



BRB No. 15-0280 BLA

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| WILLIAM L. SPARKS |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| CANNELTON INDUSTRIES, |) | DATE ISSUED: 04/20/2016 |
| INCORPORATED |) | |
| |) | |
| and |) | |
| |) | |
| ZURICH AMERICAN INSURANCE |) | |
| GROUP |) | |
| |) | |
| 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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Mary Jane Brown (Bucci Bailey & Javins LC), Summersville, West Virginia, for claimant.

Robert P. Normann (Muchow, Becker & Pasquarelli), Pittsburgh, Pennsylvania, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer and carrier¹ appeal the Decision and Order Awarding Benefits (2012-BLA-5798) of Administrative Law Judge Richard A. Morgan rendered on a claim filed on August 11, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Neither employer nor carrier contests claimant's entitlement to benefits on appeal, but carrier challenges the administrative law judge's refusal to admit and consider evidence purportedly establishing a basis for its dismissal from this case.² Relevant to the issues raised on appeal, the attorney representing both employer and carrier filed a motion to dismiss carrier from the case and submitted a copy of the insurance policy to the administrative law judge after the case was transferred from the district director to the Office of Administrative Law Judges (OALJ), but before the hearing. Counsel argued that, because the policy did not cover employees, like claimant, who worked in West Virginia, carrier was not responsible for the payment of benefits.³ The administrative law judge denied the motion in an order issued on October 9, 2014, finding that carrier did not timely raise the issue or submit supporting evidence before the district director, and did not establish extraordinary circumstances for failing to do so. Ruling and Order Denying Motion to Dismiss Carrier at 2. In his Decision and Order Awarding Benefits, issued on April 6, 2014, the administrative law judge reiterated his rationale for denying the motion to dismiss carrier,

¹ The attorney who filed a brief in support of the petition for review in this case has indicated that he represents both employer and carrier. Defendant's Brief at 3. To promote clarity in our Decision and Order, we will refer to "employer" or "carrier" according to the context of the reference.

² On the merits, the administrative law judge credited claimant with at least fifteen years of underground coal mine employment and determined that he established the existence of complicated pneumoconiosis arising out of coal mine employment. Decision and Order at 4, 17-20. The administrative law judge further found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and established his entitlement to benefits. *Id.* at 19-20.

³ Claimant's last coal mine employment was with employer in West Virginia from 1970 until October 2003. Director's Exhibit 3.

and determined that employer is the properly designated responsible operator. Decision and Order at 2-3.

On appeal, carrier maintains that the administrative law judge erred in denying its motion to dismiss. Claimant responds, urging affirmance of the award of benefits, and the administrative law judge's denial of the motion to dismiss. The Director, Office of Workers' Compensation Programs, has filed a letter brief, urging the Board to affirm the administrative law judge's determination that carrier waived its opportunity to challenge its status as employer's insurer.⁴

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The administrative law judge's disposition of procedural and evidentiary issues is reviewed under an "abuse of discretion" standard. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620, 23 BLR 2-345, 2-358 (4th Cir. 2006); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc).

On appeal, carrier argues that it "was improperly named as the insurer for this claim, and that evidence of this should have been accepted and considered by the [administrative law judge] in deciding this case." Defendant's Brief at 2. Carrier asserts that its insurance policy with employer was not submitted before the district director because carrier "was not aware of the exclusion aspect of the policy for West Virginia, until this matter had been referred by the [d]istrict [d]irector to the [OALJ] for hearing." *Id.* at 3. Carrier further contends that the administrative law judge's failure to admit the evidence of the insurance policy's lack of coverage for the named responsible operator "has led to an illogical and unjust result." *Id.*

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that employer is the responsible operator. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-711; Decision and Order at 4.

⁵ Because claimant's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In none of these arguments does carrier allege that the administrative law judge erred in determining that its failure to contest its identification as employer's insurer before the district director precluded it from raising the issue at any other stage in the proceedings. *See* Ruling and Order Denying Motion to Dismiss Carrier at 2; Decision and Order at 2-3. Furthermore, carrier does not contest the administrative law judge's finding, pursuant to 20 C.F.R. §725.456(b)(1), that extraordinary circumstances do not exist to excuse carrier's failure to raise the issue at the district director level. *See* Decision and Order at 2-3. Because carrier does not challenge the findings that provided the bases for the administrative law judge's order denying its motion to dismiss, we affirm the order. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm the administrative law judge's award of benefits in this claim, as unchallenged by employer and carrier on appeal. *Id.*

Accordingly, the administrative law judge's Ruling and Order Denying Motion to Dismiss Carrier, and Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge