U.S. Department of Labor

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

BRB No. 17-0010 BLA

THELMA JOHNSON (Widow of WILLARD E. JOHNSON) Claimant-Respondent v. MOR COAL, INCORPORATED c/o HUGHES GROUP, INCORPORATED and SECURITY INSURANCE COMPANY OF HARTFORD, c/o ARROWPOINT CAPITAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/06/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Nicholas C. Geale, Acting 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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2011-BLA-06046) of Administrative Law Judge John P. Sellers, III, rendered on a survivor's claim[1] filed on April 8, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time. In its previous decision, the Board affirmed the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[2] *Johnson v. Mor Coal, Inc*., BRB No. 15-0014 BLA, slip op. at 8 (Sept. 16, 2015) (unpub.). However, the Board vacated the administrative law judge's finding that employer is prohibited from challenging its identification as the responsible operator and remanded the case for consideration of that issue. *Id*. On remand, the administrative law judge determined that employer is the properly designated responsible operator and is liable for the payment of benefits to claimant.

On appeal, employer argues that the administrative law judge erred in finding that it is the properly designated responsible operator. In the alternative, employer asserts that it is entitled to an offset in its liability for federal black lung benefits by the award of benefits in the miner's state claim. Claimant responds, urging affirmance of the administrative law judge's findings and stating that the Board should not address the offset issue. The Director, Office of Workers' Compensation Programs (the Director),

[1] Claimant is the widow of the miner, who died on March 20, 2006. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibits 1, 2.

[2] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010).

responds in support of the administrative law judge's designation of employer as the responsible operator. The Director also maintains that the Board has already considered and properly declined to reach employer's argument that any federal black lung benefits it owes should be offset by the award of state benefits to the miner.[3]

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.[4] 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).

Pursuant to the regulations at 20 C.F.R. §§725.494 and 725.495(a)(1), the responsible operator is the employer that most recently employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for the payment of benefits. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313, 25 BLR 2-521, 2-530 (6th Cir. 2014). Relevant to this case, a designated responsible operator can avoid liability by proving that it is not the operator that most recently employed the miner for at least one year.[5] 20 C.F.R. §725.495(c)(2).

On remand, the administrative law judge rejected employer's argument that the miner's last full year of coal mine employment was with Huscoal Inc. (Huscoal). Decision and Order at 4. Instead, the administrative law judge found that the miner's Social Security Administration (SSA) earnings records and Federal Insurance Contributions Act (FICA) statement "show that the [m]iner worked for Mor Coal for a cumulative period of at least one year, and he did so after he worked for Huscoal[.]" Decision and Order at 4; Director's Exhibit 2 at 216-20. Thus, the administrative law judge determined that employer failed to satisfy its burden to prove that "it is not the

[3] Because employer does not allege any error in the award of benefits in the survivor's claim pursuant to 30 U.S.C. §932(*l*), it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1984).

[4] The miner's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that there is no evidence indicating that employer does not have sufficient assets to pay benefits in this case pursuant to 20 C.F.R. §725.495(c)(1). *See Skrack*, 6 BLR at 1-711; Decision and Order at 5.

potentially liable operator that most recently employed the miner." Decision and Order at 5; 20 C.F.R. §725.495(c)(2).

Employer argues that the administrative law judge's finding is erroneous because the administrative law judge ignored the miner's employment history form and state workers' compensation claims records indicating that Huscoal was the most recent operator to employ the miner for at least one year. Employer also asserts that although the miner's FICA statement reflects that employer paid the miner's wages between 1985 and 1990, the miner actually worked for Huscoal during this period. We reject employer's allegations of error.

Contrary to employer's argument, the administrative law judge acknowledged that the miner identified Huscoal on his employment history form as the last coal mine operator he worked for from 1985 through 1990, and that the miner did not list Mor Coal/employer on that form. Decision and Order at 4; Director's Exhibit 2 at 226. However, the administrative law judge rationally determined that the fact that the miner did not list employer on his employment history form "does not exclude the possibility that the [m]iner worked [for employer]."[6] Decision and Order at 4; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

We also reject employer's argument that the administrative law judge ignored the miner's state workers' compensation claims. In his Decision and Order, the administrative law judge acknowledged employer's argument that the miner's state workers' compensation claims support a finding that the miner was last employed by Huscoal. Decision and Order at 4. Additionally, at the hearing, the administrative law judge admitted Employer's Exhibits 1-3 into the record and specifically acknowledged employer's assertion that these documents support its argument that Huscoal should be the properly designated responsible operator. Hearing Transcript at 7-9.

However, the administrative law judge also considered additional evidence in the record indicating that, although the miner worked for Huscoal in 1986 and 1987, he subsequently worked for Mor Coal/employer for a period of at least one year. Specifically, the administrative law judge accurately found that the miner's SSA records reflect earnings from Huscoal in 1986 and 1987, and from Mor Coal/employer between 1985 and 1990. Decision and Order at 4; Director's Exhibit 2 at 216-17. Similarly, the

[6] The record also reflects that, in association with the miner's claim, employer previously conceded that it employed the miner. *See* Director's Exhibit 2-96 (Letter dated April 24, 2002, to the Employment Standards Administration, Office of Workers' Compensation, Division of Coal Miner Workers' Compensation).

administrative law judge accurately found that the miner's FICA statement identifies wages from Huscoal in 1986 and 1987, and from Mor Coal/employer between 1985 and 1990. Decision and Order at 4; Director's Exhibit 2 at 219-20. The administrative law judge permissibly found that the SSA records and FICA statement are "quite material" and entitled to the greatest weight in determining whether the miner last worked for Mor Coal/employer for at least one year. *See Martin,* 400 F.3d at 305, 23 BLR at 2-283; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 4. He further rationally determined that those records establish that the miner "worked for Mor Coal for a cumulative period of at least one year, and he did so after he worked for Huscoal[.]" Decision and Order at 4; *Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to prove that it is not the operator that most recently employed the miner for a cumulative period of at least one year, pursuant to 20 C.F.R. §725.495(c). *Lawson*, 739 F.3d at 313, 25 BLR at 2-530. We therefore further affirm the administrative law judge's determination that employer is the responsible operator liable for the payment of benefits under the Act.[7] *Id*.

[7] Employer raises the same argument in this appeal that it did in the prior appeal – that any benefits it owes to claimant should be offset by the miner's state workers' compensation award. As previously explained, the Board "does not have authority to calculate the amount of monthly benefits to which claimant may be entitled" as the computation of benefits falls within the authority of the district director under 20 C.F.R. §725.502(b)(2). *Johnson v. Mor Coal, Inc.*, BRB No. 15-0014 BLA, slip op. at 6 n.10 (Sept. 16, 2015) (unpub.); *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge