BRB No. 06-0562 BLA

| | | |
|---|---|---|
| JOHN PACK, JR. | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MINGO COAL AND COKE COMPANY | ) | DATE ISSUED: 04/26/2007 |
| | ) | |
| Employer | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order on Modification – Awarding Benefits and the Order on Reconsideration Denying Requested Relief of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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 HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Modification – Awarding Benefits and the Order on Reconsideration Denying Requested Relief (2004-BLA-101) rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The relevant procedural history of this case is as follows. After claimant filed for benefits on March 15, 2000, the district director sent notice of the claim to employer on August 29, 2000 and again on November 17, 2000,[2] identifying employer as the putative responsible operator and directing employer to respond within thirty days to accept or contest its liability. Director's Exhibits 1, 20, 21. Employer did not respond, and on February 5, 2001, the district director denied the claim. Director's Exhibit 24. Claimant subsequently requested a formal hearing, which was conducted on September 10, 2001 before Administrative Law Judge Linda S. Chapman. Director's Exhibits 25, 30. Although the record reflects that employer was sent a notice of hearing and briefing schedule as well as claimant's prehearing report, proffer of evidence, and post-hearing brief, employer did not attend the hearing or submit a brief. Director's Exhibits 28-31. On November 19, 2001, Judge Chapman issued a Decision and Order Granting Benefits, and on May 20, 2002, Judge Chapman issued a Supplemental Decision and Order Awarding Attorney's Fees, copies of which were sent to employer. Director's Exhibits 33, 37. Employer took no action until May 29, 2002, when its President, William F. Blackburn, III, filed a modification request alleging a mistake in a determination of fact, specifically arguing that employer did not qualify as a responsible operator because it was not a producer of coal, had limited assets, and was unable to pay benefits. Director's Exhibit 38. Following a hearing on February 17, 2005, Administrative Law Judge Richard A. Morgan (the administrative law judge) issued a Decision and Order on Modification – Awarding Benefits on August 1, 2005, finding that employer had failed to establish good cause pursuant to 20 C.F.R. §725.413 (2000) for contesting its status as responsible operator after it had failed to timely controvert the issue, and thus had waived the issue. The administrative law judge further found, however, that employer's 2005 financial status was not reasonably ascertainable at an earlier time pursuant to 20 C.F.R. §725.463(b), and that this evidence demonstrated that employer was unable to pay continuing benefits. Accordingly, the administrative law judge ordered that the Black Lung Disability Trust Fund (Trust Fund) assume liability for the payment of benefits commencing as of May 1, 2000.

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record reflects that the original notice was returned as undeliverable, and the notice was then sent to employer's correct address on November 17, 2000. Director's Exhibits 20, 21.

Upon the Director's motion for reconsideration, the administrative law judge issued an Order on Reconsideration Denying Requested Relief on March 20, 2006, finding that, pursuant to 20 C.F.R. §§725.413(b)(3) (2000) and 725.463, consideration of a new issue concerning employer's responsible operator status was within the scope of modification pursuant to 20 C.F.R. §725.310 (2000) when that issue was not reasonably ascertainable at an earlier proceeding in the case. The administrative law judge held that it was proper to consider employer's financial status in 2005 in assessing its ability to pay benefits, and found that modification was appropriate based on a mistake in a determination of fact because new evidence showed that employer was financially incapable of paying continuing benefits and thus did not qualify as a responsible operator pursuant to 20 C.F.R. §725.492(a)(4) (2000).

On appeal, the Director contends that the administrative law judge incorrectly relieved employer of liability for payment of benefits. Claimant responds, urging affirmance. Employer has not participated in this 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 rational, supported by substantial evidence, and in accordance with applicable law. 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).

The Director maintains that employer has waived any challenge on modification to its status as responsible operator herein because the issue of employer's inability to pay continuing benefits was reasonably ascertainable at the time it failed to respond to the district director's notice in 2000 and failed to attend the hearing in 2001. We agree. Section 725.413 (2000) provides, in pertinent part:

> (a) Within 30 days after receipt of notification issued under §725.412, unless such period is extended by the deputy commissioner for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability. . . .
>
> (b)(3) If the operator fails to respond within the specified period, such operator shall be deemed to have accepted the initial findings of the deputy commissioner when made and shall not, except as provided in §725.463, be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings in any further proceeding conducted with respect to the claim. In a case where an operator has failed to respond to notification, such failure shall be considered a waiver of such operator's

> right to contest the claim, unless the operator's failure to respond to notice is excused for good cause shown, . . . .

20 C.F.R. §725.413(a), (b)(3) (2000).

The administrative law judge found that employer had not demonstrated good cause for its failure to respond, thus waiving its right to contest the responsible operator issue, and we affirm this finding as unchallenged on appeal. Decision and Order on Modification at 7; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Relying, however, on the provision that "[a]n administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director," 20 C.F.R. §725.463(b), the administrative law judge found that modification was appropriate under Section 725.310 (2000) based on new evidence, not reasonably ascertainable earlier, of employer's financial status in 2005. The administrative law judge concluded that employer could not be held liable because the credible testimony of Mr. Blackburn, that employer was uninsured, in debt and operating at a deficit, showed that employer did not have the financial capacity to pay continuing benefits, thereby disqualifying employer from consideration as a responsible operator under Section 725.492(a)(4) (2000). Decision and Order on Modification at 8-9; Order on Reconsideration at 6. The Director correctly notes, however, that the administrative law judge ignored evidence in the record reflecting that employer's near insolvency was readily apparent in 2000 and 2001.

In support of employer's request for modification on May 29, 2002, Mr. Blackburn described employer's "bleak" financial condition and low production for the last three years, with no production since September 2001, and "no idea when future production will commence." Director's Exhibit 38 at 2. Mr. Blackburn indicated that employer "owes more than [it] can possibly pay," with Community Trust Bank holding a first lien on the entire operation and Mr. Blackburn holding a second lien, and while the company had previously continued operations "based on frequent infusions of funds from outside sources," it could no longer secure additional funding from financial institutions. *Id.* Mr. Blackburn concluded that "we simply cannot afford the benefit or the future underlying liability," Director's Exhibit 38 at 3, and added that "to say we have operated on a shoestring over the past several years would be to put it mildly," and "our ongoing business viability is day to day. . . ." Director's Exhibit 38 at 2.

Mr. Blackburn additionally testified at the 2005 hearing that he and/or his father performed accounting services for employer since its inception in approximately 1979 or 1980, and Mr. Blackburn became employer's president in approximately 1999. Hearing Transcript at 13-14. Mr. Blackburn testified that he "tried for a while to take a salary," Hearing Transcript at 69, but was never able to pay it, as employer owed him "a lot of money," Hearing Transcript at 70; accruing the salary was "pointless" because he could

not collect the accounting and tax fees that employer already owed him, *id.*; and he was last paid in approximately 1999. Hearing Transcript at 71. Mr. Blackburn admitted that he received notice of the claim, but did not respond because the claim had been denied and he did not want to hire an attorney, as employer owed him "more money than they'll ever be able to pay," Hearing Transcript at 36. Further, when Judge Chapman awarded benefits, Mr. Blackburn "still was thinking. . .I can't afford. . .to start paying a bunch of attorney's fees for. . .a company that has no money, can't pay me back." Hearing Transcript at 37.

In view of the above, we agree with the Director's argument that the issue of employer's inability to pay continuing benefits was "reasonably ascertainable" pursuant to Section 725.463(b) at the times employer failed either to respond to notice or attend the hearing. As good cause was not established to excuse employer's failure to respond, we vacate the administrative law judge's finding that modification under 20 C.F.R. §725.310 (2000) was appropriate to relieve employer of liability pursuant to 20 C.F.R. §§725.413(b)(3) (2000) and 725.463(b), and reinstate employer as the responsible operator herein. *See generally Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order on Modification – Awarding Benefits and Order on Reconsideration Denying Requested Relief are affirmed in part, vacated in part, and modified to reflect that employer is reinstated as the responsible operator liable for payment of benefits.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge