

BRB No. 13-0066 BLA

ROBIN BARTON)
(Widow of TIMMY L. BARTON))
)
 Claimant)
)
 v.)
)
 RED BARON, INCORPORATED) DATE ISSUED: 11/18/2013
)
 and)
)
 AMERICAN INTERNATIONAL/CHARTIS)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Kathryn Lea Harman (Semmes, Bowen & Semmes), Vienna, Virginia, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (11-BLA-5641, 11-BLA-5642) of Administrative Law Judge Daniel F. Solomon awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ This case involves a miner's claim filed on September 26, 2008 and a survivor's claim filed on September 21, 2009.²

After finding that the miner's claim was timely filed, and awarding benefits in both claims, the administrative law judge addressed whether Red Baron, Incorporated (Red Baron) was properly designated the responsible operator. The administrative law judge found that another operator, Upper Mill Mining Company (Upper Mill), more recently employed the miner for at least one year, and was financially capable of assuming liability for the payment of benefits. Consequently, the administrative law judge found that Red Baron was not the responsible operator, and dismissed Red Baron as a party to these claims.³

On appeal, the Director argues that the administrative law judge erred in finding that Red Baron was improperly designated the responsible operator. Red Baron responds

¹ Unless otherwise noted, the relevant version of the regulations cited in this Decision and Order can be found in 20 C.F.R. Parts 718 and 725 (2013).

² The miner filed a claim for benefits on September 26, 2008. The district director awarded benefits, and determined that Red Baron, Incorporated (Red Baron) was the responsible operator liable for the payment of benefits. Red Baron challenged its designation as the responsible operator, and requested a hearing before the Office of Administrative Law Judges (OALJ). However, before a hearing could be held, the miner died on August 26, 2009. Claimant, the surviving spouse of the miner, filed a survivor's claim on September 21, 2009. The district director awarded survivor's benefits, and again designated Red Baron as the responsible operator. Red Baron again contested its designation as the responsible operator, and both claims were forwarded to the OALJ for a hearing. Red Baron subsequently requested that a determination be made on the record. The administrative law judge granted Red Baron's request, canceled the hearing, and requested briefs on the disputed issues. Red Baron and the Director, Office of Workers' Compensation Programs (the Director), submitted briefs. Although Red Baron did not contest the medical issues in the case, it argued that the miner's claim was not timely filed, and contended that it should not have been designated the responsible operator.

³ The effect of the administrative law judge's dismissal of Red Baron as the responsible operator was to transfer liability for the payment of benefits to the Black Lung Disability Trust Fund. *See* 26 U.S.C. §9501(d)(1)(B).

in support of the administrative law judge's finding that Upper Mill should have been designated the responsible operator. Alternatively, Red Baron contends that Rapoca Energy Company (Rapoca) should have been designated the responsible operator. Claimant has not filed a response brief.⁴

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁵ 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 in finding that Red Baron was improperly designated as the responsible operator. The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, 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).⁶ Once a potentially liable operator has been properly identified by the 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 it is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The regulations provide for "a two[-]step inquiry into a miner's employment to determine if an employer is the responsible operator." *Clark v. Barnwell Coal Co.*, 22

⁴ Because no party challenges the administrative law judge's finding that the miner's claim was timely filed, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's unchallenged awards of benefits in the miner's claim and the survivor's claim. *Id.*

⁵ The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

⁶ 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).

BLR 1-275, 1-280-81 (2003). First, the administrative law judge must determine whether the miner worked for the operator for one calendar year, or for partial periods totaling one year.⁷ Second, if the administrative law judge finds that one calendar year of employment has been established, the administrative law judge must determine whether the miner worked during that one year period for at least 125 working days. *Daniels Co. v. Mitchell*, 479 F.3d 321, 330, 24 BLR 2-1, 2-17 (4th Cir. 2002); *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 562, 22 BLR 2-349, 2-360 (6th Cir. 2002); *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc) (McGranery, J., concurring and dissenting).

Although the record does not indicate the starting and ending dates of the miner's coal mine employment, the miner's Social Security Administration (SSA) Statement of Earnings reveals that Red Baron employed the miner in 1995, and from 1997 to 1999. Director's Exhibit 5. These records also document that the miner worked for several other coal mine companies from 1995 to 1999, including Buchanan Production Company (Buchanan) (1995, 1996),⁸ Upper Mill (1996, 1997, 1999), Crown Mining, Incorporated (Crown Mining) (1996, 1997), Misty-Bec Coal Corporation (Misty-Bec) (1997), and Banner Blue Coal Company (Banner Blue) (1999). *Id.*

The district director found that the miner was last employed by Upper Mill. Director's Exhibit 15. Because the district director found the evidence insufficient to establish the beginning and ending dates of the miner's coal mine employment with Upper Mill, he used the default formula set forth at 20 C.F.R. §725.101(a)(32)(iii),⁹ and

⁷ A calendar year of employment with a coal mine operator is not established by showing that more than a year has elapsed between the first and last dates of a miner's employment with that coal mine operator. The regulations define a 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). The regulations further state that "[t]o the extent the evidence permits, the beginning and ending dates of all periods of employment shall be ascertained." 20 C.F.R. §725.101(a)(32)(ii). Moreover, the "dates and length of coal mine employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits and sworn testimony." *Id.*

⁸ The miner testified that he worked for Buchanan Production Company before he worked for Red Baron. Director's Exhibit 22 at 23.

⁹ Section 725.101(a)(32)(iii) provides that, 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 finder-of-fact may, in his discretion,

calculated the miner's cumulative employment with Upper Mill as 0.94 years. *Id.* The district director found that Red Baron was the last operator to employ the miner for a calendar year. *Id.* The district director, therefore, identified Red Baron as the responsible operator. *Id.*

Because the district director identified Red Baron as the responsible operator, Red Baron had the burden of proving that it was "not the potentially liable operator that most recently employed the miner." 20 C.F.R. §725.495(c)(2). Red Baron argued, before the administrative law judge, that Upper Mill should have been designated as the responsible operator because it more recently employed the miner for at least one year. Alternatively, Red Baron argued that an entity named Rapoca was a single business entity associated with the miner's more recent employers for a combined one-year period (Buchanan, Upper Mill, Misty-Bec, and Banner Blue), and therefore should have been designated the responsible operator.

The administrative law judge rejected Red Baron's contention that Rapoca should have been designated the responsible operator. Decision and Order at 6. However, the administrative law judge found that Red Baron established that Upper Mill employed the miner for at least one calendar year, and that it was financially capable of assuming liability for benefits:

I accept that [the] [m]iner's deposition testimony attributed more than a year to [Upper Mill]. [The district director] apparently determined that [Upper Mill was] the last employer but there was no basis to attribute a year of mining employment to them. However, during the deposition, there was further elaboration. I am persuaded that [the] [m]iner worked more than a year for them. Earnings records prove that he worked more than 125 cumulative days for Upper Mill over a period of [three] years as a miner operator, a position which exposed him to coal dust. He last worked for Upper Mill.

I accept further that Upper Mill had insurance during the applicable period and is presumed capable of assuming liability.

Decision and Order at 6. The administrative law judge, therefore, dismissed Red Baron as the responsible operator.

determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

The Director contends that the administrative law judge erred in finding that the miner's testimony established that he spent a calendar year engaged in coal mine employment for Upper Mill. We agree. The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "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). In this case, the administrative law judge failed to explain the basis for his finding that the miner's deposition testimony established that Upper Mill employed him for at least one calendar year.¹⁰ Consequently, we must vacate the administrative law judge's finding that Upper Mill employed the miner for a calendar year, and remand the case to the administrative law judge for further consideration of whether Red Baron was properly designated the responsible operator.¹¹

Red Baron argues that, should the administrative law judge determine that Upper Mill is not the properly designated responsible operator, he should address Red Baron's alternative argument that Rapoca should have been designated the responsible operator.¹² Red Baron argued, before the administrative law judge, that Rapoca is the parent company of Buchanan, Upper Mill, Misty-Bec, and Banner Blue. In support of its argument, Red Baron noted that the miner's SSA Statement of Earnings lists the same address for Buchanan, Upper Mill, and Misty-Bec. Red Baron's Trial Brief at 9. Red Baron further noted that annual reports submitted to the Virginia State Corporation

¹⁰ As the Director notes, the miner testified during his deposition that he did not know whether he worked at Upper Mill Mining Company (Upper Mill) for at least one year. Director's Exhibit 22 at 52. The miner could not provide any dates for his coal mine employment. *Id.* The Director further notes that claimant testified that she was uncertain as to the length of time that her husband was employed by Upper Mill. Director's Exhibit 47 at 15-16.

¹¹ The administrative law judge erred in dismissing Red Baron as a party to these claims. An administrative law judge may not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director. 20 C.F.R. §725.465(b). We therefore reinstate Red Baron as a party.

¹² The arguments in Red Baron's response brief are in support of another method by which the administrative law judge may reach the same result and conclude that Red Baron is not the responsible operator. Therefore, those arguments are properly before the Board in this appeal. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-67 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

Commission list Mr. Gary Horn as President and Secretary of Buchanan, Upper Mill, and Banner Blue. *Id.* Red Baron also relied upon the deposition testimony of the miner and claimant to support its position.¹³ *Id.*

In addressing Red Baron's alternative argument that Rapoca should have been designated as the responsible operator (by virtue of its being the parent company of Buchanan, Upper Mill, Misty-Bec, and Banner Blue), the administrative law judge focused upon whether Mr. Gary Horn could be found liable as a responsible operator in his personal capacity. Decision and Order at 6. The administrative law judge did not address the relevant issue, specifically, whether the evidence established that Rapoca is the parent company of Buchanan, Upper Mill, Misty-Bec, and Banner Blue, and is, therefore, the last operator to have employed the miner for a cumulative period of not less than one year. Consequently, we instruct the administrative law judge, on remand, to reconsider, if necessary, Red Baron's alternative argument that Rapoca should have been designated the responsible operator in this case.¹⁴

¹³ The miner testified that Rapoca owned Buchanan, Upper Mill, Misty-Bec, and Banner Blue. Director's Exhibit 22 at 23, 26, 29. The miner testified that all of the mines under Rapoca were "real close together," and that Rapoca would send him to different mines, as needed. *Id.* at 25-26, 49-50. Moreover, the miner testified that, when he worked for those companies, his paycheck always came from Rapoca. Claimant also testified that Upper Mill, Misty-Bec, and Banner Blue are subsidiaries of Rapoca, and that "Rapoca" appeared on all of the miner's pay checks. Director's Exhibit 47 at 19.

¹⁴ If the administrative law judge determines that Rapoca was the last operator to employ the miner for a calendar year, Red Baron must also establish that Rapoca is financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, Red Baron is reinstated as a party to these claims, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge