



BRB No. 17-0371 BLA

BARRY R. HERB)	
)	
Claimant-Respondent)	
)	
v.)	
)	
R&D COAL COMPANY,)	
INCORPORATED)	
)	
and)	
)	
AMERICAN MINING INSURANCE)	DATE ISSUED: 04/30/2018
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order Granting the Director’s Motion for Partial Summary Decision as to the Responsible Operator Issue and the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Emily Goldberg-Kraft (Kate S. O’Scannlain, Solicitor of Labor, Maia S. Fisher, 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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Granting the Director's Motion for Partial Summary Decision as to the Responsible Operator Issue and the Decision and Order Awarding Benefits (2014-BLA-05766) of Administrative Law Judge Scott R. Morris (the administrative law judge),¹ rendered on a claim filed on October 15, 2013 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012).

On appeal, employer argues that the administrative law judge erred in determining that it is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of that finding. Claimant declined to file a response brief.²

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.³ 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).

¹ The first page of the Decision and Order Awarding Benefits identifies Administrative Law Judge Adele H. Odegard as the presiding judge, but the signature page bears the name of Administrative Law Judge Scott R. Morris. Decision and Order at 1, 26. The case was assigned to Judge Morris, but Judge Odegard presided at a hearing on August 25, 2016, with the parties' consent, because Judge Morris was "unexpectedly called out of town." August 25, 2016 Hearing Transcript at 4. Judge Odegard clarified that "Judge Morris is still assigned to this matter and Judge Morris will render the decision." *Id.*

² We affirm, as unchallenged on appeal, the administrative law judge's award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ Claimant's coal mine employment was in Pennsylvania. Director's Exhibits 4, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

The responsible operator is the “potentially liable operator” that most recently employed the miner for at least one year. *See* 20 C.F.R. §§725.494, 725.495(a)(1). An employer must meet five criteria to be considered a potentially liable operator: the miner worked for the operator for a cumulative period of at least one year; his employment included at least one working day after December 31, 1969; his disability or death arose at least in part out of his employment with the operator; the operator was an operator after June 30, 1973; and the operator is capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

The district director designates a responsible operator liable for the payment of benefits, with the initial burden on the Director to prove that the designated responsible operator is a potentially liable operator. 20 C.F.R. §§725.410(a)(3), 725.495(b). Once the district director has designated a responsible operator, that operator may be relieved of liability only if it proves that it is financially incapable of assuming liability for benefits, or that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(c)(1), (2).

In this case, the district director issued a Proposed Decision and Order on September 21, 2015, awarding benefits and finding that employer is the responsible operator liable for payment of benefits. Director’s Exhibit 52. Employer challenged its designation as the responsible operator, requesting reconsideration. Director’s Exhibit 53. After the district director denied reconsideration, employer requested a hearing and referral of the case to the Office of Administrative Law Judges. Director’s Exhibits 55-56.

Prior to the hearing, the Director filed a Motion for Partial Summary Decision, arguing that employer is the responsible operator. Employer filed a response. On August 18, 2016, the administrative law judge issued an Order granting the Director’s motion.⁴ As an initial matter, the administrative law judge declined to consider employer’s response, finding it untimely. Order at 3. He then determined that the evidence employer submitted before the district director was insufficient to rebut the district director’s designation of it as the responsible operator. *Id.* at 3-4. On March 28, 2017, the administrative law judge issued his Decision and Order Awarding Benefits, incorporating the finding in his earlier Order that employer is the responsible operator. Decision and Order at 3 n.5.

⁴ Employer appealed the Order, but the Board dismissed the appeal as interlocutory. *Herb v. R & D Coal Co.*, BRB No. 16-0638 BLA (Feb. 22, 2017) (Order) (unpub.).

On appeal, employer argues under 20 C.F.R. §725.495(c)(2) that it is not the potentially liable operator that most recently employed claimant.⁵ Employer’s Brief at 3-5. Employer does not dispute that claimant worked for it for at least one year in 1998 and 1999, as reflected by his Social Security Administration earnings records, Director’s Exhibit 7, but contends that claimant worked from 2001 to 2009 for RS&W Coal Company, and cites evidence that RS&W Coal Company was insured until March 1, 2002.⁶ Employer’s Brief at 3. Relying on the Board’s decision in *England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-144 (1993), employer argues that RS&W Coal Company is the responsible operator because it is claimant’s last employer of at least one year, and because “the evidence is insufficient to establish that [RS&W Coal] did not have the capability to assume payment” of benefits. *Id.* at 3-4. We disagree.

As an initial matter, employer’s reliance on *England* is misplaced. In *England*, a case that arose under the former version of the responsible operator regulations, the Board held that a designated responsible operator did not have the burden to prove that a subsequent potentially liable operator was financially capable of paying benefits to be relieved of liability.⁷ *England*, 17 BLR at 1-144. As the Director points out, the 2001 regulatory revisions clarified and established that after the Director meets its initial burden of establishing that the designated responsible operator is a potentially liable operator, the

⁵ Employer does not dispute that it meets the criteria of a potentially liable operator, or that it has sufficient assets to secure the payment of benefits. *See* 20 C.F.R. §§725.494, 725.495(c)(1). We affirm those findings as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Order at 3-4.

⁶ Claimant’s Social Security Administration earnings records indicate he was self-employed from 2001 to 2009. Director’s Exhibit 7. In a deposition on May 20, 2014, claimant testified that he worked from 2001 to 2009 at a mine called the RS&W Coal Company, under a contract with the mine owner. Director’s Exhibit 33 (Deposition Transcript at 6-11). Claimant explained that he was paid based on the amount of coal he removed from the mine, instead of receiving an hourly wage, and that taxes were not withheld from his paychecks. *Id.* Claimant considered himself an employee of RS&W Coal, rather than self-employed: “You know, you say self-employment, but we worked for RS&W. But we were under their contract. They [the Department of Labor and the Social Security Administration] don’t understand.” *Id.* (Deposition Transcript at 7).

⁷ The Board affirmed the administrative law judge’s dismissal of the employer as the responsible operator because the Director did not produce evidence to establish that the subsequent potentially liable operator was incapable of paying benefits. *England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-144-45 (1993).

burden “shifts to the designated responsible operator to prove either that it is financially incapable of assuming liability for the payment of benefits or that another potentially liable operator (i.e., an operator that meets the criteria in § 725.494) employed the miner more recently.” 65 Fed. Reg. 79,920, 80,009 (Dec. 20, 2000); *see also* 62 Fed. Reg. 3,338, 3,363-65 (Jan. 22, 1997); Director’s Brief at 3 n.2.

Therefore, it is not enough for employer to contend that the evidence is insufficient to prove that RS&W Coal is incapable of assuming payment of benefits. Employer must establish that RS&W Coal is the potentially liable operator that most recently employed claimant. 20 C.F.R. §725.495(c)(2). To do so, employer must establish that RS&W Coal is financially capable of assuming liability for benefits. 20 C.F.R. §725.494(e). The administrative law judge reasonably determined that employer failed to meet its burden. The Director submitted a statement pursuant to 20 C.F.R. §725.495(d) that, after searching its records, the Office of Workers’ Compensation Programs determined that RS&W Coal was not insured or approved to self-insure on the last day of claimant’s employment there. Director’s Exhibit 54. The Director’s statement is *prima facie* evidence that RS&W Coal is not financially capable of assuming liability for this claim. *See* 20 C.F.R. §725.495(d). The only evidence employer has offered to prove that RS&W Coal *is* capable of assuming liability — and therefore is a potentially liable operator that more recently employed claimant, *see* 20 C.F.R. §§725.494(e), 725.495(c)(2) — is evidence of the insurance policy RS&W Coal held from March 1, 2001 until March 1, 2002, when the policy was canceled. Director’s Exhibit 33.

We agree with the Director that employer’s evidence does not help employer meet its burden. Director’s Brief at 3-4. For RS&W Coal to be capable of assuming liability for payment of benefits through an insurance policy, it needed a policy “that covers the claim,” 20 C.F.R. §725.494(e)(1), which in turn requires coverage on the last day of claimant’s employment, in 2009. *See* 20 C.F.R. §726.203(a); *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 505 n.4, 19 BLR 2-290, 2-297 n.4 (4th Cir. 1995) (noting that insurance coverage for black lung benefits “exists only if the insurance policy is in effect on the last day of the miner’s exposure to coal dust while employed by the insured”). Employer’s evidence, showing that RS&W Coal was insured from March 1, 2001 until March 1, 2002, does not establish that RS&W Coal was insured on the last day of claimant’s employment there, and therefore does not establish that RS&W Coal had an insurance policy that covers this claim. *See Westmoreland Coal Co. v. Director, OWCP [Quillen]*, 696 F. App’x 604, 608 (4th Cir. June 7, 2017) (unpub.).

Because employer did not meet its burden of proving that RS&W Coal is a potentially liable operator that more recently employed claimant, *see* 20 C.F.R. §725.494(e), we affirm the administrative law judge’s determination that employer is the responsible operator. Order at 4.

Accordingly, the administrative law judge's Order Granting the Director's Motion for Partial Summary Decision as to the Responsible Operator Issue and the Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge