U.S. Department of Labor

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

BRB Nos. 20-0003 BLA
and 20-0028 BLA

CAROLYN L. GALICZYNSKI (o/b/o and Widow of EDWARD GALICZYNSKI)	)	
Claimant-Respondent	)	
v.	)	
TANOMA MINING COMPANY, INCORPORATED	)	DATE ISSUED: 10/21/2020
and	)	
AMERICAN MINING INSURANCE COMPANY (now BERKELEY INDUSTRIAL COMP)	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher L. Wildfire (Margolis Edelstein), Pittsburgh, Pennsylvania, for Employer/Carrier.

William M. Bush (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 and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decisions and Orders Awarding Benefits (2018-BLA-05506 and 2018-BLA-05821) rendered on claims filed pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on February 18, 2016, and a survivor's claim filed on December 20, 2017.[1]

In a Decision and Order Awarding Benefits dated September 5, 2019, the administrative law judge addressed the Miner's claim and determined Employer is the properly designated responsible operator. He accepted the parties' stipulation that the Miner had thirty years of coal mine employment, which he determined was all performed underground, and found the Miner was totally disabled at the time of his death. The administrative law judge therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] He further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant is the widow of the Miner, who died on November 3, 2017. Survivor's Director's Exhibit 4. She is pursuing the Miner's claim on behalf of his estate and her survivor's claim. *See* Hearing Transcript at 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's totally disabling respiratory or pulmonary impairment or death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

In a separate Decision and Order Awarding Benefits dated September 5, 2019, the administrative law judge addressed Claimant's survivor's claim. The administrative law judge, having determined the Miner had thirty years of qualifying coal mine employment and was totally disabled, found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA), and therefore the constitutionality and applicability of the Section 411(c)(4) and 422(*l*) presumptions,[3] enacted as part of the ACA. Employer also contests the admission of Dr. Bajwa's supplemental medical report, Employer's designation as the responsible operator, and the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption in both the Miner's claim and the survivor's claim. Claimant responds in support of the awards in both claims. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief urging the Benefits Review Board to reject Employer's arguments concerning the constitutionality of the ACA and the admission of Dr. Bajwa's supplemental report. The Director argues the cases should be remanded, however, for reconsideration of the responsible operator issue.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decisions and Orders if they are rational, supported by substantial evidence and in accordance with applicable law.[4] 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).

Constitutionality of the Section 411(c)(4) and 422(*l*) Presumptions

We reject Employer's contention that, pursuant to *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), the ACA, Pub. L. No. 111-148, §1556 (2010), including its provisions reviving the Sections 411(c)(4) and 422(*l*) presumptions, is unconstitutional. Employer's Brief at

[3] Section 422(*l*) of the Act provides that the 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 the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

31. The United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the individual requirement to maintain health insurance) is unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from that requirement. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

We also reject Employer's general assertion that "Constitutionality of the Federal Black Lung Act is also challenged under Article II, Section 2 of the U.S. Constitution," as it failed to provide any specific argument for this constitutional objection. 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer's Brief at 32.

Miner's Claim

Admission of Dr. Bajwa's Supplemental Report

The Act requires "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. Thus, the Department of Labor (DOL), at the Miner's request, had Dr. Bajwa conduct his DOL-sponsored examination on April 14, 2016. Director's Exhibits 13, 15. On February 3, 2017, the claims examiner requested clarification of Dr. Bajwa's assessment as a result of his clinical testing, noting he diagnosed the Miner with "possible coal workers' pneumoconiosis" and a "moderate severe disability" based on "moderate restriction on [pulmonary function study]" possibly caused by coal dust exposure.[5] Director's Exhibit 22, *referencing* Director's Exhibit 15. The claims examiner asked Dr. Bajwa to clarify his opinion because he did not address the significance of the resting blood gas study he performed, which meets the DOL regulatory standards for establishing total disability. *Id*. He was also asked to clarify his opinion regarding the cause of the Miner's disability or impairment; specifically, whether the Miner would have been able to perform the duties of his regular coal mine employment, whether he had legal pneumoconiosis, and whether

[5] Dr. Bajwa conducted a chest x-ray, pulmonary function study, blood gas study, and electrocardiogram (EKG). Director's Exhibit 15. Dr. Bajwa considered an x-ray that Dr. Simone had interpreted as indicating no radiographic evidence of pneumoconiosis. *Id*. According to Dr. Bajwa, the pulmonary function study showed no obstruction and a moderately reduced FVC value suggestive of restriction, and the blood gas study indicated moderate hypoxia at rest. *Id*. The EKG indicated "low voltage, precordial leads." *Id*. Dr. Bajwa also diagnosed congestive heart failure. *Id*.

pneumoconiosis contributed to his disability. Director's Exhibit 22. On May 16, 2017, Dr. Bajwa provided a supplemental report, which the administrative law judge admitted into the record over Employer's objection. *See* Director's Exhibit 23; Hearing Transcript at 8-9.

We reject Employer's assertion that Dr. Bajwa's supplemental report is inadmissible because clarification of a DOL-sponsored examination is prohibited. Employer's Brief at 21-22. The purpose of providing a miner with a complete pulmonary evaluation, is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a). Consistent with that purpose, a complete pulmonary evaluation must include "a report of physical examination, a pulmonary function study, a chest radiograph, and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). Importantly, the complete pulmonary evaluation must also "address the relevant conditions of entitlement . . . in a manner which permits resolution of the claim." 20 C.F.R. §725.456(e). As the Director points out, Dr. Bajwa's initial report did not clearly address the issues of total disability, legal pneumoconiosis, or disability causation in a manner that permitted resolution of the claim. Director's Brief at 8. Moreover, Employer has not identified a valid basis for excluding Dr. Bajwa's supplemental report as part of the Miner's DOL-sponsored pulmonary evaluation.[6] Consequently, we find no abuse of discretion in the administrative law judge's determination to admit Dr. Bajwa's supplemental report as part of the Miner's complete pulmonary evaluation. *See* 20 C.F.R. §725.414(a)(1) (supplemental medical reports that the same physician prepares must be considered part of the physician's original medical report); *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009) (party seeking

[6] Employer generally cites the reasoning in Administrative Law Judge Richard A. Morgan's Orders in *Pletcher v. Hobet Mining LLC*, Case No. 2017-BLA-05230 (Oct. 16, 2017) (unpub.) and *Grimmett v. Arch of West Virginia*, Case No. 2017-BLA-06184 (Aug. 29, 2018) (unpub.) to support its contention that "the DOL's development of a supplemental 'clarification' report from its examining physician is impermissible, and . . . inadmissible" but does not specifically indicate what portion of the orders it is relying on. Employer's Brief at 22; *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). In addition, unlike the facts of this case, the supplemental physician reports in *Pletcher* and *Grimmett* included statements rebutting employer's contrary medical evidence, which Judge Morgan determined meant their supplemental reports went beyond clarification and therefore admitting them would be inconsistent with the evidentiary limitations. *See* 20 C.F.R. §§725.406, 725.414. As Employer does not argue Dr. Bajwa did anything other than clarify his opinion concerning whether the Miner was totally disabled due to pneumoconiosis, we reject its assertion that the administrative law judge erred in admitting his opinion into the record.

to overturn the disposition of a procedural or evidentiary issue must establish the administrative law judge's action represented an abuse of discretion).

Employer has not otherwise challenged the administrative law judge's determinations that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and it was stipulated that the Miner had thirty years of coal mine employment, all of which was performed underground. *See* Director's Exhibit 3; Hearing Transcript at 5-6, 16-19. Moreover, Employer did not specifically challenge the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. We therefore affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Miner Decision and Order at 7.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[7] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer did not establish rebuttal by either method.[8]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Tuteur and Goodman that the Miner did not have legal pneumoconiosis. He found both opinions unpersuasive and not well-reasoned, and therefore insufficient to

[7] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] The administrative law judge found Employer rebutted the presumed existence of clinical pneumoconiosis. Miner Decision and Order at 14.

satisfy Employer's burden to disprove legal pneumoconiosis. Miner Decision and Order at 14-15, 24-25.

In challenging the administrative law judge's findings on legal pneumoconiosis, Employer summarizes the opinions of Drs. Bajwa, Cohen, Tuteur, and Goodman, and argues the administrative law judge erred in finding the opinions of Drs. Bajwa and Cohen sufficient to establish legal pneumoconiosis.[9] It also contends the opinions of Drs. Tuteur and Goodman are "reliable, competent, persuasive," and "based on all the medical evidence." Employer's Brief at 23-28.

Dr. Tuteur observed that the December 28, 2015 pulmonary function study was "essentially within normal limits" and therefore "does not represent impairment that accounts for disability." Employer's Exhibit 6. He also stated that the Miner's gas exchange impairment was fully explained by his coronary artery disease and aggravated by his leukemia. *Id*. Thus, Dr. Tuteur concluded the Miner did not have a primary pulmonary process and therefore did not have legal pneumoconiosis. *Id*. Consequently, the administrative law judge permissibly found Dr. Tuteur's opinion insufficient to establish the Miner did not have legal pneumoconiosis because he did not diagnose a pulmonary or respiratory impairment, contrary to the administrative law judge's determination. *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); Miner Decision and Order at 16-23.

Dr. Goodman opined that the Miner's hypoxemia was not the result of coal mine dust exposure but rather "[t]he most direct explanation . . . lies in his longstanding chronic congestive cardiomyopathy and chronic congestive heart failure." Employer's Exhibit 7. He also indicated "smoking and an element of *chronic obstructive disease may* well also have contributed to abnormal ventilation/perfusion relationships in the lungs leading to hypoxemia, but this is my *speculation* only." *Id*. (emphasis added).

The administrative law judge found that Dr. Goodman's "possible diagnosis of 'chronic obstructive disease' is contradictory to his conclusion that the miner did not have legal [] pneumoconiosis." Miner Decision and Order at 15. The administrative law judge concluded that "[a]s the Act does not require that coal mine dust exposure be the sole cause of the miner's respiratory impairment, for the reasons given in [his later discussion of the

[9] The administrative law judge determined the opinions of Drs. Bajwa and Cohen that the Miner had legal pneumoconiosis do not assist Employer in meeting its burden on rebuttal. 20 C.F.R. §718.305(d)(1)(i)(A); Miner Decision and Order at 13-15; *see* Director's Exhibits 15, 23; Claimant's Exhibit 1. Thus, it is not necessary to address Employer's assertions that the administrative law judge erred in weighing their opinions.

cause of the Miner's total disability, he found] that the evidence is insufficient to establish that the miner's respiratory impairment is *entirely unrelated* to coal mine dust exposure." *Id.* (emphasis added). In his discussion of the cause of the Miner's total disability, the administrative law judge concluded that Dr. Goodman "never explains why the miner's coal mine dust could not contribute to his pulmonary impairments." Miner Decision and Order at 25.

Contrary to Employer's contention therefore, the administrative law judge permissibly found Dr. Goodman's opinion unpersuasive on the basis that he did not adequately address coal dust as a substantially contributing or aggravating factor in the Miner's "possible" chronic obstructive disease or pulmonary impairment.[10] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Miner Decision and Order at 15, 25; *see also Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004). Further, the administrative law judge reasonably discredited Dr. Goodman's "possible diagnosis of 'chronic obstructive disease'" as equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Employer's Exhibit 14.

Additionally, we consider Employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 23-28. Because the administrative law judge acted within his discretion in rejecting the opinions of Drs. Tuteur and Goodman, we affirm his finding Employer did not disprove legal pneumoconiosis and

[10] We note the administrative law judge misstated the legal pneumoconiosis rebuttal standard, finding the evidence "insufficient to establish that the miner's respiratory impairment is *entirely unrelated to* coal mine dust exposure." Miner Decision and Order at 15 (emphasis added). In considering rebuttal of total disability causation, he also stated Employer "must rule out the miner's *coal mine employment* as a contributing cause of the totally disabling respiratory or pulmonary impairment," *Id*. at 23, *quoting* 77 Fed. Reg. 19,456, 19,463 (Mar. 30, 2012) (emphasis added), but the correct standard is whether Employer disproved disability causation by showing that no part of the miner's respiratory or pulmonary total disability was caused by *pneumoconiosis*. *See* 20 C.F.R. §718.305(d)(1)(ii). Employer has not raised this issue, however, nor has it challenged the administrative law judge's finding it did not rebut total disability causation. Moreover, any error is harmless, as the administrative law judge ultimately did not reject the opinions of employer's experts for failing to satisfy a particular rebuttal standard but rather concluded they were insufficient to establish rebuttal because they are not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

his determination it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Total Disability Causation

Relying, in part, on his findings at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge found the opinions of Drs. Tuteur and Goodman do not rebut the causal relationship between the Miner's totally disabling respiratory impairment and pneumoconiosis. Miner Decision and Order at 23-25. Employer does not challenge, and we thus affirm, the administrative law judge's finding that it failed to disprove the presumed fact of disability causation under 20 C.F.R. §718.305(d)(1)(ii). *See Minich*, 25 BLR at 154-56; *Skrack*, 6 BLR at 1-711.

Based on Claimant's invocation of the Section 411(c)(4) presumption and Employer's failure to rebut it, Claimant has established her entitlement to benefits in the Miner's claim.

Survivor's Claim

Employer contends the administrative law judge erred in not crediting the opinion of Dr. Rohanna, who authored the Miner's death certificate, and those of Drs. Tuteur and Goodman on the cause of the Miner's death. Employer's Brief at 28-31. We need not address this issue. Because the Board has affirmed the award of benefits in the Miner's claim, Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) and, therefore, need not establish the miner's death was due to pneumoconiosis.[11] 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013). Moreover, Employer failed to properly preserve its argument by first raising it before the administrative law judge. *See Maples v. Texports Stevedores Co.*, 23 BRBS 303 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331 (5th Cir. 1991); *Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019) (declining to consider employer's argument where it was not timely raised before the administrative law judge).

[11] The record reflects Claimant established each element necessary to demonstrate entitlement under Section 422(*l*): she filed her claim after January 1, 2005; her claim was pending on or after March 23, 2010; the miner was determined to be eligible to receive benefits at the time of his death; and she meets the requirements of an eligible survivor, which Employer does not contest. 30 U.S.C. §932(*l*) (2012); Survivor's Director's Exhibits 1, 3, 4, 19.

Because we have affirmed the award of benefits in the Miner's claim, we affirm the award of survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); 20 C.F.R. §802.211(b); *see Thorne*, 25 BLR at 1-126.

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" for at least one year.[12] 20 C.F.R. §§725.494(c), 725.495(a)(1). Employer argues the administrative law judge erred in finding it is the responsible operator without first addressing its assertion that R & R Mining, Incorporated (R & R Mining) more recently employed the Miner for at least one year.[13] Employer's Brief at 16-21. We agree.

After summarizing the regulations, the administrative law judge summarily concluded, "[b]ased on the totality of the evidence, . . . Employer is the properly designated responsible operator." Miner Decision and Order at 4. Although he cited to several record exhibits, he did not explain his determination or otherwise address Employer's contention.[14] *See id*. Thus, as the Director asserts, the administrative law judge's analysis does not comport with the Administrative Procedure Act, which provides every adjudicatory decision must include a statement of "findings and conclusions, and the

[12] In addition, the evidence must establish the miner's disability or death arose out of coal mine employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

[13] Employer asserts it employed the Miner until May 2000 but that the Miner's yearly income for R & R Mining, Inc. in 2001 is sufficient to establish the Miner subsequently worked for it for at least one year. Employer's Brief at 16-20. Thus, Employer contends the Director erred in identifying it as the responsible operator and therefore liability should transfer to the Black Lung Disability Trust Fund. *Id*. at 20.

[14] The administrative law judge cited to CM-911a – the Miner's Employment History form, the Miner's pay stubs/W-2 forms, an employment verification letter from Barnes & Tucker Company, and the Miner's Social Security Administration Itemized Statement of Earnings from 1978-2014. *See* Miner Decision and Order at 4; Miner Director's Exhibits 3, 5, 7, 9. He also referenced the portion of the Hearing Transcript where Claimant discussed the Miner's coal mine employment history. *See* Miner Decision and Order at 4; Hearing Transcript at 16-19.

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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate his finding that Employer is the responsible operator and remand the case for further consideration.

On remand, the administrative law judge must consider whether Employer met its burden to prove R & R Mining more recently employed the Miner for a cumulative period of not less than one year. 20 C.F.R. §725.494(c). A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[15] 20 C.F.R. §725.101(a)(32). If he determines Employer has proven it is not the potentially liable operator that most recently employed the Miner for at least one year, he must dismiss Employer as the responsible operator and transfer liability for the payment of benefits to the Trust Fund.[16] 20 C.F.R. §§725.495(c)(2), 725.407(d).

[15] As this case arises within the jurisdiction of the Third Circuit, we decline to instruct the administrative law judge to apply the regulatory interpretation set forth in *Shepherd v. Incoal*, 915 F.3d 392 (6th Cir. 2019), as it is not binding precedent. Employer's Brief at 19.

[16] The regulations provide that in any case in which 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 failure to meet the conditions of 20 C.F.R. §725.494(e), the district director must also submit a statement that "the Office [of Workers' Compensation Programs] has searched the files it maintains . . . and that [it] has no record of insurance coverage for that employer . . . ." *Id.* The regulation further provides, "In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming liability for a claim." *Id*.

Accordingly, the administrative law judge's Decisions and Orders awarding benefits are affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge