U.S. Department of Labor

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

BRB No. 17-0654 BLA

ROBIN STIDHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY PRINCE MINING COMPANY	)	DATE ISSUED: 08/20/2018
	)	
and	)	
	)	
FIRE & CASUALTY COMPANY OF CONNECTICUT, c/o ARROWPOINT CAPITAL	)	
	)	
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 M. Clark, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak &Nunnery), Prestonsburg, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Cynthia Liao (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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05558) of Administrative Law Judge Richard M. Clark, on a subsequent claim filed on April 9, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that the claim was timely filed and that employer is the properly designated responsible operator. He then found that claimant has complicated pneumoconiosis and is entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Therefore, the administrative law judge also concluded that claimant established a change in an applicable condition of entitlement and awarded benefits accordingly.

The sole argument employer raises on appeal is that the administrative law judge erred in finding that it is the operator that most recently employed claimant for a cumulative period of at least one year. Claimant responds that he takes no position concerning the responsible operator issue and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), asserts that the administrative law judge properly determined that employer is the responsible operator. Employer replied to the Director's response and reiterated its arguments.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act

[1] Claimant filed his initial claim for benefits on January 16, 1992, which was denied by the district director on June 29, 1992, because claimant did not establish that he had pneumoconiosis or that he had a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 1. Claimant did not take any additional action before filing the current claim. Director's Exhibit 3.

[2] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

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." 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] Once a potentially liable operator has been properly identified by the Director, 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 operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

When claimant filed his initial claim in 1992, the district director sent a Notice of Claim to employer. Director's Exhibit 1. Although employer argued that claimant did not work for it as a "miner," it did not otherwise controvert its liability. *Id*. This claim was ultimately denied because claimant failed to establish any of the elements of entitlement, without reaching the issue of whether claimant was a miner under the Act. *Id*.

After claimant filed his current claim on April 9, 2013, the district director issued a Notice of Claim to employer and its insurance carrier on April 12, 2013. Director's Exhibit 21. Employer controverted the claim on June 12, 2013, challenging its designation as responsible operator. Director's Exhibit 22. The district director issued a Proposed Decision and Order awarding benefits on January 27, 2014, and a Revised Proposed Decision and Order awarding benefits on February 12, 2014. Director's Exhibits 28-29. In both of these dispositions, employer was named as the responsible operator. *Id*. Employer requested a hearing, which was held on December 7, 2016. Director's Exhibits 30-31.

In his Decision and Order, the administrative law judge placed greatest weight on claimant's Social Security Administration (SSA) earnings records, W-2 forms, and claimant's testimony and found that employer is the operator who most recently employed

[3] In order 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; 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).

claimant for a cumulative period of at least one year. Decision and Order at 10-11. The administrative law judge therefore concluded that employer is the properly designated responsible operator. *Id*. at 11.

Employer (known as Kentucky Prince Mining Company) argues that the administrative law judge erred in determining that it is the responsible operator, as he ignored evidence establishing that: Claimant did not work for employer in 1989, 1990 and 1991; employer ceased to exist on June 30, 1990; and claimant received pension benefits, rather than wages, in 1990 and 1991. These contentions are without merit.

The administrative law judge determined correctly that although claimant's SSA earnings records for 1989-91 identify another company as the payer of claimant's wages, Kentucky Prince Mining Company is listed as the employer on claimant's W-2 statement for 1990 and has the same employer identification number as the company identified on claimant's SSA earnings records.[4] Decision and Order at 6; Director's Exhibits 11 (at 14), 12 (at 4), 13 (at 3). In addition, the administrative law judge accurately observed that documents from the Kentucky Secretary of State show that a company whose name appears on claimant's SSA earnings records for the period at issue was one of the shareholders that authorized the dissolution of Kentucky Prince Mining Company.[5] Decision and Order at 6; Director's Exhibit 33 at 15. Based on this evidence, the administrative law judge permissibly determined that "the Kentucky Prince Mining Company that paid [claimant] in 1989[-91], and the Kentucky Prince Mining Company that is party to this claim are one and the same." Decision and Order at 6; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

The administrative law judge's finding that the evidence refutes employer's argument that it cannot be the responsible operator because it was dissolved as a

[4] The name of the company appearing on claimant's Social Security Administration records for 1989-91 is "Kentucky Prince Mining Company PTR Roaring Creek Coal Corp Gen PTR." Director's Exhibits 12 (at 4), 13. "Roaring Creek Coal Company" and "Grassy Cove Coal Mining Company" were the shareholders that authorized the dissolution of Kentucky Prince Mining Company effective June 30, 1990. Director's Exhibit 33 at 13-15.

[5] The letterhead, W-2 statements, and the Kentucky Secretary of State records all list an address that corresponds to the address for Kentucky Prince Mining Company. Director's Exhibits 1 (at 35, 42, 49), 33 at 11.

corporation on June 30, 1990, is also rational and supported by substantial evidence.[6] *See Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 322 (6th Cir. 2014); Decision and Order at 6-7. The administrative law judge accurately found that a letter on Kentucky Prince Mining Company letterhead explicitly states that claimant worked for it from March 29 to April 26, 1982, and from November 7, 1989 to March 9, 1991. Decision and Order at 6; Director's Exhibit 1 at 49. Relying on 20 C.F.R. §725.493,[7] he further observed correctly that claimant's SSA records, showing that a company with employer's identification number paid claimant wages in 1990 and 1991, contradict employer's contention that it did not operate after June 30, 1990. Decision and Order at 7-8; Director's Exhibits 1 at 13 (at 3). Based on his review of the evidence, the administrative law judge rationally determined that claimant's SSA earnings records "are entitled to most weight, and are corroborated by the letter purporting to document [c]laimant's employment with [e]mployer, and [c]laimant's testimony, which is credible to the extent that it confirms his approximate dates of employment and the identity of his employer."[8] Decision and Order at 8. Accordingly, we affirm his finding that employer "is the entity that employed [c]laimant" between 1989 and 1991, and "thus, for a cumulative period of not less than one year as

[6] Employer also contends that in finding that employer did not establish that Amax Coal Company is a successor operator, the administrative law judge misunderstood one of its arguments. Employer maintains that it contended before the administrative law judge that its "dissolution on June 30, 1990 establishes that it cannot be a potentially responsible operator because claimant would not have been employed for one (1) year[] as required by 20 C.F.R. §725.494(c)." Employer's Brief at 7. Employer alleges that the administrative law judge's belief that employer attempted to prove that Amax Coal Company is its successor placed a greater burden of proof on employer. Because the administrative law judge provided valid alternative grounds for determining that employer is the properly identified responsible operator, and in light of employer's acknowledgement that establishing the existence of a successor operator was not part of its defense, we need not address this contention. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[7] The regulation at 20 C.F.R. §725.493(a)(1) provides in relevant part: "Any individuals who participate with one or more persons in the mining of coal, such as owners, proprietors, partners, and joint venturers, whether they are compensated by wages, salaries, piece rates, shares, profits, or by any other means, shall be deemed employees." Under 20 C.F.R. §725.493(a)(2): "The payment of wages or salary shall be prima facie evidence of the right to direct, control, or supervise an individual's work."

[8] Claimant testified at the hearing that he at least worked for employer from 1989 to 1991. Hearing Transcript at 19.

required by 20 C.F.R. §725.494(b)." *Id.*; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989).

Finally, the administrative law judge permissibly concluded that the checkmark in the "Pension Plan" box on claimant's W-2 forms did not establish that claimant received pension benefits rather than wages from employer in 1990 and 1991. *See Rowe*, 710 F.2d at 255; Decision and Order at 10. Relying on the W-2 form instructions, he found that claimant "'was an active participant . . . in a retirement plan . . . maintained by [employer],'" rather than the recipient of a pension distribution.[9] Decision and Order at 10, *quoting* 1992 Instructions for Form W-2, Department of the Treasury, Internal Revenue Service.

Based on the foregoing, we affirm the administrative law judge's finding that claimant worked for employer for a cumulative period of not less than one year, as it is rational and supported by substantial evidence. *See Rowe*, 710 F.2d at 255. We therefore also affirm the administrative law judge's finding that employer is the properly designated responsible operator pursuant to 20 C.F.R. §§725.494, 725.495. *See Lawson*, 739 F.3d at 322-23. Because employer raises no additional allegations of error, we further affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] The Director, Office of Workers' Compensation Programs, asserts that if claimant had received pension distributions, they would have been reported on Form W-2P or Form 1099-R, not Form W-2. Director's Letter Brief at 5, *citing* Director's Exhibit 1 at 43; Internal Revenue Service, Instructions for Form 1040 at 14 (1990).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge