U.S. Department of Labor

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

BRB No. 17-0529 BLA

GARREN W. MCGLOTHLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREASY CREEK COAL COMPANY	)	
	)	DATE ISSUED: 07/30/2018
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND, C/O AMERICAN MINING SERVICES	)	
	)	
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 of William T. Barto, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05758) of Administrative Law Judge William T. Barto 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 claim filed on August 16, 2013.

In his Decision and Order, the administrative law judge found that claimant is entitled to benefits. The administrative law judge further designated employer as the responsible operator, and determined that its insurance carrier, the West Virginia Coal Workers' Pneumoconiosis Fund (CWP Fund), is responsible for the payment of benefits.

On appeal, employer argues that the administrative law judge erred in identifying it as the responsible operator. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief.[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 rational, supported by substantial evidence, 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).

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). An operator is a "potentially liable operator" if the miner was employed by the operator, or any person with respect to which the operator may be considered a successor, for a cumulative period of not less than one year, and the operator is financially capable of assuming liability for the claim.[3] 20 C.F.R. §725.494(c), (e). Once a potentially

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[1] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Hearing Transcript at 19. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death arise at least in part out of employment with that operator; the operator, or any person with respect to which the operator may be considered a successor, was an operator for any

liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another potentially liable operator more recently employed the miner for at least one year and is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

The administrative law judge noted that employer contended that it was not financially capable of assuming liability for benefits. Because employer filed for bankruptcy in 1995,[4] it could only be found financially capable of paying benefits if it had insurance coverage for black lung benefits on the last day of claimant's coal mine employment. *See* 20 C.F.R. §726.203(a);[5] *Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 505 n.4 (4th Cir. 1995); *Westmoreland Coal Co. v. Director, OWCP* [*Quillen*], 696 F. App'x 604, 608 (4th Cir. June 7, 2017) (unpub.). The CWP Fund acknowledged that it provided black lung insurance coverage for employer from April 1, 1989 through June 18, 1995. However, the CWP Fund argued that it is not responsible for the payment of benefits because claimant worked as a miner for employer after its coverage ended on June 18, 1995. Thus, the sole issue before the administrative law judge was whether claimant worked as a miner for employer after its insurance coverage with the CWP Fund terminated on June 18, 1995.

The definition of "miner" comprises a "situs" requirement (i.e., that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the claimant worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). To satisfy the function requirement, work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 42; *Whisman*, 8 BLR at 1-97.

The administrative law judge noted that employer ceased coal production in June of 1995, but claimant, as a part owner of the company, "had an ownership interest in selling

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period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

[4] Employer filed for, and was granted, Chapter 7 bankruptcy in 1995. Claimant's Exhibit 1.

[5] Insurance coverage for black lung benefits exists only if the insurance policy is in effect on the last day of the miner's exposure to coal dust while employed by the insured. 20 C.F.R. §726.203(a).

the machinery and equipment on the property." Decision and Order 6-7. The administrative law judge summarized claimant's deposition testimony regarding the actions he took after employer ceased coal production in June of 1995:

> Claimant testified that the [e]mployer stopped "actually producing" coal in June [of 1995] but that he stayed on until August and "kind of shaped things up and did some things that [were] necessary." The mine permanently shut down in June. Claimant further explained that he only owned the equipment; while another company, Consolidation Coal, owned the actual site and the minerals. He explained that in working after the shutdown, "[m]ainly I was trying to get everything ready so I could, you know, get rid of it, sell it or whatever, prepare everything and make it more sellable." He needed to "maintain the fan." He also "made sure that . . . all those things were taken care of on a daily basis. That's one of the reasons, you know I was – to make sure that, you know, nobody didn't just come in there and rob and rogue and steal and whatever, too, you know, that was part of it." Underground, he would make sure that nothing was flooded and the roof was stable but noted that "as far as doing any maintenance work, I really didn't do that." He was "just checking on everything to make sure that nothing, no catastrophic event was going on." Between his underground and aboveground checks, [c]laimant was at the site "basically every day except weekends." At some point after the mine closed, [c]laimant sold the equipment and structures "as is" to Consolidation Coal.

Decision and Order at 6-7 (footnotes omitted).

The administrative law judge found that claimant's "monitoring of the property for damage and 'catastrophic events' in the context of an inactive mine was not integral to coal extraction and preparation – it was integral to preserving his own property interest." Decision and Order at 8. The administrative law judge further found that "[b]ecause the mine was shut down, [claimant's] acts could in no way be integral to the process of extracting and preparing coal." *Id.* Thus, the administrative law judge concluded that claimant "was merely acting as an interested property owner rather than a coal miner" after June 18, 1995. *Id.* at 7.

Employer argues that the administrative law judge erred in finding that claimant did not perform the work of a miner for employer after June 18, 1995. Specifically, employer argues that "the daily maintenance and inspection [that] claimant performed for [employer] remained an integral part of the overall coal extraction process." Employer's Brief at 8. We disagree. The administrative law judge found that claimant's uncontradicted testimony established that the tasks that he performed at the inactive mine site after June 18, 1995

were solely to protect his own personal property so that it could later be sold, not to assist in the extraction or preparation of coal. Because it is supported by substantial evidence, we affirm the administrative law judge's permissible finding that claimant's work for employer after June 18, 1995 does not satisfy the function test, and therefore was not the work of a miner.[6] *Krushansky*, 923 F.2d at 41-42; *Bower*, 642 F.2d at 70.

Because the administrative law judge found that the CWP Fund provided black lung insurance coverage on June 18, 1995, the last day of claimant's coal mine employment with employer, we affirm his designation of employer as the responsible operator and his designation of the CWP Fund as the responsible carrier.[7] Decision and Order at 8.

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[6] Citing 20 C.F.R. §725.202(a), employer asserts that it is entitled to a presumption that claimant's activity after June 18, 1995 was that of a miner. Employer's Brief at 8. Section 725.202(a) sets forth a rebuttable presumption that "any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). The regulation, however, provides that the "presumption may be rebutted by proof that the person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site." 20 C.F.R. §725.202(a)(1). Thus, the administrative law judge, in crediting claimant's uncontradicted testimony that his activities after June 18, 1995 did not assist in the extraction or preparation of coal, effectively found that the Section 725.202(a) presumption was rebutted. Decision and Order at 7-8.

[7] Because we have affirmed the administrative law judge's permissible finding that claimant did not perform the work of a miner for employer after June 18, 1995, we need not address employer's contention that the administrative law judge also erred in finding that claimant was not "employed" by employer after June 18, 1995. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 4-6.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge