

U.S. Department of Labor

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



BRB Nos. 23-0035 BLA
and 23-0092 BLA

CAROLYN M. MARLOW)
(o/b/o and Widow of LARRY D. MARLOW))

Claimant-Respondent)

v.)

ROYAL GEM COAL COMPANY)

and)

OLD REPUBLIC INSURANCE)
COMPANY, INCORPORATED)

DATE ISSUED: 10/04/2023

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeals of Decision and Order Awarding Benefits and Decision and Order Granting Summary Decision and Awarding Benefits and Order Canceling Hearing of Monica Markley, Administrative Law Judge, United States Department of Labor.

Donna E. Sonner and Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Sarah M. Hurley (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: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits and Decision and Order Granting Summary Decision and Awarding Benefits and Order Canceling Hearing (2019-BLA-06313 and 2021-BLA-05758) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim¹ filed on April 7, 2017, and a survivor's claim filed on December 8, 2020.²

The ALJ found Royal Gem Coal Company (Royal Gem) is the responsible operator. She also found Claimant established the Miner had complicated pneumoconiosis 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); *see* 20 C.F.R. §718.304.³ She further found the Miner's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits in the miner's claim. 20 C.F.R. §718.203(b). In the survivor's claim, she determined because the Miner was entitled to benefits at the time of his death, Claimant is

¹ Claimant is the widow of the Miner, who died on October 19, 2020, while his claim was pending before the ALJ. Survivor's Claim (SC) Director's Exhibits 8, 9. She is pursuing the miner's claim on her husband's estate's behalf and her survivor's claim. SC Director's Exhibit 6; Hearing Tr. at 6.

² Employer's appeal in the miner's claim was assigned BRB No. 23-0035 BLA, and its appeal in the survivor's claim was assigned BRB No. 23-0092 BLA. The Board has consolidated these appeals for purposes of decision only.

³ Alternatively, the ALJ found Claimant established, under Part 718, that the Miner was totally disabled due to clinical and legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c).

automatically entitled to survivor's benefits pursuant to Section 422(l) of the Act,⁴ 30 U.S.C. §932(l) (2018).

On appeal, Employer does not challenge entitlement in this case and instead argues the district director denied it due process by denying its request for subpoenas relevant to the responsible operator issue and that the ALJ erred in finding Royal Gem is the responsible operator.⁵ Claimant responds in support of the responsible operator finding. Although the Director, Office of Workers' Compensation Programs (the Director), urges the Benefits Review Board to reject Employer's specific due process argument, he nevertheless agrees with Employer that the Board should vacate the ALJ's finding Royal Gem is the responsible operator and remand the case for further consideration of undiscussed evidence. In separate reply briefs to Claimant's and the Director's responses, Employer reiterates its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.⁶ 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).

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.⁷ 20 C.F.R.

⁴ Section 422(l) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

⁵ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established entitlement to benefits in both the miner's claim and the survivor's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 27, 35-36.

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Tennessee and Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibits 9, 10, 18-21; Hearing Tr. at 24.

⁷ 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

§725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, 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” that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The Miner’s Social Security Administration earnings records reflect he worked for Royal Gem from 1978 to 1989. Miner’s Claim (MC) Director’s Exhibit 18. He testified that, after working for Royal Gem, he worked for his brothers Thomas and Bobby Marlow driving coal trucks, tractors, and trailers. MC Director’s Exhibit 57 at 21, 23-31. He stated they owned separate trucking companies that hauled coal. *Id.* He clarified he first worked for Tom Marlow Trucking “off and on,” then worked for Bobby Marlow Trucking, and thereafter “went back and forth a couple of times” working for each brother. *Id.* With respect to insurance, the Miner initially stated he was unsure if his brothers carried insurance that covered black lung claims, but subsequently he indicated that they did carry such insurance. *Id.* at 59-61. He testified that eventually he obtained his own truck to haul coal and started a company called Larry Marlow Trucking; he was able to grow his business by acquiring four trucks and hiring multiple employees. *Id.* at 31-37. He indicated he had workers’ compensation insurance that covered his employees but not himself and his insurance agent was James Brummett. *Id.* at 61-62, 64.

The record also includes a letter from James Brummett. MC Director’s Exhibit 45. In response to the district director’s “request for copies of insurance policies for Tom Marlow Trucking and Bobby Marlow Trucking for the years 1989-1999,” James Brummett indicated he was not able to process the request because his “records do not go back that far, and no records are available to verify this coverage.” *Id.* Nonetheless he stated, “[t]hey did not have insurance coverage . . . at that time.” *Id.* Finally, Internal Revenue Service Forms 1099-MISC reflect the Miner had non-employee compensation from Donnie Marlow in the year 1991, Tommy Marlow Trucking in the year 1992, Bobby Marlow Trucking in the years 1992, 1997, 1999, and 2000, and Larry Marlow Trucking in the years 2002 and 2010. MC Director’s Exhibits 9, 10.

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).

Before the district director, Employer requested subpoenas be issued for James Brummett and the Brummett Insurance Agency to obtain additional information regarding insurance coverage. MC Director's Exhibits 1-3. The district director denied Employer's request, stating that only the ALJ has authority to issue subpoenas. MC Director's Exhibit 64. In a Proposed Decision and Order, the district director determined Royal Gem is the responsible operator, explaining as follows:

[The Miner] alleges that he last worked a full calendar year as an insured coal miner while employed by Royal Gem from 1978 through 1990. A current Social Security Earnings Record shows [the Miner] was self-employed from 1989 through 2013. [The Miner] indicates he was hauling coal during this period; however, he did not have worker's (sic) compensation on himself, only his employees. Proof has been provided that he worked for his brothers, Bobby and Thomas, during the nineteen nineties hauling coal. However, proof that Tom Marlow Trucking and Bobby Marlow Trucking had black lung insurance on its employees has not been provided. [Royal Gem] was insured by Old Republic Insurance Company on [the Miner's] last date of employment with them and is financially capable of assuming liability in this claim.

MC Director's Exhibit 74 at 11. Thereafter, Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges (OALJ). MC Director's Exhibit 75.

Before the ALJ, Employer asserted Royal Gem should be dismissed as the responsible operator because: 1) the district director's refusal to issue subpoenas to James Brummett and the Brummett Insurance Agency violated its due process rights; 2) Royal Gem cannot be named responsible operator because it is not financially capable of assuming liability; and 3) Thomas Marlow and Bobby Marlow should have been named the responsible operator. Employer's Post-Hearing Brief at 13-21.

The ALJ rejected Employer's due process argument and its contention that Royal Gem is financially incapable of assuming liability. Decision and Order at 11. Because she determined the evidence establishes the Miner's last period of coal mine employment of at least one year was with Royal Gem and it is financially capable of assuming liability, she concluded Royal Gem is the responsible operator. *Id.*

In challenging the ALJ's finding, Employer reiterates its assertion the district director's denial of its request to subpoena James Brummett and the Brummett Insurance Agency violated its due process rights. Employer's Brief at 23-24. In response, the Director asserts Employer's contentions are without merit because Employer was given

every opportunity to renew its subpoena requests before the ALJ -- as it did with insurance providers other than Brummett in this case. We agree with the Director's position.

Due process requires Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). As the ALJ correctly determined, despite the fact Employer did request, and was granted, subpoenas for information from other insurance companies after the case was transferred to OALJ, it did not request a subpoena from James Brummett the entire time the case was before the OALJ. Decision and Order at 12 (noting subpoenas were provided for CIGNA Insurance Co., Insurance Company of North America, Liberty Mutual Fire Insurance Co., and National Surety Corporation); Director's Brief at 6-7. In addition to its failure to request a subpoena, Employer has cited no authority supporting its assertion that the district director's denial of its subpoena request violated its due process rights. Employer's Brief at 21-22. Employer therefore has not demonstrated the district director's denial deprived it of the right to a meaningful defense and has not established a due process violation. *Hatfield*, 556 F.3d at 478.

Employer also argues the ALJ erred in failing to address whether Thomas Marlow Trucking, Bobby Marlow Trucking, or Larry Marlow Trucking should have been named the responsible operator because each entity is financially capable of assuming liability and employed the Miner for at least one year after Royal Gem.⁸ Employer's Brief at 9-15. The Director agrees that the ALJ's analysis is incomplete because she failed to address the evidence relevant to the Miner's self-employment as a coal hauler subsequent to his work at Royal Gem when finding it is the responsible operator. Director's Brief at 5-6.

In light of the Director's concession, and because the ALJ failed to address Employer's arguments, render necessary factual findings, or weigh relevant evidence with respect to the Miner's coal hauling work subsequent to Royal Gem, we vacate her finding that Royal Gem is the responsible operator. 30 U.S.C. §923(b); *see Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for her decision); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). On remand, the ALJ must address all relevant evidence and address Employer's arguments that Royal Gem is not the responsible operator because another

⁸ As it is unchallenged, we affirm the ALJ's finding that Royal Gem is a potentially liable operator. *See Skrack*, 6 BLR at 1-711; Decision and Order at 11-12.

potentially liable operator that is financially capable of assuming liability more recently employed the Miner for at least one year.⁹ 20 C.F.R. §725.495(c).

⁹ Employer urges the Board to reverse the ALJ's responsible operator finding. Employer's Reply to the Director at 1-3. We decline to do so. The ALJ is tasked with evaluating the credibility of the evidence and resolving any conflict. *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). For the same reason, we decline to address, as premature, Employer's specific arguments as to why Thomas Marlow Trucking, Bobby Marlow Trucking, or Larry Marlow Trucking should have been named the responsible operator rather than Royal Gem. Employer's Brief at 9-24.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Decision and Order Granting Summary Decision and Awarding Benefits and Order Canceling Hearing are affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge