employer's Brief at 5-9; 20 C.F.R. §725.495(c). Therefore, if the administrative law judge concludes Employer was properly designated as a potentially liable operator, he may reinstate his finding that Employer is liable for benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge