U.S. Department of Labor

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

BRB No. 19-0146 BLA

CAROL TEMPLIN (o/b/o PAUL R. TEMPLIN, SR.) Claimant-Respondent v. VALLEY CAMP COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/21/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Andrea Berg and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2012-BLA-05778) of Administrative Law Judge Drew A. Swank on a subsequent claim filed on December 28, 2010 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] It is before the Board for the third time.[2]

In a February 26, 2015 Decision and Order, the administrative law judge found employer is the responsible operator. Decision and Order at 8-9. He applied the doctrine of collateral estoppel to determine a previous administrative law judge's finding of fifteen years of coal mine employment[3] was binding in this subsequent claim. *Id*. at 6-8. Because he found all of the miner's coal mine employment was at underground mines and the miner was totally disabled, he concluded claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 7-8. He further found employer did not rebut the presumption and awarded benefits. *Id*.

On employer's appeal, the Board affirmed that all of the miner's work was qualifying because it took place at underground coal mines, the miner was total disabled, and claimant established a change in an applicable condition of entitlement. *Templin v. Valley Camp Coal Co.*, BRB No. 15-0215 BLA, slip op. at 3 n.5, 6-7 (Feb. 29, 2016) (unpub.). The Board agreed with employer, however, that the administrative law judge erred in holding employer estopped from challenging the number of years the miner worked, and thus vacated the award of benefits. *Id*. The Board remanded the case for the administrative law judge to calculate the length of the miner's coal mine employment. *Id*.

[1] The miner died on September 23, 2013. Employer's Exhibit 24. Claimant, the miner's widow, is pursuing the miner's claim on behalf of his estate.

[2] We incorporate the procedural history of this case as set forth in the Board's prior decisions. *See Templin v. Valley Camp Coal Co.*, BRB No. 17-0259 BLA (Mar. 7, 2018) (unpub.); *Templin v. Valley Camp Coal Co.*, BRB No. 15-0215 BLA (Feb. 29, 2016) (unpub.).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 9.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

at 3-6. Although the Board vacated invocation of the presumption, in the interest of judicial economy it affirmed his finding that employer did not rebut it and instructed that if claimant invoked the presumption he could reinstate the award. *Id*.

In his Decision and Order on remand issued on January 12, 2017, the administrative law judge found the miner worked for employer from October 1, 1965 until September 11, 1980, when the active mine at Valley Camp Mine No. 3 closed. Decision and Order on Remand at 4-6. He calculated the miner worked a total of fourteen years and 346 days in coal mine employment for employer. *Id*. He further found the miner thereafter worked for "close to a year" as a coal truck driver loading coal at the tipple and hauling it offsite, but determined none of this work constituted the work of a miner under the Act. *Id*. Thus he found claimant did not invoke the Section 411(c)(4) presumption because she established "19 days less than the statutorily-relevant 15 years." *Id*. He further found claimant did not establish pneumoconiosis under 20 C.F.R. Part 718 without the benefit of the Section 411(c)(4) presumption and denied benefits. 20 C.F.R. §718.202(a).

On claimant's appeal, the Board held that the miner's work as a coal hauler after September 11, 1980 constituted the work of a miner under the Act. *Templin v. Valley Camp Coal Co.*, BRB No. 17-0259 BLA, slip op. at 3-8 (Mar. 7, 2018) (unpub.). It thus vacated his finding that claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits. *Id*. The Board instructed him on remand to calculate the length of the miner's employment as a coal hauler, and add that time to the fourteen years and 346 days of coal mine employment claimant already established. *Id*.

In his Decision and Order on second remand, which is the subject of this appeal, the administrative law judge credited the miner with a total of fifteen years and 346 days of underground coal mine employment. He therefore determined that claimant invoked the Section 411(c)(4) presumption and reinstated the award.

On appeal employer argues the administrative law judge erred in calculating the miner's coal mine employment and in finding it is the responsible operator. Claimant and the Director, Office of Workers' Compensation Programs (the Director) respond in support of the award of benefits. The Director also asserts employer waived its responsible operator argument.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Length of Coal Mine Employment

Claimant bears the burden of proof to establish the number of years the miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination if based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge reiterated that the miner had fourteen years and 346 days of coal mine employment with employer until the mine at Valley Camp Mine No. 3 closed on September 11, 1980. Decision and Order on Second Remand at 5-6. Pursuant to the Board's instructions, he calculated the time period the miner worked as a coal hauler after September 11, 1980. *Id*. Claimant testified the miner did this work for "close to a year." Hearing Transcript at 17. Dr. Saludes indicated in his report that the miner "delivered coal" from 1970 to 1981 in addition to his "normal coal mine work." Director's Exhibit 16 at 51. Dr. Altmeyer stated that after the miner worked for employer, he "drove his own truck for about one year hauling coal (but was not employed by the coal company)." Director's Exhibit 1 at Director's Exhibit 35.

Contrary to employer's argument, the administrative law judge permissibly found claimant's testimony credible and supported by the opinions of Drs. Saludes and Altmeyer.[5] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (holding administrative law judge evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order on Second Remand at 5-6; Employer's Brief at 6-16. We thus affirm as supported by substantial evidence his findings that the miner's year of coal mine employment after September 11, 1980, when added to his previous employment of fourteen years and 346 days, establishes greater than

[5] We reject employer's assertion that the administrative law judge failed to consider other relevant evidence on this issue. Employer's Brief at 6-16. In his January 12, 2017 Decision and Order, the administrative law judge addressed the miner's employment history forms, a written statement from employer, a letter from the United Mine Workers of America, Social Security Administration records, and claimant's hearing testimony. Decision and Order on Remand at 4-6. The administrative law judge relied on this evidence to find the miner's last day of employment with employer was September 11, 1980 and permissibly relied on additional evidence, including claimant's testimony, to find that the miner thereafter worked for "close to a year" as a coal hauler. *Id.*

fifteen years of underground coal mine employment. *Kephart*, 8 BLR at 1-186. We therefore affirm the award of benefits in the miner's claim.

Responsible Operator

The responsible operator is the "potentially liable operator"[6] that most recently employed the miner for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the Director identifies a potentially liable operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c).

Employer argues for the first time in this appeal that to the extent the administrative law judge found the miner was self-employed for one year as a coal hauler, the administrative law judge erred in finding employer is the responsible operator because another potentially liable operator more recently employed the miner. Employer's Brief at 16-18. As the Director notes, however, employer did not raise this argument previously, either before the administrative law judge, or before the Board in its prior appeal or in a cross-appeal of claimant's appeal. Director's Brief at 4.

We note further employer had ample notice of this issue. Claimant testified at the hearing that the miner was self-employed as a coal hauler for "close to a year." Hearing Transcript at 17. When the Board first remanded this case, it instructed the administrative law judge to address whether claimant's testimony established additional coal mine employment. *Templin*, BRB No. 15-0215 BLA, slip op. at 5 n.9. Claimant argued on remand that the testimony established an additional year of coal mine employment. Claimant's Closing Brief on First Remand at 5. Employer, however, did not raise the responsible operator argument before the administrative law judge in any of its closing briefs. Employer's Closing Brief; Closing Brief on First Remand; Closing Brief on Second Remand. Nor did it raise this argument in the prior appellate proceedings before the Board. Accordingly, employer has waived this responsible operator argument and we decline to address it. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995); *Verderane v. Jacksonville Shipyards, Inc.*,

[6] To meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, it must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and it 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).

14 BRBS 220.15, 226 (1981), *aff'd on other grounds*, 772 F.2d 775 (11th Cir. 1985); *Burbank v. K.G.S., Inc.*, 13 BRBS 467, 468 (1981).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge