U.S. Department of Labor

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

BRB No. 21-0531 BLA

WILLA G. HUFF (o/b/o LLOYD HUFF) Claimant-Respondent v. D M & M COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: 5/11/2023 DECISION and ORDER

Appeal of the Decision and Order on Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order on Remand (2017-BLA-05408) 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 claim filed on October 22, 2015, and is before the Benefits Review Board for a second time.

In his initial Decision and Order Awarding Benefits, the ALJ determined Employer is the properly designated responsible operator. He also credited the Miner with 16.95 years of underground coal mine employment and found Claimant[1] established a totally disabling respiratory or pulmonary impairment, thereby invoking the presumption of total disability at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

Pursuant to Employer's appeal, the Board affirmed the award of benefits. *Huff v. D M & M Coal Co., Inc.*, BRB No. 19-0502 BLA, slip op. at 18 (Nov. 30, 2020). The Board held, however, that the ALJ erred in determining that Employer was the responsible operator. *Id.* at 20-21. It therefore vacated the ALJ's responsible operator determination and remanded the case for him to evaluate the nature of the relationship between Employer and DBH Coal Company, Inc. (DBH Coal).[3] *Id.*

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[1] The Miner died while the claim was pending before the ALJ on remand. Decision and Order at 4. Claimant is the Miner's widow, who is pursuing the claim on his behalf. *Id.*

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] The Board also rejected Employer's arguments that the ALJ's appointment violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and that his removal protections are unconstitutional. *Huff v. D M & M Coal Co., Inc.*, BRB No. 19-0502 BLA, slip op. at 5-7 (Nov. 30, 2020). The Board further rejected Employer's challenge to the constitutionality of the Section 411(c)(4) presumption. *Id.* at 8-9.

On remand, the ALJ found DBH Coal was the same entity as Employer or a successor to Employer. He aggregated the time Employer and DBH Coal employed the Miner and, finding it totaled more than one year, concluded DBH Coal was the proper responsible operator. Thus, as Employer was not the proper responsible operator, the ALJ determined liability should transfer to the Black Lung Disability Trust Fund (Trust Fund).

On appeal, the Director argues the ALJ erred in finding Employer was incorrectly named as the responsible operator and in transferring liability to the Trust Fund. Employer responds, arguing the ALJ properly dismissed it as the responsible operator. Claimant has not filed a response.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator

As the entity identified as the responsible operator, Employer has the burden of proving that it is not the "potentially liable operator" that most recently employed the Miner. 20 C.F.R. §725.495(c)(2). The parties do not dispute that Employer is a potentially liable operator.[5] Rather, relying on the documentary evidence[6] as well as the Miner's testimony, the ALJ determined on remand that Employer demonstrated DBH Coal was "the same entity as [Employer] or successor to [Employer]." Decision and Order at 10.

[4] 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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR, 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] Employer argues it was the Director's burden to investigate potential responsible operators and the relationship between Employer and DBH Coal while the case was before the district director. Employer's Response at 13-15. As the Director argues, however, the Director bears the initial burden to show Employer qualifies as a potentially liable operator. Director's Reply at 2; 20 C.F.R §§ 725.407, 725.495. The burden then shifts to the designated operator to prove that it does not. 20 C.F.R. §725.495(b)-(c).

[6] On remand, Employer requested the ALJ take official notice of certain corporate filings available through the Kentucky Secretary of State. Decision and Order at 4. The ALJ noted no objections to this request and took official notice of these documents pursuant to 29 C.F.R. §18.84. *Id.*

Further determining the Miner's aggregate employment with both companies exceeded one year, the ALJ found Employer established DBH Coal is the potentially liable operator that most recently employed the Miner for at least one year. *Id.* He thus found Employer was not the correctly designated responsible operator, dismissed Employer and transferred liability to the Trust Fund. *Id.*

The Director initially argues that, because Employer failed to designate the Miner as a liability witness before the district director, the ALJ erred in considering his testimony. Director's Brief at 12-13 (citing 20 C.F.R. §725.414(c)).[7] Employer responds that it submitted the Miner's deposition transcript while the case was pending before the district director and thus met the requirements under the regulations. Employer's Response at 9-11. It further submits the Director waived its argument by failing to raise it at any time prior to the current proceedings before the Board. *Id.* at 7-9. We agree with Employer that the Director waived its argument.

A party must timely raise an issue to preserve it for judicial review. *Island Creek Coal Co. v. Young*, 947 F.3d 399, 402-403 (6th Cir. 2020); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 743 (6th Cir. 2019). At no point in this case until the current Board proceeding has the Director argued that the Miner's testimony could not be considered regarding liability issues. *See* Director's Brief on the Record Regarding the Responsible Operator; Director's Response; Director's Brief on Remand. While this case was previously before the Board, the Director addressed the Miner's testimony in his argument that the evidence was insufficient to establish DBH Coal as a successor operator. Director's Response at 11. He further requested remand so the ALJ could make factual findings on the issue. *Id.* at 10-11. Thus, even assuming Employer failed to provide the

[7] The regulation provides, in pertinent part:

> In accordance with the schedule issued by the district director, all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the [ALJ] finds that lack of notice should be excused due to extraordinary circumstances.

20 C.F.R. §725.414(c).

Director adequate notice of the Miner as a liability witness,[8] the Director has waived its argument. *Young*, 947 F.3d at 402-403 (employer waived its argument by raising the issue for the first time "four months after the merits briefing period had closed"); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against forfeited arguments due to the risk of sandbagging).

The Director also argues the ALJ erred in finding Employer established a successor operator relationship and thus in dismissing Employer as the responsible operator. Director's Brief at 5-12. He maintains that Claimant's testimony is insufficient to establish that substantially all of Employer's assets were transferred to DBH Coal and that, "[c]ritically, there is no evidence that [Employer] ceased to exist while Claimant was working for DBH Coal." *Id.* at 8. Rather, he argues the evidence demonstrates they operated concurrently, which precludes successor liability. *Id.* at 8-9. We agree there is no evidence Employer ceased to exist while Claimant was working for DBH Coal.

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). The existence of a predecessor-successor operator relationship alone does not automatically result in successor operator liability. *See* 20 C.F.R. §725.492(d). Such a relationship "shall not be construed to relieve a prior operator of any liability if such prior operator meets the condition set forth in [20 C.F.R.] §725.494 [of a potentially liable operator]." *Id.* Rather, the successor operator will be primarily liable for payment of benefits for miners employed by the prior operator only when that prior operator ceased to exist. *Id.*

[8] Employer provided the parties notice of the Miner's deposition, which included the Miner's address on the certificate of service, while the case was pending before the district director. Director's Exhibit 65. Further, as Employer states, it submitted the Miner's deposition transcript before the district director issued the Schedule for the Submission of Evidence. Employer's Brief; Director's Exhibits 34, 44.

The ALJ found the Miner's credible testimony established DBH Coal acquired "substantially all" of Employer's assets but found that there is no evidence that DBH Coal ceased to exist "at any time relevant to the Miner's employment." Decision and Order at 9-10 (citing 20 C.F.R. §725.492(a)). Employer argues the Miner's testimony demonstrates the mine owner would close one mine site, "change[] the name of the coal company," and move its employees and equipment to another site. Employer's Brief at 5. However, as the ALJ observed, the Kentucky Secretary of State records show that both companies filed annual reports on May 18, 1993 and filed for administrative dissolution on November 1, 1994. Decision and Order at 6; Employer's Brief on Remand, Attachment (unpaginated). The Miner left Employer and began working for DBH Coal in 1992. Director's Exhibits 3, 6. Further, as the Director asserts, while the Miner testified only that he personally moved from one mine to the other and that he used "mostly the same" equipment at both mines, he did not testify as to what portion of Employer's equipment and employees moved from one site to the next. Director's Brief at 11; Director's Exhibit 34 at 13-14. We thus affirm the ALJ's determination that Employer failed to establish it ceased to exist during the relevant time period as supported by substantial evidence. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Contrary to the ALJ's finding, however, the concurrent operation of Employer and DBC Coal while Claimant was working for DBH Coal preclude the application of successor liability as a matter of law. *See* 30 U.S.C. §832(i)(30)(A)-(D); 20 C.F.R. §725.492(b)(1)-(3); *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 564-65 (6th Cir. 2002); Decision and Order at 10. We must, therefore, reverse the ALJ's dismissal of Employer as the responsible operator. 20 C.F.R. §725.492(d).

Accordingly, we affirm in part and reverse in part the ALJ's Decision and Order on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge