BRB No. 12-0103 BLA

DAVID A. CERRA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/26/2012
	)	
RALPH FELOSI TRUCKING, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Micah S. Blankenship (Wolfe Williams Rutherford and Reynolds), Norton, Virginia, for claimant.

Bonnie Hoskins (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer.

Paul L. Edenfield (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (2007-BLA-5511) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of the Black Lung

Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on June 9, 2005.

The administrative law judge credited claimant with twenty-one years of coal mine employment,[1] found that claimant is totally disabled due to pneumoconiosis, and awarded benefits.[2] 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Additionally, the administrative law judge found that employer, Ralph Felosi Trucking, Incorporated (Felosi Trucking), did not employ claimant for at least one calendar year. The administrative law judge, therefore, found that Felosi Trucking is not the coal mine operator responsible for the payment of benefits. Accordingly, the administrative law judge dismissed Felosi Trucking as the responsible operator, the effect of which was to transfer liability for the payment of benefits to the Black Lung Disability Trust Fund (the Trust Fund).[3] *See* 26 U.S.C. §9501(d)(1)(B).

On appeal, the Director contends that substantial evidence does not support the administrative law judge's finding that Felosi Trucking did not employ claimant for at least one year. The Director urges the Board to reverse the administrative law judge's determination to dismiss Felosi Trucking and transfer liability to the Trust Fund. Alternatively, the Director urges the Board to vacate the administrative law judge's finding on the responsible operator issue, and remand the case for further consideration of the evidence regarding claimant's employment with Felosi Trucking. Claimant and Felosi Trucking respond, urging affirmance of the administrative law judge's dismissal of Felosi Trucking as the coal mine operator responsible for the payment of benefits.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, 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 (1989) (en banc).

[2] Because the award of benefits is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] After dismissing employer as the responsible operator, the administrative law judge did not specifically address the benefits liability issue, or order the Black Lung Disability Trust Fund to pay benefits. Decision and Order at 2-3.

The responsible operator is the "potentially liable operator, as determined in accordance with §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 employed the miner "for a cumulative period of not less than one year," 20 C.F.R. §725.494(c), and meets the other criteria of a potentially liable operator.[4] A "year" is defined to mean:

> [A] period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. §725.101(a)(32).[5] The administrative law judge may apply any reasonable method of calculation in determining the length of the miner's coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc) (McGranery, J., concurring and dissenting); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988) (en banc); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988).

In determining whether the Director established that Felosi Trucking employed claimant for at least one calendar year, the administrative law judge relied upon evidence

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[4] The remaining criteria for identifying a potentially liable operator are not at issue in this case. *See* 20 C.F.R. §725.494(a),(b),(d),(e).

[5] The regulations provide for "a two-step inquiry into a miner's employment to determine if an employer is the responsible operator." *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). First, the administrative law judge must determine whether the miner worked for the operator for one calendar year, or for partial periods totaling one year. Second, if the administrative law judge finds that one calendar year of employment has been established, the administrative law judge must determine whether the miner worked as a miner during that one year period for at least 125 days. *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 562, 22 BLR 2-349, 2-360 (6th Cir. 2002); *Daniels Co. v. Mitchell*, 479 F.3d 321, 330, 24 BLR 2-1, 2-17 (4th Cir. 2002); *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc) (McGranery, J., concurring and dissenting). In this case, it is undisputed that claimant worked in or around a coal mine for at least 125 working days. 20 C.F.R. §725.101(a)(32).

in the form of pay stubs contained in the record. Decision and Order at 2. These pay stubs document that claimant worked for Felosi Trucking for two different periods, from June 13, 1993 through March 20, 1994, and from May 8, 1995 through August 6, 1995. Director's Exhibit 17. These two periods, if credited in full, encompass a total of 372 calendar days. During the first period, however, claimant did not receive a paycheck for the weeks ending on July 10, 1993; December 25, 1993; and January 30, 1994. During the second period of employment, claimant did not receive a paycheck for the week ending July 8, 1995. *Id.*

The administrative law judge found that, based on the pay stubs, claimant worked for Felosi Trucking for thirty-seven weeks in the first period and twelve weeks in the second period, for a total of forty-nine weeks. Decision and Order at 2. Because the administrative law judge found that claimant worked for Felosi Trucking for only forty-nine weeks, or 343 days, a period of time less than one calendar year, he dismissed it as the coal mine operator responsible for the payment of benefits. *Id.*

The Director argues that the administrative law judge erred in failing to address those weeks for which claimant did not receive a paycheck in determining whether Felosi Trucking employed claimant for at least one calendar year, pursuant to 20 C.F.R. §725.101(a)(32). The Director contends that, based on claimant's "nearly steady paychecks," and the absence of any evidence that the employment relationship with Felosi Trucking ceased during the four weeks, claimant was "continuously employed" for each of the two periods he worked for Felosi Trucking. Director's Brief at 5. Employer responds, however, that claimant's employment with Felosi Trucking was "sporadic and unreliable." Employer's Brief at 4.

As the Director notes, the administrative law judge did not address the four weeks, interspersed throughout claimant's two employment periods with Felosi Trucking, for which claimant was not paid. These gaps in the paystub evidence may be creditable as approved absences, if claimant remained on Felosi Trucking's payroll. In determining whether a one-year employment relationship existed, a claimant should be given credit for days he or she actually worked or was excused from work by the employer. *Tackett*, 12 BLR at 1-13. An unpaid leave of absence may be counted where there is no evidence that the employment was terminated and the record indicates that claimant retained the right to employment. *Elswick v. New River Co.*, 2 BLR 1-1109, 1113-14 (1980).

In this case, because the administrative law judge did not address claimant's status with Felosi Trucking during the four weeks for which he was not paid, we are unable to determine whether substantial evidence supports the administrative law judge's determination that Felosi Trucking did not employ claimant for at least one year. Therefore, we must vacate the administrative law judge's finding, and remand this case for him to consider the four weeks at issue, and explain his reasons, in accordance with

the Administrative Procedure Act, for either including or excluding those weeks in calculating the length of claimant's employment with Felosi Trucking. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In light of the foregoing, we vacate the administrative law judge's determination that Felosi Trucking is not the responsible operator, and remand this case for further consideration of the coal mine employment evidence. If, on remand, the administrative law judge finds that claimant was on approved absences for the four weeks at issue, he may find that the employment relationship with Felosi Trucking continued during those periods, and thereby conclude that claimant worked for Felosi Trucking for at least one calendar year.[6] *See* 20 C.F.R. §§725.101(a)(32), 725.493, 725.494(c). Alternatively, if the administrative law judge finds that those weeks are not creditable as approved absences, he should find that the Director has not met his burden to establish an employment relationship of at least one calendar year with Felosi Trucking, and should transfer liability to the Trust Fund. *See* 26 U.S.C. §9501(d)(1)(B); *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 561, 22 BLR 2-349, 2-359 (6th Cir. 2002).

[6] More specifically, based on the administrative law judge's calculation of 343 days of employment with Felosi Trucking, he would need to find that claimant had at least twenty-two more days of employment.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge