

BRB Nos. 14-0222 BLA
and 14-0222 BLA-A

DWANE E. HELLEMS)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
WEST VIRGINIA MINE POWER,)
INCORPORATED)
)
and)
)
BRICKSTREET MUTUAL INSURANCE) DATE ISSUED: 12/03/2014
COMPANY, INCORPORATED)
)
Employer/Carrier-)
Respondents)
Cross-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Petitioner)
Cross-Respondent) DECISION and ORDER

Appeal and Cross-Appeal of the Order Denying Director's Motion for Partial Summary Decision and Order Denying Director's Motion for Reconsideration of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer/carrier.

Michelle S. Gerdano (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and claimant cross-appeals, the Order Denying Director's Motion for Partial Summary Decision and Order Denying Director's Motion for Reconsideration (2012-BLA-5757) of Administrative Law Judge Theresa C. Timlin rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on June 27, 2011. Director's Exhibit 2.

In a proposed Decision and Order issued on March 28, 2012, the district director found that employer was the properly designated responsible operator and awarded benefits. Director's Exhibit 31. Employer requested a hearing, contesting claimant's entitlement to benefits, and its designation as the responsible operator. Prior to the scheduled hearing, the Director moved for partial summary decision, contending that employer was the properly identified responsible operator and should be held liable for the payment of any black lung benefits.

Following the hearing, in a decision dated November 25, 2013, the administrative law judge initially found that employer, West Virginia Mine Power (WV Mine Power), did not employ claimant as a miner for at least one calendar year. The administrative law judge, therefore, found that WV Mine Power is not the coal mine operator responsible for the payment of benefits. Accordingly, the administrative law judge denied the Director's motion for partial summary decision on the responsible operator issue, and dismissed WV Mine Power as the responsible operator. Further, the administrative law judge affirmed the district director's Proposed Decision and Order awarding benefits, without reaching the merits of entitlement, and remanded the case for the payment of benefits by the Black Lung Disability Trust Fund (the Trust Fund). *See* 26 U.S.C. §9501(d)(1)(B). The administrative law judge subsequently denied the Director's motion for reconsideration.

On appeal, the Director contends that the administrative law judge erred in dismissing employer as the responsible operator. Claimant and employer respond, urging affirmance of the administrative law judge's determination that liability for benefits rests with the Trust Fund. The Director replies, reiterating its contentions on appeal. Claimant also filed a cross-appeal, contending that the administrative law judge erred in excluding

certain x-rays, taken as part of claimant's medical treatment, as in excess of the evidentiary limitations at 20 C.F.R. §725.414. Employer and the Director filed briefs in response to claimant's cross-appeal.¹

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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 employed the miner "for a cumulative period of not less than one year," 20 C.F.R. §725.494(c), and meets the other criteria of a potentially liable operator.³ A "year" is defined to mean:

[A] period of 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." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick

¹ In response to claimant's cross-appeal, employer contends that because the administrative law judge did not make a final ruling regarding the admissibility of the x-ray readings, the Board should decline to address claimant's arguments as premature. The Director, Office of Workers' Compensation Programs (the Director), asserts that, to the extent the administrative law judge found that even chest x-rays taken as part of medical treatment are subject to the evidentiary limitations, this finding should be vacated.

² The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

³ The remaining criteria for identifying a potentially liable operator are not at issue in this case. *See* 20 C.F.R. §725.494(a), (b), (d), (e).

leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. §725.101(a)(32).⁴ The administrative law judge may apply any reasonable method of calculation in determining the length of the miner's coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc) (McGranery, J., concurring and dissenting); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988) (en banc); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988).

In determining whether the Director established that WV Mine Power employed claimant for at least one calendar year, the administrative law judge relied on claimant's testimony at the hearing. Order Denying Director's Motion at 2; Hearing Tr. at 76-78. As the administrative law judge noted, claimant testified that he started working for employer as an underground miner in July 2010, "right after July 4th" and stopped working shortly before May 11, 2011, when he took a leave of absence to undergo heart surgery. Hearing Transcript at 44, 46. Claimant further testified that he remained employed by WV Mine Power during his medical leave, and the administrative law judge correctly recognized that the period of claimant's approved medical absence counted as coal mine employment. 20 C.F.R. §725.101(a)(32); *Elswick v. New River Co.*, 2 BLR 1-1109, 1113-14 (1980) (an unpaid leave of absence may be counted where there is no evidence that the employment was terminated and the record indicates that claimant retained the right to employment); Order Denying Director's Motion at 3; Hearing Tr. at 66. Claimant explained that when he returned to work, he was reassigned to the safety department office, which was located in town, away from the mine site. Hearing Tr. at 46, 66. Claimant testified that he could not recall the exact date that he returned to work in the safety department, but that it was sometime in July 2011. *Id.* at 46.

⁴ The regulations provide for "a two-step inquiry into a miner's employment to determine if an employer is the responsible operator." *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). First, the administrative law judge must determine whether the miner worked for the operator for one calendar year, or for partial periods totaling one year. Second, if the administrative law judge finds that one calendar year of employment has been established, the administrative law judge must determine whether the miner worked as a miner during that one year period for at least 125 days. *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 562, 22 BLR 2-349, 2-360 (6th Cir. 2002); *Daniels Co. v. Mitchell*, 479 F.3d 321, 330, 24 BLR 2-1, 2-17 (4th Cir. 2002); *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc) (McGranery, J., concurring and dissenting). In this case, it is undisputed that claimant worked in or around a coal mine for at least 125 working days. 20 C.F.R. §725.101(a)(32).

The administrative law judge initially noted that while claimant continued to work in WV Mine Power's safety department from July 2011 until June 2013, and did occasionally travel to the mine site, he never again worked as an underground miner.⁵ Order Denying Director's Motion at 2. Thus, based on claimant's testimony, the administrative law judge found that claimant worked for WV Mine Power as a miner from "right after" July 4, 2010 to an unspecified date in July 2011. Order Denying Director's Motion at 3. However, the administrative law judge further found that, while it appeared that claimant worked for employer as a miner "from some point in July 2010 to some point in July 2011," the record evidence was not sufficiently specific to allow her to determine whether the one full calendar year requirement was met. Order Denying Reconsideration at 3. Thus, the administrative law judge found that the Director had not met his burden to establish that claimant worked one full calendar year for employer, and she dismissed WV Mine Power as the coal mine operator responsible for the payment of benefits. Order Denying Reconsideration at 3; Order Denying Director's Motion at 3.

The Director initially argues that the administrative law judge erred in failing to address pertinent evidence that, the Director asserts, supports the conclusion that WV Mine Power employed claimant as an underground miner for at least one calendar year, pursuant to 20 C.F.R. §725.101(a)(32). Director's Brief at 6. Specifically, the Director notes that, on his June 27, 2011 application for benefits, claimant stated that he "may be returning to work after August 2011 if released by [his doctor]." Director's Brief at 7; Director's Exhibit 2. The Director also asserts that information contained in later medical records supports the conclusion that claimant did not return to work as a safety officer until sometime after July 28, 2011. Director's Brief at 7. The Director points to a July 28, 2011 examination report by Dr. Gaziano, which does not mention claimant's work as a safety officer, but instead notes that claimant was employed as an underground coal miner, and had been in the job from July 2010 to the "present." Director's Brief at 7; Director's Exhibit 16. Likewise, the Director contends, the January 12, 2012 report by Dr. Zaldivar, stating that claimant "is back to work now [as a safety officer] and has been since August [2011]," also supports the conclusion that claimant remained employed as an underground coal miner through the end of July. Director's Brief at 7-8; Director's Exhibit 30. The Director contends that, taken together with claimant's testimony, this evidence supports a finding that claimant's position as a safety officer did not start until

⁵ When asked whether he was exposed to coal dust while working at the safety office, claimant responded: "Not while we were there, but I went on to the mine site, but not underground." Hearing Tr. at 47.

more than one year after he began working for employer “right after July 4th.”⁶ Director’s Brief at 8.

As the Director asserts, the administrative law judge did not address the statements contained on claimant’s claim form, or in the reports of Drs. Gaziano and Zaldivar, together with claimant’s testimony, in determining whether the evidence established that claimant worked for employer for at least one calendar year. Because the administrative law judge did not address this evidence, we are unable to determine whether substantial evidence supports the administrative law judge’s determination that WV Mine Power did not employ claimant for at least one year.

The Director further asserts that the administrative law judge failed to properly analyze whether periods of claimant’s employment as a safety officer, after he returned to work with WV Mine Power, also constituted coal mine employment. Director’s Brief at 8. The Director contends that, as claimant testified that he “went on to the mine site, but not underground” as part of his job, periods of claimant’s employment as a safety officer may constitute the work of a miner, as defined in 20 C.F.R. §725.202(a). Director’s Brief at 8; Hearing Tr. at 47.

As the administrative law judge did not address the items of evidence identified by the Director, or consider whether any periods of claimant’s employment as a safety officer constituted the work of a miner as defined in 20 C.F.R. §§725.101(a)(19), 725.202(a), we vacate the administrative law judge’s finding that employer was improperly designated as the responsible operator. On remand, the administrative law judge should consider and discuss all of the evidence relevant to the responsible operator issue and fully explain her findings, in accordance with the Administrative Procedure

⁶ The Director contends that Dr. Gaziano’s statement is “arguably consistent” with claimant’s testimony, assuming that claimant started his work as a safety officer “on July 29, 30, or 31 of 2011.” Director’s Brief at 8. The Director concedes that Dr. Zaldivar’s statement contradicts claimant’s testimony, but asserts that Dr. Zaldivar’s more contemporaneous statement may be more reliable than claimant’s testimony more than two years after the events in question. Director’s Brief at 8. Employer responds, asserting that none of the evidence identified by the Director directly undermines claimant’s credible testimony. Employer’s Response Brief at 7-11. Claimant also responds, similarly asserting that the evidence identified by the Director is not dispositive. Claimant’s Response Brief at 6-11. Claimant notes that, contrary to the Director’s contention, Dr. Zaldivar clarified that claimant had been working in an office as a trainer for safety “since August or so approximately.” Claimant’s Response Brief at 9; Director’s Exhibit 29.

Act.⁷ See 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

If, on remand, the administrative law judge finds that claimant was not employed as an underground miner for WV Mine Power for at least one calendar year, she should address whether any periods of claimant's work as a safety officer constituted the work of a miner, such that claimant has a cumulative year of employment as a miner with WV Mine Power. See *Tobin v. Director, OWCP*, 8 BLR 1-115, 1-117 (1985). If the administrative law judge determines that WV Mine Power employed claimant as a miner for at least one calendar year, and that, therefore, WV Mine Power is the properly designated responsible operator, the administrative law judge should then address the merits of claimant's entitlement to benefits. See 20 C.F.R. §§725.101(a)(32), 725.493, 725.494(c). Alternatively, if the administrative law judge determines WV Mine Power did not employ claimant as a miner for a full calendar year, the administrative law judge "shall not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director." 20 C.F.R. §725.465(b). Rather, the administrative law judge should address claimant's entitlement to benefits unless the Director indicates that he has no objection to the dismissal of WV Mine Power as the responsible operator, and that he will not contest claimant's entitlement to benefits. 20 C.F.R. §725.414(a)(3)(iii); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733-34 (1985).

⁷ In light of our decision to vacate the administrative law judge's finding that employer was improperly designated as the responsible operator, we decline to address, as premature, the arguments raised by claimant on cross-appeal.

Accordingly, the administrative law judge's Order Denying Director's Motion for Partial Summary Decision and Order Denying Director's Motion for Reconsideration are vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge