BRB No. 99-0202 BLA

TOM MIX PICKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAWLEY COAL MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Philip A. LaCaria (Law Office of Philip A. LaCaria), Welch, West Virginia, for claimant.

Stephen E. Crist (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

Robert J. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Employer/Carrier's Motion to be Dismissed and Remanding Case to the District Director for Payment of Benefits (98-BLA-0133) of Administrative Law Judge Daniel F. Sutton on a 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). Initially, the administrative law judge accepted the parties' stipulation that claimant was a coal miner within the meaning of the Act, that he worked after December 31, 1969 and that there was one dependent for purposes of augmentation. The administrative law judge also accepted the stipulation that Hawley Coal Mining Company (Hawley Coal) has secured payment for any benefits for which it may be liable through the West Virginia Coal-Workers' Pneumoconiosis Fund (the Fund) and that the West Virginia Department of Energy (WV DOE) has not operated any coal mine after June 30, 1973. In determining the length of claimant's coal mine employment, the administrative law judge found that claimant's seven years as a state mine inspector for the WV DOE constituted qualifying coal mine employment and also that claimant's eight years as a bulldozer operator in reclamation work for the West Virginia Department of Natural Resources constituted qualifying coal mine employment. Therefore, the administrative law judge credited claimant with a total of thirty-six years of coal mine employment, which included claimant's twenty-one years of coal mine employment with private employers, as credited by the district director, and the above-mentioned fifteen years of employment for the State of West Virginia. The administrative law judge further found that the WV DOE was the last employer for which claimant worked at least one year and since there was no other contentions that the WV DOE did not otherwise satisfy the requirements of 20 C.F.R. §725.492(a),[1] the administrative law judge concluded that the WV DOE satisfied the requirements of Section 725.492(a) as responsible operator. Consequently, the administrative law judge dismissed Hawley Coal and its carrier, the Fund, as the putative responsible operator. Moreover, the

[1] The administrative law judge found that the stipulation that the WV DOE did not operate a mine after June 30, 1973, *see* 20 C.F.R. §725.492(a)(2), was not a sufficient basis to find that the WV DOE did not meet the requirements of a responsible operator.

administrative law judge found that as the Office of Worker's Compensation Programs (OWCP) did not name the WV DOE as a possible responsible operator, and, since Hawley Coal, the only named responsible operator, had been dismissed, the Black Lung Disability Trust Fund (Trust Fund) was liable for benefits. Lastly, the administrative law judge found that OWCP did not challenge entitlement on the merits. Accordingly, the administrative law judge remanded the case to the district director for continuation of benefits "since there was no controversy regarding entitlement between Claimant and OWCP."

In challenging the administrative law judge's decision to dismiss Hawley Coal and its carrier, the Fund, the Director contends that the administrative law judge erred in finding that the WV DOE was claimant's last coal mine employer meeting the requirements of Section 725.492(a). Specifically, the Director contends that the WV DOE is not capable of assuming liability for benefits as it is immune from suit under the doctrine of sovereign immunity and, therefore, does not meet the conditions precedent for being named the responsible operator. The Director requests that the Board reverse the administrative law judge's dismissal of Hawley Coal and the Fund and remand the case for further findings on the issue of entitlement. In response, the Fund, on behalf of Hawley Coal, urges affirmance of the administrative law judge's dismissal of Hawley Coal as responsible operator, contending that the WV DOE does not have protection under the doctrine of sovereign immunity because the suit is being brought under a federal government program and, thus, the doctrine of sovereign immunity is not applicable, citing *West Virginia v. United States*, 479 U.S. 305 (1987)(states are not immune from suits brought by the federal government). In addition, the Fund contends that the Director lacks standing to raise the defense of sovereign immunity on the WV DOE's behalf. The Fund further contends that it is, likewise, a state entity and has not waived its defense of sovereign immunity and, thus, also cannot be held liable as the responsible operator. In his Reply brief, the Director requests that the Board reject carrier's contention inasmuch as the state does have sovereign immunity in this case because it is the individual miner bringing suit and not the federal government and, therefore, *West Virginia v. U.S.* is not applicable. Lastly, claimant responds, stating that the responsible operator issue is properly litigated between the Director and Hawley Coal and its carrier and, therefore, claimant will not be responding in this appeal.

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

In order to be named the responsible operator under Section 725.492(a), an employer must meet the following conditions:

> (1) The miner's disability or death shall have arisen at least in part out of employment in or around a mine or other facility during the period when the mine or facility was operated by such operator, except as provided in §725.492(a)(2);
>
> (2) The operator shall have been an operator of a coal mine or other facility for any period after June 30, 1973;
>
> (3) The miner's employment with the operator or other employer shall have included at least 1 working day (§725.493(b)) after December 31, 1969; and,
>
> (4) The operator or the employer shall be capable of assuming its liability for the payment of continuing benefits under this part...

20 C.F.R. §725.492(a).

In challenging the administrative law judge's dismissal of Hawley Coal and its carrier, the Fund, the Director contends that the administrative law judge erred in finding that the proper responsible operator is the WV DOE based on his determination that the WV DOE was the employer for which claimant was last employed for at least one year and that the WV DOE meets the conditions set forth in Section 725.492(a). The Director argues that the WV DOE, as an entity of the State of West Virginia, is not capable of assuming liability for benefits under the doctrine of sovereign immunity. Specifically, the Director contends that the State of West Virginia is immune from suit by a private individual in federal court pursuant to the Eleventh Amendment to the United States Constitution and, thus, would not be capable of assuming liability for the payment of continuing benefits under Section 725.492(a)(4). The Director also argues that the WV DOE does not meet the statutory definition of a responsible operator inasmuch as it has not engaged in the commercial production of coal as required by the Act. The Fund responds, contending that the doctrine of sovereign immunity is not applicable.

We hold that the Director's contention has merit. The WV DOE cannot be named the responsible operator in this case inasmuch as the WV DOE, as a

governmental entity, is not capable of assuming liability for the payment of benefits as required by Section 725.492(a)(4) by virtue of the application of the doctrine of sovereign immunity. As the Director correctly contends, the question of whether a state government entity is immune from civil liability is controlled by the Eleventh Amendment to the United States Constitution,[2] which holds that there is no right to sue a state government entity unless express consent is given or a statutory exemption is created. Although the amendment expressly prohibits suits against states by citizens of other states and does not mention states being sued by their own citizens, the Supreme Court has long held that the Eleventh Amendment also bars suits by citizens of the state being sued. *Hans v. Louisiana*, 134 U.S. 1, 3 (1890); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779 (1991); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99, (1984). Thus, although Congress can abrogate the immunity, it must do so explicitly in the Act. *Id.* A review of the Black Lung Benefits Act reveals no such explicit abrogation, nor can one be inferred.[3] *Id.* Similarly, the WV DOE, by or through the State of West Virginia, did not voluntarily waive the protection of the Eleventh Amendment or make itself amenable to accepting liability for benefits paid pursuant to the Act. Consequently, the Eleventh Amendment precludes the imposition of liability under the Act against the WV DOE.[4] *Id.*

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[2]The Eleventh Amendment states:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI.

[3] The general applicability of the doctrine of sovereign immunity was addressed by the Board in *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2 (1981), wherein the Board held that the federal government could not be a responsible operator inasmuch as it is immune from civil liability unless it consents otherwise. *Id.* at 46. Because no provision of the Black Lung Benefits Act waives the government's immunity from suit, the federal government cannot be treated as an entity that is capable of assuming liability for the payment of benefits under the Act. *Moore, supra*; *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Patrick*], 791 F.2d 1129 (4th Cir. 1986); *Mansell v. Republic Steel Corp.*, 5 BLR 1-842 (1983).

[4] In light of our holding that the WV DOE is not capable of assuming liability

Moreover, contrary to the administrative law judge's consideration of and the Fund's reliance on, the holding in *West Virginia v. United States*, this case does not support a waiver of the doctrine of sovereign immunity in the case at bar. In *West Virginia v. United States*, the federal government, on its own behalf, brought suit against the State of West Virginia for payment of reimbursement costs incurred by the Army Corps of Engineers and for prejudgment interest on those costs. In accepting jurisdiction over the suit, the United States Supreme Court rejected the State's argument that it was not liable for the prejudgment interest inasmuch as it had not consented to the suit for the interest payments and, thus, under the doctrine of sovereign immunity could not be held liable for the interest. The Court held that states have no sovereign immunity to assert against the federal government, citing *United States v. Texas*, 143 U.S. 621 (1892). *West Virginia v. United States*, *supra* at 311. The instant case, however, is distinguishable from *West Virginia v. United States*, in that it is an individual and not the federal government which is bringing suit against the state entity. *See U.S. v. Spears*, 859 F.2d 284, 290 (3d Cir. 1988); *see also U.S. v. Chevron, USA, Inc.*, 39 F.3d 957, 963 (9th Cir. 1994)(in a *qui tam* action the federal government is the true party in interest and, thus, the Eleventh Amendment does not bar suit against the State); *U.S. v. Univ. of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 49 (4th Cir. 1992). Therefore, contrary to the Fund's contention, while the case is brought under the aegis of a federal program, the true party in interest is the miner, based on his coal mine employment and resultant injury, and not the federal government. Thus, the Court's holding in *West Virginia v. United States* does not support waiver of the doctrine of sovereign immunity with respect to the WV DOE in the case at bar.

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for benefits under 20 C.F.R. §725.492(a)(4), based on the doctrine of sovereign immunity and, thus, is not capable of being named responsible operator, we need not address the Director's contention that the WV DOE does not meet the statutory definition of responsible operator as it is not in the commercial production of coal.

We also reject the Fund's contention that the doctrine of sovereign immunity was not meant to apply in federal black lung litigation inasmuch as the Fund, a West Virginia state entity, is routinely named in federal black lung cases without the explicit language of waiver in the Act or in the West Virginia Code. Employer's Response Brief at 2. Contrary to the Fund's contention, it is not analogous to the state in its role as claimant's employer inasmuch as its involvement in federal black lung litigation is as the insurance carrier for the named employer or operator. In establishing the Fund, the West Virginia Code created an entity for the sole and explicit purpose of providing benefits, as an insurer, under Title IV of the Federal Coal Mine Health and Safety Act of 1969.[5] WV Code §23-4B-1. Consequently, the West Virginia Code provides for the waiver of immunity for the Fund inasmuch as its enabling statute provides that it was created for the sole purpose of providing an insurer for liability under the Act. *Id*.

Based on the facts of this case and the relevant regulatory provisions, we hold that the WV DOE cannot be named responsible operator inasmuch as it is not capable of assuming liability for benefits under Section 725.492(a)(4) pursuant to the doctrine of sovereign immunity, *see* discussion, *supra*. Consequently, we reverse the administrative law judge's finding that the WV DOE was claimant's last employer meeting the conditions for a responsible operator under Section 725.492(a) and his resultant dismissal of Hawley Coal and the Fund. We, therefore, reinstate Hawley Coal as the putative responsible operator. However, inasmuch as the administrative law judge has not determined whether Hawley Coal has satisfied the conditions for establishing liability as responsible operator

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[5] The West Virginia Code provides for the creation of the West Virginia Coal-Workers' Pneumoconiosis Fund under Section 23-4B-1 and states:

> The purpose of this article is to establish a fund to provide benefits to coal miners who are totally disabled by pneumoconiosis and to eligible dependents of coal miners whose deaths were due to pneumoconiosis or who were totally disabled from pneumoconiosis at the time of their deaths. The further purpose of this article is to provide a readily available insurer of liability created by Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended.

WV Code §23-4B-1.

set forth at Section 725.492(a), on remand, he must determine whether Hawley Coal meets these criteria and, thus, is the properly named responsible operator. 20 C.F.R. §§725.492(a), 725.493; *see Patrick, supra*.

Accordingly, the administrative law judge's Decision and Order Granting Employer/Carrier's Motion to be Dismissed and Remanding Case to the District Director for Payment of Benefits is reversed 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

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge