U.S. Department of Labor

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

BRB Nos. 20-0145 BLA
and 20-0146 BLA

DONNA C. THOMAS (o/b/o and Widow of JERRY THOMAS)	)	
Claimant-Respondent	)	
v.	)	
CRAGER FORK MINING, INCORPORATED	)	
and	)	DATE ISSUED: 01/27/2021
EMPLOYERS INSURANCE OF WAUSAU	)	
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 on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (Stanley E. Keen, Deputy Solicitor for National Operations; 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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Joseph E. Kane's Decision and Order on Remand (2015-BLA-05555, 2015-BLA-05556) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 2, 2014 and a survivor's claim filed on March 3, 2015,[1] and is before the Benefits Review Board for the second time.

In his initial Decision and Order Awarding Benefits, issued on December 20, 2017, the administrative law judge found Employer is the responsible operator, credited the Miner with twenty-two years of underground coal mine employment, and found the evidence established complicated pneumoconiosis. He thus found Claimant invoked the irrebuttable presumption the Miner was totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act,[2] 30 U.S.C. §921(c)(3), and awarded benefits. Based on the award of benefits in the Miner's claim, he also determined Claimant is automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[3] 30 U.S.C. §932(*l*)(2018).

On Employer's appeal, the Board affirmed the administrative law judge's awards. *Thomas v. Crager Fork Mining, Inc.*, BRB Nos. 18-0167 BLA, 18-0168 BLA, slip op. at 5 (Mar. 12, 2019) (unpub.). However, the Board vacated his determination that Employer

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[1] Claimant is the widow of the Miner, who died on December 14, 2014. Director's Exhibit 17. She is pursuing the Miner's claim as well as her survivor's claim.

[2] Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from complicated pneumoconiosis arising out of coal mine employment. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

[3] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

is the responsible operator[4] and remanded the case with instructions to consider whether Employer met its burden to prove Dave's Branch Coal Company (Dave's Branch) more recently employed the Miner for one year. *Id.* at 7-8.

In his Decision and Order on Remand, the administrative law judge again found Employer is the properly designated responsible operator. Employer challenges that finding and asserts the Black Lung Disability Trust Fund must assume liability for the payment of benefits. Claimant responds, indicating she takes no position on the responsible operator issue. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, agreeing with Employer that, because the administrative law judge did not consider all the relevant evidence, the Board should again remand the case for further consideration of the responsible operator issue.

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.[5] 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." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the Miner for a cumulative period of not less than one year.[6] 20 C.F.R. §725.494(c). The district director is initially charged with identifying

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[4] The Board noted the Director, Office of Workers' Compensation Programs (the Director), conceded the administrative law judge erred by summarily finding Employer the responsible operator without addressing its argument that the Miner worked for Dave's Branch Coal Company (Dave's Branch) for more than a year after he ceased working for Employer. *Thomas v. Crager Fork Mining, Inc.*, BRB Nos. 18-0167 BLA, 18-0168 BLA, slip op. at 6-7 (Mar. 12, 2019) (unpub.).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3.

[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

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 identifies a potentially liable 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 operator financially capable of assuming liability more recently employed the Miner for at least one year.[7] 20 C.F.R. §725.495(c).

As the administrative law judge found, the Miner worked for Dave's Branch during calendar years 1995, 1996, and 1997. Decision and Order on Remand at 5; Director's Exhibits 4, 5, 6. Finding he could not determine the beginning and ending dates of the Miner's employment with Dave's Branch, the administrative law judge relied on the formula at 20 C.F.R. §725.101(a)(32)(iii).[8] Decision and Order on Remand at 5. He divided the Miner's yearly earnings as reported in his Social Security Administration (SSA) earnings records by the coal mine industry's average daily earnings, as reported in

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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).

[7] As the administrative law judge noted, the district director designated Employer the responsible operator in a Proposed Decision and Order dated March 13, 2015. Decision and Order on Remand at 3; Director's Exhibit 19. Although the district director found the Miner had subsequent coal mine employment of more than one year with one operator, Torrie Mining, the district director found that Torrie Mining was incapable of assuming financial liability. Director's Exhibit 19. The district director found several other operators that employed the Miner after he ceased employment with Employer (Straight Fork Mining, Owl Mining, Shamrock Contracting, Sister Bear Mining, and Eagle Ridge Mining) employed him for less than one year. *Id.* The district director therefore determined that none of these companies could be designated the responsible operator. *Id.* The district director did not address whether Dave's Branch employed the Miner for at least one year.

[8] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, to determine the number of days the Miner worked each year. *Id.* He then divided the number of days worked by 125 to determine the fraction of a year the Miner worked each year. *Id.* Using this method, he determined the Miner worked for Dave's Branch for a total of 0.84 of a year. *Id.* Because the Miner worked for Dave's Branch for less than a year, *see* 20 C.F.R. §725.101(a)(32), the administrative law judge found Employer could not avoid liability for the claim because it did not meets its burden to prove another operator more recently employed the Miner for at least a year. 20 C.F.R. §725.495(c); Decision and Order on Remand at 5.

Employer asserts the administrative law judge erred in calculating the Miner's length of employment with Dave's Branch. Employer's Brief at 3-4. It argues he should have calculated the Miner's employment using the highest hourly wage the Miner reported on his Form CM-913, Description of Coal Mine Work and Other Employment, rather than the average daily wage in Exhibit 610.[9] *Id.* Although the Director asserts "it is far from certain"[10] the evidence upon which Employer relies establishes one year of employment with Dave's Branch, she agrees with Employer that the administrative law judge should have addressed this evidence in making his length of coal mine employment finding. Director's Response at 3, citing *Shepherd v. Incoal Inc.*, 915 F.3d 392, 407 (6th Cir. 2019) (in determining the length of employment, the administrative law judge must consider all relevant evidence, including "earnings statements, pay stubs, specific remembrances, or other indicia of reliability").

Because the administrative law judge did not consider all relevant evidence, we vacate his designation of Employer as the responsible operator. On remand, he is instructed to address all relevant evidence and reconsider whether Employer met its burden to prove that Dave's Branch more recently employed the Miner for one year. *See* 20 C.F.R. §725.495(c)(2). We offer no opinion on the weight to be given that evidence, if any, or whether, in spite of that evidence, the administrative law judge may nevertheless employ the formula in Section 725.101(a)(32)(iii). The administrative law judge must, however,

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[9] On his Form CM-913, Description of Coal Mine Work, the Miner stated his highest rate of pay as a coal miner was fifteen dollars per hour. Director's Exhibit 4 at 1. Relying on *Shepherd v. Incoal Inc.*, 915 F.3d 392 (6th Cir. 2019), Employer asserts a $15 per hour wage yields 129 days, or 1.03 years, of employment with Dave's Branch. Employer's Brief at 3-4.

[10] The Director identifies several reasons she believes Employer's identification of a $15 per hour wage does not meet its burden to prove one year of employment with Dave's Branch. Director's Brief at 4-5.

consider the parties' arguments and explain his findings as the Administrative Procedure Act requires.[11]

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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[11] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).