U.S. Department of Labor

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

BRB No. 21-0392 BLA

LONNIE M. STAPLETON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS MERCANTILE MUTUAL INSURACE	)	DATE ISSUED: 8/24/2022
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

James W. Heslep (Jenkins Fenstermaker, PLLC), Clarksburg, West Virginia, for Employer.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), 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 appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2020-BLA-05056) rendered on a claim filed on June 25, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

During a telephonic hearing held on December 16, 2020, the parties stipulated Claimant worked twenty-four years in coal mine employment and is totally disabled due to pneumoconiosis arising out of that employment. 20 C.F.R. §§718.202(a), 718.203, 718.204(b)(2), (c); Hearing Transcript at 12-13. The ALJ determined in his Decision and Order that Employer is the properly designated responsible operator and thus awarded benefits.

On appeal, Employer challenges its designation as the responsible operator. Claimant responds that if Employer is not the responsible operator, the Benefits Review Board must direct the Black Lung Disability Trust Fund (the Trust Fund) to pay Claimant's benefits. The Director, Office of Workers' Compensation Programs (the Director), urges the Board to affirm the ALJ's finding that Employer is the responsible operator.[1]

The Board's scope of review is defined by statute. We must affirm the ALJ'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 Assocs., Inc.*, 380 U.S. 359 (1965).

[1] We affirm, as unchallenged on appeal, the ALJ's award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5; Hearing Transcript at 12-13.

[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 was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Hearing Transcript at 19-20, 27-28.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[3] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, 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" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

An operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was authorized to self-insure during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to 20 C.F.R. §726.104(b) is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). Insurance coverage for black lung benefits exists only if the insurance policy is in effect on the last day of the miner's exposure to coal dust while employed by the insured. 20 C.F.R. §726.203(a).

Claimant worked for Employer from April 27, 1992 through August 1, 2016, and Southeastern Land, LLC (Southeastern) from August 2016 until February 2019.[4] Director's Exhibit 9; Hearing Transcript at 20, 33-35. On July 9, 2018, the district director identified Southeastern as the potentially liable operator; it controverted that designation. Director's Exhibit 23 at 41, 54. On October 2, 2018, Southeastern requested to be dismissed as a party to the claim because Claimant worked past the effective date of its

[3] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) 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).

[4] Claimant was still working with Southeastern when he applied for benefits.

insurance policy, which expired on July 27, 2017. *Id*. at 8. The district director subsequently prepared a statement, as 20 C.F.R. §725.495(d) requires, informing the parties that the Department of Labor (DOL) had "no record of valid insurance coverage" for Southeastern "that was effective on the date on which the miner was last employed." Director's Exhibit 24.

On November 19, 2018, the district director issued a Notice of Claim identifying Employer as a potentially liable operator, which it controverted. Director's Exhibits 27, 30. The district director issued a Schedule for the Submission of Additional Evidence on March 8, 2019, naming Employer as the responsible operator and gave it until April 7, 2019 to submit any liability evidence. Director's Exhibit 33. Although Employer filed a response, it did not directly challenge its designation as the responsible operator but merely reserved its right to do so. Director's Exhibit 34. Thereafter, the district director issued a Proposed Decision and Order awarding benefits on July 18, 2019, which identified Employer as the responsible operator. Director's Exhibit 40 at 10. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 48, 51.

The ALJ found Employer satisfied the criteria for a potentially liable operator at 20 C.F.R. §725.495(c) and did not submit any evidence to show Southeastern was insured when Claimant worked for it. Decision and Order at 4. Therefore the ALJ concluded Employer is the responsible operator. *Id*.

Employer argues Southeastern is the responsible operator because Claimant last worked for it for more than one year, and it was insured for the first eleven months Claimant worked for it. Employer's Brief at 8-12. Employer also argues benefits should transfer to the Trust Fund because Southeastern failed to maintain adequate insurance during the duration of Claimant's employment with it. *Id*. at 11-14. We disagree.

Although Claimant worked for Southeastern for one cumulative year after Employer, it may only escape liability if it proves that Southeastern is financially capable of paying benefits. 20 C.F.R. §§725.494(e), 725.495(c)(2). Here, the ALJ reasonably determined Employer failed to meet its burden. As the ALJ correctly noted, the district director submitted a 20 C.F.R. §725.495(d) statement indicating that, after searching its records, the Office of Workers' Compensation Programs determined Southeastern was not insured or approved to self-insure on the last day of Claimant's employment with it. Director's Exhibit 24. The district director's statement is prima facie evidence that Southeastern is not financially capable of assuming liability for this claim. 20 C.F.R. §725.495(d).

Regarding Southeastern's insurance policy, the ALJ also properly found it was in effect from July 27, 2016 to July 27, 2017, when the policy was canceled, but Claimant continued to work until 2019. Director's Exhibit 23 at 3, 8. The ALJ correctly observed that "the relevant inquiry is whether Southeastern had coverage that was effective '*on the last day of the last exposure* [to coal dust], in the employment of the insured.'" *Id.* at 4; quoting 20 C.F.R. §726.203(a) (emphasis added); *see Westmoreland Coal Co. v. Director, OWCP* [*Quillen*], 696 F. App'x 604, 608 (4th Cir. June 7, 2017) (unpub.) (affirming the ALJ's finding that the named employer was the responsible operator because the most recent employer's insurance coverage expired prior to the miner's last day of employment);[5] *Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 505 n.4 (4th Cir. 1995) (insurance coverage for black lung benefits "exists only if the insurance policy is in effect on the last day of the miner's exposure to coal dust while employed by the insured"). As Employer failed to submit evidence that Southeastern is capable of assuming liability and actually "conceded that Southeastern did not have valid insurance coverage following the policy's expiration in July 2017," we see no error in the ALJ's finding that Employer is the responsible operator. *Id.*

Additionally, we reject Employer's argument that if a subsequent operator fails to maintain insurance as the Act requires, liability must fall to the Trust Fund. Employer's Brief at 11-14. Employer does not point to any statute or regulatory language to support this assertion, and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected the contention that the Trust Fund must accept liability if the most recent employer is uninsured. 20 C.F.R. §725.495(c)(2); *see Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002) (finding no basis for requiring the payment of a claimant's benefits out of the Trust Fund because the regulations require the operator

[5] We reject Employer's attempt to distinguish the facts of *Quillen* from the instant case because in *Quillen* the subsequent employer was bankrupt but here it is not. Employer's Brief at 12. In *Quillen*, the court applied the regulation at 20 C.F.R. §726.203(a) and held a subsequent employer was not the proper responsible operator because it was not insured on the miner's last day of employment with it. *Quillen*, 696 F. App'x at 608. The court concluded the district director's 20 C.F.R. §725.495(d) statement was prima facie evidence of the fact that the subsequent employer was financially incapable of paying benefits, and because employer submitted no evidence otherwise, substantial evidence supported the ALJ's finding to that effect. *Id.* Here, as in *Quillen*, Employer submitted no evidence that Claimant's subsequent employer, Southeastern, was insured on Claimant's last day of employment with it. Thus, Employer did not establish the financial capability of the subsequent employer.

who meets all the criteria as the responsible operator to pay benefits[6] and do not require the Trust Fund to pay if the first potentially liable operator does not meet all the criteria).

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that Employer is the responsible operator. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 4.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[6] Employer does not assert it fails to meet the criteria at 20 C.F.R. §725.494(a)-(e).