U.S. Department of Labor

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

BRB Nos. 23-0063 BLA
and 23-0064 BLA

SANDRA MORGAN (o/b/o and Widow of LEONARD MORGAN) Claimant-Respondent v. SHAMROCK COAL COMPANY, INCORPORATED c/o SUNCOKE ENERGY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/09/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Ann Marie Scarpino (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: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2019-BLA-05212 and 2020-BLA-05930) rendered on claims filed 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 November 2, 2016, and a survivor's claim filed on November 6, 2018.[1]

The ALJ accepted Employer's stipulation that Claimant established entitlement to benefits in the miner's claim and in her survivor's claim. He awarded benefits and found Employer was properly designated as the responsible operator.

On appeal, Employer contends the ALJ erred in finding it is the responsible operator and thus the Black Lung Disability Trust Fund (Trust Fund) must assume liability for the payment of benefits.[2] The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject Employer's arguments concerning its designation as the responsible operator. Claimant has not filed a response.

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

[1] Claimant is the widow of the Miner, who died on July 23, 2018, while his claim was pending. Survivor's Director's Exhibit (SDX) 15. After being notified of the Miner's death, the ALJ issued an Order of Remand and Cancelling Hearing on January 10, 2019, remanding the case to the district director. Claimant is pursuing the miner's claim on her husband's estate's behalf and her survivor's claim. Survivor's Director's Exhibit 2d Referral (SDX2) 3. The miner's and survivor's claims were consolidated before being returned to the ALJ.

Employer's appeal in the miner's claim was assigned BRB No. 23-0063 BLA, and its appeal of the survivor's claim was assigned BRB No. 23-0064 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only. *Morgan v. Shamrock Coal Co.*, BRB Nos. 23-0063 BLA and 23-0064 BLA (Jan. 12, 2023) (unpub.).

[2] As Employer is not contesting any element of entitlement, we affirm the ALJ's determination that Claimant and the Miner are entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

with applicable law.[3] 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 responsible operator is the potentially liable operator that most recently employed the miner.[4] 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). If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation. 20 C.F.R. §725.495(d).

Additionally, if a successor relationship is established between two coal mine employers, a miner's tenure with the prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). If the successor operator is financially incapable of assuming liability

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); June 22, 2022 Hearing Transcript at 12-13.

[4] 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).

for benefits, however, liability falls to its predecessor if the predecessor meets the definition of a potentially liable operator – namely, that it employed the miner for at least one year and is financially capable of paying benefits. 20 C.F.R. §§725.492(d), 725.494(c), (e), 725.495(a)(3).

On his employment history form (Form CM-911a), the Miner stated that he was employed in coal mining by Shamrock Coal Company (Employer) from 1981 to 1997 and by Blue Diamond Coal Company (Blue Diamond) from 1998 to 2000 and 2002 to 2004. Miner's Director's Exhibit (MDX) 3. The Miner's Social Security Administration (SSA) earnings statement confirms his dates of employment with Employer but does not include any documentation concerning a company known as Blue Diamond. MDX 7. Instead, his SSA earnings statement shows that he did not earn any income from coal mine employment from 1997 to 2004 and indicates that he worked for the following operators in 2004: Cumberland Gap, Inc. (Cumberland); Carole Dale Contracting, Inc. (Carole Dale); Private Investigation and Counter Intelligence, Inc. (PICI); and B&G Inc. (B&G). *Id*. However, the Miner's W-2 forms show that he was employed by B&G in 2002 and 2003. MDX 6. At his March 27, 2018 deposition, the Miner testified that he "worked for two or three different contract companies when [he] worked for Blue Diamond" and agreed that his work for Cumberland, Carol Dale, PICI, and B&G, was all at the Blue Diamond mine site with the same people and equipment. MDX 27 at 12-15. The Miner clarified, though, that he never actually worked for Blue Diamond and contractors paid his wages. *Id*. at 15.

The ALJ applied *Shepherd v. Incoal Inc.*, 915 F.3d 392 (6th Cir. 2019) and found the only operator who employed the Miner for at least 125 working days after Employer was B&G. Decision and Order at 10-11. However, he determined B&G was not capable of paying benefits because it was not insured on the Miner's last date of employment. *Id*. at 11; MDX 28; *see* 20 C.F.R. §§725.494(e), 725.495(d). He also concluded there was no evidence the Miner worked for Blue Diamond, that Blue Diamond leased the mine to the companies the Miner worked for in 2004, or that there was a successor relationship between Blue Diamond and any of the four companies the Miner worked for in 2004. *Id*. at 12-13. Thus, the ALJ determined Employer was properly designated as the responsible operator. *Id*.

Employer does not contest, and we therefore affirm, that it meets the requirements to be designated as a potentially liable operator and that it employed the Miner from 1981 through 1997. *Skrack*, 6 BLR at 7-11; Decision and Order at 14. Nor does it challenge the ALJ's determinations that subsequent to his work with Employer, other than B&G, none of these companies, Cumberland, Carol Dale and PICI, individually employed the Miner for at least one year and that B&G was not insured on the Miner's last date of employment

or otherwise capable of paying benefits.[5] *Id*. Rather, it contends the ALJ erred in finding it was properly designated as the responsible operator, contending Claimant's testimony and the evidence of record establish Blue Diamond is liable because it was the Miner's "de facto" employer and had a successor and lessor relationship with Cumberland, Carol Dale, PICI, and B&G. Employer's Brief at 6-9. We disagree.

Contrary to Employer's contention, it failed to prove that the Miner worked for Blue Diamond. *See* Employer's Brief at 6-9. The ALJ permissibly credited the Miner's deposition testimony denying he worked for or was paid by Blue Diamond, and properly found his testimony consistent with the SSA earnings statement, W-2s, and paystubs that do not substantiate any period of employment with Blue Diamond. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc); Decision and Order at 4-6, 12; MDXs 5-7, 27 at 15. The ALJ also considered the Miner's testimony that he worked at the Blue Diamond mine site while employed for all four companies in 2004, he worked with the same people and same equipment, and nothing in his work changed except for the name of the company who paid him. However, the ALJ also credited his testimony that he did not know who the owners of the companies were, did not have a supervisor, and could identify only one "boss" from Blue Diamond but did not testify that the individual was his boss. Decision and Order at 5-6; MDX 27 at 12, 14-16, 20-22. In the absence of evidence that Blue Diamond paid the Miner's wages or directed, controlled, and supervised the Miner, the ALJ rationally rejected Employer's assertion that Blue Diamond was a "de facto" employer. *Id.*

In addition, we reject Employer's argument that a successor relationship existed between Blue Diamond and any of the four coal mine companies the Miner worked for in 2004. *See* Decision and Order at 12-13; Employer's Brief at 5-9. The ALJ permissibly found there is no evidence of any type of business relationship between Blue Diamond and any other wage-paying companies for whom the Miner worked in 2004 and no evidence of a transfer of assets between the companies. *Banks*, 690 F.3d at 489; Decision and Order at 13. Further, we agree with the Director "that [the Miner's] testimony is insufficient to establish successorship where the ownership of the mine and contractors has not been established and the business relationship among the contractors who paid [the] Miner's

[5] Contrary to Employer's contention, the record contains the statement required by 20 C.F.R. §725.495(d), indicating there is no record of insurance coverage for B&G, or of authorization to self-insure, that was effective on the date B&G last employed the Miner. Employer's Brief at 10; MDX 28. Such a statement in the record constitutes prima facie evidence that the subsequent employer is not financially capable of paying benefits. 20 C.F.R. §725.495(d).

wages and between the contractors and the owner of the mine is unknown." Director's Brief at 5; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011). Because Employer failed to establish successorship, we affirm the ALJ's finding that he could not aggregate the time the Miner spent employed with any of the coal mine companies the Miner worked for in 2004.[6] *Morrison*, 644 F.3d at 478; Decision and Order at 13.

Finally, contrary to Employer's assertion, the ALJ accurately found there is no evidence of any lease agreement in the record indicating Blue Diamond leased the mine site to any of the four companies that paid the Miner's wages in 2004. *Banks*, 690 F.3d at 489; Decision and Order at 12; Employer's Brief at 7-8. Consequently, because it is supported by substantial evidence, we affirm the ALJ's finding that Employer is the properly designated responsible operator liable for payment of benefits in both the miner's and survivor's claims. 20 C.F.R. §725.495(c); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 13, 16-17.

[6] Employer contends the district director failed to adequately investigate any Blue Diamond lessor and predecessor/successor relationship or the ability of B&G officers to pay benefits. *Id.* at 10. However, once the district director identified Employer as a potentially liable operator and the designated responsible operator, the burden shifted to Employer to establish that another operator employed the Miner for at least one year subsequent to his tenure with it. 20 C.F.R. §§725.408(b), 725.414, 725.456(b)(1), 725.495(c)(2). As the district director conducted an investigation in accordance with the regulations, there is no merit to Employer's arguments.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge