BRB No. 13-0258 BLA

DARRELL K. MILGRIM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HONEY CAMP COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 03/31/2014
	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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:

Employer and its carrier (collectively "employer") appeal the Decision and Order Granting Benefits (2011-BLA-5263) of Administrative Law Judge Pamela J. Lakes rendered on a claim filed pursuant to the 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 at least twenty years of coal mine employment; determined that employer is the properly designated responsible operator herein; and adjudicated this miner's claim, filed on March 17, 2009, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges its designation as the responsible operator. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's responsible operator determination and remand the case for further consideration. Employer has filed a reply brief in support of its position.[1]

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.[2] 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 the administrative law judge erred in finding it to be the properly designated responsible operator herein, arguing that she erroneously determined that claimant's last employer, Heritage Mining Company (Heritage), was not covered by a viable insurance policy on the date of claimant's last employment and, thus, was not financially capable of assuming liability for the claim. Employer argues that the administrative law judge failed to consider whether the Virginia Independent Coal Operators Group Self-Insurance Association (VICOA) provided coverage for Heritage in

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's award of benefits.

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

light of the district director's finding that Heritage had insurance with both VICOA and Rockwood Insurance Company (Rockwood). Employer also argues that liability should have been assessed against Heritage, and its bankrupt insurer Rockwood, through its reinsurer, the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA).[3] Employer asserts that the administrative law judge provided no legal basis for releasing VPCIGA from liability in light of its failure to contest its liability within thirty days of notice of the claim, and that the administrative law judge erred in determining that VPCIGA's bar date for claims was not in conflict with the regulations requiring an insurer or reinsurer to insure an employer's entire liability. Employer's Brief at 4-9.

Upon review of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's finding on the responsible operator issue cannot be affirmed.

Generally, the most recent coal mine operator that employed a miner for at least one year will be held liable as the operator responsible for the payment of any benefits awarded. 20 C.F.R. §725.495(a)(1). The applicable regulations provide that the Director bears the burden of proving that the designated responsible operator initially found liable for the payment of benefits pursuant to 20 C.F.R. §725.410 is a potentially liable operator that, *inter alia*, is capable of assuming its liability for the payment of continuing benefits. 20 C.F.R. §§725.494(e), 725.495. If the miner's most recent employer does not qualify as a potentially liable operator pursuant to 20 C.F.R. §725.494, then the responsible operator will be the potentially liable operator that next most recently employed the miner. 20 C.F.R. §725.495(a)(3). From a procedural standpoint, after a claim is filed and upon receipt of the miner's employment history, the district director has the duty to investigate whether any operator may be held liable for the payment of benefits as a responsible operator pursuant to 20 C.F.R. §§725.407(a), 725.494. The district director must issue a Notice of Claim to each potentially liable operator he identifies, requesting that each operator either accept or contest liability for benefits. 20 C.F.R. §725.407(b), (c). Where the records maintained by the Director's office indicate that the operator obtained insurance for the payment of benefits, and the claim falls within such policy, notice shall also be sent to the operator's carrier. 20 C.F.R. §725.407(b). The district director then makes preliminary findings, contained in the Schedule for Admission of Evidence, as to the miner's entitlement and the identity of the responsible operator. 20 C.F.R. §725.410(a).

[3] Employer does not challenge the administrative law judge's findings that Heritage and Rockwood are not capable of assuming liability.

In the present case, the record reflects, and employer and the Director agree, that claimant's most recent coal mine employment for over one year was with Heritage. Director's Exhibit 9. His next most recent employment of more than one year was with employer. Director's Exhibit 8. The district director notified Heritage and its insurer, Rockwood, that Heritage was the operator potentially responsible for the payment of miner's benefits.[4] Director's Exhibit 20. The district director subsequently determined that Heritage was no longer a viable entity and that Rockwood became insolvent on August 26, 1991. *Id*. Under Virginia law, claims against Rockwood were to be paid by a reinsurer, VPCIGA, but only those claims that were filed prior to August 26, 1992 could be covered by VPCIGA. *Id*. Because claimant's claim for benefits was filed after August 26, 1992, VPCIGA notified the district director that it could not cover the claim. Thereafter, the district director notified employer that it was potentially responsible for the payment of benefits, and employer controverted the claim. Director's Exhibits 20, 21, 23. In his liability analysis, the district director stated,

> This operator is not the operator that most recently employed the miner, but is the designated responsible operator because after he was employed by [employer], he was employed by Heritage from 1983 to November 1988. According to Virginia's Dept. of State, this company has been purged from there [sic] records and therefore is no longer considered to be a viable entity. The company did have insurance with both Rockwood and VICOA. Both Rockwood and VICOA are no longer viable entities. Rockwood went bankrupt in 1991 and a [sic] August 26, 1992 bar date to file against the reinsurance fund. This is [claimant's] first federal application for black lung benefits and it was filed long past the bar date to file against insurance for companies operating in the state of Virginia. Also, [claimant] does note [sic] allege having any state workers' compensation claims for occupational pneumoconiosis and this has been confirmed by the Virginia Workers' Compensation Commission. [Claimant] testified at his March 5, 2010 deposition that he did not have any state workers' compensation claims. Therefore this avenue to assess liability against Heritage as insured by VICOA is also blocked. There is no evidence that VICOA had reinsurance. But even if it did, it would be similarly blocked as Rockwood is.

Director's Exhibit 28.

[4] Old Republic Insurance Company (Old Republic) was also notified of its potential liability as an insurer of Heritage, but the district director subsequently determined that Heritage had no policy in effect with Old Republic at the time of claimant's last coal mine employment, and dismissed it as a carrier for Heritage. Director's Exhibit 20; *see* 20 C.F.R. §725.407.

In finding that employer was properly designated as the responsible operator herein, the administrative law judge accurately summarized the pertinent facts and applicable case law, and held employer liable for the payment of benefits "in view of the insolvency of the most recent employer [Heritage] and insurer [Rockwood], coupled with the untimeliness of the claim against the guaranty association [VPCIGA]." Decision and Order at 5-9. The administrative law judge further determined that, because there was no inconsistency between the provisions of the Act and the state statute setting a time bar for filing a claim against the state reinsurance fund, there was no need to reach the issue of whether Federal law preempts the state statute. The administrative law judge concluded that "Heritage and Rockwood are incapable of paying benefits, and [employer], the penultimate employer, was properly named as the responsible operator." Decision and Order at 10.

With respect to VPCIGA, substantial evidence supports the administrative law judge's finding that Heritage, through its carrier, Rockwood, is incapable of paying benefits, as Rockwood was liquidated and the state-sponsored reinsurer, VPCIGA, was not liable for claims filed after August 26, 1992. The administrative law judge correctly concluded that although Rockwood was covered by VPCIGA, this coverage did not extend to the current claim, as it was filed on March 17, 2009. Decision and Order at 7, 9. Furthermore, contrary to employer's argument, the administrative law judge correctly noted that state-run insurance guaranty associations are not covered by 20 C.F.R. §726.203(c), which prohibits private insurance carriers from limiting their liability for black lung claims. Decision and Order at 10; *see Boyd and Stevenson Coal Co. v. Director, OWCP* [*Slone*], 407 F.3d 663, 23 BLR 2-288 (4th Cir. 2005); *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998). Thus, the administrative law judge rationally determined that, notwithstanding the failure of Heritage and Rockwood to timely respond to the Notice of Claim, their insolvency precludes them from being capable of assuming responsibility for claims, such as this, not covered by VPCIGA. Decision and Order at 10. Accordingly, we affirm the administrative law judge's determination that Heritage and its carrier, Rockwood, are incapable of assuming liability for the payment of benefits, and that VPCIGA's liability for claims insured by Rockwood extended only to claims filed prior to August 26, 1992.

However, as the district director indicated that Heritage had insurance with both Rockwood and VICOA, we find merit to employer's and the Director's argument that it was incumbent upon the administrative law judge to additionally address whether Heritage, through VICOA, was capable of paying benefits. Because the administrative law judge made no findings regarding VICOA, as required by the Administrative

Procedure Act,[5] we must vacate her determination that employer, as the penultimate employer, was properly named the responsible operator herein pursuant to 20 C.F.R. §§725.494, 725.495, and remand this case to the administrative law judge for consideration of whether Heritage, through VICOA, is financially capable of assuming liability. On remand, the administrative law judge must address the sufficiency of the district director's explanation for finding that VICOA is not responsible for the payment of benefits, *i.e.*, that VICOA is no longer a viable entity; that there was no evidence that VICOA had reinsurance; and that even if VICOA had a reinsurer, any claim would be "similarly blocked as Rockwood is." Director's Exhibit 28. As the record reflects that the district director did not issue a Notice of Claim to VICOA, and Section 725.407(b) requires that notice be sent to an operator's carrier where the operator has obtained a policy of insurance and the claim falls within such policy, the administrative law judge must determine the type of insurance policy Heritage had with VICOA, as well as the existence of any reinsurance. *See Tazco v. Director, OWCP* [*Osborne*], 895 F.2d 949, 13 BLR 2-313 (4th Cir. 1990). The administrative law judge is also instructed to determine how this information relates to the district director's statement that claimant did not have any state workers' compensation claims and "[t]herefore this avenue to assess liability against Heritage as insured by VICOA is also blocked." Director's Exhibit 28; *see* 20 C.F.R. §725.407(b). If the administrative law judge determines that the district director's liability assessment with respect to VICOA does not withstand scrutiny, she must transfer liability to the Black Lung Disability Trust Fund. *See England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984).

[5] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed on the merits of entitlement; is affirmed in part and vacated in part on the issue of the responsible operator; and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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