U.S. Department of Labor

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

BRB No. 17-0406 BLA

HERBERT W. ROBERTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FREESTONE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/10/2018
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05307) of Administrative Law Judge Morris D. Davis, rendered on a subsequent claim filed on July 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge initially determined that the claim was timely filed and that employer is the properly designated responsible operator. He then found that claimant established thirty-two years of underground coal mine employment and a totally disabling respiratory impairment, thereby establishing a change in an applicable condition of entitlement. The administrative law judge further determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge concluded that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer's sole argument is that the administrative law judge erred in determining that it is the properly designated responsible operator. Claimant has not filed a response brief in this case. The Director, Office of Workers' Compensation Programs (the Director), responds and urges affirmance of the administrative law judge's finding that employer is the responsible operator.[3]

[1] Claimant filed his initial claim for benefits on November 21, 1997, which the district director denied on April 21, 1998, because claimant established the existence of pneumoconiosis but did not prove he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant did not take any further action until he filed a second claim for benefits on November 5, 1999, which was denied on March 23, 2000, on the same grounds as the prior denial. Director's Exhibit 2. Claimant did not take any further action until filing the current subsequent claim. Director's Exhibit 3.

[2] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total respiratory or pulmonary disability, a change in an applicable

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

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). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[5] 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 operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

The regulations provide that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the operator that most recently employed the miner is financially incapable of assuming liability for the payment of benefits, the district director must submit a statement to that effect, and such statement is prima facie evidence "that the most recent employer is not financially capable of assuming its liability for a claim." *Id*.

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condition of entitlement at 20 C.F.R. §725.309, and entitlement to benefits under 20 C.F.R. Part 718. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-27.

[4] Because the record reflects that claimant's last coal mine employment occurred in Virginia, we will apply the case law 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); Director's Exhibit 5.

[5] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one working day of such employment must have occurred after December 31, 1969, and 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).

In determining that employer is the responsible operator, the administrative law judge considered claimant's tenure with employer and all subsequent employment. Decision and Order at 6-10. The administrative law judge determined that "the Director has clearly established that some of the coal mine operators cannot be named as the Responsible Operator because [c]laimant's employment with each was for less than one calendar year." Decision and Order at 10. The administrative law judge identified these operators as Freeport Mining, Roberts Mining, Southbound, Cavett Creek Shop, Blue Swan Energy, Claudette Mining, Black Diamond Leasing, Eastern Energy, Rock Branch, Timco Energy, Walcoal, and Tug Valley Mine Services. *Id*.

The administrative law judge further found that although claimant worked for more than one year at RS&R Mining, U.S. Mining, DVR Mining, and Hilo Energy, the record contained statements from the district director pursuant to 20 C.F.R. §725.495(d) that these operators were not insured on the last day of claimant's employment with them. Decision and Order at 10. After reviewing all of the evidence of record, the administrative law judge agreed with the Director that employer is the properly designated responsible operator because all of the subsequent coal mine operators employed claimant for less than one year or did not have insurance on his last day of employment. *Id*.

Employer does not dispute that it meets the criteria for a potentially liable operator at 20 C.F.R. §725.494, but argues that claimant subsequently worked for operators that also meet the criteria. Specifically, employer objects to the administrative law judge's findings that RS&R Mining, U.S. Mining, DVR Mining, Hilo Energy, Southbound, and Claudette Mining are not the responsible operator in this claim. Employer asserts that the fact that these employers did not have insurance does not relieve them of liability because the statute provides that the responsibility for the payment of benefits would then become the responsibility of the president, secretary, and treasurer of the company. Employer also contends that the administrative law judge failed to resolve conflicts concerning claimant's length of employment with Southbound and Claudette Mining.[6]

The Director responds that, contrary to employer's argument, the record contains evidence establishing that none of these companies had insurance coverage while

[6] Employer does not challenge the administrative law judge's finding that claimant worked for Freeport Mining, Roberts Mining, Cavett Creek Shop, Blue Swan Energy, Black Diamond Leasing, Eastern Energy, Rock Branch, Timco Energy, Walcoal, and Tug Valley Mine Services for less than one year, or identify any evidence to support a contrary finding. Accordingly, we affirm the administrative law judge's determination that these operators do not meet the criterion for a potentially liable operator at 20 C.F.R. §725.494(c). *See Skrack*, 6 BLR at 1-711.

employing the miner. Therefore, the Director contends that the burden shifted to employer to prove that another employer had the financial capability of paying benefits pursuant to 20 C.F.R. §725.495(c)(2), which employer failed to do.

We agree with the Director. The records show that claimant was employed by: RS&R Mining for more than one year from 1989-1990; U.S. Mining for more than one year from 1990-1991; and by DVR Mining and Hilo Energy for periods of time between 1990 and 1995. Director's Exhibits 5, 20-21, 47. However, as the administrative law judge found, the Director submitted statements pursuant to 20 C.F.R. §725.495(d) that these operators did not have insurance coverage during the time that claimant worked there. Decision and Order at 6-10. These statements are prima facie evidence that the companies are not capable of providing for the payment of benefits. 20 C.F.R. §725.495(d).

We also hold that remand is not required for the administrative law judge to address claimant's employment with Claudette Mining and Southbound.[7] Any error by the administrative law judge is harmless because there are statements in the record for each of these companies indicating that they did not have insurance or authorization to self-insure under 20 C.F.R. §725.495(d). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); Decision and Order at 6-10; Director's Exhibit 30. Further, we reject employer's argument that if a subsequent operator fails to obtain the insurance required by the Act, liability must fall to the Black Lung Disability Trust Fund (Trust Fund). Employer does not point to any statutory or regulatory language to support this assertion, and the contention that the Trust Fund must accept liability if the most recent employer is uninsured has been rejected by the United States Court of Appeals for the Fourth Circuit. *See Armco, Inc. v. Martin*, 277 F.3d 468, 476, 22 BLR 2-334, 2-346 (4th Cir. 2002) (Because the regulations call for designating as responsible operator an employer that satisfies the criteria, rather than having liability revert to the Trust Fund if the first potentially responsible operator does not meet the criteria, there is no basis for transferring liability to the Trust Fund.).[8]

[7] Employer argues that the administrative law judge did not resolve the conflict between claimant's statement that he worked for Claudette Mining for several years and his Social Security earnings records. Employer also asserts that the administrative law judge did not resolve the conflict between claimant's testimony that he worked for Southbound from October 1995 to December 1996 and his statement that he worked for Southbound for less than one year.

[8] Employer states that *Armco, Inc. v. Martin*, 277 F.3d 469, 22 BLR 2-334 (4th Cir. 2002), is not on point because, in this case, claimant, who had an interest in several of the

Based on the documentation in the record, the administrative law judge correctly found that the district director submitted the statements required by 20 C.F.R. §725.495(d). Decision and Order at 9-10. Once employer was designated as the responsible operator, it was then employer's burden to demonstrate that the more recent employers were financially capable of assuming liability for benefits. 20 C.F.R. §725.492(c)(2). Employer did not submit any evidence to support its burden. Because the administrative law judge's finding that employer is the responsible operator is supported by substantial evidence and in accordance with law, it is affirmed. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23, 25 BLR 2-521, 2-546-48 (6th Cir. 2014); Decision and Order at 10.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

companies, can pay the cost of benefits. We reject employer's allegation, as employer has not offered any proof to support its assertion.