BRB No. 93-1569 BLA

FRANKLIN OSBORNE )
)
Claimant-Respondent )
)
v. )
)
BILL BRANCH COAL CORPORATION )
) DATE ISSUED:
Employer-Petitioner )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
) DECISION and ORDER on
Party-in-Interest ) MOTION for RECONSIDERATION

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer has timely filed a Motion for Reconsideration of the Board's Decision and Order in *Osborne v. Bill Branch Coal Corp.*, BRB No. 93-1569 BLA (Nov. 29, 1994)(unpub.) in which the Board affirmed in part and vacated in part the Decision and Order(92-BLA-1250) of Administrative Law Judge Stuart A. Levin on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). *See* 20 C.F.R. §802.407(a). In *Osborne*, the Board affirmed the administrative law judge's denial of employer's motion to remand for payment by the Black Lung Disability Trust Fund (Trust Fund), vacated the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4), and remanded the case to the administrative law judge for further findings pursuant to subsections (b)(3) and (b)(4). *Osborne*, *supra*.

On reconsideration, employer argues that the Board erroneously failed to consider the applicability of *Truitt v. North American Coal Corp.*, 2 BLR 1-199, *aff'd sub nom Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980) and *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984) upon considering the responsible operator issue. Claimant and the Director, Office of Workers' Compensation Programs (the Director), are not participating on reconsideration.

After consideration of employer's contentions, we grant the Motion for Reconsideration but deny the relief requested. Employer first argues that, because there is evidence that claimant was totally disabled prior to his employment with employer, the case law in *Truitt* applies and employer must be dismissed as the responsible operator. Employer's Brief at 2-5. We disagree. The Board, in *Truitt*, held that in cases where the onset of complicated pneumoconiosis is found to predate claimant's employment with employer the employer is relieved of the status of responsible operator. *See Truitt*, *supra*. However, in *Rowan v. Lewis Coal and Coke Co.*, 12 BLR 1-31 (1988), which was cited by the Board in its Decision and Order, the Board held that the holding in *Truitt* does not apply to cases involving total

disability due to simple pneumoconiosis as relevant in the instant case. Thus, we reject employer's argument.

Employer next contends that because this case was previously litigated and claimant was previously found totally disabled due to pneumoconiosis, *Crabtree* is applicable and any liability must be imposed upon the Trust Fund. Employer's Brief at 7. As employer contends, the Board did not to address this issue in the prior decision.

In this case, claimant was initially awarded benefits because Tazco, Incorporated, did not controvert the claim. The award of benefits was subsequently reversed on appeal and Tazco was dismissed as the responsible operator. *See Tazco, Inc. v. Director, OWCP*, 895 F2d 949, 13 BLR 2-313 (4th Cir. 1990). Employer was then named as the responsible operator and a formal hearing was held on the merits of the claim for the first time. Decision and Order at 6.

When the Department of Labor names an employer as the responsible operator prior to any formal hearing on the merits of the claim, and, the employer has an opportunity to develop a defense against claimant's claim for benefits, employer's right to due process under the Act has not been violated. *See Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991); 20 C.F.R. §725.412(a). Thus, the piecemeal litigation prohibited by *Crabtree*, which requires the Department to resolve the operator issue in a preliminary hearing is not present in the instant case. Therefore, we reject employer's contention, deny the relief requested, and reaffirm

our affirmance of the administrative law judge's denial of employer's motion to remand the case for payment by the Trust Fund. Accordingly, we grant employer's motion for reconsideration, but deny the relief requested and reaffirm our prior Decision and Order.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge