

U.S. Department of Labor

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



BRB No. 15-0298 BLA

JOHN CARPENTER)
)
 Claimant-Respondent)
)
 v.)
)
 BENHAM COAL, INCORPORATED)
)
 and)
) DATE ISSUED: 03/25/2016
 NAVISTAR INTERNATIONAL)
)
 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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: BOGGS, BUZZARD, and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-6269) of Administrative Law Judge Lystra A. Harris awarding benefits 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 July 23, 2010.

After finding that employer was properly designated as the responsible operator, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that claimant established that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in identifying it as the responsible operator. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the administrative law judge's designation of employer as the responsible operator.¹

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer challenges its designation as the responsible operator, arguing that it did not employ claimant for at least one calendar year.² Employer's Brief at 2-3. The Director, however, contends that, because employer failed to timely contest its designation as a potentially liable operator before the district director, it was precluded from raising the issue before the administrative law judge. Although the administrative law judge decided whether employer had employed claimant for at least one calendar year on the merits, we need not address the administrative law judge's finding in light of our agreement with the Director's position that employer was precluded from raising the issue.

The district director issued a Notice of Claim on August 19, 2010, informing employer that it was identified as a "potentially liable operator." Director's Exhibit 22. The Notice provided that "[w]ithin 30 days of receipt of this Notice of Claim, you (or your insurer) must file a response pursuant to 20 C.F.R. §725.408 indicating your intent to accept or contest your identification as a potentially liable operator." *Id.* The Notice informed employer that if it failed to respond within 30 days of its receipt of the Notice of Claim, it would "not be allowed to contest [its] liability for payment of benefits on any of the grounds set forth in 20 C.F.R. 725.408(a)(2)." *Id.* A certified mail return receipt was signed by employer's representative on August 23, 2010. *Id.* There is no indication in the record that employer responded to the Notice of Claim within thirty days of its receipt.³

Section 725.408(a)(3) provides that an operator which receives notice of a claim, and which fails to file a response within thirty days of receipt, "shall not be allowed to contest its liability for the payment of benefits on any of the grounds set forth in paragraph (a)(2)." 20 C.F.R. §725.408(a)(3). One of the grounds specified in paragraph (a)(2) is whether the operator "employed the miner as a miner for a cumulative period of not less than one year." 20 C.F.R. §725.408(a)(2)(ii). The record contains no evidence that employer timely responded to the district director's August 19, 2010 Notice of

² Employer does not challenge the findings of the district director and administrative law judge that it otherwise meets the criteria of a responsible operator. *See* 20 C.F.R. §§725.491(a)(1); 725.494(b), (d), (e).

³ On March 17, 2011, the district director issued a Schedule for the Submission of Additional Evidence. Director's Exhibit 30. The Schedule indicated that employer received the Notice of Claim on August 23, 2010, but failed to timely submit any response. *Id.* Therefore, the Schedule advised employer that it was precluded from submitting any documentary evidence relevant to its status as the responsible operator. *Id.*

Claim. As a consequence, employer is precluded from arguing that it did not employ claimant for a cumulative period of not less than one year, the sole ground upon which it relies to contest its designation as the responsible operator. We, therefore, affirm the administrative law judge's determination that employer is the responsible operator.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge