U.S. Department of Labor

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

BRB No. 19-0209 BLA

RONNIE CHARLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG DOG COAL, INCORPORATED	)	
	)	DATE ISSUED: 04/28/2020
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Rita A. Roppolo (Kate S. O'Scannlain, 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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05333) of Administrative Law Judge Monica Markley on a subsequent claim[1] filed on August 3, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found employer is the responsible operator and credited claimant with 15.93 years of underground coal mine employment.[2] She found the evidence established complicated pneumoconiosis, entitling claimant to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304, and establishing a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). She further found claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

On appeal, employer challenges its designation as the responsible operator.[3] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response arguing there is no merit to employer's responsible operator argument.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C.

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[1] Claimant filed an initial claim on September 11, 2012, which the district director denied because he did not establish total disability. Director's Exhibit 1.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 37.

[3] Employer objects to the application of the Section 411(c)(4) presumption, contending that Section 1556 of the Patient Protection and Affordable Care Act, which revived this provision, "violates Article II of the United States Constitution." *See* Pub. L. No. 111-148, §1556 (2010); Employer's Brief at 2. The administrative law judge, however, did not award benefits based on the Section 411(c)(4) presumption.

[4] We affirm, as unchallenged, the administrative law judge's finding that claimant is entitled to benefits because he established complicated pneumoconiosis arising out of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.304, 718.203.

§921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

The responsible operator is the "potentially liable operator"[5] that most recently employed claimant for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the district director identifies a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed claimant as a miner for at least one year. *See* 20 C.F.R. §725.495(c).

Employer does not dispute it is a potentially liable operator,[6] but argues the administrative law judge erred in finding it is the responsible operator. Employer's Brief at 3-6. It asserts another potentially liable operator more recently employed claimant. Employer's Brief at 3-6. We reject employer's arguments.

The administrative law judge first addressed employer's argument that Powell Mountain Coal Company (Powell) is a potentially liable operator that more recently employed claimant as a miner for one year. Decision and Order at 5-6. Claimant's Social Security Administration (SSA) records reflect he earned $3,261.27 in 1995 and $18,262.10 in 1996 with Powell. Director's Exhibit 8. He testified he started working for Powell in June or July 1995, and he stopped working "inside the mines" in September 1995 when he was injured. Hearing Transcript at 33-36. After five to six weeks, he returned to work in a "light duty" capacity at Powell's St. Charles[7] mine site. *Id*. He worked during the night shift when the mine was mostly inactive.[8] *Id*. During this time, he answered the phone

[5] 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, it must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and it 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).

[6] Because it is unchallenged on appeal, we affirm the finding employer is a potentially liable operator. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §725.494.

[7] Claimant testified the St. Charles mine site, where he did light work, is referenced in his SSA records as "Powell Mountain Coal Company, Mayflower Preparation Site." Hearing Transcript at 35-36.

[8] Claimant stated he was at the mine for "three or four hours when they were running coal," but the remainder of the time the mine was inactive and undergoing maintenance.

and ordered supplies. *Id*. While working on light-duty, he was laid-off in December 1996 and never returned to work for Powell. *Id*.

Contrary to employer's argument, the administrative law judge permissibly found claimant's light-duty work with Powell answering the phone and ordering supplies was not the work of a miner.[9] *See Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 69-71 (4th Cir. 1981) (Whether an individual satisfies the definition of a miner is a factual determination for the administrative law judge); *Slone v. Director, OWCP*, 12 BLR 1-92, 1-93 (1988) (claimant not a miner where he "mostly stayed in the trailer and took care of telephone calls coming in, checking tickets going out," and thus was hired to "further the commercial interests of his employer"); Decision and Order at 5-6. As it is supported by substantial evidence, we affirm her finding that employer did not satisfy its burden to establish Powell is a potentially liable operator that employed claimant for at least one year as a miner.[10] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might

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Hearing Transcript at 33-34. He indicated if mechanics needed a part, he ordered them. *Id*.

[9] A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). This "includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." *Id*. The definition of a "miner" includes a "situs" requirement (i.e., that he worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that he worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42 (4th Cir. 1991).

[10] Employer argues the administrative law judge should have applied the average daily earnings for coal miners for each year as set forth in Exhibit 610 of the *Black Lung Benefits Act Procedure Manual* to determine the number of days claimant worked. Employer's Brief at 5. As discussed above, she found claimant worked as a miner for Powell only in 1995. Based on claimant's earnings of $3,261.27 and the average daily earnings of $147.52 for miners in 1995 as listed in Exhibit 610, the formula employer advocates would establish claimant worked for twenty-two days in that year. A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). A "working day" means any day or part of a day for which a miner received pay for work as a miner. *Id*. Because claimant did not have 125 working days as a miner with Powell, employer's proposed formula yields less than one year.

accept as adequate to support a conclusion); 20 C.F.R. §725.494(c); Decision and Order at 5-6.

The administrative law judge also addressed employer's argument that Hills Trucking and Coal (Hills Trucking) is a potentially liable operator. Decision and Order at 6-7. On an employment history form, claimant stated he worked for Hills Trucking from 2005 to 2012 and his work involved transporting poultry meal, corn, soybeans, and coal. Director's Exhibit 9. He hauled coal one to two times per week. *Id*. At the hearing, claimant testified that when he hauled coal, he transported it from stockpiles to paper plants in Georgia that purchased the coal. Hearing Transcript at 31. Occasionally he picked up processed coal from one storage stockpile and delivered it to another stockpile. *Id*. at 32-33. In a February 25, 2013 deposition, claimant testified the frequency that he transported coal varied, but averaged two loads per week. February 25, 2013 Deposition at 14-22. He would drive to coal yards and other workers would load coal into his truck.[11] *Id*. at 16. The paper plants in Georgia had already purchased the coal claimant was delivering to them. *Id*. at 17-18. He never hauled coal from the mine to the preparation plant. *Id*. at 40.

Hills Trucking also completed an employment questionnaire. Director's Exhibit 6. It confirmed claimant hauled processed coal from stockpiles to a paper plant in Georgia. *Id*. However, it stated ninety-nine percent of claimant's work for Hills Trucking involved hauling poultry meal, corn, and soybeans, and one percent involved hauling coal. *Id*. Gus Hill, a Hills Trucking representative, testified claimant primarily hauled grain, but occasionally hauled processed coal from stockpiles to customers that had purchased the coal. Director's Exhibit 29 at 11-12. He stated claimant never hauled coal from a mine to a preparation plant or tipple but "on occasion" picked up processed coal from the mine site and delivered it to the stockpile for storage. *Id*. at 13, 17-18.

The administrative law judge found claimant's transportation of coal for Hills Trucking did not meet the function test and therefore was not the work of a miner. Decision and Order at 7. She explained claimant hauled "processed coal [that] had already been purchased from the coal company by the time it was loaded in [his] truck" and "transported the coal to the purchaser" that hired Hill Trucking for delivery purposes. *Id*. Based on the employment form Hills Trucking submitted, she found claimant "transported soybeans and other grains [ninety-nine percent] of the time" and "transported coal extremely infrequently" when he worked for this company. *Id*. She also found claimant's work did

[11] Claimant stated he would drive to Hills Trucking's "little coal yard down there, [t]ipple." February 25, 2013 Deposition at 16. Although he testified the coal he picked up had not been prepared or washed, he conceded he did not know where the coal had come from. *Id*. at 18-22. When he arrived, the coal was in "piles" and he drove it straight to the customer. *Id*.

not qualify as covered employment because he had "very little exposure to coal mine dust." *Id*. Thus she found employer did not establish Hills Trucking is a potentially liable operator that employed claimant for at least one year as a miner. *Id*.

Employer does not challenge the administrative law judge's finding that claimant transported soybeans and grains for Hills Trucking ninety-nine percent of the time, and hauled coal only one percent of the time. Thus, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Further, we reject employer's assertion that she erred in finding the time claimant hauled coal was not the work of a miner. Employer does not dispute her finding that claimant transported coal that had already been processed and purchased. Decision and Order at 7. The United States Court of Appeals for the Fourth Circuit has explained an individual who is involved in the transportation and distribution of coal after it is processed and prepared for market is not a miner under the Act. *Director, OWCP v. Consol. Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991) (individual who worked at a dock house loading facility three hundred yards from the preparation plant is not a miner). When coal leaves the tipple, extraction and preparation are complete, and it is entering the stream of commerce. *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986). While individuals who come in contact with the coal at this interval or later may still suffer harmful exposure to coal dust, they are not within the class the black lung statute protects. *Id., citing Eplion v. Director, OWCP*, 794 F.2d 935, 937 (4th Cir. 1986). Thus, the administrative law judge permissibly found claimant's coal hauling work for Hills Trucking was not the work of a miner.[12] *Bower*, 642 F.2d at 69-71.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer did not meets its burden to establish Hills Trucking is a potentially liable operator because it did not employ claimant as a miner for a cumulative period of one year. *See Owens*, 724 F.3d at 557; 20 C.F.R. §725.494(c); Decision and Order at 7. We further affirm her determination that employer, as the last potentially liable

[12] Citing the Board's decision in *Setttlemoir v. Old Ben Coal Co.*, 9 BLR 1-109, 1-111 n.12 (1986), employer contends "transferring coal between [stockpiles is] part of the inventory process, which is an integral function of the preparation of coal for sale." Employer's Brief at 4. In *Settlemoir*, the Board noted an individual who inventories coal is a miner because coal cannot be considered fully processed and in the stream of commerce until it is inventoried. Claimant, however, did not inventory coal. Rather, the record reflects he came into contact with coal that had already been processed and purchased.

operator to employ claimant for one year, is the responsible operator.[13] 20 C.F.R. §725.495(a)(1).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[13] Because the administrative law judge provided valid reasons for finding Hills Trucking is not a potentially liable operator, we need not address employer's argument that she erred in finding claimant's work for this company was not that of a miner because he had "very little exposure to coal mine dust." Decision and Order at 7; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).