



BRB No. 20-0568 BLA

RUTH L. COKER)
(Widow of JAMES L. COKER))
)
Claimant-Respondent)

v.)

BIG LAUREL MINING CORPORATION)
)
and)

DATE ISSUED: 09/28/2021

AMERICAN INTERNATIONAL SOUTH)
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 Order of Remand and Order Denying Motion for Reconsideration of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Sarah Y. M. Himmel and Joseph N. Stepp (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting 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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Dana Rosen's Order of Remand and Order Denying Motion for Reconsideration (2019-BLA-05771) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on September 28, 2015.¹

On December 7, 2018, the district director issued a Proposed Decision and Order awarding benefits, identifying Big Laurel Mining Corporation (Big Laurel) and American International South Insurance Company (AI South) as the responsible operator and its carrier. Director's Exhibit 51. The district director found that while the Miner last worked for Mill Branch Coal Corporation (Mill Branch), it did not employ the Miner for at least one year and thus dismissed Mill Branch and its carrier, Brickstreet Insurance Company (Brickstreet), as potential liable parties to the claim. *Id.* Employer contested its designation as the responsible operator and Claimant's entitlement to benefits; therefore, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibits 60, 67.

Upon the case's assignment to the ALJ, Employer requested that Big Laurel be dismissed as the responsible operator because the Miner had one year of cumulative coal mine employment with Mill Branch, based on its merger with Big Laurel, and Brickstreet insured Mill Branch on the Miner's last day of his coal mine employment. At the August 20, 2020 hearing, the ALJ found the district director's Proposed Decision and Order failed to adequately resolve whether Mill Branch was a successor operator to Big Laurel and whether the Miner had complicated pneumoconiosis prior to Brickstreet's coverage period but during the time that AI South insured Mill Branch. Despite objections from Employer and the Director, Office of Workers' Compensation Programs (the Director), the ALJ agreed with Claimant's counsel that the claim should be remanded to the district director

¹ Claimant is the widow of the Miner, who died on March 7, 2014. Director's Exhibit 6. The survivor's claim indicates the Miner never filed a federal black lung claim. Director's Exhibit 2.

to resolve the responsible operator and liable carrier issues. The ALJ subsequently issued her Order of Remand on August 27, 2020. Employer filed a timely motion for reconsideration, which the ALJ summarily denied.

On appeal, Employer argues the ALJ erred as a matter of law in remanding the claim to the district director for further findings regarding whether Big Laurel is the responsible operator. Claimant contends in response that, while 20 C.F.R. §725.407 precludes the district director from naming a new responsible operator after a case is referred to the OALJ, the regulation is unclear whether an ALJ can remand a case for further clarification as the ALJ did here. The Director agrees with Employer that the ALJ's remand order is contrary to the regulations, and requests that the Benefits Review Board vacate it and remand the case to the ALJ to consider all the contested issues and the merits of Claimant's entitlement to benefits.

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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

The responsible operator is the potentially liable operator 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).³ 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 identifies 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

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

³ 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 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).

“potentially liable operator,” financially capable of assuming liability, more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The regulations further state:

If at any time *before a case is referred to [the OALJ]*, the district director determines that an operator which may be liable for the payment of the benefits has not been notified under this section *or has been incorrectly dismissed* pursuant to § 725.410(a)(3), the district director shall give such operator notice of its potential liability in accordance with this section The district director may not notify additional operators of their potential liability *after a case has been referred to the [OALJ]*, unless the case was referred for a hearing to determine whether the claim was properly denied as abandoned pursuant to § 725.409.

20 C.F.R. §725.407(d) (emphasis added).

We agree with the Director’s position that the ALJ’s order remanding the case for the district director to consider whether Mill Branch is liable as a successor operator to Big Laurel contravenes 20 C.F.R. §725.407(d). By its terms, the regulation permits the district director to notify an “incorrectly dismissed” operator of its potential liability only “before a case is referred to the [OALJ].” 20 C.F.R. §725.407(d). Meanwhile, it prohibits notifying “additional operators” of their potential liability “after a case has been referred to the [OALJ].” *Id.* It does not permit the district director to notify an incorrectly dismissed operator – or any operator for that matter – of its potential liability after a claim has been referred to the OALJ, except in limited circumstances not present here. *Id.* As case law and the Department’s explanation when it finalized the regulation confirm, once a claim is referred to the OALJ, the named employer/responsible operator has the burden to prove it is not the correct responsible operator, and the Trust Fund assumes liability for benefits if the employer satisfies this burden. 20 C.F.R. §§725.407(d), 725.418(d); 65 Fed. Reg. 79,920, 79,985, 79,990 (Dec. 20, 2000) (“The Department intends that, once a claim is referred to the Office of Administrative Law Judges, the Department shall not be able to impose liability for that claim on any operator other than the one finally designated as responsible operator by the district director, whether through remand by the administrative law judge or through modification of a finally awarded claim.”); *see Rockwood Cas. Ins. Co. v. Director, OWCP [Kourianos]*, 917 F.3d 1198, 1215 (10th Cir. 2019), *cert. denied*, 140 S.Ct. 502 (2019) (“[E]ven if the district director incorrectly identifies the responsible operator and refers the case to an ALJ, a new responsible operator may not be named.”); *Island Fork Constr. v. Bowling*, 872 F.3d 754, 756 (6th Cir. 2017) (“[O]nce the claim reaches the ALJ stage, there is no mechanism to designate a different responsible operator.”). We thus vacate the ALJ’s Order of Remand and remand the case to her for a

formal hearing and to determine whether Big Laurel and AI South are the responsible operator and carrier, respectively, and whether Claimant is entitled to benefits.

Accordingly, the ALJ's Order of Remand and Order Denying Motion for Reconsideration are vacated, and the case is remanded to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge