



BRB No. 17-0401 BLA

JAY T. MULLINS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ROCKSTORE MINING)	DATE ISSUED: 04/26/2018
)	
and)	
)	
KENTUCKY CENTRAL 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 Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for employer.

Anne Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judges, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05288) of Administrative Law Judge Larry A. Temin, rendered on a subsequent claim filed on October 16, 2012,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 13.19 years of coal mine employment and found that employer is the responsible operator. He found that claimant established the presence of complicated pneumoconiosis and thereby invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. He further found the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, he awarded benefits.

On appeal, employer does not challenge the award of benefits² but asserts that the administrative law judge erred in finding that it is the responsible operator. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that employer is the responsible operator.

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant filed a prior claim for benefits on June 1, 1987, which was denied by the district director on August 24, 1987, for failure to establish the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis. Director's Exhibit 1. Claimant took no further action until he filed the current claim on October 16, 2012. Director's Exhibit 3.

² We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 13.19 years of coal mine employment, complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.304, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 8. Accordingly, the Board will apply the law of the United States Court

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). A coal mine operator is a “potentially liable operator” if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).⁴ Once a potentially liable operator has been properly identified by the district director, 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 operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

On February 15, 2013, the district director issued a Notice of Claim identifying employer as a potentially liable responsible operator.⁵ Director’s Exhibit 16. On August 6, 2013, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying employer as the responsible operator and giving employer thirty days to challenge that designation. Director’s Exhibit 30. Employer did not respond to the SSAE.

On November 6, 2013, the district director issued a Proposed Decision and Order identifying employer as the responsible operator and awarding benefits. Director’s Exhibit 35. In a letter dated December 5, 2013, the law firm of Greenberg Traurig, counsel for

of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁴ In order for a coal mine operator to meet the regulatory definition of a “potentially liable operator,” the miner’s disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and 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). In this case, employer does not contest that it satisfies the definition of a potentially liable operator.

⁵ Claimant’s most recent coal mine employment for a period of one year was with Kentucky Virginia Coal Corporation (KVCC). The district director initially identified KVCC as the potentially liable operator, but ultimately determined that KVCC and its insurer, Kentucky Coal Producers Self-Insurance Fund, were insolvent and incapable of paying benefits under the regulations. Director’s Exhibits 15, 16, 22, 25, 30, 35. Thus, the district director dismissed KVCC and identified employer as the potentially liable operator.

employer's insurance carrier, requested reconsideration, asserting that counsel had not received a copy of the SSAE and, therefore, did not have an opportunity to challenge employer's designation as the responsible operator or submit evidence on the issue.⁶ Director's Exhibit 40. On December 11, 2013, the district director issued a revised Decision and Order denying employer's request for reconsideration and awarding benefits. Director's Exhibit 36. The district director specifically noted that the SSAE was sent via certified mail to all parties and a return receipt bearing the signature of a representative from Greenberg Traurig indicated that counsel had received the SSAE on August 12, 2013. *Id.*; Director's Exhibit 30. Thus, the district director concluded that employer had waived its right to contest its designation as the responsible operator pursuant to 20 C.F.R. §725.412(a). Director's Exhibit 36.

Employer subsequently requested a hearing and the case was referred to the Office of Administrative Law Judges. The administrative law judge found that employer was properly designated as the responsible operator.⁷

On appeal, employer argues that liability for benefits should transfer to the Black Lung Disability Trust Fund because the district director did not properly identify Kentucky Insurance Guaranty Association (KIGA) as a party to the claim. Employer asserts that claimant last worked for a year with Kentucky Virginia Coal Corporation (KVCC) and that KIGA is responsible for payment of benefits as it is a guarantor of KVCC's insurance coverage. We will not consider employer's argument because we agree with the Director that employer has waived its right to contest liability for payment of benefits.

The regulation at 20 C.F.R. §725.412(a), governing the obligation of the parties to respond to the SSAE states as follows:

⁶ The regulations provide that "no documentary evidence pertaining to liability may 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).

⁷ Employer argued that claimant worked for Tag Coal Corporation and Templeman and Adkins Coal Company for a cumulative period of one year, after working for employer, and that those companies were related because they shared the same address. The administrative law judge determined that claimant's testimony was insufficient to establish that the companies were related or that claimant's employment with them should be aggregated. Decision and Order at 10. The administrative law judge also found that employer did not submit evidence to show that either Tag Coal Corporation or Templeman and Adkins Coal Company was financially capable of paying benefits. *Id.*

(a)(1) Within 30 days after the district director issues a schedule pursuant to §725.410 of this part containing a designation of the responsible operator liable for the payment of benefits, that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation.

(2) If the responsible operator designated by the district director *does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability*, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim.

20 C.F.R. §725.412(a) (emphasis added).

In this case, the SSAE issued on August 6, 2013, gave employer thirty days, until September 5, 2013, to accept or reject its designation as the responsible operator. Director's Exhibit 30. Employer was further informed in the SSAE that if it failed to respond, it would be deemed to have accepted the designation and to have waived its right to contest its liability in any further proceedings. *Id.* The SSAE was sent via certified mail to all of the parties and a return receipt establishes that employer received the SSAE on August 12, 2013. *Id.* Because employer did not file a timely response to the SSAE, employer is foreclosed from contesting the district director's designation and has waived its right to contest liability for benefits. 20 C.F.R. §725.412(a)(2). Thus, we 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge