BRB No. 08-0683 BLA

R.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WORK SOURCE, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/23/2009
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Motion to Dismiss Carrier and Decision and Order Awarding Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for carrier.

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals the Order Denying Motion to Dismiss Carrier and Decision and Order Awarding Benefits (07-BLA-5287) of Administrative Law Judge Jeffrey Tureck rendered 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). The relevant procedural history of the case is as follows: Claimant filed his claim for benefits on June 6, 2005.[1] Director's Exhibit 3. On June 17, 2005, the district director sent a Notice of Claim to claimant and employer, but, based on the information on file in the Office of Workers' Compensation Programs (OWCP) indicating that employer was uninsured, the district director did not notify an insurance carrier for employer. Director's Exhibits 20, 24. The district director also issued a Notice of Claim to claimant's prior employer, Tiffany Mining (Tiffany), which was insured by carrier. Director's Exhibit 20. Carrier was served with the Notice of Claim in its capacity as the carrier for Tiffany. Director's Exhibit 20.

Employer, through counsel, filed an "objection" to the claim, asserting that employer had been dissolved and discharged in bankruptcy on January 8, 2002, but had been insured by carrier through February 29, 2000, and, thus, had coverage as of claimant's last day of employment, on or around January 29, 2000. Director's Exhibit 19. In support of its assertion, employer attached an affidavit from employer's bookkeeper, and a Certificate of Coverage from the West Virginia Bureau of Employment Programs, reflecting insurance coverage for underground coal mining and coal shaft sinking through February 29, 2000. Director's Exhibit 19. Employer did not contest claimant's entitlement to benefits.

On October 27, 2005, the district director issued a Schedule for the Submission of Additional Evidence, again describing employer as "uninsured." Director's Exhibit 25. In the liability analysis section of the accompanying October 27, 2005 Summary of Medical and Employment Evidence, the district director noted that the OWCP files reflected that employer had been insured through carrier, but that coverage had ended on January 20, 2000, prior to claimant's last day of work with employer. The district director acknowledged that this information conflicted with the insurance information submitted by employer, and he indicated that he was attempting to resolve the discrepancy. Director's Exhibit 25. The district director served claimant and employer with the Schedule for the Submission of Additional Evidence, but did not serve carrier, or otherwise notify carrier of its potential liability for payment of benefits, as insurance carrier for employer. Again, Tiffany, and carrier, in its capacity as carrier for Tiffany, were served with the Schedule for the Submission of Additional Evidence.

[1] Claimant's prior claim, filed on September 13, 2001, was withdrawn at claimant's request on February 24, 2003. Director's Exhibits 1, 13. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

On January 30, 2006, the district director issued a Proposed Decision and Order awarding benefits, Director's Exhibit 29, and on February 1, 2006, he issued an amended Proposed Decision and Order awarding benefits, which included a dependent child. Director's Exhibit 33. In the liability analysis section of both proposed decisions, the district director again acknowledged the discrepancy between the OWCP insurance records and the insurance information provided by employer. However, the district director stated that, based on the letter of insurance coverage employer had provided, he designated employer as the responsible operator for this claim,[2] and dismissed Tiffany as a potential responsible operator. Director's Exhibits 26, 33. The district director served carrier, in its capacity as carrier for Tiffany, with the January 30, 2006 Proposed Decision and Order dismissing Tiffany. Director's Exhibits 29, 36. Despite the district director's reliance on employer's insurance coverage information, the district director did not notify carrier of its liability for benefits as the insurance carrier for employer.

A Proposed Decision and Order becomes final thirty days after the date of its issuance, unless a party timely requests a revision of the Proposed Decision and Order, or a hearing. *See* 20 C.F.R. §725.419(a), (d). The record does not reflect that any party filed a response to the February 1, 2006 Proposed Decision and Order within thirty days.

The next activity reflected in the record occurred when, by letter dated March 8, 2006, the district director informed carrier's counsel that OWCP had information that employer had been insured by carrier through February 29, 2000, and asked whether carrier "will be a party to this claim." Director's Exhibit 37.

On March 27, 2006, the district director issued a new Notice of Claim, finding that employer was insured by carrier. Director's Exhibit 38. The district director served claimant, employer, and carrier with the new Notice. Subsequently, on July 3, 2006, the district director issued a new Schedule for the Submission of Additional Evidence, naming and serving claimant, employer, and carrier.

By letter to the district director dated July 5, 2006, claimant's counsel asked that claimant's February 1, 2006 award of benefits be forwarded to OWCP's Enforcement Section, as nearly six months had passed since the award of benefits had become final, and claimant had yet to receive any benefits. Director's Exhibit 45. Claimant sent a copy of his request for enforcement to carrier.

[2] The regulations provide, in pertinent part, that a potentially liable operator must be capable of assuming its liability for the payment of benefits, and such capability will be assumed if (1) the operator has an insurance policy that covers the claim, (2) the operator qualifies as a self-insurer, or (3) the operator possesses sufficient assets to secure the payment of benefits. *See* 20 C.F.R. §725.494(e)(1)-(3).

On July 7, 2006, carrier objected to the enforcement against carrier of claimant's February 1, 2006 award of benefits. Carrier asserted that the Proposed Decision and Order named employer as the operator responsible for payment, and that carrier was "not named as the insurer or, in any way, implicated as the party responsible for payment of benefits," and, moreover, "was not apprised of any potential liability for payment of benefits until March 8, 2006, more than a month after the Proposed Decision and Order was issued." Director's Exhibit 44.

On October 3, 2006, the district director issued a new Proposed Decision and Order awarding benefits, designating carrier as the insurance carrier for employer. By letter dated October 6, 2006, carrier contested all elements of entitlement. Director's Exhibit 51. At carrier's request, the district director forwarded the case to the Office of Administrative Law Judges for a hearing. Director's Exhibit 51, 57.

On May 15, 2007, carrier moved to be dismissed as the responsible carrier, asserting that the February 1, 2006 award of benefits did not name carrier as a responsible party, and that carrier's due process rights were violated by the district director's failure to notify carrier of its potential liability until after the award became final. The Director, Office of Workers' Compensation Programs (the Director), opposed the motion, asserting that the district director's failure to serve carrier with either the January 30, 2006 Proposed Decision and Order, or the February 1, 2006 amended Proposed Decision and Order, rendered the Orders "procedurally defective," and thus "not legally valid" and "not final." The Director further contended that carrier's due process rights had been protected by the district director's issuance of the new Notice of Claim on March 27, 2006, which properly notified carrier and afforded carrier the right to mount a meaningful defense to claimant's claim for benefits.

In an Order dated August 8, 2007, the administrative law judge denied employer's motion. The administrative law judge initially found that, contrary to the Director's assertion, the February 1, 2006 Proposed Decision and Order awarding benefits became final on March 3, 2006, thirty days after its issuance. Order Denying Motion to Dismiss Carrier at 2. The administrative law judge further found, however, that the issuance of a new Notice of Claim on March 27, 2006 constituted the initiation of modification proceedings by the district director, pursuant to 20 C.F.R. §725.310, and "did not result in any prejudice to [carrier]." Order Denying Motion to Dismiss Carrier at 3. Thus, the administrative law judge concluded that the district director's designation of carrier on March 27, 2006 was proper. Order Denying Motion to Dismiss Carrier at 3. Carrier requested reconsideration, which was denied by the administrative law judge in an Order dated September 13, 2007. At the hearing before the administrative law judge, and in its post-hearing brief, carrier continued to contest its designation as the responsible carrier.

In a Decision and Order dated June 11, 2008, the administrative law judge credited claimant with 29.1 years of coal mine employment[3] and found that claimant established the existence of complicated pneumoconiosis and therefore was entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 10. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Additionally, the administrative law judge found that carrier was correctly designated as the responsible carrier for this claim, as the evidence established that employer's policy with carrier provided coverage to employer for federal black lung claims, and was in effect beyond claimant's last day of work for employer. Decision and Order at 10-11. Accordingly, the administrative law judge awarded benefits, to be paid by carrier. Decision and Order at 12.

On appeal, carrier challenges the administrative law judge's finding that it was correctly designated as the responsible carrier for this claim. Carrier agrees with the administrative law judge's finding that the district director's February 1, 2006 award of benefits became final after thirty days, but contends that the administrative law judge erred in finding that the district director properly initiated modification of the final award, pursuant to 20 C.F.R. §725.310, by issuing the March 27, 2006 Notice of Claim to restart the claim proceedings. Carrier further asserts that the district director's failure to notify carrier of its potential liability for benefits until after the February 1, 2006 Proposed Decision and Order became final violated carrier's due process rights, and unfairly jeopardized claimant's final award. Therefore, carrier asks that liability for the payment of benefits be transferred to the Black Lung Disability Trust Fund (the Trust Fund). The Director responds, agreeing with carrier that the administrative law judge erred in finding that the district director's March 27, 2006 Notice of Claim constituted a proper initiation of modification proceedings, pursuant to 20 C.F.R. §725.310. The Director further asserts, however, that the district director's failure to serve carrier with either the January 30, 2006 Proposed Decision and Order, or the February 1, 2006 amended Proposed Decision and Order, rendered the Orders "procedurally defective," and thus "not legally valid." Therefore, the Director contends, he acted within his authority to issue the new Notice of Claim on March 27, 2006, which properly notified carrier and protected carrier's due process rights by affording carrier the opportunity to defend against claimant's claim for benefits. The Director urges the Board to affirm the administrative

[3] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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*).

law judge's ultimate determination that carrier is the entity responsible for the payment of benefits in this case. Claimant has not filed a brief in this appeal.[4]

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).

Initially, we address the parties' contentions regarding the finality of the February 1, 2006 Proposed Decision and Order awarding benefits. As noted, *supra*, the applicable regulation provides that, if no party requests revision of a Proposed Decision and Order, or a hearing, the Proposed Decision and Order becomes final and effective after thirty days. 20 C.F.R. §725.419(a), (d). Applying this regulation, the administrative law judge determined that the February 1, 2006 Proposed Decision and Order awarding benefits became final on March 3, 2006. Order Denying Motion to Dismiss at 2.

Carrier urges affirmance of this determination. The Director, however, asserts that the February 1, 2006 Proposed Decision and Order was "procedurally defective," and therefore, did not become final. Director's Brief at 5. Specifically, the Director asserts that, pursuant to 20 C.F.R. §725.360, any coal mine operator notified of its potential liability, and any insurance carrier of such operator, are parties to a claim. 20 C.F.R. §725.360(a)(3), (4); Director's Brief at 7. Thus, the Director contends, because employer is a party to this claim, and because carrier insured employer, carrier became a party when the district director notified employer of its potential liability for benefits, pursuant to 20 C.F.R. §725.407. Director's Brief at 7. The Director concludes that, because the district director is required to serve a Proposed Decision and Order on all parties to the claim by certified mail, 20 C.F.R. §725.418(b), the district director's failure to serve carrier with either the January 30, 2006, or the February 1, 2006 Proposed Decision and Order rendered the decisions "not legally valid," and, as a result, not final. Director's

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings of 29.1 years of coal mine employment and that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment and therefore is entitled to benefits based on the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. We further affirm, as unchallenged, the administrative law judge's findings that employer is the responsible operator, that employer's insurance policy with carrier provided coverage to employer for federal black lung claims, and that the policy was in effect beyond claimant's last day of work for employer. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Brief at 7. Therefore, the Director contends, the district director was free to issue the new Notice of Claim on March 27, 2006. Director's Brief at 8.

The Director's contention lacks merit. First, as the administrative law judge found, the Director cites to no statute, regulation, or case law in support of his contention that failure to serve a party to a claim with a Proposed Decision and Order ultimately renders the decision "not legally valid" and, therefore, incapable of becoming final. Order Denying Motion to Dismiss Carrier at 2; Director's Brief at 7. Moreover, the Director's position is inconsistent with the current regulatory scheme, as revised to codify the concerns recognized in both *Crabtree v. Bethlehem Steel Corp*., 7 BLR 1-354 (1984), and in the law of the United States Court of Appeals for the Fourth Circuit, for "due process, as well as the efficient administration of the Act." *Crabtree*, 7 BLR at 1-357; *see Director, OWCP v. Trace Fork Coal Co*. [*Matney*], 67 F.3d 503, 508, 19 BLR 2-290, 2-301-02 (4th Cir. 1995)(agreeing with the concerns raised in *Crabtree*).

First, the Director ignores *Crabtree*'s concern with preventing piecemeal litigation. *Matney*, 67 F.3d at 508, 19 BLR at 2-301-02; *Crabtree*, 7 BLR at 1-357. If, as the Director suggests, the district director may determine that a mistake in service renders a prior award "not legally valid," effectively allowing the district director to restart the claims process, a responsible operator or carrier will then be afforded a second chance to contest its designation as a party responsible for payment of benefits, request a second hearing before an administrative law judge, appeal to the Board, and so on. Permitting a second round of litigation on the responsible operator or responsible carrier issue more than thirty days after the issuance of a Proposed Decision and Order "obviously is not compatible with the efficient administration of the Act and expeditious processing of claims." *Crabtree*, 7 BLR 1-354, 1-357 (1984); *see also Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 566, 22 BLR 2-349, 2-368 (6th Cir. 2002)(refusing to remand the case either to name a new responsible operator "or for further inquiry as to whether Kentland is in fact the proper responsible operator"). Moreover, to allow the district director to correct his oversight in failing to identify and serve the potentially liable carrier with a proposed decision, as required by 20 C.F.R. §725.418(b), by simply declaring an otherwise final decision void, and issuing a new Notice of Claim, could jeopardize claimant's award. *See Matney*, 67 F.3d at 508, 19 BLR at 2-301-02 (following *Crabtree* because "we are unwilling to potentially upset the finding that Matney is entitled to benefits"); *Crabtree*, 7 BLR at 1-357 (expressing concern that "a claimant who has established entitlement in the first round of proceedings may lose his award in a later round against another operator"). In this case, although claimant prevailed in the second round of proceedings against carrier, the award should not have had to be relitigated. The Director supported the revision to the regulations requiring the early, final designation of the party responsible for payment, *see* 62 Fed. Reg. 3360 (Jan. 22, 1997), and the Director cannot now benefit from the failure to properly notify carrier of its potential liability for payment of benefits. We therefore reject the Director's argument, and affirm

the administrative law judge's determination that the February 1, 2006 Proposed Decision and Order became final on March 3, 2006.

For similar reasons, we agree with employer and the Director that, having found that the February 1, 2006 Proposed Decision and Order became final on March 3, 2006, the administrative law judge erred in finding that the district director's issuance of the March 27, 2006 Notice of Claim effectively initiated modification proceedings on that award, pursuant to 20 C.F.R. §725.310. As the Director asserts, 20 C.F.R. §725.418(d) requires that the Proposed Decision and Order contain "the district director's final designation of the responsible operator liable for the payment of benefits" and the dismissal of all other potentially liable operators that had previously received notice of the claim. 20 C.F.R. §725.418(d). The Director construes this regulation to apply equally to the designation of the insurance carrier as the party ultimately responsible for the payment of benefits. *See* 20 C.F.R. §§725.360(a)(4); 725.407(b); Director's Brief at 6. Thus, contrary to the administrative law judge's analysis, allowing the district director to utilize modification to correct a mistake in the final identification of the responsible operator or carrier would nullify the requirement of 20 C.F.R. §725.418(d), that the district director's Proposed Decision and Order contain the "final designation of the responsible operator," and, by extension, its carrier. Moreover, as discussed above, to allow such an approach would squarely present the due process and piecemeal litigation concerns of *Crabtree* and *Matney*. We, therefore, vacate the administrative law judge's finding that the issuance of the March 27, 2006 Notice of Claim constituted a valid initiation of modification proceedings by the district director pursuant to 20 C.F.R. §725.310, that resulted in the proper designation of carrier as a party liable for the payment of benefits. Rather, the February 1, 2006 Proposed Decision and Order awarding benefits became final on March 3, 2006, and remains the final disposition of this claim. Concern for "due process, as well as the efficient administration of the Act, compels this result." *Crabtree*, 7 BLR at 1-357.

In sum, the district director failed to notify carrier of its potential liability for the payment of benefits on behalf of employer before the February 1, 2006 Proposed Decision and Order containing the district director's "final" designation of the responsible operator became final on March 3, 2006. *See* 20 C.F.R. §725.418(b). Contrary to law, the district director sought to rectify his mistake by issuing a new Notice of Claim designating and notifying carrier, thereby starting the claim proceedings anew. The Board must therefore decline to follow the Director's suggestion that this procedure was proper. 20 C.F.R. §§725.418(d), 725.419(a), (d); *Matney*, 67 F.3d at 508, 19 BLR at 2-301-02; *Crabtree*, 7 BLR at 1-357. Because no responsible carrier for employer was identified or notified prior to March 3, 2006, the date upon which the February 1, 2006 Proposed Decision and Order awarding benefits became final, the Trust Fund must assume liability for the payment of benefits in this case. *See* 26 U.S.C. §9501(d)(1)(B);

Tazco Inc. v. Director, OWCP [*Osborne*], 895 F.2d 949, 13 BLR 2-313 (4th Cir. 1990); *Crabtree*, 7 BLR at 1-357.

Accordingly, the administrative law judge's Order Denying Motion to Dismiss Carrier is reversed, the Decision and Order Awarding Benefits is affirmed, and the case is remanded to the district director for payment of benefits by the Trust Fund.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge