U.S. Department of Labor

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

BRB No. 17-0658 BLA

GADDY W. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY VIRGINIA, LLC, f/k/a PARAMONT COAL CORPORATION	)	DATE ISSUED: 10/24/2018
	)	
and	)	
	)	
PYXIS RESOURCES COMPANY	)	
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham and Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05893) of Administrative Law Judge Richard M. Clark 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 miner's claim filed on March 21, 2013.

The administrative law judge found that employer, Paramont Coal Corporation, is the responsible operator. He also found that the evidence established that claimant has complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203. Consequently, the administrative law judge found that claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and awarded benefits.

On appeal, employer challenges the responsible operator finding and asserts that liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund).[1] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the determination that employer is the responsible operator liable 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.[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).

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," it must have employed the miner

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The record reflects that claimant's most recent coal mine employment was in Virginia. Hearing Transcript at 28-30. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

for a cumulative period of not less than one year. 20 C.F.R. §725.494(c).[3] The administrative law judge found that Paramont Coal Corporation is the responsible operator based on employer's concession before the district director. Employer argues, however, that the district director and the administrative law judge erred in resolving the issue of which entity is the responsible operator.

Relevant to this issue, claimant indicated in his application for benefits that his most recent coal mine employment was with Paramont Mining Company. Director's Exhibit 3. His Social Security Administrative (SSA) earnings statement reflects that he was most recently employed from 1992 to 1994 by Paramont Coal Corporation. Director's Exhibit 7 at 4.

The district director issued a Notice of Claim on April 11, 2013, naming an entity identified as Paramont Coal Company Virginia, LLC as a potentially liable operator, because it employed claimant from 1992 to 1994 and met the other criteria for being a potentially liable operator. Director's Exhibit 18. The district director indicated that Paramont Coal Company Virginia, LLC is self-insured through Pyxis Resources Company.[4] *Id*. Subsequently, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) on January 28, 2014 identifying Paramont Coal Company Virginia, LLC as the responsible operator. Director's Exhibit 20. The district director again determined that Paramont Coal Company Virginia, LLC is self-insured through Pyxis Resources Company. *Id*. The SSAE was sent care of Healthsmart CCS as a self-insurance administrator.[5] *Id*. Healthsmart CCS responded to the SSAE on behalf of Paramont Coal Company Virginia, LLC, disputing that claimant is entitled to benefits and

[3] 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 miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits. 20 C.F.R §725.494(a)-(e).

[4] The Notice of Claim was sent care of Wells Fargo Disability Management as a self-insurance administrator. Director's Exhibit 18. Wells Fargo responded to the Notice of Claim on behalf of the operator, disputing that claimant was entitled to benefits and that Paramont Coal Company Virginia, LLC is a potentially liable operator. Director's Exhibit 19.

[5] Healthsmart CCS was substituted for Wells Fargo Disability Management as self-insurance administrator. Director's Exhibit 20.

that Paramont Coal Company Virginia, LLC is a potentially liable operator. Director's Exhibit 21. A copy of this response was sent to attorney Timothy Gresham. *Id*.

Subsequently, Mr. Gresham entered his appearance before the district director and informed the district director that he represented Paramont Coal Corporation. Director's Exhibit 22 at 1. He stated that the district director "incorrectly identified the employer as Paramont Coal Company Virginia, LLC," when claimant actually worked for Paramont Coal Corporation. *Id*. He attached a completed form CM-2790, Operator Response to Schedule for the Submission of Additional Evidence, in which Paramont Coal Corporation accepted that it is the responsible operator in this claim. *Id*. at 2. In addition, Mr. Gresham stated that Paramont Coal Corporation is self-insured through Pyxis Resources Company. *Id*. In response, the district director stated that the Department of Labor's records reflect that Paramont Coal Company Virginia, LLC was formerly known as Paramont Coal Corporation. Director's Exhibit 27. In response, Mr. Gresham disputed the district director's characterization, arguing that the two entities are separate companies and that Paramont Coal Company Virginia, LLC did not exist until 2002.[6] Director's Exhibit 32. He stated that Paramont Coal Corporation is a subsidiary of Pyxis Resources Company. *Id*. Therefore, he again requested that the district director revise its records to reflect that Paramont Coal Corporation is the responsible operator. *Id*.

The district director issued a Proposed Decision and Order awarding benefits on July 11, 2014, naming "Paramont Coal Company Virginia, LLC, formerly known as Paramont Coal Corporation," as the responsible operator. Director's Exhibit 41. Moreover, the district director found that the responsible operator was self-insured through Pyxis Resources Company, care of Healthsmart CCS. *Id*. Employer requested a hearing, which was held on June 15, 2016.

During the hearing,[7] employer submitted the deposition testimony of Antonetta Stevens, an employee of Healthsmart CCS. Hearing Transcript at 16. Employer argued that this evidence would establish that claimant was not employed by Paramont Coal Company Virginia, LLC. *Id*. In his post-hearing brief, the Director challenged the admissibility of this deposition testimony because no party submitted it before the district director. Director's Post-Hearing Brief at 2-4. Employer responded, arguing that the

[6] Attorney Gresham also argued that Paramont Coal Company Virginia, LLC is a subsidiary of Alpha Natural Resources. Director's Exhibit 32. He argued that Paramont Coal Company Virginia, LLC has never been self-insured for black lung claims. *Id*.

[7] Employer, Paramont Coal Corporation was represented by counsel at the hearing. Hearing Transcript at 4. Paramont Coal Company Virginia, LLC did not have any representative appear at the hearing.

Director specifically waived its objection to this evidence at the hearing.[8] Employer's Post-Hearing Reply Brief at 1-3.

The administrative law judge issued his Decision and Order on August 16, 2017. He excluded the deposition testimony of Antonetta Stevens because employer failed to identify Ms. Stevens as a liability witness pursuant to 20 C.F.R. §725.457(c)(1).[9] Decision and Order at 14-15. In the alternative, the administrative law judge found that Ms. Stevens's testimony had no probative value because she is the employee of a third party administrator, Healthsmart CCS, and thus had no basis to speak on behalf of Paramont Coal Company Virginia, LLC or Paramont Coal Corporation. *Id*. at 14 n. 12.

Notwithstanding the manner in which the district director resolved the responsible operator issue, the administrative law judge found that employer, Paramont Coal Corporation, is the responsible operator. Decision and Order at 17. The administrative law judge agreed with the Director that employer was not prejudiced by the district director's processing of the claim. *Id*. The administrative law judge found that, "regardless of how the claim was styled, 'Paramont Coal Corporation' and its self-insurance [carrier] were given notice of the claim, admitted to be[ing] the responsible operator, and defended the claim to the present date."[10] *Id*. The administrative law judge also denied employer's request to transfer liability to the Trust Fund based on the district director's failure to

[8] Employer also argued that it informed the district director that it would present evidence by deposition or by testimony at a hearing from employees or agents of Paramont Coal Company Virginia, LLC or Paramont Coal Corporation, or their parents or affiliated companies, to establish that claimant never worked for the named responsible operator. Employer's Post-Hearing Reply Brief at 4.

[9] The regulations require that any witness offering testimony relevant to the liability of the responsible operator, absent extraordinary circumstances, must have been identified as a potential witness while the case was still pending before the district director. 20 C.F.R. §725.457(c)(1). Likewise, 20 C.F.R. §725.414(c) provides that "all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator" and that in the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c).

[10] Claimant also testified at the hearing that he last worked for Paramont Coal Corporation in 1994. Hearing Transcript at 26.

correct its records and list the correct operator. The administrative law judge found that "the district director sufficiently identified the correct entity and, crucially, the correct entity responsible for payment of benefits" and that "Paramont Coal Corporation failed to meet its burden of showing otherwise." *Id.*

Employer argues that the administrative law judge erred in naming Paramont Coal Company Virginia, LLC as the responsible operator rather than Paramont Coal Corporation, and in finding that Paramont Coal Company Virginia, LLC was formerly known as Paramont Coal Corporation. Employer's Brief at 5-7. Contrary to employer's argument, the administrative law judge made no such findings. Rather, the administrative law judge found that, notwithstanding how this claim was styled by the district director, Paramont Coal Corporation is the responsible operator. The administrative law judge correctly found that employer, Paramont Coal Corporation, conceded before the district director that it is the responsible operator. Decision and Order at 17; Director's Exhibit 22. Because employer has not identified any error in the administrative law judge's finding that Paramont Coal Corporation is the responsible operator, that finding is affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Employer also argues that the administrative law judge erred in declining to transfer liability for this claim to the Trust Fund based on the district director's resolution of the responsible operator issue. Specifically, employer asserts that the district director did not meet its burden at the outset of this claim to name Paramont Coal Corporation as a potentially liable operator pursuant to 20 C.F.R. §725.495(b) and improperly named Paramont Coal Company Virginia, LLC.[11] Employer's Brief at 8-13. Employer also asserts that the district director named the wrong operator in the SSAE and the Proposed Decision and Order, and then improperly named two operators when transferring this case to the Office of Administrative Law Judges pursuant to 20 C.F.R. §725.418(d).[12] *Id.* Employer contends that there was no basis for the district director to conclude that Paramont Coal Company Virginia, LLC was formerly known as Paramont Coal Corporation. *Id.* at 9-10. Employer argues that, regardless of whether it experienced actual

[11] The district director designates a responsible operator liable for the payment of benefits, with the initial burden on the district director to prove that the designated responsible operator is a potentially liable operator. 20 C.F.R. §§725.410(a)(3), 725.495(b).

[12] Under 20 C.F.R. §725.418(d), the district director's Proposed Decision and Order must contain "the district director's final designation of the responsible operator liable for the payment of benefits" and the dismissal of all other potentially liable operators that had previously received notice of the claim. 20 C.F.R. §725.418(d).

"harm" as a result of the district director's erroneous actions, the district director's failure to comply with the regulations justifies transferring liability to the Trust Fund. *Id*. at 12.

Contrary to employer's argument, none of these alleged errors warrants transferring liability to the Trust Fund. To the extent employer argues that it was denied due process by the manner in which the district director processed this claim, we find no merit in employer's argument. The Due Process Clause of the United States Constitution, which applies to adjudicative administrative proceedings, requires that an employer receive notice and an opportunity to be heard before it is held liable for an award of benefits. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009). Notice must be reasonably calculated to inform the employer of the claim for benefits. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048 (6th Cir. 1990). A delay in notifying an employer of its potential liability violates due process only if the employer is deprived of a fair opportunity to mount a meaningful defense against the claim. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998); *see also Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Due process "is concerned with procedural outrages, not procedural glitches." *Energy West Mining v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009).

Employer does not dispute that it conceded before the district director that it is the responsible operator pursuant to 20 C.F.R. §§725.494, 725.495(a)(1). Director's Exhibit 22. Further, the administrative law judge properly identified the correct name for the responsible operator, Paramont Coal Corporation. Decision and Order at 16-17. Thus, the pertinent issue is whether employer, Paramont Coal Corporation, received adequate notice and an opportunity to be heard. *See Richardson*, 402 U.S. at 401; *Mullane*, 339 U.S. at 313; *Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807. As discussed above, Paramont Coal Corporation entered its appearance before the district director after the issuance of the SSAE and accepted that it is the responsible operator, i.e., a potentially liable operator that employed claimant most recently pursuant to 20 C.F.R. §§725.494, 725.495(a)(1). Director's Exhibits 20, 22. Employer, therefore, has failed to explain how it was prejudiced by the district director's reference to Paramont Coal Company Virginia, LLC and alleged failure to notify Paramont Coal Corporation at the outset of this claim that it is a potentially liable operator through a Notice of Claim. *See Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807; *Lemar*, 904 F.2d at 1048. Thus we reject employer's argument that liability should transfer to the Trust Fund because the district director issued a Notice of Claim to

"Paramont Coal Company Virginia, LLC," as this error, at most, constitutes a procedural glitch.[13] *Oliver*, 555 F.3d at 1219.

Further, as the Director argues, Paramont Coal Corporation developed medical evidence and defended this claim from the issuance of the SSAE up to the time of the hearing. Director's Brief at 3. It responded to the SSAE by submitting a CT scan and arterial blood gas study from Mountain Comprehensive Health Corporation, and a pulmonary function study from Pikeville Medical Center. Director's Exhibit 13. It filed a Motion to Compel claimant to provide his medical history and to sign a Social Security release, which the district director granted. Director's Exhibits 31, 35. It requested an extension of time to submit medical evidence, which the district director also granted. Director's Exhibit 26, 28. It also submitted medical evidence before the administrative law judge. Decision and Order at 17-22. Thus, the record establishes that Paramont Coal Corporation was not deprived of a fair opportunity to mount a meaningful defense against the claim.[14] *See Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807.

Notwithstanding that the district director may have used an incorrect name to initially designate the responsible operator in this claim, the correct responsible operator was given notice of this claim immediately after the SSAE was issued, entered its appearance, accepted that it is the responsible operator, and mounted a meaningful defense with respect to whether claimant was entitled to benefits. The correct responsible operator also participated at the hearing before the administrative law judge. Further, the administrative law judge corrected the procedural glitch committed by the district director

[13] Further, the parties agree that Paramont Coal Corporation is self-insured through Pyxis Resources Company and that the district director issued the Notice of Claim to Pyxis Resources Company.

[14] Employer argues that the administrative law judge erred in excluding the deposition testimony of Antonetta Stevens. Employer's Brief at 13-18. We decline to address employer's argument that the administrative law judge abused his discretion in excluding this evidence. As discussed above, employer submitted this evidence to prove that claimant did not work for Paramont Coal Company Virginia, LLC. Because the administrative law judge ultimately found that Paramont Coal Corporation is the responsible operator, employer fails to explain how this evidence would affect the administrative law judge's responsible operator finding. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). Further, employer does not challenge the administrative law judge's alternative finding that Ms. Stevens's deposition testimony lacked probative value. Decision and Order at 14 n. 12. Thus, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

by naming "Paramont Coal Corporation" as the responsible operator. Therefore, we reject employer's argument that liability of this claim should transfer to the Trust Fund.

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

RYAN GILLIGAN
Administrative Appeals Judge