BRB No. 07-0895 BLA

B.D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
J.J. COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE GROUP	)	DATE ISSUED: 07/23/2008
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-5204) of Administrative Law Judge Alice M. Craft rendered on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Upon stipulation of the parties, the administrative law judge credited claimant with at least twenty-four years of coal mine employment, and determined that employer was the properly designated responsible operator pursuant to 20 C.F.R. §§725.492, 725.493(b)(1), because it was the operator that most recently employed claimant. The administrative law judge found that new evidence submitted in support of this subsequent claim was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and thus sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the weight of the evidence was sufficient to establish the existence of both simple and complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.304, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c), 718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer does not challenge claimant's entitlement to benefits,[1] but contends that the administrative law judge erred in finding it to be the properly designated responsible operator, and asserts that liability should be assumed by the Black Lung Disability Trust Fund (the Trust Fund). Employer also challenges the administrative law judge's admission of evidence, which was proffered by the Director, Office of Workers' Compensation Programs (the Director). Claimant responds, urging affirmance of the award of benefits. The Director has also responded, conceding that the administrative law judge erred in admitting certain documentary evidence and witness testimony at the hearing pertaining to the liability of a potentially liable operator, but argues that remand of this case is appropriate for the administrative law judge to reconsider the responsible operator designation. Employer has replied in support of its position.

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,

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and entitlement to benefits pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204, 718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[2] 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).

Turning first to the evidentiary issue, employer maintains that the administrative law judge erred in allowing the Director to submit evidence regarding the potential liability of a responsible operator in violation of the twenty day rule pursuant to 20 C.F.R. §725.456(b)(2), because the Director failed to establish "good cause" for its late submission. The Director agrees that the evidence should not have been admitted into the record at the hearing, but maintains that the real error was that the administrative law judge did not require a showing of "extraordinary circumstances" for the admission of such documentary evidence and witness testimony, as provided under 20 C.F.R. §§725.456(b)(1), 725.414(c). The Director's arguments have merit.

The regulations explicitly require that, unless documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator is submitted to the district director, such evidence "*shall not* be admitted into the hearing record in the absence of *extraordinary circumstances*." 20 C.F.R. §725.456(b)(1) (emphasis added). Similarly, absent notice to the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator, the testimony of such a witness "*shall not* be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to *extraordinary circumstances*." 20 C.F.R. §725.414(c) (emphasis added). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See generally Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004)(evidentiary limitations set forth in the regulations are mandatory, and as such, they are not subject to waiver). As the Director concedes that extraordinary circumstances have not been shown, the documentary evidence contained at Director's Exhibits 59-61,[3] as well as the hearing testimony of Gladys Funk and Troy Wright[4] with

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 9.

[3] The Director sought to admit payroll records and notes; the Kentucky New Hire Reporting Form; and 1999 IRS payroll filings, all regarding Wright Coal Company, the purported successor operator to J.J. Coal Company. Director's Exhibits 59, 60, 61.

[4] The Director called hearing witnesses Gladys Funk, Wright Coal Company's independent bookkeeper, and Troy Wright, the owner of Wright Coal Company.

regard to the issue of operator liability, are inadmissible. *See* 20 C.F.R. §725.456(b)(1); 725.414(c); Decision and Order at 2; Transcript at 51. Consequently, because the administrative law judge relied in large part upon inadmissible evidence and testimony, we vacate her finding that employer was properly designated the responsible operator herein.

Employer next contends that the admissible evidence of record establishes that Wright Coal Company (Wright) should have been retained and held liable for potential benefits as a successor operator pursuant to Section 725.492(a), and that liability should therefore transfer to the Trust Fund because the Director failed in his duty to investigate and assess liability against the proper responsible operator. The Director disagrees, arguing that if employer cannot prove that claimant actually worked for Wright after he worked for employer, then employer remains primarily liable, even though Wright qualifies as a successor operator. *See* 20 C.F.R. §§725.495(c), 725.493(b)(1). The Director maintains that the record contains conflicting evidence on the responsible operator issue, and urges the Board to remand this case for the administrative law judge to reconsider the issue based solely on the evidence that was properly submitted to the district director. We agree with the Director's position.

Employer's wage records reflect claimant's earnings through March 5, 1999. Director's Exhibit 6. Claimant's Social Security Administration (SSA) records indicate that claimant worked from 1992-1994 and from 1998-1999 for employer, and also show 1999 earnings from Wright in the amount of $344.50. Director's Exhibits 8, 9. The district director designated employer as the responsible operator in a Proposed Decision and Order (PDO). Director's Exhibits 20, 22, 36. Employer filed a Motion for Reconsideration in which it disputed its designation as the responsible operator, and asserted, based on claimant's deposition testimony, that claimant last worked for Wright, and that Wright was a successor operator[5] under the regulations. *See* 20 C.F.R. §725.492(a); 20 C.F.R. §725.493(b)(1); Director's Exhibits 18 at 8; 38.

Claimant testified in his deposition that he worked one or two days for Troy Wright, "the guy who took over the mines," but never got paid. Director's Exhibit 18 at 9. Claimant's SSA records indicate that he was paid $344.50 in 1999 by Wright. Based

[5] In the successor operator context, employment with the prior operator is "also deemed to be employment with the successor operator." 20 C.F.R. §725.493(b)(1). Therefore, if both companies have the financial ability to pay benefits as required by 20 C.F.R. §725.494(c), (e), the designation of the responsible operator turns on whether the miner actually worked for the successor operator. 20 C.F.R. §725.493(b). If the miner was not independently employed by the successor operator, the prior operator remains primarily liable. 20 C.F.R. §725.493(b)(1).

on this evidence, the district director issued a new Notice of Claim identifying Wright as a potentially liable operator. Director's Exhibit 42. Wright disputed its liability, and submitted payroll records, which indicated that while Wright issued a check to claimant in the amount of $344.50 for his final day's work, this was work performed while claimant was still employed by employer. Director's Exhibits 44, 45, 47. The district director issued a Revised PDO dismissing Wright as a party to the claim and designating employer as the responsible operator. Director's Exhibit 49. Employer requested a hearing, alleging that there was a successor relationship between employer and Wright and, therefore, Wright was the correct responsible operator. Director's Exhibit 51. While the case was still before the district director, Wright submitted a statement from Gladys Funk, self-employed accountant and bookkeeper for Wright, stating that to the best of her knowledge, claimant was never employed by Wright and the wages paid to claimant were for his employment with employer.[6] Director's Exhibit 54. The district director then transferred the case to the administrative law judge. Director's Exhibit 56.

The Director maintains that, while claimant's deposition testimony and SSA records could support a finding that claimant actually worked for Wright, the documentary evidence submitted by Wright to the district director could, if credited, support a finding that claimant was never independently employed by Wright, and that the 1999 payment claimant received from Wright was for work performed as an employee of employer. The Director additionally notes that claimant's written statements from his original claim, supported by a statement from employer's bookkeeper, Geneva Stiltner, indicate that claimant was last employed by employer on April 30, 1999. *See* Director's Exhibits 1-60, 1-84. As the evaluation of this conflicting evidence is a matter for the consideration of the administrative law judge, we remand this case for the administrative law judge to determine if the evidence properly submitted before the district director is sufficient to support a finding that claimant last worked for Wright, as the successor operator to employer. If the administrative law judge finds the evidence insufficient to support such a determination, then employer remains liable as the named responsible operator. 20 C.F.R. §725.495(c)(2). Should the administrative law judge find the evidence sufficient to support a determination that claimant last worked for Wright, as the successor operator to employer, then liability may properly transfer to the Trust Fund. *See Kentland Elkhorn Coal Co. v. Hall*, 287 F.3d 555, 22 BLR 2-349 (6th Cir. 2002).

[6] The district director issued its Notice of Claim on June 10, 2004, in which it identified Wright as a potentially liable operator. Director's Exhibit 42. Pursuant to 20 C.F.R. §725.408, Wright had 30 days to contest its designation and 90 days to submit documentary evidence in support of its position. 20 C.F.R. §725.408(a)(1), (b)(1). Wright contested its liability on July 2, 2004, and submitted evidence in support of its position on July 14, 2004 and on August 23, 2004. Director's Exhibits 44, 54.

Accordingly, we affirm the administrative law judge's award of benefits, but vacate the administrative law judge's responsible operator determination, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge