U.S. Department of Labor

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

BRB No. 21-0381 BLA

LARRY H. MCCAULEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DLR MINING, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 5/31/2022
	)	
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 Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Christopher Pierson (Burns White, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation & Legal Advice), Washington, D.C., for the Director, Office of Worker's Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-06038) rendered on a claim filed pursuant to the Blank Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on June 26, 2015, and is before the Benefits Review Board for the second time.[1]

In consideration of Employer's initial appeal, the Board affirmed the ALJ's findings that Claimant established complicated pneumoconiosis, 20 C.F.R. §718.304, and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018), and that Claimant's complicated pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b); *see McCauley v. DLR Mining, Inc.*, BRB No. 18-0606 BLA, slip op. at 3-6 (Nov. 12, 2019). The Board therefore affirmed the ALJ's finding that Claimant established a change in an applicable condition of entitlement and the award of benefits. 20 C.F.R. §725.309(c); *McCauley*, BRB No. 18-0606 BLA, slip op. at 6. The Board held, however, that the ALJ erred by failing to adequately explain his responsible operator determination as required by the Administrative Procedure Act (APA),[2] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *McCauley*, BRB No. 18-0606 BLA, slip op. at 6-7. The Board thus vacated the ALJ's determination that DLR Mining, Inc. (DLR Mining) is the responsible operator and remanded the case for further consideration of this issue. *Id*.

On remand, the ALJ again found DLR Mining is the responsible operator and reiterated his conclusion Claimant is entitled to benefits.

On appeal, Employer contends the ALJ erred in finding DLR Mining is the responsible operator. It also argues he erred in finding Claimant established complicated pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers'

[1] We incorporate the procedural history of the case as set forth in *McCauley v. DLR Mining, Inc.*, BRB No. 18-0606 BLA (Nov. 12, 2019).

[2] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Compensation Programs (the Director), responds in support of the award of benefits but concedes the ALJ again erred in finding DLR Mining is the responsible operator.

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

Responsible Operator

The responsible operator is the "potentially liable operator . . . that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator,"[4] the coal mine operator must have employed the miner for a cumulative period of not less than one year.[5] 20 C.F.R. §725.494(c). The district director is initially charged with identifying and notifying operators that may be liable for benefits,

[3] We will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 7, 12.

[4] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e). Employer does not contest that it meets these requirements. Thus we affirm it is a potentially liable operator. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The regulations define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the 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 1-277, 1-280 (2003). If the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing his yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

and then 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 responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another potentially liable operator more recently employed the miner and is financially capable of assuming liability. 20 C.F.R. §725.495(c)(2).

On remand, the ALJ addressed Employer's argument that Samuel Beni (Beni) is a potentially liable operator that more recently employed Claimant. Employer's Post-Hearing Brief at 10-17. The ALJ noted Claimant's Social Security Administration (SSA) records reflect income from Beni in the years 1996 to 1998 and 2001, and from DLR Mining in the years 1998 to 2000. Decision and Order at 6-7; Director's Exhibit 13 at 4. He determined Employer must establish Beni employed Claimant for a full calendar year in 2001 to establish Beni is a potentially liable operator that more recently employed Claimant. Decision and Order at 6-7. He found "Employer has not done so" because, applying the calculation method at 20 C.F.R. §725.101(a)(32)(iii), Claimant's income of $5,493.50 from Beni in 2001 was insufficient to establish a year of coal mine employment.[6] Decision and Order at 7. The ALJ thus found DLR Mining is the properly designated responsible operator. *Id.* at 8.

Employer argues the ALJ erred by requiring it to establish Beni more recently employed Claimant for the entirety of 2001 without considering whether all of Claimant's periods of employment with Beni cumulatively totaled at least one year. Employer's Brief at 8-9. The Director asserts the record establishes Beni did not actually employ Claimant in coal mining in 2001, notwithstanding his SSA earnings in that year, but concedes the

[6] Although the ALJ permissibly applied the calculation at 20 C.F.R. §725.101(a)(32)(iii), he erred by using Exhibit 609 of the *BLBA Procedure Manual* rather than Exhibit 610. In *Osborne v. Eagle Coal Co.*, 25 BLR 1-195 (2016), the Board observed that Exhibit 609 of the *BLBA Procedure Manual*, entitled "*Average Wage Base*," does not contain "the coal mine industry's average daily earnings," as specified in 20 C.F.R. §725.101(a)(32)(iii). Rather, Exhibit 609 reports the SSA's wage base table, which sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax. *Id.* Thus reliance on Exhibit 609 to determine the length of a miner's coal mine employment when the formula at 20 C.F.R. §725.101(a)(32)(iii) is applied is not appropriate because it contains a wage base that is not specific to the coal mine industry. In contrast, Exhibit 610 of the *BLBA Procedure Manual*, entitled *Average Earnings of Employees in Coal Mining*, contains the information specified in 20 C.F.R. §725.101(a)(32)(iii), i.e., "the coal mine industry's average daily earnings for that year." *Id.*

ALJ erred by requiring Employer to establish Beni employed Claimant for a full calendar year in 2001 rather than determining whether Beni employed Claimant for a cumulative year. Director's Brief at 4-6. The Director also argues the ALJ erred by not rendering a finding on whether Beni in fact more recently employed Claimant as a miner in 2001. *Id.* The Director requests that the Board remand the matter "for the ALJ to reconsider whether [DLR Mining] has met its burden to establish that Beni more recently employed [Claimant] as a miner." *Id.* at 6.

We agree with Employer and the Director that the ALJ erred in evaluating whether Beni is a potentially liable operator that more recently employed Claimant. The regulations do not require that an operator employ a miner for a continuous period of one calendar year to be a potentially liable operator, but rather indicate an operator must employ a miner "for a *cumulative period* of not less than one year." 20 C.F.R. §725.494(c) (emphasis added); *see also Snedeker v. Island Creek Coal Co.*, 5 BLR 1-91 (1982) (responsible operator is the most recent employer with whom the miner's cumulative periods of employment amount to at least one year regardless of whether the most recent period with that operator amounts to one year); 20 C.F.R. §725.101(a)(32) (defining a "year" to include "partial periods totaling one year").

In light of the Director's concession, and because the ALJ failed to properly apply the regulations when ascertaining whether Beni employed Claimant for not less than one year or render necessary factual findings, we vacate the ALJ's finding that DLR Mining is the responsible operator and remand this case for further consideration of this issue.[7] *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). We instruct the ALJ to reconsider whether Employer met its burden to prove that Beni is a potentially liable operator that more recently employed Claimant.[8] *See* 20 C.F.R. §725.495(c)(2). As part

[7] Employer urges the Board to reverse the ALJ's responsible operator finding. We decline to do so. The ALJ is tasked with evaluating the credibility of the evidence and resolving any conflict. *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the ALJ's opinion).

[8] Employer argues the ALJ erred in finding Claimant has complicated pneumoconiosis. Employer's Brief at 16-17. The Board previously rejected Employer's arguments and affirmed the ALJ's finding that Claimant has complicated pneumoconiosis. *McCauley*, BRB No. 18-0606 BLA, slip. op. at 5-6; 20 C.F.R. §718.304. As Employer has not shown the Board's holding was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley*

of this analysis, he is to determine (1) whether Beni employed Claimant as a miner for cumulative periods amounting to at least one year, and (2) whether Beni employed Claimant as a miner more recently than DLR Mining.[9] The ALJ must explain these necessary determinations in accordance with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the ALJ's Decision and Order Awarding Benefits on Remand is affirmed in part and vacated in part, and the case is remanded for further consideration of the responsible operator issue.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

v. Peabody Coal Co., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989).

[9] On remand, the ALJ should address the Director's argument that Claimant's testimony credibly establishes Beni did not employ him in 2001, and his SSA earnings for that year are "late severance payments" from his employment that ceased in 1998. Director's Brief at 3, 5-6, *citing* Hearing Transcript at 24-25.