U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0531 BLA

VICTOR E. ARMSTRONG	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
T & T MANAGEMENT COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/06/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Daniel K. Evans and Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

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

Emily Goldberg-Kraft (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (15-BLA-5612) of Administrative Law Judge Natalie A. Appetta awarding benefits on a claim filed pursuant to 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 March 26, 2014.

The administrative law judge credited claimant with twenty-one years of underground coal mine employment,[1] and found that the evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, T & T Management Company (T&T) contends that the administrative law judge erred in identifying it as the responsible operator. Claimant and the Director,

[1] The record reflects that claimant's last coal mine employment was in West Virginia. Hearing Transcript at 9. 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Office of Workers' Compensation Programs (the Director), respond in support of the administrative law judge's designation of employer as the responsible operator.[3]

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).

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). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[4] Once a potentially 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 operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c). The regulations also provide that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d).

The district director issued a Notice of Claim on April 10, 2014, informing T&T that it was identified as a "potentially liable operator." Director's Exhibit 16. By letter dated April 24, 2014, T&T did not contest its identification as a potentially liable operator, but instead alleged that two other operators, Anker West Virginia Mining Company (Anker) and Wayne Processing, Incorporated (Wayne Processing), more recently employed the miner for at least a year. Director's Exhibit 18.

On August 12, 2014, the district director issued a Schedule for the Submission of Additional Evidence, wherein she again identified T&T as the responsible operator.

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

[4] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, 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).

Director's Exhibit 19. The district director advised T&T that it could submit additional documentary evidence relevant to its liability. *Id.* In response, T&T filed a motion to be dismissed as the responsible operator, again asserting that Wayne Processing employed claimant more recently for at least a year. T&T subsequently sought two extensions of time in which to submit evidence, each of which was granted. Director's Exhibits 21-24. On March 27, 2015, T&T requested a third extension of time in which to submit evidence, and also requested a ruling on its outstanding motion to be dismissed as the responsible operator. Director's Exhibit 25.

On April 10, 2015, the district director denied T&T's request for a third extension of time in which to submit evidence, explaining that the evidence of record established that no operator had employed claimant for a cumulative year after his employment with T&T ceased. Director's Exhibit 26. The district director therefore designated T&T as the responsible operator. *Id.* In a Proposed Decision and Order dated May 1, 2015, the district director awarded benefits, and again designated T&T as the responsible operator.[5] Director's Exhibit 27. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 31. On January 8, 2016, T&T filed a pre-hearing motion contesting its designation as the responsible operator. The administrative law judge held a hearing on February 8, 2016.

In a Decision and Order dated May 24, 2016, the administrative law judge found that T&T was the potentially liable operator that most recently employed claimant for a cumulative year. The administrative law judge further found that none of the operators that employed claimant after he ceased employment with T&T (Anker, Wayne Processing, Coastal Coal and Island Fork Construction) employed claimant for a cumulative period of at least a year. Decision and Order at 4-5. The administrative law judge therefore found that none of these companies could be designated the responsible operator. *Id.* Having found that T&T was the last operator to have employed claimant for a cumulative period of not less than one year, the administrative law judge designated T&T as the responsible operator. *Id.* at 5.

[5] The district director noted that Wayne Processing, Incorporated (Wayne Processing) employed claimant for less than a cumulative year. Director's Exhibit 27. The district director also stated that "records maintained by the U.S. Department of Labor have been searched and no record of insurance coverage or authorization to self-insure [by Wayne Processing] has been found." *Id.*

T&T argues that the administrative law judge erred in determining that Wayne Processing did not employ claimant for at least one year.[6] For the reasons set forth below, we disagree.

Because the evidence was insufficient to establish the beginning and ending dates of claimant's coal mine employment with Wayne Processing, the administrative law judge elected to apply the formula set forth at 20 C.F.R. §725.101(a)(32)(iii).[7] Decision and Order at 5. Applying the formula, she determined that claimant worked a total of 207.59 days at Wayne Processing, which is less than one cumulative year. *Id.* The administrative law judge therefore determined that Wayne Processing could not be designated the responsible operator. *Id.*

T&T asserts that state employee wage data records reveal that claimant was employed by Wayne Processing "beginning in the second quarter of 1999 through the third quarter of 2000," thereby establishing a year of employment. Although the administrative law judge did not directly address this evidence, the Director contends that the administrative law judge's error was harmless since the wage data records do not assist T&T in establishing that Wayne Processing employed claimant for a cumulative year:

> The records show earnings in five separate, non-contiguous quarters (but do not list precise beginning and ending dates). These are the second, third and fourth quarters of 1999 and the second and third quarters of 2000. Thus, at best, these records show that [claimant] was employed by Wayne Processing from some point in the second quarter of 1999 to some point in the third quarter of that year.[8] Similarly, the records show that [claimant]

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[6] Because T & T Management Company (T&T) does not contest the administrative law judge's designation of T&T as a potentially responsible operator, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

[7] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the finder-of-fact may, in her discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

[8] Based upon his earlier characterization of the wage data records, it is apparent that the Director, Office of Workers' Compensation Programs, intended to state that the

> was employed from some point in the second quarter of 2000 to some point in the third quarter of that year. This nebulous information says nothing about his actual length of employment relationship with Wayne Processing.

Director's Response Brief at 3 (footnote omitted). We agree with the Director that, in the absence of any definitive beginning and ending dates of employment, the wage data records do not assist T&T in establishing that Wayne Processing employed claimant for at least one year.[9]

T&T also relies upon a West Virginia Workers' Compensation Fund form entitled "Employee's Report of Occupational Pneumoconiosis" to establish the beginning and ending dates of claimant's employment at Wayne Processing. T&T asserts that claimant completed the form on November 24, 2000, indicating that he worked for Wayne Processing from June 1, 1999 to September 15, 2000. Employer's Brief at 5. T&T also refers to a West Virginia Claims Allocation Worksheet indicating that claimant worked for T&T from June 1, 1999 to September 27, 2000. *Id.* at 6. Although employer has attached copies of these forms to its brief as Exhibit B, the Director accurately notes that these forms are not a part of the record.[10] Director's Brief at 3-4. Because this evidence was not properly before the administrative law judge, the Board is precluded from considering it on appeal. *See* 20 C.F.R. §802.301(b); *Berka v. N. Am. Coal Corp.*, 8 BLR 1-183 (1985).

We affirm the administrative law judge's finding that Wayne Processing did not employ claimant for a cumulative period of at least one year as supported by substantial evidence.[11] We therefore affirm the administrative law judge's determination that Wayne

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records show, at best, that claimant was employed by Wayne Processing from some point in the second quarter of 1999 to some point in the *fourth* quarter of that year.

[9] The wage data records indicate that an additional employer, Anker West Virginia Mining Company, also paid claimant wages in the second quarter of 1999. Director's Exhibit 18.

[10] The administrative law judge found that the "West Virginia State claim information was not included in the Director's exhibits." Decision and Order at 4 n.3.

[11] T&T also asserts that it was denied a meaningful opportunity to develop evidence establishing that Wayne Processing was financially capable of assuming liability for benefits. Having determined that Wayne Processing did not employ claimant for at least a year, the administrative law judge did not address whether Wayne

Processing did not qualify as the responsible operator,20 C.F.R. §725.493(b)(3)(i)-(iii), and the administrative law judge's designation of T&T as the responsible operator in this claim.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

Processing was financially capable of assuming liability for benefits. We therefore decline to address this issue.