U.S. Department of Labor

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

BRB No. 18-0477 BLA

ESTATE OF MARVIN E. EDWARDS[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
R & R TRUCKING COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 10/17/2019
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

[1] The miner died on July 15, 2017. His daughter is pursuing the claim on behalf of his estate. Decision and Order Awarding Benefits at 2.

Andrea Berg and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (2015-BLA-05662) of Administrative Law Judge Monica Markley, rendered on a deceased miner's claim filed on February 11, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined employer was not the responsible operator and liability for benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). She found the miner had 20.9 years of qualifying coal mine employment and was totally disabled, and thus claimant invoked the presumption he was totally disabled due to pneumoconiosis under Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). She further found the presumption unrebutted and awarded benefits.

On appeal, the Director argues the administrative law judge erred in holding the Trust Fund liable for the payment of benefits. Claimant responds, asserting the administrative law judge properly awarded benefits, which either employer or the Trust Fund should pay. Employer responds, urging affirmance of the administrative law judge's finding it is not the 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia and West

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director contends the administrative law judge selectively analyzed the miner's testimony regarding his employment and did not rationally explain her finding that employer is not the responsible operator in accordance with the Administrative Procedure Act (APA).[4] We disagree.

The "responsible operator" is the "potentially liable operator"[5] that most recently employed the miner for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Relevant to this appeal, the term "operator" includes "any independent contractor [such as a self-employed coal truck driver] performing services" at a coal mine. 20 C.F.R. §725.491(a)(1).

The Director bears the burden of proving that the responsible operator is a potentially liable operator. 20 C.F.R. §725.495(b). Once designated, the responsible operator can avoid liability by proving either that it does not possess sufficient assets to pay benefits, or that another potentially liable operator employed the miner more recently for one year and is capable of assuming liability for benefits. 20 C.F.R. §725.495(c); *see* 20 C.F.R. §725.494(c), (e). In certain circumstances, however, an operator that more recently employed the miner will be presumed financially capable of assuming liability for benefits.[6] 20 C.F.R. §725.495(d).

Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 6.

[4] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[5] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[6] If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include

The district director designated employer as the responsible operator and estimated the miner last worked for employer on February 21, 2008. Director's Exhibit 37 at 13. The administrative law judge found the miner's statements and testimony to be inconsistent, however, regarding his coal mine employment history.[7] Decision and Order at 9 n.5. While the miner testified that he was only self-employed for a brief period before he began working for employer in 1974, the administrative law judge declined to credit that testimony for several reasons. The Social Security Administration (SSA) earnings record showed distinct periods of employment with employer in 1980 and from 1995-2008, and multiple periods of self-employment in 1978-1980, 1984-1994, and 2008-2009. *Id*. She also noted that, except for 1980, none of the self-employment earnings overlapped with the earnings he received from employer. *Id*.

Further differentiating his time with employer and his self-employment, the administrative law judge noted the SSA-reported earnings reflected different "pay structure[s]," with the miner's self-employment earnings reported as "random" numbers and his earnings with employer reported as "round" numbers.[8] Decision and Order at 9

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a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. 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." *Id*.

[7] On his employment history form, the miner reported he had difficulty remembering his coal mine employment and referred to the Social Security Administration (SSA) earnings record. Director's Exhibit 3. He listed employer as the owner of the trucking business for which he last worked. Director's Exhibit 5. In answers to interrogatories, the miner stated he worked for employer from 1974 to 2004. Director's Exhibit 25. On June 11, 2014, the miner testified he was self-employed in 1974 or 1975, but got rid of his coal truck and went to work for employer. Director's Exhibit 26 at 4. He alleged he worked for employer until 2008, and was never self-employed while working for it. *Id*. at 5.

[8] The SSA earnings records show the miner earned wages in self-employment for the years 1976, 1978-1980, 1984-1994, and 2008-2009, respectively: $4,929.00, $2,573.00, $10,148.00, $4,435.00, $4,070.00, $3,501.00, $7,191.00, $7,671.00, $4,718.00, $5,976.00, $10,077.00, $9,888.00, $9,953.00, $19,897.00, $17,100.00, $16,624.00, and $10,159.00. Director's Exhibit 6. He earned the following wages with employer for the years 1980, and 1995-2008, respectively: $1,000.00, $25,500.00, $16,500.00, $3,000.00, $36,000.00, $27,900.00, $26,000.00, $23,000.00, $24,000.00, $24,000.00, $20,000.00, $23,000.00, $24,750.00, $24,000.00, and $7,000.00. *Id*.

n.5. She stated "[t]here is no explanation in the record for these differences, if [c]laimant was not actually self-employed and was working for [employer] all those years." *Id.* As the SSA records showed self-employment in 2008 and 2009, which qualified as coal mine employment,[9] she concluded the district director incorrectly identified the miner as having last worked in coal mine employment on February 21, 2008, for employer. Decision and Order at 9. Because claimant had at least one year of subsequent coal mine employment as a self-employed coal truck driver, she found employer is not the responsible operator. *Id.* Moreover, because the district director "did not . . . provide a statement indicating that [the miner] was not insured for liability as required by 20 C.F.R. §725.495(d)," she found the Trust Fund liable for the payment of benefits. *Id.*, *citing Mays v. Bell Cnty. Coal Corp.*, BRB No. 15-0023 BLA (Oct. 29, 2015) (unpub.); *Ramey v. Robert Coal Co.*, BRB No. 13-0070 BLA (Nov. 25, 2013) (unpub.).[10]

The administrative law judge is empowered to weigh the evidence and make credibility determinations. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Contrary to the Director's assertion, we see no error in the administrative law judge's finding that SSA earnings records were the "more reliable evidence" of the miner's coal mine employment. Decision and Order at 9 n.5; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable."). The administrative law judge recognized that she had conflicting information before her and rationally explained why the SSA earnings record supported her finding that claimant was self-employed in coal

[9] The administrative law judge noted the district director found the miner's self-employment in 2008 and 2009 was coal mine employment and included it when calculating the length of his coal mine employment. Decision and Order at 9, *citing* Director's Exhibit 37.

[10] In *Mays v. Bell Cnty. Coal Corp.*, BRB No. 15-0023 BLA (Oct. 29, 2015) (unpub.), the Board affirmed the administrative law judge's finding that employer was the responsible operator liable for the payment of the miner's benefits, even though the miner's last coal mine employment for one year was working as a self-employed coal truck driver. Unlike the facts of this case, the district director in *Mays* specifically noted in the proposed decision and order that the miner did not have insurance, thereby satisfying the requirements of 20 C.F.R. §725.495(d). *Id.* In *Ramey v. Robert Coal Co.*, BRB No. 13-0070 BLA (Nov. 25, 2013) (unpub.), the Board held the employer should not have been named the responsible operator because there was no 20 C.F.R. §725.495(d) statement regarding the most recent operator who employed the miner for one year.

mine employment for one year after he worked for employer.[11] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (explaining that if a reviewing court can discern what the administrative law judge did and why she did it, the duty of explanation under the APA is satisfied). As the Director raises no other error,[12] we affirm the administrative law judge's determination employer is not the responsible operator[13] and her finding that liability for benefits transfers to the Trust Fund.[14]

[11] Contrary to the Director's argument, the administrative law judge as fact-finder had the discretion to credit claimant's testimony regarding the nature of his coal mine employment as a truck driver, while discrediting his testimony regarding who his employer was during specific periods of time. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988) ("Deference must be given the fact-finder's inferences and credibility assessments[.]"); *see also Russell v. Bowen*, 856 F.2d 81, 83 (9th Cir. 1988) (holding that an administrative law judge who credits part of an expert's opinion need not agree with everything the expert says). The administrative law judge was not, as the Director suggests, required to either accept or reject all of claimant's testimony; the evidence the administrative law judge credited is not inherently contradictory. Director's Brief at 11.

[12] The Director, Office of Worker's Compensation Programs, does not allege error with the administrative law judge's findings regarding financial ability to accept liability under 20 C.F.R. §725.495(d).

[13] Because we affirm the administrative law judge's finding that employer is not the responsible operator, we decline to remand this case based on the Director's assertion that employer's outstanding motions before the administrative law judge were not resolved. Director's Brief at 13 n.4

[14] We affirm, as unchallenged, the administrative law judge's finding that claimant is entitled to benefits under Section 411(c)(4) of the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge