**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0314 BLA

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| EDDIE SMITH | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ANDALEX RESOURCES, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN RESOURCES INSURANCE COMPANY | ) | DATE ISSUED: 11/22/2016 |
| | ) | |
| 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 on Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Tighe Estes and Brian W. Davidson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2011-BLA-5457) of Administrative Law Judge Larry S. Merck (the administrative law judge), 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, involving a miner's claim filed on April 8, 2010, is before the Board for the second time.

In his initial decision, the administrative law judge credited claimant with at least twenty-one years of coal mine employment in underground mines or in surface mines under substantially similar conditions, and determined that employer is the properly designated responsible operator. The administrative law judge found that claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption, and awarded benefits.

Upon employer's appeal, the Board affirmed the award of benefits and affirmed the administrative law judge's finding that employer failed to establish a successor relationship between employer and Ikerd-Bandy Company, Incorporated (Ikerd), thereby rejecting employer's assertion that Ikerd is the responsible operator in this case as a successor operator to employer. However, the Board vacated the administrative law judge's finding that employer was the properly designated responsible operator because the administrative law judge did not make specific findings or explain how he determined that the Social Security Administration (SSA) records did not support a finding that claimant worked for Ikerd for at least one year after his employment with employer. The administrative law judge was instructed to reassess the evidence of record; to determine, if possible, the dates of claimant's employment with Ikerd; and to explain with specificity whether the evidence supports a finding that Ikerd employed claimant for a period of at

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

least one year. *Smith v. Andalex Resources, Inc*., BRB No. 14-0324 BLA (June 23, 2015)(unpub.).

On remand, the administrative law judge noted the Board's instructions and, upon review of the record, determined that the evidence was insufficient to conclude that claimant was employed for at least one year with Ikerd after his employment with employer. The administrative law judge found, therefore, that employer was the properly designated responsible operator.

In the present appeal, employer again challenges its designation as the responsible operator in this case. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging affirmance of the administrative law judge's determinations that the evidence is insufficient to establish one year of employment with Ikerd and that employer is the properly designated responsible operator.

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)

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Employer contends that claimant worked at least one full year for Ikerd after his employment with employer, and that the administrative law judge erred in finding the evidence insufficient to support "an inference" that claimant was employed by Ikerd beginning in January of 1994 and continuing through 1995. Specifically, employer asserts that claimant's June 18, 2010 testimony that he worked for Ikerd for two years is consistent with his W-2 forms and his SSA earnings records that reflect earnings in 1994 and 1995. Employer maintains, therefore, that because the evidence is sufficient to establish more than one calendar year of employment, the administrative law judge erred in utilizing the formula at 20 C.F.R. §725.101(a)(32)(iii). Employer's Brief at 2-6. Employer's arguments lack merit.

As we noted in our prior decision, to be liable for the payment of benefits as the responsible operator, employer must be the last coal mine operator to have employed the miner for a period of at least one year. 20 C.F.R. §725.494(c). A "year" is defined as "a

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

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.'" 20 C.F.R. §725.101(a)(32). The designated responsible operator bears the burden of proving, *inter alia*, that a more recent operator employed the miner for at least a year. *See* 20 C.F.R. §725.495(c)(2).

A review of the Decision and Order on Remand reveals that the administrative law judge set forth his findings of fact and conclusions of law, based on his assessment of the probative value of the relevant evidence of record. Decision and Order on Remand at 3-4. In determining whether employer demonstrated that claimant worked at least one year for Ikerd after his employment with employer,[3] the administrative law judge considered claimant's testimony, his SSA earnings records, his W-2 forms, and his employment history form. *Id*. Initially, the administrative law judge noted his prior determination to accord little probative weight to claimant's testimony regarding the length of time he worked for Ikerd, based on his finding that "claimant is not a good historian of his coal mine employment."[4] Decision and Order on Remand at 3; Decision and Order at 8. The administrative law judge noted claimant's employment history form on which claimant indicated that he was employed by Ikerd from December 1993 through March 1994, and noted that claimant's SSA earnings records and his W-2 forms reflected that claimant worked for Ikerd in 1994, earning $10,705.31, and in 1995, earning $2,485.71. Director's Exhibits 3, 6, 7; Decision and Order on Remand at 3. According greater weight to claimant's W-2 forms and SSA earnings record, the administrative law judge determined that, while the record confirmed that claimant was employed by Ikerd in 1994 and 1995, the evidence was insufficient to support a conclusion that claimant was employed by Ikerd for a period of one calendar year or partial periods totaling one year.

[3] It is undisputed that claimant worked for employer from 1988 to 1993. Director's Exhibit 7.

[4] In his Decision and Order dated May 9, 2014, the administrative law judge determined that claimant's testimony concerning the length of his employment with Ikerd was "uncertain and inconsistent," based on claimant's testimony at depositions held on June 18, 2010 and October 22, 2012, and at the December 12, 2012 hearing. Decision and Order at 8. The administrative law judge found that "claimant is not a good historian of his coal mine employment," noting that "[claimant] testified during his deposition on June 18, 2010, that he believed it was two years, but during his deposition on October 22, 2012, he stated that he probably worked for Ikerd less than a year" and "[a]t the hearing, he testified that he believed it was from December 1993 until March 1994." Decision and Order at 8; Director's Exhibit 18 at 5, 6-7; Employer's Exhibit 12 at 5; Hearing Transcript at 30, 40.

*See* 20 C.F.R. §725.101(a)(32). Thus, the administrative law judge found that there was no evidence of record that conclusively established the beginning and ending dates of claimant's employment with Ikerd. Decision and Order on Remand at 3.

Having determined that the evidence was insufficient to establish the beginning and ending dates of employment, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[5] and considered whether claimant's earnings for each of the years equaled or exceeded the average earnings of employees in coal mining, as set out in Exhibit 610.[6] Dividing $10,705.31, claimant's earnings in 1994, by $142.08, the average daily rate in 1994, the administrative law judge determined that claimant worked for Ikerd for 75 days in 1994. Dividing $2,485.71, claimant's earnings in 1995, by $147.52, the average daily rate in 1995, the administrative law judge determined that claimant worked for Ikerd for 17 days in 1995. *Id.* Finding that claimant worked for Ikerd for a total of 92 days in 1994 and 1995, the administrative law judge concluded that, even if employer had established that claimant worked for a cumulative period of one year with Ikerd, the evidence failed to establish at least 125 working days in such employment. *See* 20 C.F.R. §725.101(a)(32); *Id.* Thus, the administrative law judge found that employer produced insufficient evidence to establish that claimant worked for Ikerd for a period of at least one year after his employment with employer.

Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co*., 22 BLR 1-275, 1-280-81 (2003); *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). As the administrative law judge

[5] If the beginning and ending dates of the miner's employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the 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. 20 C.F.R. §725.101(a)(32)(iii).

[6] Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, *Average Earnings of Employees in Coal Mining*, contains the coal mine industry's average daily earnings for each year and the average earnings for 125 days. *See* http://www.dol.gov/owcp/dcmwc/exh610.htm.

employed a reasonable method of computation and sufficiently explained its use, *see Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984), and as substantial evidence supports his findings, we affirm the administrative law judge's determination that claimant worked less than one year with Ikerd after his employment with employer, and further affirm his finding that employer is the properly designated responsible operator in this case.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge