U.S. Department of Labor

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

BRB No. 21-0525 BLA

LARRY A. HERRON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 9/30/2022
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Jeannie B. Walston (Webster Henry, P.C.), Birmingham, Alabama, for Employer.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order on Remand (2016-BLA-05534) 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 miner's claim filed on May 20, 2015, and is before the Benefits Review Board for the second time.[1]

The Board previously affirmed, as unchallenged, the ALJ's award of benefits. *Herron v. Drummond Co., Inc.*, BRB No. 18-0255 BLA, slip op. at 2 (Sept. 9, 2019) (unpub.). However, the Board vacated the ALJ's findings that Employer failed to prove Warrior Investment Company (Warrior) is able to pay benefits but met its burden to prove Warrior[2] employed Claimant for at least one year after it. Because the district director failed to provide a statement pursuant to 20 C.F.R. §725.495(d),[3] the Board concluded that Employer was entitled to a presumption that Warrior is capable of assuming liability. However, the Board agreed with the Director, Office of Workers' Compensation Programs (the Director) that the ALJ erred in relying on Claimant's deposition and hearing testimony to establish that Claimant worked for at least one year with Warrior after he worked for Employer because Employer did not properly identify Claimant as a liability witness while the case was before the district director.

Thus, the Board remanded the case for the ALJ to determine if Employer proved extraordinary circumstances exist for admitting Claimant's deposition and hearing testimony regarding his employment with Warrior. The ALJ was also instructed to weigh

[1] We incorporate the procedural history of this case and the Board's prior holdings, as set forth in *Herron v. Drummond Co., Inc.*, BRB No. 18-0255 BLA (Sept. 9, 2019) (unpub.).

[2] The Board previously noted that Claimant testified at the hearing that Warrior Investment Company was known as Warrior Hauling. *Herron*, BRB No. 18-0255 BLA, slip op. at 3 n.3.

[3] 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). If the reasons include the more recent operator's inability to pay for benefits, the district director must provide a statement that he has no record of insurance coverage or authorization to self-insure for that employer as of Claimant's last day of employment. *Id.* Such a statement in the record constitutes prima facie evidence that the subsequent employer is not financially capable of paying benefits. *Id.* If the record lacks such a statement, however, the subsequent employer is presumed to be financially capable of paying benefits. *Id.*

any other relevant evidence that is not subject to the requirement that Employer establish extraordinary circumstances for its consideration. If the ALJ determined that Employer satisfied its burden to prove it was not the potentially liable operator that most recently employed Claimant for at least one year, the Board instructed him to dismiss Employer as the responsible operator and transfer liability for benefits to the Black Lung Disability Trust Fund.

On remand, the ALJ rejected Employer's contention that the Director waived his right to file a remand brief because he had not filed a post-hearing brief. The ALJ found Employer did not establish extraordinary circumstances for admitting Claimant's deposition and hearing testimony regarding his employment with Warrior. The ALJ also found insufficient evidence in the record from which to conclude that Claimant was employed for one year with Warrior in coal mine employment subsequent to his work for Employer. Thus, the ALJ found that Employer was properly designated as the responsible operator.

On appeal, Employer contends the ALJ erred in finding that the Director did not waive his right to participate in this case and contests its designation as the responsible operator. Claimant did not file a response brief. The Director responds, urging the Board to reject Employer's waiver arguments and further to affirm the ALJ's finding that Employer is the responsible operator.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is 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 Assocs., Inc.*, 380 U.S. 359, 362 (1965).

We initially reject Employer's assertion that the Director waived his right to participate in this proceeding. Employer's Brief at 17-21. Employer forfeited this argument by failing to raise it when the case was previously before the Board. *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020) (upholding forfeiture for failure to raise Appointments Clause challenge pursuant to Board's issue-exhaustion requirements); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief). In addition, as the ALJ properly noted, the Act provides that the Director is a party in all

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the Claimant performed his coal mine work in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 33; Director's Exhibit 3.

proceedings relating to black lung claims. 30 U.S.C. §932(k) ("The Secretary [represented by the Director] shall be a party in any proceeding relative to a claim for benefits" under the Act); *see also* 20 C.F.R. §725.360(a)(5). Further, the Director's failure to participate in an earlier stage of a case does not preclude the Director from later participation. Director's Brief at 7, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 574 (6th Cir. 2000) ("With respect to the Director's absence below, its absence before the Board does not preclude the Director from participating on appeal.").

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[5] 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)(2).

Because the district director must identify the responsible operator or carrier before a case is referred to the Office of Administrative Law Judges, the regulations require that, absent extraordinary circumstances, liability witness designations must be made within the deadlines set by the district director and liability evidence must be timely submitted to the district director. 20 C.F.R. §§725.414(c), (d), 725.456(b)(1), 725.457(c); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Where no party provides such notice to the district director, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c).

[5] 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).

In accordance with the Board's remand instructions, the ALJ considered whether Employer proved extraordinary circumstances warranted admitting Claimant's deposition and hearing testimony relevant to his employment with Warrior and Employer's liability. 20 C.F.R. §725.414(c); Decision and Order on Remand at 6 (unpaginated). He found Employer did not meet its burden of proof and declined to consider this evidence. Decision and Order on Remand at 6 (unpaginated). He also found there is no other evidence in the record to show that Claimant worked in coal mine employment for at least one year subsequent to Employer and thus held Employer liable for benefits as the responsible operator. *Id*. at 7 (unpaginated).

Employer asserts extraordinary circumstances exist because the district director failed to ascertain which of Claimant's subsequent employers were coal mine operators, he did not explain his designation of Employer as the responsible operator, and Claimant failed to include Warrior on his "Employment History" form (CM-911a).[6] Employer's Brief at 25-27.

The ALJ acknowledged the district director's investigation was inadequate but permissibly determined that there was sufficient evidence in the record when the case was pending before the district director to "alert Employer to the possibility" that Claimant had coal mine employment subsequent to working for Employer. Decision and Order on Remand at 6 (unpaginated). In this regard, he correctly noted Claimant listed working for Alabama Fuel[7] at a coal processing plant after his work for Employer on his CM-911a. *Id.* at 6-7 (unpaginated); Director's Exhibit 3. Because Employer made no attempt to verify Claimant's work history, the ALJ permissibly found "nothing resembling 'extraordinary circumstances' [were] present to justify Employer's failure to identify Claimant as a liability witness" before the district director. *Id*. at 6; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (ALJ has broad discretion over procedural matters). Additionally, Employer provided no explanation for failing to submit liability evidence

[6] Employer alternatively argues that because Claimant's identity was already known by the district director, its failure to provide notice to the district director that Claimant could be a liability witness may be "merely minor/negligible" rather than "detrimental." Employer's Brief at 27. However, Employer's assertion is unavailing as 20 C.F.R. §725.414(c) does not contain an exception to the "extraordinary circumstances" requirement.

[7] The Board previously affirmed the ALJ's determination that Claimant's work with Alabama Fuel was not coal mine employment. *Herron*, BRB No. 18-0255 BLA, slip op. at 6 n.9.

apart from asserting it was unaware of Claimant's subsequent employment with Warrior. Employer's Brief at 24-25.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark*, 12 BLR at 1-153. Thus, a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish that the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer raises no such claims here, nor does it challenge the ALJ's determination that the evidence of record should have put it on notice, while the claim was before the district director, that Claimant may have had subsequent coal mine employment. Because the ALJ acted within his discretion in determining Employer did not establish extraordinary circumstances for the admission of Claimant's testimony relevant to Employer's liability, we affirm it. 20 C.F.R. §725.414(b)-(c); *see Clark*, 12 BLR at 1-153; Decision and Order on Remand at 6 (unpaginated). Consequently, we affirm the ALJ's exclusion of Claimant's deposition and hearing testimony. *Blake*, 24 BLR at 1-113.

Employer's contention that the district director failed to correctly identify all of Claimant's coal mine employers before designating a responsible operator is not a basis for relieving it of liability in this claim.[8] 20 C.F.R. §725.495(b); Employer's Brief at 26. While the Director bears the burden of "proving that the responsible operator initially found liable for the payment of benefits . . . is a potentially liable operator," once the responsible operator designation was made the burden shifted to Employer to establish either that it is financially incapable of paying benefits or another financially-capable operator subsequently employed Claimant as a miner for at least one year. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1), 725.495(c)(2). As Employer does not contest that it meets the definition of a "potentially liable operator," it had the burden of proving it should not have been designated the "responsible operator." And, as the ALJ found, Employer failed to meet its burden.

Employer next incorrectly asserts that the ALJ failed to weigh or consider other relevant evidence as instructed by the Board to determine if Employer was the responsible

[8] In this appeal, Employer resurrects its arguments that were previously rejected by the Board that it was denied due process in view of the district director's inadequate investigation of the responsible operator issue. Employer's Brief at 8-17; *see Herron*, BRB No. 18-0255 BLA, slip op. at 7-8. Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

operator and only focused on whether it had established extraordinary circumstances. Employer's Brief at 9. Employer also asserts Claimant's CM-911a, "Description of Coal Mine Work and Other Employment" form (CM-913), initial claim for benefits, Social Security Administration earning records, paystubs and W-2s, and Dr. Hawkins' medical report, are "clear evidence" of coal mining employment subsequent to Claimant's work for Employer. *Id*. at 10-15. The Director contends none of the evidence of record establishes that Warrior engaged in coal mining or that Claimant was employed by Warrior for at least one year. Director's Brief at 6. For the following reasons we affirm the ALJ's determination.

The ALJ considered all of the evidence of record and determined it did not establish Claimant's work with Warrior was coal mine employment nor did it establish that Claimant worked for Warrior for at least one year. Decision and Order on Remand at 7 (unpaginated). Moreover, Employer does not specifically challenge the ALJ's findings regarding Warrior; rather, Employer merely argues that the evidence establishes that Claimant had coal mine employment after he worked for Employer.[9] As Employer does not identify any specific evidence that undermines the ALJ's determinations about Claimant's work with Warrior, we affirm them.

We thus conclude the ALJ properly excluded Claimant's deposition and hearing testimony and properly found Employer is the responsible operator. 20 C.F.R. §§725.494(e), 725.495(a)(1). As such, we affirm the ALJ's finding that Employer is liable for benefits.

[9] Employer identifies a quote from the ALJ's Decision and Order on Remand where the ALJ stated, "Claimant worked for [Warrior] for a period greater than one year." Employer's Brief at 10; Decision and Order on Remand at 2. This quote, which is recounted in the procedural history of the Decision and Order on Remand, is a finding from the ALJ's initial Decision and Order that was subsequently vacated by the Board. *Herron*, BRB No. 18-0255 BLA, slip op. at 10; ALJ's February 23, 2018 Decision and Order at 12.

Accordingly, we affirm the ALJ's Decision and Order on Remand.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge