U.S. Department of Labor

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

BRB No. 22-0102 BLA

LOUISE (CONNIE) TRENT o/b/o TIMOTHY E. LEE	)	
Claimant-Respondent	)	
v.	)	
REEBOK COAL COMPANY	)	
and	)	
	)	DATE ISSUED: 7/17/2023
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Finding that Reebok Coal Company is Not Responsible Operator and Awarding Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C. for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (Director) appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Finding that Reebok Coal Company is Not Responsible Operator and Awarding Benefits (2020-BLA-05047) rendered on a miner's claim filed on August 31, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found that, because two coal mine operators more recently employed the Miner for at least one year and were financially capable of assuming liability, the district director incorrectly designated Employer and its Carrier (Employer) as the responsible operator liable for the payment of benefits. Because she found Employer was not the responsible operator, she dismissed it and transferred liability for benefits to the Black Lung Disability Trust Fund (Trust Fund). As the Director did not oppose Claimant's entitlement to benefits, she further awarded benefits.

On appeal, the Director argues the ALJ erred in finding subsequent operators employed the Miner for at least one year and thus erred in finding Employer was incorrectly named as the responsible operator. Employer responds, asserting the error was harmless because even if one of the operators did not employ the Miner for at least a year, the evidence demonstrates that two later employers were a single entity and the Miner's aggregated employment with both totals at least one year. Thus, it urges affirmance of the ALJ's responsible operator determination. Alternatively, Employer contends that if remand is necessary, the ALJ must allow submission of medical evidence and consider the merits of entitlement. The Director filed a reply, acknowledging remand rather than reversal is the appropriate remedy. Claimant has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[1] The Miner, Timothy E. Lee, died on June 30, 2020. Director's Exhibit 67. The Claimant, Louise (Connie) Trent, is the maternal grandmother of the Miner's minor child and is pursuing this claim for the benefit of his child. Director's Exhibits 71, 73.

accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year.[3] 20 C.F.R. §§725.494(c), 725.495(a)(1). The district director is initially charged with identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits or another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

If the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such a designation.[4] 20 C.F.R. §725.495(d). If the district director fails to identify the proper responsible operator prior to the claim's transfer to the Office of Administrative Law Judges, the improperly designated operator must be dismissed, and the Trust Fund must assume liability for benefits. 20 C.F.R. §725.407(d); *see Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (regulations place "the risk that the district director has not named the proper operator on the [Trust Fund]").

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibits 5, 8.

[3] In addition, the evidence must establish the miner's disability or death arose out of coal mine employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

[4] The district director acknowledged Employer is not the operator that most recently employed the Miner, but designated Employer as the responsible operator because she determined no subsequent operators employed the Miner for a period of at least one year. Director's Exhibit 35, 54.

Employer does not contend that it does not meet the criteria of a potentially liable operator; thus, we affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5. In addition, it is undisputed that the Miner worked in coal mine employment for Employer for more than one calendar year from 1989 through 1992 and subsequently worked for Big Dog Coal Company, Incorporated (Big Dog Coal) in 1992 and 1993 for more than 125 days, and then for Hot Rod Coal Company (Hot Rod Coal) in 1994 for more than 125 days.[5] Decision and Order at 5, 8; Director's Brief at 2; Employer's Response at 2-3, 15; Director's Exhibit 8.

Relying on the holding of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019),[6] the ALJ determined Hot Rod Coal and Big Dog Coal each employed the Miner for a period of one year after his work with Employer.[7] Decision and Order at 6-8. Because there was no statement in the record that the subsequent operators were incapable of paying benefits, the ALJ found they were presumed capable of assuming liability and Employer thus established that a more recent, financially capable operator employed the Miner for at least one year. 20 C.F.R. §725.495(c)(2), (d); Decision and Order at 8. Because she concluded Employer was improperly designated as the responsible operator, the ALJ found liability for the payment of benefits transferred to the Trust Fund. Decision and Order at 2, 8.

The Director argues the ALJ erred in finding Hot Rod Coal and Big Dog Coal employed the Miner for at least one year by relying on *Shepherd*. Director's Brief at 5-8. Because the law of the Fourth Circuit applies to this case, the Director argues that *Shepherd* is not binding precedent and the ALJ should have followed the two-step analysis set forth in the regulations, requiring the ALJ to first determine if the operators employed the Miner for a calendar year before determining if he worked 125 days during that year. Director's Brief at 5-10. While Employer agrees the ALJ erred in applying *Shepherd*, it argues it was

[5] The Miner also worked for Teays Mining Incorporated and Guest Mountain Mining Corporation after he worked for Employer, but the parties do not contend he worked for either of these operators for at least 125 days. Director's Exhibits 8, 54.

[6] The United States Court of Appeals for the Sixth Circuit held in *Shepherd* that 125 days may constitute a year of coal mine employment even if the miner did not have a calendar year employment relationship with an employer. *Shepherd*, 915 F.3d at 403.

[7] The ALJ acknowledged the law of the Fourth Circuit applies to this case, but agreed with the reasoning in *Shepherd* and found it was not contrary to Fourth Circuit precedent, which has not specifically addressed the definition of a "year" in the amended regulations. Decision and Order at 5-6.

harmless because the evidence demonstrates that Big Dog Coal and Hot Rod Coal constituted the same company;[8] thus, collectively, the operators employed the Miner for a calendar year and should have been named as the responsible operator. Employer's Response at 15-17. Employer further argues there is "ample support" that the Miner's employment with Big Dog Coal in 1992 and 1993 exceeded a calendar year and 125 working days.[9] *Id.* at 17.

The Director replies that the ALJ's erroneous application of *Shepherd* was not harmless. He argues that because the ALJ found the evidence insufficient to establish beginning and ending dates of the Miner's coal mine employment with Big Dog Coal or Hot Rod Coal, in his view there is "no basis" to establish a full calendar year relationship with either company. Director's Reply at 2-3. The Director further argues that, while he believes the evidence is insufficient to establish a successor-operator relationship between Big Dog Coal and Hot Rod Coal,[10] the ALJ did not consider the nature of any relationship between the two companies, and thus concedes remand is required for the ALJ to make this determination. Director's Reply at 6-8. Finally, the Director asserts that if the case is remanded, the ALJ must first consider if extraordinary circumstances exist to consider the

[8] Based on the Miner's deposition testimony, and his Social Security Administration Earnings Records, Employer asserts Big Dog Coal Company, Incorporated (Big Dog Coal) and Hot Rod Coal Company (Hot Rod Coal) were "one-in-the-same." Employer's Response at 15-16.

[9] The Director contends Employer did not argue below that Big Dog Coal employed the Miner for a calendar year as defined by the regulations and thus forfeited the argument. Director's Reply at 4. While Employer did not raise that specific argument, it challenged the district director's finding that neither Big Dog Coal nor Hot Rod Coal employed the Miner for a year; thus, we find the issue sufficiently raised. Employer's Responsible Operator Brief at 1-4.

[10] We reject Employer's argument that the Director is prevented from arguing there is no corporate relationship between Big Dog Coal and Hot Rod Coal, as it did not raise the argument in its opening brief and is further barred under judicial estoppel because this position is contrary to the Director's position in *Newsome v. DM&M*, BRB No. 22-0029 BLA (May 10, 2023) (unpub.). Employer's Response at 16. As the Director argues, it was not required to contest a corporate relationship between the two operators in its opening brief, as the ALJ did not make such a finding. *See* 20 C.F.R. §802.213(b); Director's Reply at 2 n.1. Further, judicial estoppel does not apply, as the parties here are not the same as in *Newsome* and the determinations regarding corporate relationships are factually specific. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); Director's Reply at 5-6.

Miner's testimony, as he was not specifically identified as a liability witness before the district director. *Id.* at 6; 20 C.F.R §§725.414(c), 725.457(c)(1). We agree the ALJ erred in applying *Shepherd* and that remand is required.

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which a miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280 (2003) (pre-2000 regulation required the ALJ to determine whether the miner worked for an operator for one calendar year and then determine whether the miner worked for 125 days during the one-year period). In promulgating the amended regulations, the Department of Labor (DOL) stated that "in order to have one year of coal mine employment, the regulation contemplates an employment relationship totaling 365 days, within which 125 days were spent working and being exposed to coal mine dust." 65 Fed. Reg. at 79,959. It also specifically noted its disagreement with cases decided under a previous version of the regulations which held that a miner receives credit for a full year of employment for each partial period of a calendar year where the miner worked at least 125 days.[11] *Id.* at 79,960. Instead, the DOL clarified that it "believes the partial periods must be aggregated until they amount to one year of coal mine employment comprising a 365-day period. Only then should the factfinder determine whether the miner spent at least 125 working days as a coal miner during the year." *Id.*

Consistent with the Director's interpretation, the Board has recognized a two-step approach in determining whether a miner established at least one year of coal mine employment. *Clark*, 22 BLR at 1-280-81; *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007) (one-year employment relationship must be established, during which the

[11] In *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc), the Board expressed disagreement with the decisions of the United States Courts of Appeals for the Seventh and Eighth Circuits in *Landes v. Director, OWCP*, 997 F.2d 1192 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192 (8th Cir. 1989). The Board noted that although *Landes* and *Yauk* held that the 125-day rule requires a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment, neither case addressed whether the 125-day rule pursuant to the former 20 C.F.R. §718.301(b) should be applied only *after* the miner has established a calendar year of coal mine employment. Consequently, except in those cases arising within the jurisdiction of the Seventh and Eighth Circuits, the Board declined in *Croucher* to hold that the 125-day rule set out at the former 20 C.F.R. §718.301(b) mandated that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment. *Croucher*, 20 BLR at 1-73-74.

miner had 125 working days); Director's Brief at 5-6. Namely, the ALJ must first determine whether the miner was engaged in coal mine employment for a period of one calendar year, that is, 365 days or partial periods totaling one year. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36. If the threshold requirement of a one-year period is met, then the ALJ must determine whether the miner worked for at least 125 days during that one-year period. *Mitchell*, 479 F.3d at 334-36; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark*, 22 BLR at 1-280. Moreover, the Board has continued to apply the two-step interpretation of the regulation to cases arising in jurisdictions other than the Sixth Circuit, including the Fourth Circuit, even after *Shepherd* was issued. *See Mims v. Drummond Co.*, BRB No. 21-0314 BLA (Feb. 24, 2023) (unpub.); *Salaz v. Powderhorn Coal Co.*, BRB No. 21-0406 BLA (Oct. 31, 2022) (unpub.); *Smith v. Heritage Coal Co.*, BRB No. 20-0147 BLA (June 29, 2022) (unpub.).

The Fourth Circuit, whose law applies to this case, has not adopted the holding expressed in *Shepherd*. The ALJ's rationale for finding a year of coal mine employment with Big Dog Coal and Hot Rod Coal is inconsistent with the DOL's contemporaneous explanation of the wording of the current regulation in the preamble to its rulemaking, its long-standing interpretation of the statute and regulation, and Board precedent. Decision and Order at 5-8; *see also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

Because the ALJ failed to make the proper analysis in the first instance, we decline to hold the evidence cannot support a finding of a calendar year with any subsequent operator of the Miner's. *See v. Wash. Metro. Area Trans. Auth.*, 36 F.3d 375, 383-84 (4th Cir. 1994) (ALJ is the factfinder; thus, the Board should not rule on an issue before the ALJ has considered it); Director's Reply at 2-3. Further, because the ALJ did not consider what relationship, if any, existed between Big Dog Coal and Hot Rod Coal, we agree the ALJ must consider this issue in the first instance. *See*, 36 F.3d at 383-84; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (Board must remand when the ALJ fails to make necessary factual findings); Employer's Response at 15-16; Employer's Responsible Operator Brief at 3-5; Director's Reply at 6-8. We therefore vacate the ALJ's responsible operator determination and dismissal of Employer.

Remand Instructions

On remand, the ALJ should first consider whether the Miner's deposition testimony was properly admitted as liability witness evidence relevant to the responsible operator before the district director and, if not, whether the Employer complied with the regulation

requiring identification of liability witnesses before the district director.[12] 20 C.F.R. §725.414 (b),(c). If the ALJ finds the deposition was not properly admitted and that the Miner was not properly designated as a liability witness before the district director, then she must consider whether the Director waived the issue and, if not waived, whether extraordinary circumstances justify the admission of the Miner's testimony regarding liability matters. 20 C.F.R. §725.457(b)(1); Director's Reply at 6-8; Employer's Response at 15-17.

Under the two-step inquiry, the ALJ must then consider the evidence as a whole to determine whether the Miner was engaged in coal mine employment for a period of one calendar year, that is, 365 days or partial periods totaling one year, with Hot Rod Coal or Big Dog Coal. *Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280. In making such a finding, the ALJ must consider whether the evidence is sufficient to establish a relationship between Hot Rod Coal and Big Dog Coal and thus whether the time periods of employment for these operators may be aggregated. *See* 20 C.F.R. §725.492. If the threshold requirement of a calendar year is established with one or both of these subsequent operators, then the ALJ must determine whether the Miner worked for at least 125 days during that one-year period. *Mitchell*, 479 F.3d at 334-36; *Martin*, 277 F.3d at 474-75.

If the ALJ again finds the subsequent operators should have been named the responsible operator, she may reinstate her dismissal of Employer and transfer of liability to the Trust Fund. However, if she finds Employer is the proper responsible operator, she must allow the parties to submit medical evidence and address the merits of the claim. 20 C.F.R. §725.414. She must then consider the contested issues and determine if Claimant has established entitlement to benefits.

[12] On January 10, 2019, Employer requested an extension of time to submit the Miner's deposition testimony. Director's Exhibit 33. In response, the claims examiner advised that evidence relevant to the responsible operator would be accepted "up until the Proposed Decision & Order is issued." Director's Exhibit 34. The Schedule for the Submission of Additional Evidence was issued on February 8, 2019, providing Employer until May 9, 2019, to submit documentary evidence and identify liability witnesses. Director's Exhibit 35. Employer subsequently submitted the Miner's deposition transcript on February 13, 2019. Director's Exhibit 40. We also note that the Director relied on the Miner's testimony in its briefing before the ALJ. Director's Responsible Operator Brief at 3.

Accordingly, the ALJ's Decision and Order Finding that Reebok Coal Company is Not Responsible Operator and Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge