U.S. Department of Labor

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

BRB No. 22-0030 BLA

RAY L. HALE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THREE H COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 03/09/2023
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Finding Three H Coal Company, Inc. as Responsible Operator and Awarding Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri and Patricia Karppi (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Gary K. Stearman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Finding Three H Coal Company, Inc. as Responsible Operator and Awarding Benefits (2020-BLA-05724) on a subsequent claim filed on October 28, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act or BLBA).

The ALJ granted Employer's Motion to Withdraw Controversion on the entitlement issues and thus awarded benefits. She further found Three H Coal Company (Three H Coal) is the correctly named responsible operator liable for the payment of benefits.

On appeal, Employer argues the removal provisions applicable to ALJs render the ALJ's appointment unconstitutional. It also challenges Three H Coal's designation as the responsible operator. Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges and affirm the ALJ's determination that Employer is liable for benefits. Employer filed a reply brief, reiterating its arguments.

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] Claimant filed a prior claim on October 6, 1993, which was "finally closed" on April 25, 1997, and is not included in the record. Director's Exhibits 1, 40 at 7. Because Employer has conceded Claimant is entitled to benefits, the prior claim record has no consequence to the outcome of this claim.

[2] 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); Decision and Order at 3, 4 n.4; Director's Exhibit 9; Director's Brief at 3.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs.[3] Employer's Brief at 5-10; Employer's Reply Brief at 1-3. It generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[4] Employer's Brief at 5-10; Employer's Reply Brief at 1-3. It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 5-10; Employer's Reply Brief at 1-3. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

[3] We reject Employer's assertion that the Board lacks authority to decide constitutional issues. Employer's Reply Brief at 1 (citing *Carr v. Saul*, 141 S. Ct. 1352 (2021)). Employer's reliance on *Carr* is misplaced as its holding is not on point. In *Carr*, the United States Supreme Court held that Social Security procedures did not require claimants for Social Security disability benefits to raise their Appointments Clause challenge to their respective Social Security Administration ALJs. 141 S. Ct. at 1356. Contrary to Employer's assertion, the Board has both the inherent authority and vested authority to consider constitutional questions arising in cases before it. *See McCluseky v. Zeigler Coal* Co., 2 BLR 1-1248, 1-1258-62 (1981); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Carozza v. United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). Moreover, the United States Court of Appeals for the Sixth Circuit has held that the Board may address timely-raised Appointment Clause challenges. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019).

[4] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

Responsible Operator

The district director is charged with determining which of a miner's "potentially liable operator[s]" is the "responsible operator" liable for benefits. 20 C.F.R. §§725.407(a), 725.495(a)(1). To be a "potentially liable operator," a coal mine operator must have employed the miner for at least one year and be financially capable of assuming liability for the payment of benefits.[5] 20 C.F.R. §725.494(e). The "responsible operator" is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1).

If the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs (OWCP) has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

The designated responsible operator may be relieved of liability only if it proves it is either financially incapable of assuming liability for benefits or 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)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016). If the district director fails to identify the proper responsible operator prior to the claim's transfer to the ALJ, the improperly designated operator must be dismissed and the Black Lung Disability Trust Fund must assume liability for benefits. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 20 C.F.R. §725.407(d); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (regulations place "the

[5] The regulation at 20 C.F.R §725.494 further requires the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e). Employer does not contest that Three H Coal Company meets the requirements of a potentially liable operator. Thus, we affirm it is a potentially liable operator. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund").

The district director determined that while Chestnut Ridge Mining Company (Chestnut Ridge), self-insured through the Virginia Coal Producer's Self-Insurance Association (VCP), more recently employed Claimant for at least one year,[6] VCP is insolvent and thus Chestnut Ridge is financially incapable of assuming liability for the payment of benefits. Director's Exhibits 21, 29 at 9. As support, the district director provided a statement that the OWCP has no record of insurance coverage for Chestnut Ridge as 20 C.F.R. §725.495(d) requires, as well as a statement from the administrator of the Virginia Uninsured Employers' Fund (Uninsured Employer's Fund) that it does not guarantee federal black lung claim liabilities. Director's Exhibits 22, 24. Having found Three H Coal was the next most recent operator to employ Claimant and it meets the criteria of 20 C.F.R. §725.495(d), the district director designated it as the responsible operator. Director's Exhibits 20, 41.

The ALJ considered Employer's contention that the district director failed to properly name the Uninsured Employer's Fund and Virginia Property and Casualty Insurance Guaranty Association (Guaranty Association) as potentially liable guarantors of VCP's liability for this claim.[7] Decision and Order at 4-6. The ALJ noted that while Chestnut Ridge, self-insured through VCP, was the last operator to employ Claimant for at least one year, she agreed with the district director's determination that VCP was insolvent and that the Uninsured Employer's Fund does not guarantee federal black lung claim liabilities. *Id.* at 6. She also determined that the Guaranty Association is not liable for VCP's obligations because VCP is a self-insurance association, which the Guarantee Association does not cover. *Id*. As the Uninsured Employer's Fund and the Guaranty Association were not liable as a matter of law for Claimant's claim, the ALJ found the district director was not obligated to provide notice of the claim to either company. *Id.*

In addition, as the district director entered a statement confirming OWCP searched its files and found no record of insurance coverage for Chestnut Ridge or of authorization for it to self-insure, the ALJ found it constitutes prima facie evidence that Chestnut Ridge is not financially capable of assuming its liability for

[6] The parties do not dispute that Chestnut Ridge employed Claimant for more than one year in 1984 and 1985. Decision and Order at 5; Director's Brief at 7-18; Employer's Brief at 10-19.

[7] Employer did not dispute that Chestnut Ridge and VCP are incapable of paying benefits. Decision and Order at 4.

the claim and that the burden shifted to Three H Coal, as the designated operator, to show that it is not liable for benefits. *Id.* at 4. Further finding Three H Coal did not dispute its status as a potentially liable operator and did not establish Chestnut Ridge is financially capable of assuming liability for the claim, the ALJ found Three H Coal is the properly designated responsible operator. 20 C.F.R. §§725.494(e), 725.495(c)(2); Decision and Order at 4-7.

Employer argues the ALJ erred in finding Three H Coal is the potentially liable operator that most recently employed Claimant for a cumulative period of at least one year. Specifically, it asserts Chestnut Ridge more recently employed Claimant for one year and the ALJ erred in finding it financially incapable of assuming liability for the claim via either the Uninsured Employer's Fund or the Guaranty Association. Employer's Brief at 10-19; Employer's Reply Brief at 3-7. We disagree. For the reasons that follow, we hold substantial evidence supports the ALJ's finding that Employer did not carry its burden to establish Chestnut Ridge is financially capable of assuming liability for this claim via either the Uninsured Employer's Fund or the Guaranty Association. *See* 20 C.F.R. §725.495(c)(2); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

The Virginia legislature created the Uninsured Employer's Fund to "provid[e] funds for [state workers'] compensation benefits awarded against any uninsured or self-insured employer." Va. Code Ann. § 65.2-120l(A). The statute expressly provides that the Virginia Workers' Compensation Commission may order a payment from the Uninsured Employer's Fund only for benefits awarded "in accordance with the provisions of *this chapter* and all applicable provisions of *this title*." Va. Code Ann. § 65.2-1203(A)(l) (emphases added); *see also id.*§ 65.2-1203(A)(2) (Commission shall order payment from the Uninsured Employer's Fund only "[a]fter an award has been entered against an employer for compensation benefits under any provision of *this chapter"*) (emphasis added); *Redifer v. Chester*, 720 S.E.2d 66, 69 n.4 (Va. 2012) ("The [Uninsured Employer's Fund] ensures the payment of compensation benefits owed by an uninsured employer that fails to pay *benefits ordered by the Commission."*) (emphasis added). Because this claim arises under the federal BLBA, not Virginia state law, the ALJ correctly found the Uninsured Employer's Fund does not guarantee VCP's liability for this claim and we affirm her finding. *See* Va. Code Ann. § 65.2-1203(A)(l), (2); Decision and Order at 6.

We similarly see no error in the ALJ's finding that the Guaranty Association is not liable for VCP's obligations because it does not cover self-insurance associations. Decision and Order at 6.

The Virginia legislature established the Guaranty Association 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 (emphasis added). A "covered claim" is defined as "an unpaid claim . . . submitted by a claimant, that arises out of and is within the coverage and is subject to the applicable limits of a *policy covered by this chapter* and issued by an *insurer* who has been declared to be an *insolvent insurer." Id.* at § 38.2-1603 (emphases added). An "insolvent insurer" is defined as an insurer "licensed to transact the business of insurance in the Commonwealth," "against whom an order of liquidation with a finding or insolvency has been entered . . . by a court of competent jurisdiction." *Id.*

Under Virginia law, self-insurance is not considered insurance. *See Farmers Ins. Exch. v. Enter. Leasing Co.*, 708 S.E.2d 852, 856-57 (Va. 2011) (recognizing distinctions between insurance and self-insurance, insurance companies and self-insurers: "With self-insurance, there is neither an insured nor an insurer. In fact, self-insurance does not involve the transfer of a risk of loss, but rather a retention of that risk, making it the 'antithesis of insurance.'"); *see also Yellow Cab v. Adinolfi*, 134 S.E.2d 308, 312 (Va. 1964) (insurance company writing motor vehicle liability insurance, and not a self-insurer, is required to provide uninsured motorist coverage because the statute mandating such coverage assumes the existence of insurance policies and "it is obvious that a self-insurer does not issue liability insurance policies"), *on other grounds superseded by statute,* as stated in *William v. City of Newport*, 397 S.E.2d 813 (Va. 1990); *Northland Ins. Co. v. Va. Prop. and Cas. Ins. Guar. Ass'n*, 392 S.E.2d 682, 685 (Va. 1990) ("insurer" means an insurance company engaged in the business of making contracts of insurance). We thus reject Employer's assertion that VCP's license to provide group self-insurance for Employer's black lung liabilities under Va. Code Ann. § 65.2-802 establishes VCP's status as an insurer whose liabilities are guaranteed by the Guaranty Association.[8] Employer's Brief at 17 (referencing Employer's Exhibit 5 at 25). Therefore, because Employer did not establish VCP is an "insurer" whose liability is guaranteed under the Guarantee Act, the ALJ correctly found it did not establish

[8] For the same reason, we reject Employer's assertion that VCP's license to self-insure pursuant to Va. Code Ann. § 65.2-802 establishes its status as a "member insurer" under the Virginia Guaranty Act. Employer's Brief at 17 (citing Va. Code Ann. § 38.2-1603). Contrary to Employer's assertion, a member insurer is "any person who (i) writes any class of insurance to which this chapter applies under § 38.2-1601 . . . and (ii) is licensed to transact the business of insurance in the Commonwealth." Va. Code Ann. § 38.2-1603.

the Guarantee Association is responsible for VCP's federal black lung obligations.[9] *See* Va. Code Ann. § 38.2-1603; Decision and Order at 6.

We additionally reject Employer's assertion that the BLBA, which requires all insurers and reinsurers to assume full liability for black lung claims, preempts Virginia law to the extent it limits the Guaranty Association's liability for Claimant's claim. Employer's Brief at 18 (citing 30 U.S.C. §933(b)(1) (requiring an insurer 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"); 20 C.F.R. §725.203(a)). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected this argument, holding that the Guaranty Fund is not an insurer within the meaning of the BLBA and, thus, is not covered by the BLBA. *Mullins,* 842 F.3d at 284-85. For the reasons set forth in *Mullins,* we reject Employer's argument.

Further, as the Uninsured Employer's Fund and the Guaranty Association cannot be liable for this claim as a matter of law, we reject Employer's assertion that the district director was obligated to notify either entity as potentially liable parties to the claim.[10] *See Mullins,* 842 F.3d at 283 (district director has no duty to

[9] Because Employer has not established VCP is an "insurer" under Virginia law that issued an insurance policy that the Guaranty Association guaranteed, we reject Employer's assertion that the ALJ erred in failing to consider the following statements from employees of Old Republic Insurance Company (Old Republic): "the premium which Old Republic charged its *insureds* in the Commonwealth of Virginia included coverage for state workers' compensation claims and coverage for federal black lung claims, insofar as the *insured* is otherwise required to obtain coal mine risk insurance"; and "[t]he federal black lung endorsement must be attached to every standard workers' compensation *insurance policy* obtained by a coal mine risk employer written by Old Republic and *all other carriers* in Virginia." Employer's Brief at 18 (emphasis added) (quoting Director's Exhibit 28 at 3-4); Employer's Reply at 6-7. *See Shinseki v. Sanders,* 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

[10] Although Employer cites various cases in which ALJs determined the district director erred in failing to name a Virginia state guaranty fund for an insolvent self-insurance association, the Director correctly notes ALJ decisions are not precedential and, unlike *Mullins,* do not bind the Board. *See Briggs v. Pa. R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993); Director's Brief at 16 n.6; Employer's Brief at 12. The Director further correctly notes 20 C.F.R. §725.494(e)(1) does not support Employer's assertion that the regulation requires the district director to "put a state guaranty fund on notice for

notify a state guaranty fund of a claim for which it cannot be liable as a matter of law); Employer's Brief at 13. Similarly, we reject Employer's assertions that the ALJ impermissibly raised affirmative defenses for the state guaranty funds, the ALJ failed to address its assertion that the burden-shifting analysis constitutes a "regulatory taking," and the ALJ's findings violate the APA,[11] as these assertions presume the guaranty funds may be potentially liable parties. *See Mullins*, 842 F.3d at 287-88 (burden of proof is irrelevant to wholly legal issues); *N&N Contractors, Inc. v. Occupational Safety & Health Review Comm'n*, 255 F.3d 122, 127-28 (4th Cir.) (even an erroneous shifting of the burden of proof is harmless if the decision did not turn on that burden); Employer's Brief at 13-15, 19; Employer's Reply Brief at 4, 6. Having affirmed the ALJ's findings that the Uninsured Employer's Fund and the Guaranty Association may not be held liable for this claim as a matter of law, we affirm her conclusion that Employer failed to prove Chestnut Ridge is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c)(2).

Because Employer failed to establish Chestnut Ridge, or another potentially liable operator more recently employed Claimant and is financially capable of assuming liability, we affirm the ALJ's finding that Three H Coal is the properly designated responsible operator. Decision and Order at 7.

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the liability of a coal miner [sic] operator where the operator's carrier was insolvent." Employer's Brief at 2, 11-12; *see* 20 C.F.R. §725.494(e)(l) (providing that when an employer's carrier "has been declared insolvent and its obligations for the claim are not otherwise guaranteed," the employer is not considered financially capable of assuming liability for benefits); Director's Brief at 16. Further, while the regulation contemplates that the DOL "may collect from a state guaranty association where state law *requires* such an association to assume the [insolvent] insurer's liabilities," 62 Fed. Reg. 3,338, 3,369 (Jan. 22, 1997) (emphasis added), nothing in the regulation obligates the district director to pursue a state guaranty fund where, as here, state law neither requires nor allows the fund to assume liability for a federal BLBA claim.

[11] The APA requires every adjudicatory decision include "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).

Accordingly, the ALJ's Decision and Order Finding Three H Coal Company, Inc. as Responsible Operator and Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge