U.S. Department of Labor

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

BRB No. 21-0399 BLA

JOYCE MCKNIGHT (O/B/O THOMAS A. MCKNIGHT)	)	
Claimant-Respondent	)	
v.	)	
ST. CHARLES MINING COMPANY, INCORPORATED	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/14/2023
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner	)	DECISION and ORDER

Appeal of the Order: (1) Dismissing Operator; (2) Remanding Matter for Payment by the Fund; and (3) Staying Remand of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Michael Pusateri and Mark Solomons (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Steven Winkelman (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 JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals Administrative Law Judge (ALJ) Jonathan C. Calianos's Order: (1) Dismissing Operator; (2) Remanding Matter for Payment by the Fund; and (3) Staying Remand (2018-BLA-05588) rendered on a claim filed on October 31, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Employer was not the responsible operator and liability for benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). Having bifurcated the issues of liability and entitlement, he stayed any findings on entitlement until resolution of the liability issue.

On appeal, the Director argues the ALJ erred in finding Employer is not the properly named responsible operator and in holding the Trust Fund liable for the payment of benefits. Employer responds, asserting the ALJ properly dismissed it as the responsible operator and transferred liability to the Trust Fund. The Director filed a response reiterating his arguments and urging reversal of the ALJ's decision.

The Benefits Review 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.[1] 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 Operator

The Director argues the ALJ erred in finding the Department of Labor did not properly designate Employer as the responsible operator and in not shifting the burden to Employer to prove either it is not financially capable of paying benefits or that a more recent employer qualifies as a potentially liable operator. Director's Brief at 6-8. We agree.

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 29, 41-43.

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).[2]

The district director issued a Notice of Claim to Employer on March 17, 2017, stating it had been identified as a potentially liable operator. Director's Exhibit 21. Employer filed a response on April 21, 2017, generally arguing it is not the responsible operator because other operators more recently employed the Miner for a cumulative period of one year. Director's Exhibit 25.

On July 7, 2017, the district director issued the Schedule for the Submission of Additional Evidence (SSAE) stating the Miner worked for Employer, St. Charles, for at least one year from 1978 to 1980, and identifying it as the responsible operator. Director's Exhibit 35. The district director recognized the Miner subsequently worked for Bill Carter Trucking Inc. (Bill Carter Trucking) from 1985 to 1986, KYVA Mining Inc. (KYVA Mining) from 1986 to 1988, and Hill Contractors Inc. (Hill Contractors) from 1989 to 1992 but did not identify them as potentially liable operators because they are not financially capable of assuming liability. 20 C.F.R. §725.494(e); Director's Exhibits 5-7, 35. The district director explained Hill Contractors is insolvent and was not covered by an insurance policy or approved to self-insure on the date it last employed the Miner; he also explained Bill Carter Trucking, KYVA Mining, and Rockwood Insurance Company (Rockwood), the insurance carrier that provided coverage for both on the last day they each employed the Miner, are all insolvent. 20 C.F.R. §§725.494(e), 725.495(d); Director's Exhibits 5-7, 35.

In its response to the SSAE, Employer again generally argued it is not liable because the Miner was subsequently employed by other operators for cumulative periods of at least one year. Director's Exhibit 30. Employer did not submit any liability evidence. On January 11, 2018, the district director issued the Proposed Decision and Order awarding benefits and naming Employer as the responsible operator. Director's Exhibit 35. Employer requested a hearing on the issues of its liability and Claimant's entitlement, and

[2] 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, the 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). Employer has not, at any point before the district director, ALJ, or on appeal, argued it does not meet these requirements.

the case was referred to the Office of Administrative Law Judges. Director's Exhibits 40, 43.

At the hearing before the ALJ on November 18, 2020, Employer argued that Bill Carter Trucking, KYVA Mining, and Hill Contractors should have been identified as potentially liable operators instead of Employer because they more recently employed the Miner for at least one year. Hearing Transcript at 15. Employer acknowledged the district director filed the statements required by 20 C.F.R. §725.495(d) which stated these entities were not identified as potentially liable operators because they are insolvent and uninsured. *Id.* However, Employer asserted for the first time they are financially capable of assuming liability because the Virginia Property Casualty and Insurance Guaranty Association (VPCIGA) guarantees the liability of Bill Carter Trucking and KYVA Mining, and the Virginia Uninsured Employer's Fund (Uninsured Fund) guarantees the liability of Hill Contractors. *Id.* The ALJ bifurcated the liability and entitlement issues and ordered the parties to brief the liability issue. *Id.* at 55.

In its post-hearing brief, Employer argued the VPCIGA "collects premiums from all insurers doing business in [Virginia] for the purpose of detecting and preventing insolvencies," and Virginia "created the [U]ninsured [F]und to provide coverage for workers' compensation claims when the employer is uninsured." Employer's Post-Hearing Brief at 3. Thus, it contended, the VPCIGA and the Uninsured Fund are "available to ensure coverage for individuals with work related claims," and the district director erred in not pursuing Bill Carter Trucking, KYVA Mining, and Hill Contractors as potentially liable operators. *Id.* at 3-7.

The Director replied, arguing the Uninsured Fund only covers claims arising under Virginia law, and thus would not cover this claim arising under federal law. Director's Post-Hearing Brief at 4. Further, he argued the VPCIGA would not cover this claim because the final date for filing claims against Rockwood to be paid by the VPCIGA was August 26, 1992, and this claim was filed on October 31, 2016. *Id.* at 4-5. Thus, he argued, Bill Carter Trucking, KYVA Mining, and Hill Contractors are insolvent and not financially capable of assuming liability through their insurers, the VPCIGA, or the Uninsured Fund, and Employer is the correctly identified responsible operator. *Id.* at 2-5.

On February 11, 2021 the ALJ held a telephone conference on the record during which he found the district director erroneously designated Employer as the responsible

operator.[3] Feb. 11, 2021 Conference Transcript at 7-8. He reasoned, and Employer argues in its reply on appeal, that 20 C.F.R. §725.494(e)(1) creates a duty for the district director to investigate whether there are any potential guarantors for an insolvent carrier's or uninsured operator's obligations, and to designate any potential guarantors that investigation produces as potentially liable operators.[4] *Id.* at 7-8, Employer's Reply at 1, 4-5. Thus, the theory goes, the district director was required to designate the VPCIGA because it may potentially guarantee claims against Rockwood and the Uninsured Fund because it may potentially guarantee claims against Hill Contractors, and then determine whether they would provide coverage for the claim.[5]

But the theory ignores 20 C.F.R. §725.495, which sets forth the district director's duties in designating the responsible operator. The regulations clearly state that if the operator finally designated as responsible is not the operator that most recently employed the miner, the district director is required to explain the reason for such designation. 20 C.F.R. §725.495(d). If the reasons include the more recent operator's inability to pay for benefits, the district director must provide a statement that he has no record of insurance

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[3] The ALJ later issued the Order that is the subject of this appeal which was "meant to adopt and incorporate [his] Bench Decision and memorialize [his] ruling in this matter." April 6, 2021 Order.

[4] 20 C.F.R. §725.494(e)(1) states a "potentially liable operator" must be capable of assuming its liability for a claim and is considered capable of assuming liability if

> [t]he operator obtained a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter that covers the claim, except that such policy shall not be considered sufficient to establish the operator's capability of assuming liability if the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed.

20 C.F.R. §725.494(e)(1).

[5] Employer argues 20 C.F.R. §725.619(e) also forms part of the burden on the Director to notify guaranty funds. Employer's Reply at 4-5. Employer's argument is not persuasive. While there is no 20 C.F.R. §725.619(e), it appears Employer is referring to 20 C.F.R. §725.609(e). This section does not create a burden on the district director, but rather allows him to enforce an obligation "in the discretion of the Secretary or district director . . . [a]gainst any other person who has assumed or succeeded to the obligations of the operator or insurer by operation of any state or federal law, or by any other means." 20 C.F.R. §725.609(e).

coverage or authorization to self-insure for that employer as of Claimant's last day of employment. *Id.* Such a statement in the record constitutes prima facie evidence that the subsequent employer is not financially capable of paying benefits. *Id.*

Because the district director submitted the requisite statements for Bill Carter Trucking, KYVA Mining, and Hill Contractors explaining he searched the Department's files and found the employers and their carriers are insolvent or uninsured, we find the Director complied with the regulations when designating Employer as the responsible operator. *See id.*; Director's Exhibits 5-7.

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 is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c). The Director argues Employer failed to meet this burden. Director's Brief at 10-13. We agree.

Initially, we note Employer has not argued it is financially incapable of assuming liability, and the Director concedes Bill Carter Trucking, KYVA Mining, and Hill Contractors more recently employed the Miner for at least one year. *Id.* at 3. Further, Employer does not contest the Director's finding that all three subsequent employers are insolvent and that Rockwood, the carrier for Bill Carter Trucking and KYVA Mining, is also insolvent. Thus, the only remaining issue is whether Employer has proven one of these employers financially capable of assuming liability because the VPCIGA or the Uninsured Fund would cover this claim. 20 C.F.R. §725.495(c).

Employer did not submit any evidence, before the district director or the ALJ, showing either entity would cover this claim. Because there is no evidence in the record proving the VPCIGA or the Uninsured Fund guarantees the obligations of Bill Carter Trucking, KYVA Mining, or Hill Contractors, Employer cannot, as a matter of law, establish they would provide coverage for this claim. *See* 20 C.F.R. §725.495(c)(2). Thus, Employer cannot meet its burden to prove any of the more recent employers is financially capable of assuming liability for benefits. *See id.*

Moreover, we agree with the Director's argument that under binding Fourth Circuit precedent, the VPCIGA could not provide coverage for this claim. In *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016), the employer was insured by the same insolvent carrier as Bill Carter Trucking and KYVA Mining, Rockwood. The Fourth Circuit explained the VPCIGA:

> [I]s a state chartered non-profit association established by the legislature to 'provide prompt payment of covered claims to reduce financial loss to

> claimants or policyholders resulting from the insolvency of an insurer.' Va. Code Ann. §38.2-1600 . . . When a member insurer becomes insolvent, the VPCIGA takes on liability for some, but not all, of its obligations . . . the Guaranty Act provides: 'Notwithstanding any other provision of this chapter, a covered claim shall not include any claim filed with the [VPCIGA] after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.' *Id.* §38.2-1606(A)(1)(b).

Id. The Fourth Circuit noted that, following Rockwood's insolvency, the liquidator set the final date for filing claims against it as August 26, 1992. *Id.* It then found that, because Mullins filed his claim in 2009, seventeen years after the final date to file a claim against Rockwood had passed, his claim was not a "covered claim" under the Guaranty Act, and the VPCIGA was under no obligation to pay it. *Id.* at 284. Likewise, the Miner filed this claim in 2016, twenty-four years after the final date to file a claim against Rockwood passed, and the VPCIGA by operation of law has no obligation to cover it.[6] *See id.*

Further, we agree with the Director's argument that the Uninsured Fund likewise cannot provide coverage for this claim. Director's Brief at 12. The Virginia legislature created the Fund to provide for workers' compensation benefits awarded against any uninsured or self-insured employer under any provision of the Virginia Workers' Compensation Act. Va. Code §65.2-1201(A). Thus, it is specifically for workers' compensation claims arising under Virginia law, and because this claim arises under federal law, it cannot provide coverage.[7] *See id.*

[6] Employer's reliance on *Boyd* and *Bowling* for the proposition the VPCIGA is liable for this claim is misplaced. Employer's Reply at 7-8. *Boyd and Stevenson Coal Co. v. Director, OWCP*, 407 F.3d 663 is distinguishable from this case because the claim was filed in 1989, before the final date for filing claims. *Boyd*, 407 F.3d at 664, 667; Employer's Reply at 7. *Island Fork Construction v. Bowling*, 872 F.3d 754 (6th Cir. 2017), a Sixth Circuit case which is not binding here, analyzed whether the Kentucky Insurance Guaranty Association is liable for a black lung claim but said nothing about time-barred claims. *Bowling*, 872 F.3d at 759-60; Employer's Reply at 8.

[7] We reject Employer's assertion *Mounts* and *Flanary* stand for the proposition that the Uninsured Fund is liable for this claim. *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997), *aff'd*, 497 S.E.2d 464 (Va. 1988); *Uninsured Employer's Fund v. Flanary*, 497 S.E.2d 913 (Va. Ct. App. 1998), *aff'd*, 257 Va. 237 (Va. 1999). Both

We also reject Employer's argument that the guaranty funds are liable because the Act's "requirement for full and complete coverage preempts any state limitation on liability." Employer's Reply at 9-10 *citing* 30 U.S.C. §933(b)(1). Contrary to Employer's contention, the Act requires that operators secure the payment of benefits by either qualifying as a self-insurer or holding an insurance policy that contains "a provision to pay benefits required under section 932 of this title, notwithstanding the provisions of the State workmen's compensation law which may provide for lesser payments." 30 U.S.C. §933(b)(1). It does not, as Employer alleges, require guaranty funds created by state legislatures to guarantee insurers in claims under the Act. *See id.*

Finally, Employer argues for the first time on appeal it cannot be held liable for this claim because the Director failed to enforce the Act's insurance requirements against Hill Contractors and shifting liability to its carrier is a regulatory taking. Employer's Reply at 10-13. Because, as the Director argues, Employer did not raise either of these arguments before the district director or the ALJ, we decline to address them. 20 C.F.R. §802.301(a) (Board's review authority limited to "findings of fact and conclusions of law on which the decision or order appealed from was based"); *see Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021) (black lung regulations require that an issue be "raised before the ALJ to preserve issue for the Board's review"); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6-7 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986). Moreover, neither of these arguments help Employer meet its burden of showing the VPCIGA or the Uninsured Fund is liable for this claim. *See* 20 C.F.R. §725.495(c).

In summary, there is no evidence in the record that either the VPCIGA or the Uninsured Fund would provide coverage for this claim.[8] Thus, as a matter of law, Employer cannot meet its burden to show another operator more recently employed the miner for at least one year and is financially capable of assuming liability for benefits, and therefore cannot prove it is not the responsible operator. *See id*.

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cases are distinguishable from this case because they involved Virginia state workers' compensation claims. *Id.*

[8] We further reject Employer's argument that the Department was required to put Bill Carter Trucking, KYVA Mining, and Hill Contractors on notice and litigate whether the VPCIGA and the Uninsured Fund apply to this claim because there is no legal basis to find the VPCIGA and the Uninsured Fund provide coverage. *See RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016); Va. Code §65.2-1201(A).

Accordingly, the ALJ's Order: (1) Dismissing Operator; (2) Remanding Matter for Payment by the Fund; and (3) Staying Remand is reversed and remanded for consideration of Claimant's entitlement.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge