U.S. Department of Labor

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

BRB No. 21-0566 BLA

CHARLES LINDSAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
S&H MINING, INCORPORATED	)	
	)	
and	)	
	)	
ARROWOOD INDEMNITY f/k/a THE FIRE & CASUALTY COMPANY of CONNECTICUT	)	DATE ISSUED: 12/16/2022
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

William M. Bush (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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Awarding Benefits (2020-BLA-5353) rendered on a claim filed on July 12, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] The ALJ determined S&H Mining, Incorporated (S&H), and Arrowood Indemnity (Arrowood)[2] are the properly designated responsible operator and carrier, respectively. On the merits, the ALJ found Claimant established 19.25 years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Further finding Employer failed to rebut the presumption, the ALJ awarded benefits.

On appeal, Employer challenges the ALJ's determination that Arrowood is the responsible carrier. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Board to vacate his responsible carrier determination and remand the case for further consideration.[4]

The Benefits Review Board's scope of review is defined by statute. The ALJ's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[1] As Claimant's initial claim was withdrawn, it is considered not to have been filed. 20 C.F.R. §725.306; Decision and Order at 2.

[2] Throughout the proceedings in this case, the district director, the ALJ, and counsel for the business entity formerly known as The Fire & Casualty Company of Connecticut refer to the carrier in this case interchangeably as "Arrowood Indemnity" and "Arrowpoint Capital Point Corporation." Decision and Order at 1, 6; Director's Exhibits 50, 53, 60, 68, 69, 80, 87; Employer's Closing Brief. For the sake of consistency, we refer to Carrier only as "Arrowood."

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption and Employer did not rebut it, and therefore the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20, 29.

and in accordance with applicable law.[5] 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).

Responsible Carrier

The responsible operator is the potentially liable operator that most recently employed the miner.[6] 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 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).

Employer does not challenge the ALJ's finding that S&H is the correct responsible operator; thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983);

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

[6] 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).

20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 6. Rather, Employer asserts the ALJ erred in determining Arrowood as the responsible carrier, contending Claimant last worked for S&H after September 3, 1992, when Arrowood's policy for S&H terminated and another carrier insured S&H's black lung liability.[7] Employer's Brief at 2-9; *see* 20 C.F.R. §726.203(a).

Based on a comparison of Claimant's Social Security Earnings Record (SSER) with the average daily earnings of miners reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual* (Exhibit 610),[8] the ALJ determined "Claimant stopped working for S&H in about June 1992" when Arrowood insured its liability.[9] Decision and Order at 6. In challenging this finding, Employer contends the ALJ failed to consider evidence that Claimant's daily earnings were significantly less than Exhibit 610's reported average daily earnings of $137.60. Employer's Brief at 5. Employer notes the rate of pay Claimant reported earning in 1992 was "nine something an hour," Director's Exhibit 42 at 47, which equates to an eight-hour daily earnings rate of at most $79.92 ($9.99 x 8 = $79.92). Employer's Brief at 6. Employer further correctly notes the ALJ's reliance on Exhibit 610 was material to his

[7] Employer concedes Arrowood insured S&H's black lung liabilities from February 14, 1992, through September 3, 1992. Employer's Brief at 2. It further correctly notes record evidence establishes American Mining Insurance Company (AMIC) insured S&H's black lung liabilities between September 4, 1992, and September 1, 1993. *Id.* at 2-3; *see* Director's Exhibits 42 at 6-7, 51 at 6-7.

[8] Exhibit 610, titled *Average Earnings of Employees in Coal Mining*, sets forth the average "daily earnings" of miners by year, and the "yearly earnings (125 days)" for employees in coal mining, as reported by the Bureau of Labor Statistics. https://www.dol.gov/sites/dolgov/files/OWCP/dcmwc/blba/indexes/Exh%20610-Mar2022.pdf (Exhibit 610). The Bureau of Labor Statistics stopped keeping records on an annual basis after 1990 and the earnings standards from that year forward are based on the surveyed average hourly rate multiplied by an eight-hour workday. *Id.*; *see* Director's Exhibit 68 at 20.

[9] Claimant's SSER shows 1992 earnings with S&H in the amount of $17,387.52. Director's Exhibit 8 at 1. Exhibit 610 reports $137.60 as the average daily earnings for miners in 1992. Exhibit 610. Dividing Claimant's 1992 earnings by the Exhibit 610 average daily earnings yields 126.4 working days ($17,387.52 / $137.60 = 126.4). Although the ALJ did not explain how he arrived at "about June 1992" as the date of Claimant's last employment with Employer, he appears to have divided 126.4 working days by a five-day workweek to determine Claimant worked 25.3 weeks (126.4 / 5 = 25.3) which would place Claimant's last day of work in June 1992.

finding Arrowood liable, because if the ALJ were to find Claimant worked eight hours per day and 5 days per week, *see n.*11 *infra*, dividing his 1992 yearly earnings by an 8-hour daily earnings rate of $79.92 yields 217.57 days or 43.5 weeks (217.5 / 5 = 43.5),[10] which places Claimant's last day of employment with Employer in October 1992 after Arrowood ceased to insure its liability. *Id.* As the ALJ did not explain why he discredited Claimant's reported earnings rate, we agree with the Director and Employer that the ALJ's finding does not comply with the Administrative Procedure Act (APA).[11] 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Director's Brief at 3-5; Employer's Brief at 6-8. We thus vacate the ALJ's finding that Claimant last worked for S&H in June 1992 and, therefore, that Arrowood is the responsible carrier. *See Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir.1984) (finding which does not encompass discussion of contrary evidence does not warrant affirmance); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Remand Instructions

On remand, the ALJ must again consider whether Arrowood is the responsible carrier in this case. In doing so, the ALJ may use any reasonable method of calculating Claimant's last date of 1992 employment; however, he must consider all evidence bearing on this issue and resolve any conflicts.[12] 20 C.F.R. §726.203(a); *see Martin v. Ligon*

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[10] We do not conclude, however, that the evidence definitively establishes Claimant worked only 8 hours per day and 5 days per week. These are findings for the ALJ to make. *See* n.11 *infra*.

[11] The APA requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[12] The Director and Employer correctly note Claimant gave conflicting accounts of his last date of employment with Employer, the number of hours per day he worked, the number of days per week he worked, and his hourly rate of pay. Director's Brief at 1-4; Employer's Brief at 3-8; *see* Director's Exhibit 6 (Claimant last worked for S&H in November 1992, worked ten hours per day, six days per week, and earned "$9" per hour); Director's Exhibit 14 at 5-6 (Claimant "not sure on [the] month" he last worked in 1992 but he worked eight-to-ten hours per day, five-to-six days per week); Director's Exhibit 42 at 47-49 (Claimant does not remember the month he left S&H but he left about six months after his cousin's April 1992 death in a mining accident; he last earned "nine something an hour"); Hearing Transcript at 16-17 (Claimant worked six or seven months after his

Preparation Co., 400 F.3d 302, 305 (6th Cir. 2005); *see generally Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). Further, the ALJ must explain his findings in accordance with the APA. *See Congleton*, 743 F.2d at 430; *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

If the ALJ again finds Claimant's last day of 1992 coal mine employment with Employer predates September 4, 1992, such that Arrowood insured S&H's liability on the last day of his employment, the ALJ may reinstate his finding that Arrowood is the properly designated responsible carrier. 20 C.F.R. §726.203(a). However, if he finds Claimant's last day of 1992 employment was on or after September 4, 1992, when another insurer insured S&H's liability, then Arrowood is not the responsible carrier and liability transfers to the Trust Fund. 20 C.F.R. §§725.495(c)(2); 726.203(a).

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cousin's April 1992 death and last earned about "$8.00-something an hour…. I don't think it was more than $9.00 that I was getting paid."). The ALJ must consider this evidence on remand.

However, the ALJ should not consider Employer's Exhibit K, a Knox County Public Library Obituary Index confirming that the Knoxville News Sentinel published an obituary for the miner's cousin on April 11, 1992. Employer's Exhibit K. During his January 28, 2019 deposition with AMIC, Claimant stated he ceased coal mine employment six months after his cousin's April 1992 death in a mining accident. Director's Exhibit 42 at 48-49. Although Employer confirmed on March 5, 2019, that the district director included this deposition with his February 15, 2019 Notice of Claim to Employer, Director's Exhibit 60, Employer first offered the obituary index as evidence at the hearing. Hearing Transcript at 7. As Employer did not submit this documentary liability evidence to the district director in accordance with his Schedule for the Submission of Additional Evidence, nor argue before the ALJ or the Board that extraordinary circumstances excuse its failure to have done so, we agree with the Director that the ALJ may not consider it. 20 C.F.R. §§725.414(d), 725.456(b)(1)(1) (documentary evidence pertaining to the liability of a potentially liable operator and/or identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances); *see Joseph Forrester Trucking v. Dir., OWCP* [*Davis*], 987 F.3d 581, 590 (6th Cir. 2021) ("a party must touch each base of the preservation process during the administrative and court proceedings"); Director's Brief at 4 n.3; Director's Exhibit 68.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and we remand the case for further consideration consistent with this decision.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge