

U.S. Department of Labor

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



BRB No. 20-0153 BLA

CHARLIE G. MEADE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTOVER MINING COMPANY)	
)	DATE ISSUED: 04/28/2021
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer/Carrier.

Sarah M. Hurley (Elena S. Goldstein, Deputy 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier appeal Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-05437) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim for benefits filed on February 27, 2017.

The administrative law judge found Employer is the properly-designated responsible operator. *See* Decision and Order at 5. She credited Claimant with 11.91 years of coal mine employment. *See id.* She further found Claimant established all elements of entitlement and awarded benefits.

On appeal, Employer objects to its designation as the responsible operator and challenges the administrative law judge's findings on the merits of entitlement.¹ Claimant, who had a lay representative before the administrative law judge, did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, urging remand on the responsible operator issue. Employer filed a reply brief, urging the case be remanded in accordance with the Director's brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.² 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 responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for a cumulative period of at least one year. 20 C.F.R. §§725.494(c), 725.495(a)(1). The district

¹ Employer filed a motion before the administrative law judge challenging the validity of her appointment. At the formal hearing, the administrative law judge denied the motion, stating she is not subject to an Appointments Clause challenge because she was appointed by the Secretary of Labor after the issuance of the decision in *Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044 (2018). Hearing Tr. at 8. To the extent Employer raises a constitutional challenge to the administrative law judge's authority based on the removal protections afforded under 5 U.S.C. §5721, *see* Employer's Brief at 2 n.1, we decline to address it as inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); 20 C.F.R. §802.211(b); *see also Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018).

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 11.

director bears the initial burden of proving the identified coal mine operator is the potentially liable operator. 20 C.F.R. §725.495(b). If the operator finally designated as the responsible operator is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation:

If the reasons include the most recent operator's failure to meet the conditions of §725.494(e) [ability to pay benefits], the record shall also include a statement that the Office [of Workers' Compensation Programs] has searched the files it maintains ... and that [it] has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of §725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent operator is financially capable of assuming its liability for a claim.

20 C.F.R. §725.495(d). Employer challenges its designation as the responsible operator, arguing that because the Director did not place a statement into the record that the most recent coal mining company that employed Claimant is not capable of assuming liability as 20 C.F.R. §725.495(d) requires, it is not the responsible operator. The Director agrees.

Claimant's most recent coal mine employment was with Bodie Mining Systems. Prior to his employment with Bodie, Claimant worked for Gatt Mining and Supply. Claimant worked for Employer, Eastover Mining, prior to working for Gatt. In his proposed decision and order awarding benefits, the district director stated,

This operator (EMPLOYER) is not the operator that most recently employed the miner, but is the designated responsible operator because, subsequent to his employment with Eastover Mining Co., the miner was employed by Gatt Mining Systems for less than the required one year, and by Bodie Mining who was uninsured and incapable of assuming liability.

Director's Exhibit 39; *see also* Director's Exhibit 27 (Schedule for Submission of Additional Evidence).³ The administrative law judge rejected Employer's argument that it

³ The district director's Proposed Decision and Order and the Schedule for Submission of Additional Evidence contain identical language regarding the designation of the responsible operator. *See* Director's Exhibit 39; Director's Exhibit 27.

is not the responsible operator, finding the Director properly identified Employer as the responsible operator under Section 725.495(d). She further stated Employer did not submit sufficient evidence to refute its designation as the responsible operator. *See* Decision and Order at 5.⁴

We agree with Employer and the Director that the administrative law judge's finding on the responsible operator issue cannot be affirmed. The administrative law judge did not explain her reasons for finding the district director's statement as to Employer's designation as the responsible operator satisfied the requirements of Section 725.495(d). It is unclear whether the statement in the district director's Proposed Decision and Order amounts to an official statement in the record and if so, it does not contain any reference to the district director's searching his files as Section 725.495(d) requires. We therefore vacate the finding that Employer is the responsible operator and remand for the administrative law judge to reconsider the issue. On remand, the administrative law judge is directed to determine whether Employer was properly designated as the responsible operator pursuant to Section 725.495 and explain her reasoning. *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305 (4th Cir. 2012). If the district director's statement is inadequate under Section 725.495(d), it is presumed Bodie is financially capable of assuming liability. Employer then bears the burden of establishing Claimant worked for Bodie for a cumulative period of at least one year. 20 C.F.R. §725.494(c). We decline to address Employer's arguments on the merits of entitlement at this point as premature.

⁴ The administrative law judge found that because Employer did not submit evidence that it did not possess sufficient assets to secure the payment of Claimant's benefits, or that another potentially liable operator did possess such assets, Employer did not meet its burden to refute its designation as responsible operator. *See* 20 C.F.R. §725.495(c).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge