U.S. Department of Labor

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

BRB No. 17-0402 BLA

WINFORD E. BAKER	)	
	)	
Claimant-Respondent	)	
	)	
V.	)	
	)	
GLEN ALLEN MINING, INCORPORATED	)	
	)	
and	)	
	)	
EMPLOYERS' INSURANCE OF WAUSAU	)	DATE ISSUED: 05/10/2018
	)	
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 of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer, Glen Allen Mining Company, Incorporated (Glen Allen Mining), appeals the Decision and Order (2013-BLA-05278) of Administrative Law Judge Morris D. Davis awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 27, 2011.[1]

After finding that Glen Allen Mining was properly designated as the responsible operator, the administrative law judge found that the new evidence established that claimant has complicated pneumoconiosis, entitling him to the irrebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).[2] The administrative law judge further found that claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(c), and he awarded benefits accordingly.

On appeal, Glen Allen Mining argues that the administrative law judge erred in finding that claimant's claim was timely filed pursuant to 20 C.F.R. §725.308 and in identifying it as the responsible operator. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the administrative law judge's designation of Glen Allen Mining as the responsible operator.[3] Claimant also responds in support of the finding that the claim was timely filed.

[1] Claimant's initial claim, filed on August 21, 2006, was denied by the district director on May 24, 2007, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] Because claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge found that claimant established a change in an applicable condition pursuant to 20 C.F.R. §725.309.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[4] 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).

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). An operator is a "potentially liable operator" if the miner was employed by the operator, or any person with respect to which the operator may be considered a successor, for a cumulative period of not less than one year, and the operator is financially capable of assuming liability for the claim.[5] 20 C.F.R. §725.494(c), (e). Once a potentially liable operator has been properly identified by the Director, 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 potentially liable operator more recently employed the miner for at least one year and is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

The administrative law judge addressed Glen Allen Mining's argument that claimant's testimony establishes that Crown Mining, Ram Mining and Lucky Mining are liable as successor operators to Glen Allen Mining.[6] Decision and Order at 6-13. The

[4] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 4; Hearing Transcript at 23. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death arise at least in part out of employment with that operator; the operator, or any person with respect to which the operator may be considered a successor, was an operator for any period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

[6] A "successor operator" is defined as "[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 operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Additionally, 20 C.F.R. §725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization,

administrative law judge rejected that argument, finding that claimant's testimony did not establish that Glen Allen Mining transferred any mine, or "substantially all" of its assets, to claimant's subsequent employers, Crown Mining, Ram Mining and Lucky Mining. *Id.* He therefore found that Glen Allen Mining, rather than Crown Mining, Ram Mining or Lucky Mining, is the responsible operator. *Id.*

We reject Glen Allen Mining's argument that the administrative law judge erred in finding that claimant's hearing testimony did not establish a successor relationship between itself and Crown Mining, Ram Mining and Lucky Mining.[7] Employer's Brief at 3-4. Glen Allen Mining cannot rely on claimant's hearing testimony to establish that claimant's subsequent employers were its successors. The regulations require that while the claim is before 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." 20 C.F.R. §725.414(c). In the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations in Section 725.414 are mandatory and, thus, are not subject to waiver). As the administrative law judge noted, there is no indication in the record that Glen Allen Mining designated claimant as a liability witness while this claim was before the district director. Decision and Order at 8. Moreover, Glen Allen Mining did not argue to the administrative law judge that its failure to provide the required notice to the district director should be excused due to extraordinary circumstances. Therefore, claimant's hearing testimony relevant to the status of Crown Mining, Ram Mining and Lucky Mining as potentially liable operators was inadmissible. 20 C.F.R. §725.414(c).

We also reject Glen Allen Mining's argument that claimant's testimony, assuming its admissibility, is sufficient to establish that Crown Mining, Ram Mining or Lucky Mining were successor operators. To establish that these operators were its successors,

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liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

[7] Because Glen Allen Mining Company, Incorporated (Glen Allen Mining) does not challenge the finding that it employed claimant for at least one year, that finding is affirmed. *See Skrack*, 6 BLR at 1-711.

Glen Allen Mining was required to show that they "acquired a mine or mines, or substantially all of the assets thereof" from Glen Allen Mining, or "acquired the coal mining business of [Glen Allen Mining], or substantially all of the assets thereof." 20 C.F.R. §725.492(a). After noting that claimant testified that he worked for an individual named Glen Smith who invested in all of the companies, Decision and Order at 12; Hearing Transcript at 29, the administrative law judge found that claimant's testimony was insufficient to establish a successor relationship between them:

> Claimant's testimony, at best, shows that Glen Smith had some amount of financial interest in several mines in the Grundy, Virginia, area and that he shifted some personnel and some equipment around for his own reasons. It does not, however, prove, by a preponderance of evidence that Glen Allen Mining was subsumed by Crown Mining, Ram Mining or Lucky Mining. Claimant was "pretty sure" mining operations at Glen Allen [Mining] had shut down before he started work at Lucky Mining, but he offered no testimony on whether Glen Allen Mining . . . was bought out or merged with another company or otherwise ceased to exist. In short, I find that [c]laimant's testimony alone is too vague and inconclusive to meet [Glen Allen Mining's] burden of proof to establish that [it] is not the responsible operator.

Decision and Order at 13 (footnote omitted).

In his role as fact-finder, the administrative law judge is granted broad discretion in evaluating the credibility of the evidence, including witness testimony. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). Under the facts of this case, we agree with the Director that the administrative law judge reasonably found that claimant's testimony was too vague and inconclusive to establish that Glen Allen Mining transferred any mine, or "substantially all" of its assets, to claimant's subsequent employers, Crown Mining, Ram Mining and Lucky Mining.[8] We

[8] The administrative law judge noted that claimant's testimony established only that some, but not all, of the equipment and personnel at Glen Allen Mining moved to Lucky Mining. Decision and Order at 12; Hearing Transcript at 30. As an example of the inconclusive nature of claimant's testimony, the administrative law judge noted that he testified that Glen Smith owned Lucky Mining, but later testified that Glen Smith and Gene Love operated Lucky Mines as partners before Gene Love decided to close the mine because he had made enough money. Decision and Order at 13 n.6; Hearing Transcript at 24, 28.

therefore affirm the administrative law judge's determination that Glen Allen Mining did not meet its burden of proving that it is not the responsible operator liable for payment of benefits. 20 C.F.R §§725.494, 725.495.

Timeliness of Claim

Section 422(f), 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis that has been communicated to the miner. The regulation at 20 C.F.R. §725.308(c) provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). The "burden falls on the employer to prove that the claim was filed outside the limitations period." *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timeliness involves factual findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc).

Glen Allen Mining argues that claimant received a diagnosis of total disability due to pneumoconiosis more than three years before he filed his claim on January 27, 2011, thus rendering his claim untimely. In support of its argument, it relies upon claimant's 2015 hearing testimony during which claimant testified that, as part of an examination in 1997, he was told that he "needed to quit the mines . . . because of the dust."[9] Hearing Transcript at 22. Claimant, however, testified that he was never told by a physician in 1997 that he was totally disabled by pneumoconiosis. *Id.*

The administrative law judge accurately noted that claimant's hearing testimony contains no evidence that a physician communicated a diagnosis of total disability due to pneumoconiosis to him in 1997. 20 C.F.R. §725.308(a); *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989) (holding that a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment). Glen Allen Mining has not identified any other medical evidence that could trigger the three-year statute of limitations. We, therefore, affirm the administrative law judge's finding that Glen Allen Mining failed to rebut the presumption of timeliness, and further affirm his determination that this claim was timely filed.

[9] Claimant also testified that he was provided a list of "about ten different things" that were "wrong" with his lungs. Hearing Transcript at 23.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge