U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0144 BLA

CHESTER NAPIER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MOUNTAIN RIDGE MINING COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 01/15/2016
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Scott R. Morris, Administrative Law Judge, United States Department of Labor

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Michele 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, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (13-BLA-5319) of Administrative Law Judge Scott R. Morris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on September 27, 2010.[1]

After crediting claimant with at least ten years of coal mine employment,[2] the administrative law judge found that the evidence established the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that claimant established that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge finally found that employer is the responsible operator. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues only that the administrative law judge erred in designating it as the responsible operator.[3] The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that the case must be remanded for reconsideration of the responsible operator issue, because the administrative law judge did not make a specific finding as to whether employer proved that claimant did not have at least 125 working days with employer. Further, the Director

[1] Claimant filed two previous claims for benefits, both of which were finally denied. Director's Exhibits 1, 2.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Employer does not challenge the administrative law judge's determination that claimant is entitled to benefits, or his finding that claimant's employment relationship with employer lasted for more than one calendar year. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

argues that, even if the administrative law judge, on remand, finds that claimant did not work at least 125 days with employer, the administrative law judge should consider evidence which, the Director asserts, demonstrates that employer is the successor to other coal mine operators that employed claimant. Claimant has not filed a response brief.

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. 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).

Employer challenges its designation as the responsible operator,[4] contending that it did not employ claimant for the requisite number of working days. Employer's Brief at 3-4. The regulations impose liability for the payment of benefits on the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[5] 20 C.F.R. §§725.494(c), 725.495(a)(1). A "year" is defined as "one calendar year . . . 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.'"[6] 20 C.F.R. §725.101(a)(32). Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). Here, it is undisputed that claimant was most recently employed with employer for at least one calendar year. Thus, the burden shifted to employer to establish that claimant did not work 125 working days. *See* 20 C.F.R. §725.101(a)(32)(ii).

---

[4] In its post-hearing brief, the Director, Office of Workers' Compensation Programs (the Director), argued that, in claimant's 2002 claim, employer stipulated that it was the responsible operator, and that stipulation was binding on employer in the adjudication of this subsequent claim. Director's Post-Hearing Brief at 6-7. The administrative law judge, however, found that the 2002 claim record did not reflect a stipulation by employer that it was the responsible operator. Decision and Order at 20 n.31. The Director does not challenge this aspect of the administrative law judge's decision. Accordingly, we do not address the issue.

[5] The remaining criteria for a potentially liable operator, set forth at 20 C.F.R. §725.494(a),(b),(d),(e), are not at issue.

[6] A working day is "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." 20 C.F.R. §725.101(a)(32).

The administrative law judge found that the record evidence established that claimant worked for employer for more than one year, and that employer had "not met its burden to show otherwise." Decision and Order at 20. Employer, however, contends that the administrative law judge did not address relevant evidence which, it argues, establishes that claimant worked for less than 125 days during his employment with employer.[7] The Director agrees with employer, contending that the administrative law judge "failed to make a specific finding with respect to whether . . . [c]laimant worked for a total of 125 days during that period." Director's Brief at 2. The Director notes that the "record contains evidence that, if credited, demonstrates that [claimant] worked less than 125 days for Mountain Ridge . . . ." *Id.*

We agree with employer and the Director that the administrative law judge erred in not determining whether employer was able to establish that claimant worked for less than 125 working days during his year of employment with employer. 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 during that one year period for at least 125 working 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). Here, the administrative law judge noted employer's argument that the record evidence

---

[7] Specifically, employer argues that:

> Claimant earned a total of $14,777.39 for his work for Mountain Ridge . . . in 1989 and 1990. This is insufficient to establish 125 working days according to Exhibit 610 [compiled by the Bureau of Labor Statistics]. Further, [c]laimant testified that he earned $12.50 per hour working for Mountain Ridge and worked over 58 hours per week. (Tr., p. 23). This establishes that [c]laimant made approximately $837.50 per week for Mountain Ridge (when the overtime premium is included). Thus, the records establish less than 18 weeks of actual employment with Mountain Ride [sic]. Since [c]laimant worked six days a week, the record establishes only 108 days of employment.

Employer's Brief at 3.

established less than 125 working days, but did not make a specific finding on that issue. Decision and Order at 20. Therefore, we must vacate the administrative law judge's finding that employer is the responsible operator, and remand the case for the administrative law judge to consider whether employer has satisfied its burden of establishing that claimant had less than 125 working days during his employment with employer. *See* 20 C.F.R. §725.101(a)(32)(ii).

The Director argues that even if the administrative law judge, on remand, finds that claimant did not work at least 125 days for employer when it operated the mine at which claimant worked, the administrative law judge should find that employer is the responsible operator because employer is the successor to earlier coal mine operators who employed claimant at that mine.[8] The record reflects that the Director has consistently asserted this alternative theory as a basis for finding that employer is the responsible operator.[9] The regulations provide that "[i]n any case in which an operator may be considered a successor operator, as determined in accordance with [20 C.F.R.] §725.492, any employment with a prior operator shall also be deemed to be employment with the successor operator." 20 C.F.R. §725.493(b)(1); *see also Hall*, 287 F.3d at 564-65, 22 BLR at 2-364-66. Therefore, we instruct the administrative law judge to consider, if necessary, the Director's argument that employer is the responsible operator because, as a successor operator, it employed claimant for at least one year during which claimant had 125 working days. The administrative law judge should make a specific finding on that issue, if reached.

---

[8] The Director asserts that:

> The record contains evidence that Mountain Ridge is a successor to several other coal mine operators that employed [claimant], most recently LAR Coal from 1986 to 1988. DX 1. If the [administrative law judge] credits that evidence, any such employment must be imputed to Mountain Ridge and that company will have met the one year employment requirement. 20 C.F.R. 725.493(b)(1).

Director's Response Brief at 2.

[9] In a Proposed Decision and Order dated November 2, 2012, the district director found that Mountain Ridge "is considered a Successor Operator to LAR Mining Incorporated which employed the miner from 1986 to 1988." Director's Exhibit 26. In its Post-Hearing Brief before the administrative law judge, the Director asserted that "Mountain Ridge should be considered a successor operator to LAR Mining which employed the miner from 1986 [to] 1988." Director's Post-Hearing Brief at 9.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge