

BRB No. 11-0833 BLA

NORMA A. OLENICK)
(Widow of NICHOLAS OLENICK))
)
 Claimant-Respondent)
)
 v.)
)
 OLENICK BROTHERS COAL COMPANY) DATE ISSUED: 09/19/2012
)
 and)
)
 ROCKWOOD CASUALTY INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Granting Director's Motion to Dismiss Carrier's Request for Modification and Dismissing Case of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Richard A. Seid (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (carrier) appeals the Order Granting Director's Motion to Dismiss Carrier's Request for Modification and Dismissing Case (2011-BLA-05030) of Administrative Law Judge Adele H. Odegard, with respect to a survivor's claim, filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The relevant procedural history of this case is as follows. The miner filed a claim for benefits on November 21, 2002. Director's Exhibit 2. He died on August 4, 2003, while his claim was pending. Director's Exhibit 30. Claimant, the miner's surviving spouse, filed a survivor's claim on September 24, 2003, which was consolidated with the miner's claim. Director's Exhibit 29. The district director identified employer and carrier as potentially liable and notified them of the claims.

On October 29, 2004, carrier filed a Motion to Dismiss with Administrative Law Judge Ralph A. Romano, asserting that it was not employer's insurer at the time of the miner's last coal mine employment. Director's Exhibit 54. Carrier attached four exhibits concerning the dates its policies were in effect and the dates of the miner's tenure with employer. Judge Romano denied the motion and subsequently issued a Decision and Order awarding benefits in both claims and identifying carrier as the party liable for the payment of benefits. Director's Exhibits 59, 79. The Board affirmed the award of benefits and the designation of carrier as the liable party. *Olenick v. Olenick Bros. Coal Co.*, BRB No. 06-0570 BLA (Apr. 30, 2007)(unpub.). The Board denied carrier's subsequent Motion for Reconsideration. *Olenick v. Olenick Bros. Coal Co.*, BRB No. 06-0570 BLA (Dec. 31, 2007)(unpub. Order).

On February 4, 2008, carrier filed a timely request for modification of its designation as the responsible carrier in the survivor's claim and attached the same documents that it had submitted before Judge Romano. Director's Exhibit 95. When the case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing before Judge Odegard (the administrative law judge), the Director, Office of Workers' Compensation Programs (the Director), filed a motion to dismiss carrier's request for modification. The Director argued that carrier was foreclosed from using 20 C.F.R. §725.310 to readjudicate its identification as the responsible carrier, as carrier did not properly raise this issue before the district director. The administrative law judge granted the Director's motion and dismissed carrier's request for modification.

On appeal, carrier argues that the administrative law judge erred in granting the Director's motion, as carrier submitted evidence regarding its liability at the appropriate stage in the proceedings. The Director responds, urging affirmance of the administrative law judge's Order, maintaining that carrier did not comply with the regulations requiring

carrier to proffer evidence regarding its status as the responsible carrier before the district director. Claimant declined to file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.¹ 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).

In the administrative law judge's Order, she concurred with the Director's position that the regulations require that any documentary evidence pertaining to the identity of the responsible carrier be submitted before the district director. Order Granting Director's Motion to Dismiss at 4, *citing J.H.B. [Boyd] v. Peres Processing, Inc.*, BRB No. 08-0625 BLA (June 30, 2009)(unpub.). The administrative law judge then found that carrier did not submit relevant documentary evidence until both claims were transferred to the OALJ for a hearing before Judge Romano. Order Granting Director's Motion to Dismiss at 4. The administrative law judge further determined that, because the district director notified carrier of the survivor's claim, and informed carrier that the miner's coal mine employment ended in 1997, carrier had the opportunity to submit to the district director evidence that it did not insure employer in that year or that the miner continued to perform coal mine employment, but did not do so. *Id.* The administrative law judge concluded, therefore, that carrier was prohibited from using the modification procedure to seek consideration of documentary evidence relating to the properly designated responsible carrier. *Id.* at 5-6. Accordingly, the administrative law judge dismissed carrier's request for modification. *Id.* at 6.

Carrier alleges that the administrative law judge erred in applying the Board's decision in *Boyd* in this case as, unlike the carrier in *Boyd*, it controverted liability from the outset by submitting evidence before the district director and the administrative law judge. Carrier further contends that none of the evidence submitted to the administrative law judge was untimely and states that the Board ruled that Judge Romano improperly excluded carrier's evidence during the prior litigation. Carrier also cites *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), in support of its assertions that the admission of the evidence submitted on modification would "further buttress the evidence that was previously submitted in support of its position that [it] was not the appropriate carrier" and that granting modification would render justice under the Act.

¹ The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Carrier's Brief at 7. Carrier concludes, therefore, that the administrative law judge erred in granting the Director's Motion to Dismiss.

We agree with the Director that, "[b]ased on the program rules that require liability evidence be submitted initially to the district director, and on the Board's decision in [*Boyd*] that the liability evidence rules apply to carriers," the administrative law judge properly determined that, because carrier did not timely submit liability evidence before the district director, this evidence could not be considered on modification. Director's Letter Brief at 7. Regarding the relevant "program rules," under 20 C.F.R. §§725.407(d), 725.410(a) and 725.418(d), the district director is responsible for rendering a final designation of the responsible operator, after he or she has notified all potentially liable operators and permitted them to proffer evidence relevant to their liability. Once the district director has made the final designation and the case is transferred to the OALJ for hearing, the district director is barred from identifying any other potential responsible operators, unless the hearing involves the issue of whether the claim was properly denied by reason of abandonment. 20 C.F.R. §725.407(d). Regarding the procedure for submitting evidence, 20 C.F.R. §725.456(b)(1) provides that "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances."² 20 C.F.R. §725.456(b)(1). Under 20 C.F.R. §725.414(d), "no documentary evidence pertaining to liability shall be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director . . ." 20 C.F.R. §725.414(d). Thus, the regulations require that the identity of the responsible operator or carrier must be finally resolved by the district director and, therefore, all liability evidence must be submitted to the district director. 20 C.F.R. §§725.407(d), 725.414(d), 725.418(d), 725.456(b)(1).

With respect to carrier's contention that the facts of this case are distinguishable from *Boyd*, this argument has no merit as, regardless of the fact that carrier responded to the district director's Notice of Claim and submitted evidence opposing claimant's entitlement to benefits, the relevant issue is whether carrier presented evidence before the district director challenging its identification as the potential responsible carrier. Similarly, the appropriateness of Judge Romano's evidentiary rulings is not germane to whether the administrative law judge properly determined that carrier did not comply

² The administrative law judge properly omitted any analysis of whether carrier proved, under 20 C.F.R. §725.456(b)(1), that extraordinary circumstances excused its tardy submission of evidence, as carrier did not make this assertion before the administrative law judge. In addition, carrier does not make this argument in the present appeal.

with the requirements set forth in 20 C.F.R. §§725.414(d) and 725.456(b)(1). *See Olenick*, BRB No. 06-0570 BLA, slip op. at 5-6. For the same reason, we reject carrier's assertion that the administrative law judge's dismissal order was contrary to case law holding that new evidence may be submitted on modification and that various factors must be considered before an administrative law judge denies a request for modification. Because these precedents involved cases in which the time limitations for the submission of evidence regarding the identification of the responsible operator or carrier were not at issue, they are not applicable to this case. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 88 S.Ct. 1140 (1968); *Sharpe v. Director, OWCP*, 495 F.3d at 128, 24 BLR at 2-66; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Accordingly, contrary to carrier's arguments, the administrative law judge rationally found that evidence that is not proffered before the district director cannot be admitted in any subsequent proceeding, including in conjunction with a request for modification. 20 C.F.R. §725.455(c); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). In addition, the administrative law judge correctly determined there is nothing in the record to support carrier's allegation that it submitted liability evidence to the district director in the initial claim proceedings.³ *See Order Granting Director's Motion to Dismiss at 4; Carrier's Brief at 7.* Thus, we affirm the administrative law judge's determination that modification is not a procedure by which carrier can circumvent the requirements of 20 C.F.R. §§725.414(d) and 725.456(b)(1) and 725.414(d), in order to have evidence considered that was not timely submitted to the district director. We further affirm, therefore, the administrative law judge's dismissal of carrier's request for modification.

³ The Director, Office of Workers' Compensation Programs (the Director), notes that carrier contended before Judge Romano that it submitted at least one piece of liability evidence to the district director in the form of the transcript of its interview with Leo Kolenick, Jr., who had worked at the same mine as claimant. Director's Brief at 8; *see* Director's Exhibit 95 (Exhibit C). We agree with the Director that, even if carrier timely submitted this interview, it would not have proven carrier's case, as it indicates, at best, that the miner was working for employer in August 1998. *Id.* The evidence in the record before the district director, which consists of computer printouts from the Office of Workers' Compensation Programs, indicates that the carrier provided coverage for employer through 1998. *See* Director's Exhibit 13.

Accordingly, the administrative law judge's Order Granting Director's Motion to Dismiss Carrier's Request for Modification and Dismissing Case is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge