BRB No. 11-0232 BLA

EARL BEGLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 12/29/2011
	)	
Employer-Petitioner	)	
	)	
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Ronald Gilbertson (Husch Blackwell), Washington D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05659) of Administrative Law Judge Kenneth A. Krantz, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718, and determined that employer was the responsible operator liable for benefits. He accepted the parties' stipulation of twenty-seven years of coal mine employment and also determined that claimant worked at least fifteen years underground. The administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended

Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that it was incorrectly identified as the responsible operator, pursuant to 20 C.F.R. §725.495(c)(2), because it was not the coal mine operator that most recently employed claimant for a cumulative period of one year. Employer contends that liability should transfer to the Black Lung Disability Trust Fund. Employer maintains that the Department of Labor (DOL) is barred from applying amended Section 411(c)(4), in light of constitutional challenges to the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), of which the recent amendments to the Act are a part. Alternatively, employer argues that if amended Section 411(c)(4) is applicable, the administrative law judge erred by not addressing: 1) its motion to remand or for an enlargement of time to submit evidence to address the change in the law, or 2) its motion for leave to file evidence, attached to which were supplemental opinions from Drs. Dahhan and Rosenberg. Finally, employer contends that the administrative law judge erred in excluding a rebuttal x-ray reading and in finding that employer failed to rebut the amended Section 411(c)(4) presumption.

Claimant responds, urging affirmance of the award of benefits, but does not take a position with regard to whether employer is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, indicating that the case should be remanded for further consideration of the responsible operator issue.

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.[1] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. RESPONSIBLE OPERATOR

Employer challenges the administrative law judge's determination that it is the responsible operator liable for the payment of benefits. In order to meet the regulatory definition of "a potentially liable operator," an operator must have employed the miner for a cumulative period of not less than one year and must also have the financial ability

[1] Because claimant's most recent coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

to assume liability for the payment of benefits. 20 C.F.R. §725.494(c), (e). Pursuant to 20 C.F.R. §725.101(a)(32), a "year" is defined as "one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" The regulations further state that "[t]o the extent the evidence permits, the beginning and ending dates of all periods of employment shall be ascertained. The dates and length of coal mine employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits and sworn testimony." 20 C.F.R. §725.101(a)(32)(ii).

If a miner worked for more than one operator who meets all the requirements of a potentially liable operator, then the operator for whom the miner worked most recently will be named the responsible operator. 20 C.F.R. §725.495(a)(2)(i). If the most recent operator demonstrates an inability to pay benefits, and there is no successor operator, then liability is assessed against the potentially liable operator that next most recently employed the miner. 20 C.F.R. § 725.495(a)(2)(ii) and (iii). A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492. Additionally, the regulations provide that a successor operator is created if an operator ceases to exist by reason of a reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

It is undisputed in this case that claimant worked for employer from 1989-1999. Decision and Order at 2. Employer, however, asserts that it was improperly identified as the responsible operator because it is not the coal mine operator that most recently employed claimant for one cumulative year. Employer maintains that claimant had one year of coal mine employment with Tricoal, Incorporated (Tricoal), after his work with employer. Alternatively, employer contends that even if claimant did not work for Tricoal or any other coal company for one year, because these companies are related or successor companies to each other, employer must be relieved of liability, as claimant has combined coal mine employment that totals one cumulative year.

To support its assertion, employer relies on Social Security Administration (SSA) records and claimant's testimony. In a deposition conducted on February 1, 2008, claimant indicated that, after he left work with employer in 1999, he went to work for Tricoal, where he assisted in setting up the mine and performed electrical work. Claimant's Exhibit 34 at 10. With regard to the length of his employment with Tricoal, claimant stated:

> I worked for Tricoal I would say a little over a year. My son and I got together, and he - I went to work, and then he started to work after I did,

> and he said that we'd work there for over a year. So, I would say probably a year and four months more – more or less, maybe a year and five months.

Id. Claimant testified that, after he left Tricoal, he went to work for Kelly Branch Mining, Incorporated (Kelly Branch), and that the "people that owned Tricoal were the same people that opened up Kelly Branch," but that they were "two different mines." *Id.* at 10-11. He also testified that he then worked for Boone Mountain Services, Incorporated (Boone Mountain) and Oak Mountain Resources (Oak Mountain), and that both of these mines were owned by the same person. *Id.* at 21-23. Claimant testified that his last coal mine employment was with Lakeway Mining, Incorporated (Lakeway), which he stated had the same owner as Kelly Branch and Tricoal. *Id.* at 34-48. At the April 28, 2009 hearing, claimant further testified that Tricoal and Kelly Branch were controlled by the same mine owner and shared one payroll office, operated on the same license and had one insurance plan. April 28, 2009 Hearing Transcript at 27-29, 33-34.

In addressing the responsible operator issue, the administrative law judge noted that because the district director properly identified employer as a potentially liable operator pursuant to 20 C.F.R. §725.495(b), employer bears the burden under 20 C.F.R. §725.495(c), to show that claimant worked for another operator for at least one cumulative year, after his work with employer.[2] Decision and Order at 27. The administrative law judge reviewed the SSA records and found that claimant had yearly earnings in 2000 with North Star Mining, Incorporated (North Star) in the amount of $22,580.26 and Tricoal in the amount of $5,248.75; in 2001 with Tricoal in the amount of $28,208.00; in 2002 with Kelly Branch in the amount of $2,163.25 and Boone Mountain in the amount of $3,402.00; in 2003 with Boone Mountain in the amount of $13,440.50, Oak Mountain in the amount of $5,155.50 and Lakeway in the amount of $1,676. Decision and Order at 12.

The administrative law judge found that claimant worked for Boone Mountain for less than one year, from March 2003 to December 2003, and that he worked for Oak Mountain for less than one year, from July 2003 through December 2003. Decision and Order at 27. The administrative law judge did not address the beginning and ending dates of claimant's employment with any other coal company. With regard to employer's argument of a successor relationship, the administrative law judge stated:

> Claimant's testimony was confusing and his memory is unclear[,] especially with respect to his employment history. Further, [c]laimant testified that he is not a

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[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that employer is a potentially liable operator pursuant to 20 C.F.R. §725.495(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> shareholder, officer or president of any of the companies he worked for, so his testimony cannot be used to prove the mines are related. Taking the inconsistent nature of [c]laimant's testimony on this point and his lack of authoritative knowledge as to the ownership of the mines, I assign the [SSA] records and [e]mployment records that have been admitted [into] evidence the heaviest weight. These records do not present sufficient evidence that [c]laimant was employed for over a year with any company after he left [employer].

Decision and Order at 27-28. Thus, because the administrative law judge found that employer failed to show that claimant had a cumulative year of employment with any coal mine operator after working for employer, the administrative law judge concluded that employer was the responsible operator liable for payment of benefits. *Id*. at 28.

Employer contends that the administrative law judge erred by not finding that claimant worked for one cumulative year for Tricoal, based on claimant's deposition and hearing testimony. The Director agrees that the administrative law judge's "explanation for rejecting [claimant's] testimony, by itself, cannot withstand appellate review" and that the administrative law judge must explain why he found claimant's specific testimony regarding the length of his coal mine employment with Tricoal to be "confusing and unclear." Director's Brief at 4, *quoting* Decision and Order at 4.

We affirm the administrative law judge's finding that claimant's testimony, standing alone, is insufficient to establish a successor relationship between the coal companies that employed him after his work for employer, as the administrative law judge permissibly found that claimant lacked the "authoritative knowledge" to assess such a relationship. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) *(en banc*). However, we agree with employer and the Director, that the administrative law judge has failed to adequately explain, in accordance with the Administrative Procedure Act (APA),[3] why claimant's testimony is not credible regarding the length of his employment for Tricoal. We also agree with employer that the administrative law judge erred in failing to address the significance, if any, of the fact that the same individual, Randall Fleming, completed the employment questionnaires and reported the wages earned by claimant for Boone Mountain and Oak Mountain. Director's Exhibits 6, 8. The administrative law judge should consider whether this documentary evidence is corroboration for claimant's testimony that these two entities were actually the same

[3] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

company. In addition, the administrative law judge should address employer's assertion that Mr. Fleming's statements on the questionnaires did not reflect a complete statement of the length of time that claimant worked for either Boone Mountain or Oak Mountain, as he reported overlapping periods of employment for claimant with these companies, and since the dates listed on the questionnaires do not correspond to the SSA records, which indicate that claimant had worked for Boone Mountain in 2002. *See* Employer's Petition for Review at 18; Director's Exhibits 6, 8.

Thus, we vacate the administrative law judge's determination that employer is the responsible operator and remand the case for further consideration. On remand, we instruct the administrative law judge to consider claimant's testimony regarding his employment with Tricoal and determine whether it is sufficient to establish that claimant worked for Tricoal for a period of one cumulative year.[4] The administrative law judge must also address all of the record evidence pertaining to whether there is a successor relationship between Tricoal and any other coal mine operator that employed claimant. In resolving the responsible operator issue, the administrative law judge is instructed to explain all of his findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

II. EVIDENTIARY CHALLENGES

Subsequent to the hearing held in this case on April 28, 2009, amendments to the Act were enacted on March 23, 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine

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[4] Because the record does not show the beginning and ending dates for claimant's employment with Tricoal, employer maintains that the administrative law judge must apply a formula set forth at 20 C.F.R. §725.101(a)(32), to determine the length of claimant's coal mine employment. The regulation at 20 C.F.R. §725.101(32)(iii) states, "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment . . . the adjudication officer *may use* the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)." 20 C.F.R. §725.101(32)(iii). Contrary to employer's argument, based on the specific language of the regulation, the administrative law judge has discretion to apply the formula on remand, but is not required to do so. If the administrative law judge decides to utilize the formula in determining the responsible operator, he should attach to his Decision and Order, a copy of the BLS table that he used to calculate the length of claimant's coal mine employment. *Id.*

employment and a totally disabling respiratory impairment are established.[5] 30 U.S.C. §921(c)(4).

On April 26, 2010, the administrative law judge issued a Notice of Opportunity to Submit Supplemental Briefs on Applicability of §1556 of the PPACA, which gave the parties forty-five days to submit position statements as to whether claimant was eligible to invoke the rebuttable presumption at amended Section 411(c)(4), and to also submit "one supplemental report, in writing or deposition format" from any physician who prepared an affirmative medical report in the case, addressing the issues underlying amended Section 411(c)(4). The administrative law judge also indicated that the parties would be given "additional time to file rebuttal evidence in light of the supplemental report" or "additional time to file rehabilitative evidence in light of the rebuttal evidence," if an appropriate motion was filed. *Id*.

On June 3, 2010, within the forty-five day submission period allotted by the administrative law judge, employer filed a position statement, challenging the constitutionality of the recent amendments. Employer objected to the limitations on evidence, set forth in the April 26, 2010 Notice, and requested that the case be remanded to the district director or, in the alternative, that it be granted an extension of time to develop all evidence it deemed necessary to respond to the recent changes in the law. Employer's June 3, 2010 Position Statement at 5-6. As grounds for the request for an extension of time, employer argued that the time frame provided by the administrative law judge was not sufficient due to "[t]he large number of cases potentially impacted by these amendments [which] has led to inevitable delays in developing proof as experts are overwhelmed with requests for supplemental medical opinions." *Id*. at 6.

On October 19, 2010, employer filed a Motion for Leave to File Evidence Addressing the Change in Law, Notice of Filing Employer's Exhibits 1A and 9A and Motion for Briefing Scheduling. Employer indicated that it had not received a ruling on its motion to remand the case to the district director, or its request for an extension of time to develop evidence. Employer indicated that it had "completed development of proof" and submitted Employer's Exhibit 1A, a supplemental report by Dr. Dahhan, dated July 31, 2010, and Employer's Exhibit 9A, a supplemental report by Dr. Rosenberg, dated September 17, 2010, for admission into the record. Employer's October 19, 2010 Motion at 1. Employer asked the administrative law judge to set a

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[5] We reject employer's assertion that if any portion of the Patient Protection and Affordable Care Act is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 411(c)(4), must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, F.3d , 2011WL 6062116 *12 FN2 (4th Cir. 2011); *Florida v. U.S. Dept. of HHS,* 648 F.3d 1235 (11th Cir. 2011), *cert. granted* 2011 WL 5515164 (U.S. Nov. 14, 2011) (No.11-398).

briefing schedule, "once the pending motions are resolved." *Id.* at 2. On October 28, 2010, claimant advised the administrative law judge that he had no objection to the admission of employer's supplemental evidence, but requested an opportunity to submit rebuttal evidence. The administrative law judge issued his Decision and Order Awarding Benefits on November 29, 2010. The administrative law judge did not rule on either of employer's motions or discuss the supplemental reports by Drs. Dahhan and Rosenberg in his analysis of the record evidence.

Although an administrative law judge is generally afforded broad discretion in dealing with procedural matters, he must insure a full and fair hearing on all the issues presented. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987) (*en banc*). Where a party would be denied the opportunity to fully present its case because it is unable to develop evidence relevant to a change in the law, due process requires that the party be afforded the opportunity to develop such evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011). In this case, the administrative law judge erred by failing to address employer's motions to submit additional evidence addressing the change in the law. S*ee Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Therefore, we must vacate the award of benefits and remand this case for further consideration. On remand, the administrative law judge should address employer's outstanding motions and claimant's request to submit rebuttal evidence, in light of his April 2010 Notice of Opportunity to Submit Supplemental Briefs on Applicability of §1556 of the PPACA.[6]

Additionally, the record reveals that claimant proffered, in support of his affirmative case, two readings, by Drs. Powell and Alexander, of an x-ray dated August 8, 2007. *See* Claimant's Evidence Summary Form. In rebuttal to these readings, employer proffered two readings, by Drs. Kendall and West, of the August 8, 2007 x-ray. *See* Employer's Evidence Summary Form. Although the administrative law judge admitted claimant's two affirmative readings, he excluded the rebuttal reading of Dr. West, ruling that the regulations allow each party to "submit in rebuttal[,] no more than one physician['s] interpretation of *each chest x-ray* submitted by the opposing party." Decision and Order at 15 (emphasis added). The administrative law judge also found that

[6] The administrative law judge has discretion to decide whether it is necessary to remand this case to the district director. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) *(en banc*).

employer failed to demonstrate good cause for the admission of Dr. West's x-ray reading, in excess of the evidentiary limitations. *Id*.

Employer correctly asserts that the administrative law judge erred in limiting employer to one rebuttal reading of the August 8, 2007 x-ray. In *Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006), the Board held that the rebuttal provisions set forth in Section 725.414(a)(2)(ii) and (3)(ii) "permitting each party to submit 'no more than one physician's interpretation of each chest [x]-ray' in rebuttal, refer to the x-ray *interpretations* that are proffered by the opposing party in its affirmative case, not to the underlying x-ray film." *Ward*, 23 BLR at 1-155-56 (emphasis in original); *accord J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-84 (2008). In this case, because claimant submitted two readings of the August 8, 2007 x-ray as affirmative evidence, employer was entitled to respond to each of those readings, regardless of the fact that they involved the same x-ray. Thus, we instruct the administrative law judge on remand to admit employer's rebuttal reading into the record.[7]

[7] Because the evidentiary record in this case is not complete, we decline to address employer's arguments with regard to the weight accorded the evidence relevant to rebuttal of amended Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge