

BRB No. 91-0827 BLA

WILLIAM B. DONELL)
)
 Claimant-Respondent)
)
 v.)
)
 TAMROY MINING, INCORPORATED)
)
 and)
)
 PRATT MINING COMPANY)
) DATE ISSUED:
 Employers-Respondents)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits and the Decision and Order-Denying Reconsideration of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Don M. Stacy, Beckley, West Virginia, for claimant.

C. William Mangum (Marshall J. Breger, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

Thomas H. Zerbe (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order-Award of Benefits and the Decision and Order-Denying Reconsideration (89-BLA-1212) of Administrative Law Judge Edward J. Murty, Jr. on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). Claimant filed a claim for benefits on June 28, 1988, and on October 19, 1990, the administrative law judge issued a Decision and Order awarding benefits. Prior to finding that claimant established entitlement to benefits, the administrative law judge considered the evidence relevant to the responsible operator issue. The administrative law judge found that claimant worked for Energy Enterprises, Incorporated (Energy Enterprises) from 1982 until May of 1987, and that claimant was employed by Harvey Energy Corporation from May 1987 until December 1987, when he retired. The administrative law judge added that the West Virginia Coal Workers' Pneumoconiosis Fund had assured him that they insured Energy Enterprises during the entire period of claimant's employment there. The administrative law judge then determined that Energy Enterprises was the proper responsible operator and dismissed Pratt Mining Company (Pratt Mining) and Tamroy Mining, Incorporated (Tamroy Mining) as putative responsible operators in this claim. The administrative law judge then ordered the Director to provide for payment of any benefits, as Energy Enterprises is not a party to this action. The Director filed a motion for reconsideration on November 15, 1990 requesting the reinstatement of Tamroy Mining and Pratt Mining as parties, and that the West Virginia Coal Workers' Pneumoconiosis Fund be ordered to pay benefits. In his Decision and Order denying reconsideration, the administrative law judge noted that the Director submitted the claim to the Office of Administrative Law Judges with two designated responsible operators, neither of which were correct. The administrative law judge then stated that Energy Enterprises was the proper responsible operator and denied the motion for reconsideration. On appeal, the Director contends that the administrative law judge erred in dismissing Pratt Mining and Tamroy Mining from liability because neither company's responsible operator status was in issue before the administrative law judge. The West Virginia Coal Workers' Pneumoconiosis Fund and claimant respond in support of the administrative law judge's Decision and Order-Denying Reconsideration.

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

The Director contends that the administrative law judge erred by considering the responsible operator issue. We disagree. The Director should have been on notice that the issue would be addressed as he submitted the claim to the Office of Administrative Law Judges with two possible responsible operators listed. Thus, the administrative law judge was proper in weighing the evidence to determine the proper responsible operator. See generally Carpenter v. Eastern Associated Coal Corp., 6 BLR 1-784 (1984). Upon considering the evidence on this issue, the administrative law judge properly determined that Energy Enterprises was the last employer with whom claimant had worked for at least one year. See Decision and Order-Award of Benefits at 2. In his brief, the Director states that Energy Enterprises was not named as the responsible operator because it was not insured for the full period of claimant's employment from 1982 to December, 1987, specifically the last six months from June 1987 to December 1987. However, upon considering the evidence on this issue, the administrative law judge properly found that claimant was employed by Harvey Energy Corporation from the middle of May, 1987 until December 1987. See Decision and Order-Denying Reconsideration at 1; Director's Exhibit 5. The administrative law judge further permissibly found that Energy Enterprises was insured by the West Virginia Coal Workers' Pneumoconiosis Fund from January 26, 1983 until June 28, 1987. See Decision and Order-Denying Reconsideration at 1; Letter dated July 18, 1990; Mabe v. Bishop Coal Co., 9 BLR 1-67 (1986). Thus, the administrative law judge properly dismissed Tamroy Mining and Pratt Mining as potential responsible operators and named Energy Enterprises as the responsible operator. See 20 C.F.R. Part 727, Subpart F. Further, as the identified potential responsible operators are dismissed, and Energy Enterprises is not a party to this action, the administrative law judge properly found the Director to be liable for the payment of any benefits. See Crabtree v. Bethlehem Steel Corp., 7 BLR 1-354 (1984).

Accordingly, the administrative law judge's Decision and Order-Award of Benefits and the Decision and Order-Denying Reconsideration are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge