U.S. Department of Labor

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

BRB No. 18-0219 BLA

RAYMOND ABSHIRE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION, c/o THE PITTSTON COMPANY	)	
	)	
and	)	DATE ISSUED: 03/22/2019
	)	
THE PITTSTON COMPANY, c/o HEALTHSMART CCS	)	
	)	
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 Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Lois Kitts and James M. Kennedy (Baird & Baird P.S.C.), Pikeville, Kentucky, for employer/carrier.

Ann Marie Scarpino (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05402) of Administrative Law Judge John P. Sellers, III, 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). This case involves a subsequent claim filed on January 27, 2015.[1]

After crediting claimant with 15.51 years of underground coal mine employment,[2] the administrative law judge found that the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator. Employer further argues that the administrative law judge

[1] Claimant filed nine prior claims, five of which were finally denied and four of which were withdrawn. Director's Exhibits 1-5, 48. Claimant's most recent prior claim, filed on February 27, 2013, was finally denied by the district director on October 24, 2013 because claimant did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 5.

[2] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law 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 7.

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

erred in crediting claimant with at least fifteen years of coal mine employment and, therefore, erred in finding that he invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's identification of employer as the responsible operator.[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).

I. Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). To be a "potentially liable operator," a coal mine operator must be financially capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(e).[5] Once a potentially liable operator has been properly identified by the Director, it may be relieved of liability only if it proves either that it is financially incapable of paying benefits, or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer does not dispute that it meets the criteria for a potentially liable operator at 20 C.F.R. §725.494, but argues claimant subsequently worked for operators that also meet the criteria. In cases in which the designated responsible operator did not most recently employ the miner, the district director must explain the designation. 20 C.F.R. §725.495(d). If the operator that most recently employed the miner is financially incapable of assuming liability for the payment of benefits, the district director must submit a statement to that effect, which is prima facie evidence "that the most recent employer is not financially capable of assuming its liability for a claim." *Id.* "In the absence of such a

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; the operator must have employed the miner for a cumulative period of not less than one year; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

statement, it shall be presumed that the most recent employer is financially capable of assuming liability for a claim." *Id*.

Before issuing the Proposed Decision and Order designating employer as the responsible operator, the district director submitted statements identifying two operators that more recently employed claimant, D&L Coal Company and D&A Coal Company, that were not covered by an insurance policy, or approved to self-insure on the date of claimant's last employment. *Id*. Therefore, they were financially incapable of assuming liability for the claim. *Id*. The district director specified that claimant was last employed by D&L Coal Company in 1984 and by D&A Coal Company in 1991. *Id*.

The Director submitted updated 20 C.F.R. §725.495(d) statements to the administrative law judge to correct a clerical error regarding claimant's dates of last employment. Director's Exhibits 59, 60; Hearing Transcript at 7-15. The Director clarified that claimant was employed by D&A Coal Company in 1984 and by D&L Coal Company in 1991, and that the dates were transposed on the documents submitted to the district director.[6] *Id*. Over employer's objection, the administrative law judge admitted the exhibits. Decision and Order at 8-9. The administrative law judge then found employer did not meet its burden to establish that another financially capable operator more recently employed claimant for at least one year. Decision and Order at 8-9.

Employer argues that the updated statements should not have been admitted because, absent extraordinary circumstances, all liability evidence must be submitted to the district director, not the administrative law judge. Employer's Brief at 12-13, *citing* 20 C.F.R. §725.456(b)(1). Therefore, employer argues the administrative law judge should have presumed that D&L Coal Company and D&A Coal Company are financially capable of assuming liability for the claim. *Id*. Employer's argument has no merit.

The administrative law judge correctly found that the district director complied with 20 C.F.R. §725.495(d) by submitting statements indicating that D&L Coal Company and D&A Coal Company were financially incapable of assuming liability for this claim. Decision and Order at 8-9; Director's Exhibit 25. Contrary to employer's argument, the administrative law judge acted within his discretion in admitting the updated statements because they "simply clarify [the] dates of [claimant's] last employment with D&A Coal Company and D&L Coal Company" contained in the prior exhibits. Decision and Order

[6] The updated statements also set forth that D&A Coal Company and D&L Coal Company had previously been insured by the Kentucky Coal Producers Fund, which went bankrupt on January 14, 2013 and is unable to honor any obligations of D&A Coal Company and D&L Coal Company. Director's Exhibits 59, 60.

at 9; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (Board reviews the administrative law judge's procedural rulings for abuse of discretion).

Based on the foregoing, the administrative law judge correctly determined that the burden shifted to employer to prove that D&L Coal Company and D&A Coal Company had the financial capability of paying benefits pursuant to 20 C.F.R. §725.495(c)(2).[7] Employer did not submit any evidence to support its burden. We therefore affirm the administrative law judge's finding that employer is the responsible operator. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 8-9.

II. Invocation of the Section 411(c)(4) Presumption-Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). As the regulations provide only limited guidance to calculate coal mine employment, the Board will uphold an administrative law judge's determination based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In addressing the length of claimant's coal mine employment, the administrative law judge considered claimant's hearing testimony, employment history forms, and Social Security Administration (SSA) earnings records. Decision and Order at 4-8. He was unable to determine the beginning and ending dates of claimant's coal mine employment and found that claimant's SSA earnings records were the most credible evidence. *Id*.

For pre-1978 employment, the administrative law judge credited claimant with coal mine employment for every quarter of a year for which he earned at least $50.00 from coal mine operators as reflected in the SSA earnings records. Decision and Order at 5. Finding

[7] Employer also contends that the administrative law judge erred in finding it the responsible operator, because "the Director never confirmed or verified whether any officer, shareholder, or other personal potentially liable for payment of benefits was capable of paying benefits before issuing the Proposed Decision and Order." Employer's Brief at 16. Contrary to employer's arguments, the Director was not required to consider whether the corporate officers of a potential responsible operator are financially capable of assuming liability. *See Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-162 (1999) (en banc) (Hall, C.J., and Nelson, J., concurring and dissenting), *aff'd on recon.*, 22 BLR 1-24 (1999) (en banc) (Hall, C.J., and Nelson, J., concurring and dissenting); *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999).

that claimant earned more than $50.00 in coal mine employment in thirty-one quarters between 1968 and 1977, the administrative law judge credited claimant with 7.75 years of coal mine employment through 1977. *Id*. For coal mine employment from 1978 onwards, he applied the formula set forth at 20 C.F.R. §725.101(a)(32)(iii), and credited claimant with an additional 7.76 years of coal mine employment, for a total of 15.51 years. *Id*. at 6-7.

Employer contends the administrative law judge's method for crediting claimant for every quarter in which he earned at least $50.00 from 1968 to 1977 overestimates his coal mine employment. Employer's Brief at 13-14. Contrary to employer's argument, the Board has found this a reasonable method for calculating pre-1978 coal mine employment.[8] *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984). We thus affirm the administrative law judge's finding that claimant had 7.75 years of coal mine employment before 1978. *Muncy*, 25 BLR at 1-27; Decision and Order at 5.

We further affirm as unchallenged the administrative law judge's determinations that claimant established 7.76 years of coal mine employment from 1978 to 1990, and that all 15.51 years occurred in underground mines.[9] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-8. Consequently, we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 24-25. As employer raises no challenge to the administrative law judge's determination that it failed to rebut the presumption, we further affirm the award of benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25-31.

[8] Contrary to employer's argument, the Board did not overrule *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984). Employer's Brief at 14, *citing North v. Harlan Cumberland Coal Co.*, BRB No. 16-0200 BLA (Feb. 2, 2017) (unpub.). In *North*, the Board specifically stated that for pre-1978 coal mine employment, "an administrative law judge permissibly may credit a miner for each calendar quarter in which $50.00 was earned." *North*, BRB No. 16-0200 BLA, slip op. at 8 n. 13.

[9] We reject employer's argument that the administrative law judge erred in using two methods of calculating the length of coal mine employment. Employer's Brief at 14-15. The relevant inquiry is whether the determination based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

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