

BRB No. 05-0915 BLA

BARBARA E. LOY )  
(Widow of CHARLES J. LOY) )  
 )  
Claimant )  
 )  
v. )  
 )  
CONSOLIDATION COAL COMPANY ) DATE ISSUED: 07/28/2006  
 )  
Employer-Respondent )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Petitioner ) DECISION and ORDER

Appeal of the Order Remanding Claim to the District Director and the Decision on Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Remanding Claim to the District Director (Order) and the Decision on Motion for Reconsideration (Decision) (2004-BLA-6466) of Administrative Law Judge Daniel L. Leland rendered on a survivor's 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). The administrative law judge found that employer, Consolidation Coal Company (Consol) was improperly designated the responsible operator herein, as he determined that the miner was engaged in coal mine employment with Kitt Energy Corporation (Kitt) for a cumulative period of at least one year after ceasing employment with Consol. Accordingly, the administrative law judge remanded the case to the district director for payment of survivor's benefits.

On appeal, the Director contends that the administrative law judge erred in calculating the length of the miner's last coal mine employment with Kitt. Claimant, the miner's widow, has not participated in this appeal. Consol responds, urging affirmance.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that the operator responsible for the payment of benefits is the potentially liable coal mine operator that most recently employed the miner for a cumulative period of not less than one year, with the designated responsible operator bearing the burden of proving that it is not the potentially liable operator that most recently employed the miner for such period. *See* 20 C.F.R. §§725.494, 725.495, 725.101(a)(32). The Director asserts that Consol was properly designated the responsible operator herein, and contends that the administrative law judge erred in finding that Consol established that the miner was engaged in coal mine employment with Kitt for a cumulative period of at least one calendar year after ceasing employment with Consol. We disagree.

The administrative law judge determined that employment records showed that the miner worked for Kitt, formerly known as Republic Steel Corporation, from November 16, 1976 to September 15, 1977, but that Social Security Administration (SSA) records reflected additional earnings from LTV Steel Corporation, the parent company of Republic Steel, of \$241.36 in the last quarter of 1977 and \$173.49 in an unspecified quarter of 1978. Order at 1-2. The administrative law judge further determined that this evidence was buttressed by the United Miner Workers of America (UMWA) Health and Retirement Funds records, which credited the miner with one quarter of employment in 1976 and all four quarters of employment in 1977; and the miner's Wage and Tax Statement for 1978, which reflected \$173.49 in earnings from Republic Steel. *Id.* Although the precise nature of the compensation received in 1978 and in the last quarter of 1977 was not stated in the record, the administrative law judge noted that the compensation could have been for an approved absence such as vacation or sick leave, which is properly included in calculating the length of coal mine employment. Order at

2; see 20 C.F.R. §725.101(a)(32); *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (9186); *Verdi v. Price River Coal Co.*, 6 BLR 1-1067 (1984); *Elswick v. The New River Co.*, 2 BLR 1-1109 (1980). Based on the evidence, the administrative law judge concluded that claimant's employment with Kitt lasted until the end of the first quarter of 1978, and that he was employed by Kitt from November 16, 1976 until March 31, 1978. The administrative law judge was not persuaded by the Director's argument that the earnings reported for the last quarter of 1977 most likely represented compensation for work performed in September which was not paid out until October, finding it to be purely speculative. Decision at 1.

On appeal, the Director maintains that even if the amounts of \$241.36, earned by the miner in the last quarter of 1977, and \$173.49, earned in 1978, were attributable to vacation or sick leave, they only represent compensation for another seven-plus days of employment pursuant to the Director's calculations. Director's Brief at 6. The Director argues that the date a miner receives compensation is not relevant in determining the ending date of the miner's employment; therefore, since Kitt reported that the miner worked for a period of only ten months ending on September 15, 1977, the Director asserts that compensation for an additional seven-plus days cannot extend the miner's employment period to November 15, 1977, the requisite calendar year. Director's Brief at 5-7. The administrative law judge, however, permissibly rejected these arguments, finding that the SSA and UMWA records demonstrated that the miner had a continuing employment relationship with Kitt that extended into 1978, and that the relatively small amount of compensation failed to demonstrate that the miner did not continue to be employed by Kitt beyond November 15, 1977, which was all that the regulations required. Order at 3; Decision at 1; see 20 C.F.R. §725.101(a)(32); see generally *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

It is well settled that an administrative law judge may employ any reasonable method of calculating the length of coal mine employment, and his determination will be upheld if it is supported by substantial evidence in the record considered as a whole. See *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Moreover, the regulations explicitly provide that "[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." 20 C.F.R. §725.101(a)(32)(ii). As substantial evidence supports the administrative law judge's finding that the miner was employed by Kitt for a cumulative period of at least one calendar year after ceasing employment with Consol, we affirm his finding that Consol met its burden of establishing that it was not properly designated the responsible operator herein pursuant to 20 C.F.R. §725.495.

Accordingly, the administrative law judge's Order Remanding Claim to the District Director and his Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge