U.S. Department of Labor

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

BRB No. 17-0291 BLA

HERBERT H. METCALFE, JR. Claimant-Respondent v. HARLAN KY VA COAL, INCORPORATED and EMPLOYER'S INSURANCE OF WAUSAU Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/29/2018 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Nathan Lee Bishop (Curt Hamilton Law Office PLLC), Henderson, Kentucky, for claimant.

Carl M. Brashear (Hopkins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (14-BLA-05643) of Administrative Law Judge Timothy J. McGrath, rendered on a claim filed on December 10, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 7.60 years of coal mine employment and found that employer is the responsible operator. The administrative law judge determined that claimant established the existence of legal pneumoconiosis[1] pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges its designation as the responsible operator and the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), (c).[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging the Board to remand the case for further consideration of the issue of 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,

[1] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 7.60 years of coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b)(2) *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 23. Because claimant established less than fifteen years of coal mine employment, claimant is not eligible for the rebuttable presumption of total disability pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

[3] By Order issued April 17, 2018, the Board requested that the Director, Office of Workers' Compensation Programs (the Director), file a brief regarding the administrative law judge's finding that employer failed to prove that Jericol Mining, Inc. (Jericol) was capable of assuming liability for benefits and the application of 20 C.F.R. §725.495(d) under the facts of this case. *Metcalfe v. Harlan, KY VA Coal, Inc*., BRB No. 17-0291 BLA (May 7, 2018) (unpub. Order).

and in accordance with applicable law.[4] 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).

Employer contends that it is not the responsible operator liable for benefits in this case. 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).[5] 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. 20 C.F.R. §725.495(c).

In its post-hearing brief, employer argued that it should be dismissed as the responsible operator because the record established that claimant worked for Jericol Mining Inc. (Jericol) for one year after his employment with Harlan KY VA Coal, Inc.[6] The Director filed a post-hearing brief, noting that the district director had determined that claimant was employed less than one year with Jericol, relying primarily on claimant's statements to a claims examiner. The Director asserted that claimant's "memory about his employment history is poor" but that claimant "likely did not work for Jericol for a year as defined by 20 C.F.R. §725.101(a)(32)." Director's Post-Hearing Brief at 4. The Director

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; e) 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).

[6] Employer noted that Claimant's Social Security Administration Earnings Statement showed $17, 667.68 in 1993 and $1,622.16 in 1994 from Jericol. Employer asserted that since claimant worked one calendar year for Jericol and "the earnings are sufficient to establish at least 125 working days," it should not have been named as the responsible operator. Employer's Post-Hearing Brief at 2.

further noted that employer cannot show that Jericol is capable of assuming liability for payment of benefits as "[a] search of the Kentucky Secretary of State's website shows that Jericol Mining is an inactive corporation." *Id.*

The administrative law judge determined that the record was insufficient to establish the beginning and ending dates of claimant's coal mine employment and calculated claimant's coal mine employment pursuant to 20 C.F.R. §725.101(a)(32)(iii). Under this method, the administrative law judge determined claimant worked for Jericol for 1.10 years from 1993 to 1994, subsequent to his employment with employer.[7] Decision and Order at 5, 7. Although the administrative law judge found that employer was not the most recent operator to employ claimant for one year, he concluded that employer was properly identified by the district director as the responsible operator liable for payment of benefits because employer did not sustain its burden to demonstrate that Jericol is financially capable of paying benefits. *Id*.

Employer asserts in this appeal that the district director failed to adequately investigate the responsible operator[8] because the Director "is in a unique position to know whether Jericol was insured or self-insured as of the date of claimant's last work there." Employer's Brief at 7. Employer maintains that "in light of [this] failure to adequately investigate the responsible operator issue, any liability must be assigned to the Black Lung Disability Trust Fund." *Id.* Employer's argument has merit.

The regulations 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). If the reasons include the most recent employer's failure to meet the conditions of 20 C.F.R. §725.494(e), the district director must also submit a statement that "the Office [of Workers' Compensation Programs] has searched the files it maintains . . . and that [it] has no record

[7] Because claimant's income in 1993 ($17,667) exceeded the industry average ($17,260) as reported by the Bureau of Labor Statistics, the administrative law judge credited claimant with one year of employment with Jericol in 1993. Then, comparing claimant's income from Jericol in 1994 ($1,622.16) with the BLS-reported industry average ($17,760), the administrative law judge credited claimant with 0.10 year of employment with Jericol in 1994 ($1,622.16 / $17,760 = 0.091). Decision and Order at 4; *see* Exhibit 610, *BLBA Procedure Manual* ("Average Earnings of Employees in Coal Mining"), at: https://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit610TR16.02.pdf.

[8] The administrative law judge specifically determined that claimant's statements to the district director were not sufficient to establish that claimant worked for Jericol for less than one year. Decision and Order at 5.

of insurance coverage for that employer . . . ." *Id*. The regulation further provides, "In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming liability for a claim." *Id*.

The Director concedes that "the record contains no statement regarding Jericol's insurance coverage" and that under 20 C.F.R. §725.495(c), "Jericol's ability to provide for the payment of benefits is presumed." Director's Brief at 2. Thus, the Director agrees with employer that the administrative law judge erred in requiring employer to produce evidence regarding Jericol's ability to pay benefits in order to establish that Jericol is a potentially liable operator." *Id.*

In light of the Director's concession that the Office of Workers' Compensation Programs failed to meet its obligations under 20 C.F.R. §725.495(d), we vacate the administrative law judge's finding that employer is the responsible operator because it did not produce evidence showing that Jericol was financially capable of assuming liability for benefits. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62 (1994).

The Director further argues, however, that reversal of the administrative law judge's finding that employer is the responsible operator is not warranted because the administrative law judge erred in concluding that claimant worked for at least one year with Jericol. The Director requests that the Board remand the case for the administrative law judge to reconsider that finding. The Director states:

> It is true that [claimant's] recollection of his employment history was often sketchy, and in particular he equivocated regarding whether or not he worked at least a year with Jericol. But even so, [claimant] never suggested that his work with Jericol greatly exceeded one year. And during his initial deposition, [he] was adamant that he was fired from Jericol and hired after a few months, a point the [administrative law judge] did not address. [Director's Exhibit 14 at 25-26]. It could be inferred from [claimant's] overall testimony that his actual employment relationship with Jericol was less than one year, given his months-long absence due to his dismissal. The [administrative law judge] should have considered all of [claimant's] testimony before resorting to the [20 C.F.R. §] 725.101(a)(32)(iii) formula to establish a year of employment.

Director's Brief at 3, *citing Osborne v. Eagle Coal Co., Inc.*, 25 BLR 1-195 (2016) (direct evidence of length of employment preferred over formula).

Contrary to the Director's argument, we see no error in the administrative law judge's determination that claimant worked one year with Jericol. In his role as fact-finder,

the administrative law judge is granted broad discretion in evaluating the credibility of the evidence, including witness testimony. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). Having found that claimant's testimony was not credible to establish the beginning and ending dates of his coal mine employment with Jericol, the administrative law judge permissibly relied on the formula at 20 C.F.R. §725.101(a)(32)(iii) to find that claimant worked one year with Jericol *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

Specifically, the administrative law judge found that claimant consistently testified at deposition, "'I don't remember' when asked about when and where he worked." Decision and Order at 5, *quoting* Director's Exhibit 14 at 18-28. The administrative law judge also noted that claimant's hearing testimony "about the coal companies he worked for differed from those companies listed in his [Social Security Administration] Earnings Statement and differed from the companies he mentioned at his deposition." *Id*. Moreover, in addressing the Director's argument that claimant "likely" did not work for Jericol for one year, the administrative law judge noted the Director's acknowledgment that "[c]laimant's memory about his employment history is poor." Decision and Order at 5; Director's Post-Hearing Brief at 4.

While the Director now asserts that claimant's testimony about having been laid off "for a couple of months" supports an inference that his employment with Jericol was less than one year, Director's Brief at 3, she conceded in her post-hearing brief that the miner's testimony on this point is "unclear." Director's Post-Hearing Brief at 4. Because the administrative law judge permissibly declined to rely on claimant's testimony, and in light of the Director's concessions that claimant's recollection is "poor" and his testimony is "unclear," we deny the Director's request to remand this case for further consideration of claimant's testimony on the responsible operator issue.

Because the administrative law judge permissibly found that claimant last worked for more than one year with Jericol, and there is no evidence to rebut the presumption that Jericol is capable of assuming liability for benefits, we reverse the administrative law judge's finding that that employer is the responsible operator and direct payment of benefits by the Black Lung Disability Trust Fund.[9] *See* 20 C.F.R. §725.495(c), (d).

[9] Because employer is not the responsible operator in this case, it is not necessary that we address employer's arguments regarding the administrative law judge's findings on the merits of claimant's entitlement. The Director also has not challenged claimant's entitlement to benefits in this appeal.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and reversed in part, and the case is remanded to the district director for payment of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge