U.S. Department of Labor

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

BRB No. 18-0558 BLA

STEVIE PENNINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COLA COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 07/12/2019
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

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: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05622) of Administrative Law Judge Morris D. Davis on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on June 1, 2015.

The administrative law judge credited claimant with 13.72 years of coal mine employment and found employer is the properly designated responsible operator. He also found the medical evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found claimant established that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it is the operator responsible for the payment of benefits, asserting it employed claimant for less than one year.[1] The Director, Office of Workers' Compensation Programs (the Director), urges affirmance. Claimant did not file a response.[2]

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

[1] Employer filed a supplemental brief on May 21, 2019, objecting to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*) because the revived provisions violate Article II of the United States Constitution. Employer's Supplemental Brief at 1. As employer did not raise this contention in its Petition for Review and brief, the Board will not address it. 20 C.F.R. §§802.211, 802.215; *see Williams v. Humphreys Enters., Inc.* 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[2] We affirm, as unchallenged on appeal, the administrative law judge's award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act 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). In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," it must have employed the miner for a cumulative period of not less than one year.[4] 20 C.F.R. §725.494(c). The Director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once a potentially liable operator has been identified by the Director, it may be relieved only if it proves either that it is financially incapable of assuming liability for benefits, or that another financially-capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

If a successor relationship is established, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a).

Here, the district director initially designated Sammy Joe Enterprises, Inc. (Sammy Joe) as the potentially liable operator. Director's Exhibit 22. Sammy Joe challenged this designation and submitted documentation to support its position, including claimant's August 24, 2015 deposition where he testified that in 1992-1994 he worked first for Sammy Joe and then for Cola Coal Company (Cola Coal or employer) but that these were the same company under different names: the two mines were operated by the same individual, Mr.

[3] Because claimant's last coal mine employment was in Virginia, 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); Director's Exhibit 3.

[4] The regulation at 20 C.F.R. §725.494 further requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator or its successor must have been in business after June 30, 1973; at least one day of the employment must have occurred after December 31, 1969; and the operator 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).

James Ball, and the jobsite and his duties remained the same.[5] Director's Exhibit 35 at 31-35, 38-39. Based on this information, the district director released Sammy Joe from further liability and notified employer that as the successor company to Sammy Joe it was potentially liable for the claim.[6] Director's Exhibits 45-46. Employer responded, generally challenging its liability. Director's Exhibit 58. The district director ultimately found claimant entitled to benefits and assigned liability for payment of benefits to employer. Director's Exhibits 59, 64. Employer filed a timely request for a hearing, and the case was transferred to the Office of Administrative Law judges.

In finding that employer, Cola Coal, is the responsible operator, the administrative law judge determined it is a successor company to Sammy Joe and claimant's periods of employment with the two must be aggregated. Decision and Order at 4-5. We find no merit in employer's challenge to that determination.

The administrative law judge correctly noted that claimant wrote on his employment history form, CM-911a, that he worked for Mr. James Ball at Sammy Joe in Keokee, Virginia in 1992 and then worked for Mr. James Ball at Cola Coal in Keokee, Virginia from 1992 through 1994. Decision and Order at 14; Director's Exhibit 3. Claimant also drew a line connecting the two companies and wrote "same mine changed name." *Id*. The administrative law judge found this information consistent with claimant's Social Security Administration (SSA) earnings record, documenting employment with Sammy Joe in 1992-1993 and Cola Coal in 1994. Decision and Order at 14-15; Director's Exhibit 5. The administrative law judge further noted claimant's SSA earnings record showed the two companies sharing the same post office box number in Wise, Virginia. *Id*.

The administrative law judge also considered claimant's August 24, 2015 and July 24, 2017 deposition testimony, and March 15, 2018 hearing testimony, finding it "essentially the same." Decision and Order at 17-18. Specifically, claimant testified he was laid off at Sammy Joe for a week or two and when he returned the name of the company

[5] Counsel for Sammy Joe Enterprises, Inc. (Sammy Joe) notified the district director that according to the Virginia State Corporation Commission, corporate records for Sammy Joe were purged on September 30, 2002 and are no longer available. Director's Exhibits 28 at 3; 33 at 1. The administrative law judge determined that the State Corporation Commission website confirmed this information. Decision and Order at 15 n.10.

[6] Counsel for Sammy Joe submitted documentation showing Cola Coal Company (Cola Coal or employer) was insured by Employers Insurance of Wausau during the time period it employed claimant, and was thus financially capable of assuming liability for the payment of benefits. Director's Exhibit 60; 20 C.F.R. §725.494(e)(1).

had changed to Cola Coal, but it was the same mine, with the same crew and the same supervisor as before. Decision and Order at 17-18; *see* Director's Exhibit 35; Employer's Exhibit 1; Hearing Tr. at 17-19. Claimant testified: "The only thing that really changed was the name. They gave us a new hat." Hearing Tr. at 17-18.

While employer generally challenged its liability, it submitted no evidence refuting it is the successor to Sammy Joe, aside from claimant's July 24, 2017 deposition which, the administrative law judge found, essentially reiterates his other testimony.[7] Decision and Order at 17-18; *see* Employer's Exhibit 1. Thus, contrary to employer's argument, the administrative law judge permissibly credited claimant's uncontradicted testimony, supported by his SSA earnings record, to find employer a successor operator to Sammy Joe and the properly named responsible operator.[8] *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *see* 20 C.F.R. §§725.101(a)(32), 725.103, 725.492(a), 725.494(c); Decision and Order at 18. As substantial evidence supports the administrative law judge's findings, they are affirmed.

[7] On July 24, 2017 claimant testified he worked for Mr. James Ball at Sammy Joe; the mine closed for a week or two and when it reopened the name had changed to Cola Coal. Decision and Order at 17; Employer's Exhibit 1 at 13. The mine was still owned by Mr. James Ball and it employed the same miners who went in and out through the same entrance, used the same equipment, and worked under the same supervisor, Claude Street, who was the brother-in-law of James Ball. *Id.* at 13-15. The only difference claimant noted was that he got a new hat. *Id.* at 15.

[8] Employer does not contest this finding. Director's Exhibits 50, 58; Employer's Exhibit 1. As there was no subsequent coal mine employment, the district director determined Cola Coal, as the successor to Sammy Joe, is liable for this claim. Director's Exhibits 59, 64. Given that the Commonwealth of Virginia purged the corporate records for Sammy Joe, the administrative law judge concluded "[i]t is unclear what more the District Director could have done to investigate and document the relationship between the two companies." Decision and Order at 15 n.10, 18. Employer does not identify any action the district director could and should have undertaken, and offers no explanation for its failure to submit any evidence contrary to the district director's proposed finding when given the opportunity to do so.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge