BRB No. 13-0070 BLA

DEBORAH RAMEY (Widow of BILLY J. RAMEY) Claimant-Respondent v. ROBERT COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/25/2013 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Richard A. Seid (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2008-BLA-5285) of Administrative Law Judge Peter B. Silvain, Jr. (the administrative law judge) rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act.). The administrative law judge determined that employer is the properly designated responsible operator herein, and adjudicated this survivor's claim[1] pursuant to the regulatory provisions at 20 C.F.R. Part 718. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with 15.25 years of qualifying coal mine employment, and determined that the evidence was sufficient to

[1] Claimant is the widow of the miner, who died on May 1, 2006. Director's Exhibit 10. The miner's claim for benefits, filed on June 22, 1993, was denied by Administrative Law Judge Gerald M. Tierney on August 3, 1995. On January 15, 1998, Administrative Law Judge Daniel F. Sutton denied the miner's request for modification. On January 26, 1999, the Board affirmed the denial of modification and the denial of benefits. *Ramey v. Robert Coal Co.*, BRB No. 98-0630 BLA (Jan. 26, 1999)(unpub.). The miner filed a second request for modification on March 11, 1999, Director's Exhibit 1-496. No further action was taken after the district director denied modification, and the claim was administratively closed and deemed abandoned on March 28, 2001. Director's Exhibits 1-2, 1-5, 1-19. Claimant filed her survivor's claim on September 29, 2006. Director's Exhibit 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where at least fifteen years of qualifying coal mine employment, *i.e.*, 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 are established. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id*. Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2013), and that claimant established invocation of the presumption that the miner's death was due to pneumoconiosis. The administrative law judge further found that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and awarded benefits.

On appeal, employer challenges its designation as the responsible operator herein, arguing that the doctrine of collateral estoppel is applicable to preclude relitigation of this issue. Employer also challenges the administrative law judge's calculation of the length of the miner's coal mine employment, and his finding that invocation of the amended Section 411(c)(4) presumption was established, and not rebuttal. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's liability arguments. Employer has filed a combined reply brief, reiterating its position.

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.[3] 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 initially contends that the administrative law judge erred in finding that the doctrine of collateral estoppel was not applicable to bar relitigation of the responsible operator issue in this case, based on Administrative Law Judge Gerald M. Tierney's order dismissing employer as the responsible operator in the miner's claim.[4] Employer's Brief at 17-21; Reply Brief at 2. We disagree.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[4] In the miner's claim, the district director named Ramey Trucking and employer, Robert Coal Company (Robert Coal), as potential responsible operators. Robert Coal filed a motion to dismiss, citing claimant's subsequent employment with Ramey Trucking. Judge Tierney noted that Ramey Trucking was the miner's last employer for a period of more than one year; that its insurance policy expired in 1990; and that soon after March 1991, it filed for bankruptcy. Judge Tierney determined, therefore, that Ramey Trucking could not be named as a responsible operator, since it was not capable of assuming liability for the payment of benefits. As case law at that time prohibited prior employers from being held liable, Judge Tierney dismissed Robert Coal as a responsible operator and transferred liability to the Black Lung Disability Trust Fund (Trust Fund). While Judge Tierney's interlocutory order, dated January 25, 1995, was

The United States Court of Appeals for the Sixth Circuit has held that for collateral estoppel to apply, four elements must be met:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
(2) determination of the issue must have been necessary to the outcome of the prior proceeding;
(3) the prior proceeding must have resulted in a final judgment on the merits; and
(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 908 (6th Cir. 2001); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(en banc); *see also Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998). In the present case, as benefits were denied in the miner's claim, the administrative law judge properly found that the doctrine of collateral estoppel was not applicable, because the determination of the responsible operator issue in the miner's 1993 claim was not essential to the denial of that claim. Decision and Order at 11; *see Hughes*, 21 BLR at 1-137. Moreover, when the miner's claim was finally denied on modification, employer remained a party to the case, as the designated responsible operator. Accordingly, we affirm the administrative law judge's finding that the doctrine of collateral estoppel is not applicable in this survivor's claim.

We agree, however, with employer's argument that, because the district director failed to satisfy the requirements of 20 C.F.R. §725.495 (2013), liability must shift to the Black Lung Disability Trust Fund (Trust Fund).

Section 725.495 (2013) addresses the burden of proof of the parties with regard to the criteria for determining the responsible operator, and specifically provides that the Director bears the burden of proving that the responsible operator initially found liable

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pending on appeal, the miner moved to remand, and the Board remanded the case to the district director for modification proceedings. On July 7, 1997, Judge Sutton issued an Order granting Ramey Trucking's unopposed motion to be dismissed from the case, based upon Judge Tierney's prior finding of its inability to assume liability. However, by Order issued on July 30, 1997, Judge Sutton denied Robert Coal's motion for dismissal as the responsible operator. On January 15, 1998, Judge Sutton issued his Decision and Order denying the miner's request for modification, and the Board subsequently affirmed the denial of benefits. Director's Exhibit 1.

for the payment of benefits is a potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a), (b) (2013). The regulation also provides 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. If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record shall also contain a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of authorization to self-insure. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." 20 C.F.R. §725.495(d) (2013).

The record reflects that the miner was self-employed by Ramey Trucking from 1981 to 1991, and that he received wages from employer, Robert Coal, from 1978 to 1982.[5] Director's Exhibit 5. The district director named employer as a potentially liable operator in its Notice of Claim, and employer timely filed a controversion of liability. Director's Exhibits 18, 19; *see* 20 C.F.R. §725.408 (2013). Subsequently, the district director issued a Schedule for Submission of Additional Evidence and a Proposed Decision and Order, in which employer was named as the designated responsible operator. As support for the liability designation, the district director stated that:

> This operator is not the operator that most recently employed the miner, but is the designated responsible operator because: Robert Coal Company was the miner's last employment of one year duration (1978-1982). All other companies the miner worked for after 1982, Ramey Trucking, Buccaneer Coal, Clintwood Coal and Valley Coal, were for less than one year.

Director's Exhibits 22, 25.

As Ramey Trucking was the operator that most recently employed the miner, and as the record reflects, and the administrative law judge found, that the miner worked for Ramey Trucking for over one year, the district director's explanation for designating employer as the liable responsible operator is erroneous and incomplete. The district director failed to address or substantiate Ramey Trucking's insolvency, and failed to state whether Ramey Trucking had insurance coverage or whether it was even required to obtain a policy. Accordingly, because the Director failed to carry his initial burden of proof, we reverse the administrative law judge's finding that employer was properly designated the responsible operator herein pursuant to 20 C.F.R. §§725.494, 725.495 (2013). Consequently, the Trust Fund is liable for any payment of benefits.

[5] The miner's employment history form reflects that the miner ended his employment with Robert Coal in February of 1981. Director's Exhibit 3.

In the interest of judicial economy, we next address the administrative law judge's finding that claimant established the requisite fifteen years of qualifying coal mine employment necessary to invoke the amended Section 411(c)(4) presumption. Employer asserts that the administrative law judge substituted the yearly earnings contained in Exhibit 610 of the Department of Labor's "Average Earnings of Employees in Coal Mining" (Exhibit 610) for actual proof in the record. Employer argues that the administrative law judge assumed, by resorting to Exhibit 610, that 125 days of employment equaled one year of work. Employer's Brief at 21-24. Employer's arguments have merit.

In addressing the length of coal mine employment issue, the administrative law judge reviewed testimony by the miner and claimant regarding the miner's employment; the miner's employment history form; and the Social Security Administration (SSA) records, which reflected coal mine work from 1975 to 1992. Decision and Order at 4-5. "Relying on Exhibit 610," the administrative law judge compared the miner's yearly income from the SSA records with the average "yearly" earnings for miners as reported in Exhibit 610.[6] Decision and Order at 8. If the miner's earnings exceeded the average earnings from Exhibit 610 for the corresponding year, the administrative law judge credited the miner with one year of employment. If the miner's earnings were less than the average earnings from Exhibit 610, the administrative law judge divided the miner's yearly earnings for each year by the industry average "yearly" earnings for 125 days, and added each proportional amount together to total the number of years of coal mine employment. Accordingly, the administrative law judge credited claimant with 13.25 years of coal mine employment based on "the records alone." Decision and Order at 5-6. The administrative law judge further credited the miner with two additional years of coal mine employment for 1983 and 1984, when he was self-employed, based on the miner's testimony, for a total of 15.25 years. Decision and Order at 6.

We agree with employer that the administrative law judge's method of calculating years of coal mine employment cannot be upheld. To be credited with a year of coal mine employment, claimant must prove that the miner worked in or around a coal mine over a period of one calendar year, or partial periods totaling one year, during which he worked for at least 125 working days. 20 C.F.R. §725.101(a)(32) (2013). If the beginning and ending dates of the miner's employment cannot be ascertained, the

[6] The Department of Labor uses the tables identified as Exhibits 609 and 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* Exhibit 609, entitled *Wage Based History*, contains the average annual wages for miners by year. Exhibit 610, entitled *Average Earnings of Employees in Coal Mining*, contains the average annual earnings by year for miners who worked 125 days at a mine site.

administrative law judge may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics.[7] 20 C.F.R. §725.101(a)(32)(iii) (2013). The dates and length of employment may be established by any credible evidence, and any reasonable method of computation will be upheld if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii) (2013); *see Vickery v. Director,* OWCP, 8 BLR 1-430 (1986). In the instant case, the administrative law judge erroneously credited the miner with 365 days of employment if his income exceeded the industry average for just 125 days of work. *See Clark v. Barnwell Coal Co*., 22 BLR 1-277, 1-281 (2003). Additionally, the administrative law judge failed to take note of whether the miner's employment, as set out in the SSA earnings record, spanned the whole year, or just quarters within a year; in some instances, the administrative law judge credited the miner with complete years of coal mine employment when the SSA records indicate that the miner worked only specific quarters within the year. Because we find that the method employed by the administrative law judge is not reasonable, we vacate his finding of 15.25 years of qualifying coal mine employment, and remand this case for further findings. As the administrative law judge's finding of greater than fifteen years of qualifying coal mine employment affects the applicability of amended Section 411(c)(4), we must also vacate his finding that claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis thereunder, and vacate the award of benefits. If, on remand, the administrative law judge credits the miner with less than fifteen years of coal mine employment, he must determine whether claimant has established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203 (2013), and that the miner's death was due to pneumoconiosis without benefit of a presumption pursuant to 20 C.F.R. §718.205(c).

[7] The pertinent regulation provides that "[a] copy of the BLA table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history." 20 C.F.R. §725.101(a)(32)(iii) (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is reversed in part and vacated in part, and the case is remanded for further proceedings 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