U.S. Department of Labor

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

BRB No. 19-0279 BLA

CHESTER VANDYKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION, Self-insured through SUNCOKE ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DATE ISSUED: 06/25/2020
	)	
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 A. Temin, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Edward Waldman (Kate S. O'Scannlain, 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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05712) of Administrative Law Judge Larry A. Temin rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on December 22, 2015.

The administrative law judge found the evidence established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He further found claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, employer contends the administrative law judge erred in identifying it as the responsible operator. Employer also challenges the date for the commencement of benefits and argues claimant's benefits are subject to offset.[1] Claimant responds in support of the administrative law judge's determination regarding the commencement date of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's identifying employer as the responsible operator. In separate reply briefs, employer reiterates its contentions of error.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence and in accordance with applicable law.[2] 33 U.S.C.

[1] Because it is unchallenged on appeal, we affirm the administrative law judge's award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] Employer argues the Board should apply the law of the United States Court of Appeals for the Sixth Circuit. Employer relies on the fact that claimant has been a legal resident of Kentucky for many years, that the district director developed the claim from an office in Kentucky, that the administrative law judge conducted the hearing in Kentucky, and that claimant worked as a miner in Kentucky for many years. Employer's Reply Brief to the Director's Response at 2. However, the administrative law judge found, and employer does not dispute, claimant's last coal mine employment occurred in Virginia. Decision and Order at 3; Hearing Transcript at 13-14, 19, 24. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See*

§921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Responsible Operator

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), one of which is the operator must have employed the miner for a cumulative period of not less than one year.

The administrative law judge found employer was the potentially liable operator that most recently employed claimant for a year.[3] Although the administrative law judge found that Omega Mining-Beehive Coal Company (Omega) employed claimant after his employment with employer ceased, he found the employment with Omega lasted less than a year.[4] Decision and Order at 5. The administrative law judge therefore designated employer as the responsible operator. *Id.*

Employer argues the administrative law judge erred in finding it did not establish Omega employed claimant for a year.[5] Employer's Brief at 7-16. We disagree. During his deposition, claimant testified he worked for Omega from January 2015 to February 2016. Director's Exhibit 24 at 8-9. The administrative law judge found, however, claimant's testimony that he began working for Omega in January 2015 conflicted with other evidence.

The administrative law judge noted Omega was not issued a mine license until February 3, 2015, and employer did not officially terminate claimant until March 31, 2015. Decision and Order at 5; Director's Exhibit 46. He further noted claimant earned

---

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Because employer does not contest the administrative law judge's designation of it as a potentially responsible operator, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

[4] The administrative law judge also found employer did not provide any evidence that Omega was capable of paying benefits. Decision and Order at 5.

[5] Contrary to employer's assertion, Employer's Brief at 10, the district director was not required to notify Omega of its potential liability because she determined Omega did not employ claimant for a year.

significant income from both employer and Omega in 2015.[6] *Id.* Given the conflicting evidence, the administrative law judge permissibly found claimant's testimony insufficient to establish the beginning date of his employment with Omega. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (administrative law judge evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). He therefore found employer failed to establish that Omega employed claimant for a year.[7]

Employer contends the administrative law judge erred in not considering claimant's updated Social Security Administration (SSA) earnings statement. Director's Exhibit 60. Because the district director must resolve the identification of the responsible operator or carrier before a case is referred to the Office of Administrative Law Judges, the regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). In a January 9, 2019 Order, the administrative law judge found claimant's updated SSA earnings statement was not submitted to the district director and employer failed to establish extraordinary circumstances for failing to do so. Therefore, the administrative law judge found claimant's updated SSA earnings statement inadmissible for the purpose of contesting employer's liability for the claim. 20 C.F.R. §725.414(c).

Employer asserts the need for accurate information in order to identify the responsible operator establishes the extraordinary circumstances to justify the admission of claimant's updated SSA earnings statement. We need not address employer's contention. Although claimant's updated SSA earnings statement reveals claimant earned $41,109.19 from Omega in 2015 and $9,181.75 from Omega in 2016, it also confirms information from claimant's W-2 Wage and Tax Statement that claimant earned $31,801.00 from employer in 2015. Director's Exhibit 60. It does not on its face establish,

[6] The administrative law judge noted claimant indicated on an employment history form that he worked for employer in 2015. Decision and Order at 5; Director's Exhibit 5. Claimant's 2015 W-2 Wage and Tax Statement indicates claimant earned $31,801.00 from employer in 2015. Director's Exhibit 10. Claimant's Social Security Earnings Statement indicates that claimant earned an additional $41,109.19 from Omega during this same year. Director's Exhibit 11.

[7] Contrary to employer's assertion, Employer's Brief at 12-13, the administrative law judge did not defer to the district director's determination, but properly made a *de novo* finding regarding employer's liability for benefits.

nor has employer otherwise shown it would establish, a beginning date of claimant's employment with Omega that would make Omega the responsible employer. Consequently, the administrative law judge's error, if any, in not considering claimant's updated SSA earning statement was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer notes claimant's earnings of $31,801.00 from Omega in 2015 establish more than 125 days of employment. Citing a decision from the United States Court of Appeals for the Sixth Circuit, *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), employer argues this is sufficient to establish a year of coal mine employment. We disagree. The United States Court of Appeals for the Fourth Circuit, in which this case arises, has not adopted *Shepherd* or otherwise held that working 125 days establishes a year-long employment relationship. *See Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one year employment relationship during which miner worked 125 days to establish a year of employment). We therefore affirm the administrative law judge's finding that employer failed to establish Omega employed claimant for a year.[8] Consequently, we affirm the administrative law judge's designation of employer as the responsible operator. 20 C.F.R. §§725.494, 725.495.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). Where a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If not, the commencement date is the month in which the claim was filed, unless the evidence establishes claimant had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period the evidence first establishes when claimant had simple pneumoconiosis subsequent to the date of filing. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

The administrative law judge found the record does not establish the onset date of claimant's complicated pneumoconiosis. Decision and Order at 12. He therefore

[8] Employer also contends Omega has the financial ability to pay benefits. Employer's Brief at 16-17. We need not reach this issue because employer has failed to establish Omega employed claimant for one year.

determined benefits are payable on December 2015, the month in which the claim was filed. *Id.*

Employer contends because claimant's complicated pneumoconiosis was first diagnosed on March 16, 2016, his benefits should commence on this date. Employer's Brief at 20. We disagree. Because there is no evidence in the record that establishes claimant had only simple pneumoconiosis after he filed his claim, the administrative law judge properly awarded benefits as of the month of the filing date of the claim, December 2015. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

We agree with employer, however, that claimant's benefits may be subject to offset. Although a miner with complicated pneumoconiosis may establish entitlement to benefits while continuing to work, 20 C.F.R. §725.504(a)(1), any benefits received are subject to the excess earnings offset set forth at 20 C.F.R. §725.536.[9] *See* 30 U.S.C. §932(g); 20 C.F.R. §725.536. As the administrative law judge noted, there is evidence that claimant continued to work as coal miner after he filed his claim for benefits. Decision and Order at 12; Hearing Transcript at 39-40; Director's Exhibit 24 at 8-9.

The district director must determine any credit or offset upon proof that claimant received income concurrent with his federal black lung benefits. In light of the Board's affirmance of the award of benefits, employer must raise this issue with the district director to obtain the relief that it seeks. 20 C.F.R. §725.502(b)(2); *Crider v. Dean Jones Coal Co.*, 6 BLR 1-606, 1-610 (1983).

[9] Section 725.536 provides:

> In the case of a . . . miner whose claim was filed on or after January 1, 1982, benefit payments are reduced as appropriate by an amount equal to the deduction which would be made with respect to excess earnings under the provisions of sections 203(b), (f), (g), (h), (j), and (*l*) of the Social Security Act. . . , as if such benefit payments were benefits payable under section 202 of the Social Security Act . . . .

20 C.F.R. §725.536.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge