U.S. Department of Labor

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

BRB No. 18-0063 BLA

CHESTER USCIO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WYOMING POCAHONTAS LAND COMPANY	)	DATE ISSUED: 03/29/2019
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Erik A. Schramm (Hanlon, Estadt, McCormick & Schramm Company, LPA), St. Clairsville, Ohio, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry Joyner, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05470) of Administrative Law Judge Thomas M. Burke on claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on September 25, 2014.

The administrative law judge found that claimant established clinical pneumoconiosis arising out of coal mine employment and total respiratory or pulmonary disability due to pneumoconiosis, and thus awarded benefits. Claimant's award is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-20.

Employer challenges only the administrative law judge's finding that it is the operator responsible for the payment of benefits. The Director, Office of Workers' Compensation Programs (the Director), urges affirmance. Employer replied to the Director's response and reiterated its arguments. Claimant did not file a response.

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.[1] 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).

When the claim was before the district director, claimant reported on his Employment History form and Description of Coal Mine Work form that he last worked as a coal miner in 1980 for employer. He also listed subsequent work as a general laborer for a construction union, Laborer's Union 809, from 2005 to 2014. Director's Exhibits 3, 4. Claimant's Social Security Administration (SSA) earnings statement does not list Laborer's Union 809 by name, but instead reflects income from various construction and environmental companies during that time period, including $33,394.50 from David Stanley Consultants LLC (DSC) in 2005. Director's Exhibit 6. Claimant did not identify any of his construction work as being that of a coal miner.

On October 3, 2014, the district director issued a Notice of Claim, informing employer that it had been identified as a potentially liable operator. Director's Exhibit 16. Employer timely responded and challenged the district director's finding. Director's Exhibit 17. On July 17, 2015, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) that included a preliminary finding that employer is the

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

designated responsible operator because it meets the criteria for a potentially liable operator and the SSA earnings record "confirm[s] [coal mine employment] from 1970 to 1980 based on wage earnings, with Wyoming Pocahontas as the last coal mining employer." Director's Exhibit 18, *citing* 20 C.F.R. §§725.494(a)-(e).

The district director advised employer that it could no longer submit evidence regarding its status as a potentially liable operator because it did not submit such evidence within ninety days of receiving the Notice of Claim. Director's Exhibit 18, *citing* 20 C.F.R. §725.408(b)(2). Employer was further advised that it could submit documentary evidence and identify liability witnesses relating to its status as the designated responsible operator by September 15, 2015, and that the date could be extended for good cause. *Id.*, *citing* 20 C.F.R. §725.414(b), (c). Finally, the district director warned that failure to identify liability witness before the case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing would preclude admission of the testimony absent extraordinary circumstances. *Id.*, *citing* 20 C.F.R. §725.456(b)(1). Employer did not thereafter identify any liability witnesses or attempt to submit any documentary evidence while the claim was pending before the district director.

In a Proposed Decision and Order issued on January 29, 2016, the district director found claimant entitled to benefits and employer is the responsible operator, citing the same evidence referenced in the SSAE. Director's Exhibit 23. Employer replied by letter dated February 12, 2016, contesting claimant's entitlement to benefits and requesting a hearing before the OALJ. Director's Exhibit 24. Employer did not contest the finding that it is the responsible operator but instead, referring to itself as the "Responsible Operator," stated generally that it "reserves the right to assert all other defenses." *Id*.

On February 26, 2016, employer served interrogatories on claimant, requesting information on jobs he had subsequent to his work for employer. Employer's Exhibit 1. Claimant responded on April 29, 2016, after the case had been transferred to the OALJ for a hearing on March 30, 2016. In response to the question asking him to list "all jobs worked after leaving the employment of [employer]," claimant again reported his work as a construction laborer for Laborer's Union 809 from 2005 to 2014. *Id*. The next question asked whether he worked for "any other employers which used and/or handled coal in any fashion," to which claimant responded, "No." *Id*.

On February 2, 2017 the administrative law judge conducted a hearing at which claimant testified. In response to a question from his counsel regarding when he last worked as a coal miner, claimant responded:

> It was back in 1980. But in 2005, I – they opened up an old – it was an old Y-NO mine, and I got on the construction end of it to – they was cleaning

> out all the stone and everything in the slope to reopen the mine up, and I was hired to do that. And once that was done, we got laid off and then I went on the other end of construction.

Hearing Transcript at 14. He acknowledged that he did this work for DSC. *Id*. at 14-15; Director's Exhibit 6. When asked about his specific duties, claimant stated:

> We was going underground, and that was the main belt line where they was going to haul the coal back out. Which originally it was at one time, but it was shut down for 20 years and it was all kinds of falls . . . So our job was to cut holes in the – in the floor, and all we did is haul rocks out and drop them through holes about every 120 feet. We'll wheelbarrow at times, but it was – or just drag them on curtains just drop them down into cars they had waiting for the rocks that fell down.

Hearing Transcript at 15. On cross-examination, employer asked claimant: "That was coal mine related work, correct?" *Id*. at 25. He replied: "I would say it was, yeah. I mean, it's work that was being done in a coal mine." *Id*. When asked if he was exposed to coal dust at that job, claimant answered: "I would say I was. I wouldn't say I wasn't. You know, it was a coal mine." *Id*.

On June 22, 2017, claimant filed a Motion to Dismiss Wyoming Pocahontas Land Company and Remand to the District Director for Payment of Benefits, asserting that DSC should have been designated as the responsible operator. On July 7, 2017, the Director opposed claimant's motion. The Director acknowledged claimant's testimony that his construction work for DSC in 2005 was at a coal mine, but asserted inter alia that claimant's testimony is not admissible on the responsible operator issue because none of the parties identified claimant as a potential witness whose testimony would pertain to the liability of the responsible operator, as required by 20 C.F.R. §725.414(c). The Director further maintained that no extraordinary circumstances exist to excuse the parties' failure to provide such notice.

On July 27, 2017, the administrative law judge issued an Order Denying Claimant's Motion to Dismiss. Although he found that claimant's testimony "supports a finding" that claimant worked for at least one year for DSC in 2005 as a coal mine construction worker, he found that such testimony is not admissible because none of the parties notified the district director that claimant would testify as a liability witness and "no extraordinary circumstances have been alleged for the lack of notice." *Id*. at 4. Thus, he found that employer is the responsible operator and remains liable for the payment of benefits. *Id*.

Employer argues on appeal that it should be dismissed as the responsible operator based on the Director's failure to identify DSC as claimant's last coal mine employer when the claim was before the district director. Employer's Brief at 8. Employer does not contest that it did not identify any extraordinary circumstances for admission of claimant's testimony, but asserts that extraordinary circumstances nevertheless exist because the administrative law judge determined the testimony supports a finding of one year of coal mine employment with a subsequent employer. *Id*. at 9. The Director responds that because employer failed to submit liability evidence before the district director or identify claimant as a potential liability witness, the administrative law judge properly excluded claimant's testimony and determined employer is the responsible operator. She further contends employer waived its argument that extraordinary circumstances exist because employer did not raise it before the administrative law judge. We affirm the administrative law judge's finding that employer is the responsible operator.

The regulatory framework sets forth obligations for both the Director and the employer designated as the responsible operator to investigate claimant's coal mine employment history. The Director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator.[2] 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once this determination is made, the burden shifts to the designated responsible operator to set forth "evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator." 20 C.F.R. §725.495(c)(2). The designated responsible operator must submit documentary evidence relevant to its liability before the district director and must notify the district director of any potential witnesses whose testimony pertains to its liability. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1). Failure to do so renders such documentary evidence and testimony

[2] Under 20 C.F.R. §725.495(b), the Director, Office of Workers' Compensation Programs (the Director) bears "the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to [20 C.F.R.] §725.410 (the 'designated responsible operator') is a potentially liable operator." A coal mine operator is a "potentially liable operator" if: a) the miner's disability or death arose at least in part out of employment with the operator; b) the operator or its successor was in business after June 30, 1973; c) the operator employed the miner for a cumulative period of not less than one year; d) at least one day of the employment occurred after December 31, 1969; and e) the operator is 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). Employer's designation as a "potentially liable operator" is affirmed as uncontested. *See Skrack v. Island Creek Coal Co.*, 12 BLR 1-170, 1-171 (1983).

inadmissible before the administrative law judge unless "extraordinary circumstances" exist to excuse the untimely submission.[3] 20 C.F.R. §§725.414(c), (d), 725.456(b)(1).

Employer did not introduce any relevant documentary evidence, identify any liability witnesses, or make any specific arguments as to why it is not the responsible operator when the matter was before the district director.[4] 20 C.F.R. §§725.408(b), 725.414(c), 725.456(b)(3). Consequently, employer's own inaction resulted in what it describes as the "surprise" revelation in claimant's testimony that he may have engaged in coal mine employment subsequent to his work for employer. As the administrative law judge correctly observed, employer did not allege before him that extraordinary circumstances excused its failure to provide notice of claimant's liability testimony. Order Denying Claimant's Motion to Dismiss at 4; Hearing Transcript at 24-29; Employer's Post-Hearing Brief at 7-8. We therefore affirm the administrative law judge's finding that claimant's testimony relevant to the issue of operator liability is inadmissible. 20 C.F.R. §§725.414(c), 725.456(b)(3); *see Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc) (McGranery & Boggs, JJ., dissenting), *aff'd Marfork Coal Co. v. Weis*, 251 Fed. App'x 229, 236 (4th Cir. 2007) (no extraordinary circumstances for the untimely

[3] Timely development or notice of liability evidence when the claim is before the district director is of particular significance in light of 20 C.F.R. §725.407, which prohibits the district director from "notify[ing] additional operators of their potential liability" after the claim has been referred to the Office of Administrative Law Judges (OALJ). *See England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-145 (1993) (liability transfers to Trust Fund when responsible operator dismissed and other potential operators not notified); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984) (liability transfers to Trust Fund unless responsible operator issue resolved in preliminary proceeding or claim proceeds against all putative responsible operators at every stage of adjudication).

[4] Employer submitted interrogatories to claimant on February 26, 2016, after it had already requested that the claim be transferred to the OALJ for a hearing. Employer's Exhibit 1. Employer cites to the interrogatories as support for its statement that it "made every reasonable effort to learn of [claimant's employment history] prior to the hearing." Employer's Brief at 8. But the timing of the employer's service of the interrogatories – they were not served until long after the September 15, 2015 deadline to submit documentary evidence or identify liability witnesses – belies its claim. Regardless, whether employer took reasonable efforts to investigate claimant's employment "prior to the hearing" before the administrative law judge does not address the relevant inquiry of whether extraordinary circumstances exist for its failure to develop evidence or identify claimant as a potential liability witness when the claim was before the district director. 20 C.F.R. §725.414(c).

admission of liability evidence when an x-ray showing complicated pneumoconiosis was "waiting to be found," but employer failed to investigate until after the claim was referred to the OALJ).

Absent claimant's inadmissible testimony, there is no evidence supporting a finding that DSC, rather than employer, is the coal mine operator responsible for the payment of benefits. Thus, we affirm the administrative law judge's determination that employer is the properly designated responsible operator.[5] 20 C.F.R. §§725.407, 725.494(a)-(e), 725.495(a)(1); Decision and Order at 2.

[5] In light of this disposition, we need not address employer's argument that the administrative law judge erred in finding it failed to establish that David Stanley Consultants LLC (DSC) is financially capable of assuming liability for benefits, or the Director's argument that he erred in finding that claimant worked for DSC for at least one year. Employer's Brief at 6; Director's Letter Brief at 5; Order Denying Claimant's Motion to Dismiss at 2.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge