

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0057 BLA

JIMMY BOWLING)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND FORK CONSTRUCTION)	
)	DATE ISSUED: 09/21/2016
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Cameron Blair (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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 Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5956) of Administrative Law Judge Alice M. Craft, rendered on a miner's subsequent claim¹ filed on June 21, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the BLBA).

Because both employer and its insurance carrier are insolvent, the administrative law judge first determined, in an order issued on May 12, 2015 (Order), that the Kentucky Insurance Guaranty Association (KIGA) would be responsible for payment of benefits as a coverage guarantor if claimant was awarded benefits, and that employer therefore remained the responsible operator. In her Decision and Order issued on September 28, 2015, the administrative law judge found that claimant has twenty-nine years of coal mine employment,² including at least fifteen years of underground coal mine employment, and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the presumption set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),³ that he is totally disabled due to pneumoconiosis, and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in determining that it is the responsible operator. Claimant responds, asserting that

¹ Claimant's initial claim, filed on May 2, 2002, was denied on December 15, 2005, by Administrative Law Judge Thomas F. Phalen, Jr., for failure to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1 at 30-46. The Board affirmed the denial of benefits. *Bowling v. Island Fork Constr. Ltd.*, BRB No. 06-0326 BLA (Sept. 19, 2006) (unpub.).

² Claimant's last coal mine employment was in Kentucky. Hearing Transcript at 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ If a miner has fifteen or more years of underground or substantially similar coal mine employment and establishes that he or she has a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

employer is the responsible operator, and urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also filed a response, arguing that the administrative law judge correctly determined that KIGA is liable for payment of claimant's benefits, and that employer is the responsible operator.⁴

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 responsible operator is the operator that most recently employed the miner, provided that the operator meets the five criteria of a "potentially liable operator" under 20 C.F.R. §725.494. *See* 20 C.F.R. §725.495(a)(1). There is no dispute in this case that employer meets the first four criteria;⁵ the only question is whether it meets the fifth, by being "capable of assuming its liability for the payment of continuing benefits." 20 C.F.R. §725.494(e). As is relevant here, an operator is deemed capable of assuming its liability if it "obtained a policy or contract of insurance . . . that covers the claim," unless "the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed." 20 C.F.R. §725.494(e)(1). It is employer's burden, as the designated responsible operator, to prove that it is incapable of assuming liability for the payment of benefits. 20 C.F.R. §725.495(b).

With its own insurer insolvent, employer offers two arguments that KIGA is also unable to assume liability for the payment of claimant's benefits. Employer's Brief at 3-9 (unpaginated). Either argument, employer contends, establishes that "its obligations for the claim are not otherwise guaranteed," pursuant to 20 C.F.R. §725.494(e)(1). Employer therefore contends that it cannot be the responsible operator, pursuant to 20 C.F.R. §725.495, and that the Black Lung Disability Trust Fund (the Trust Fund) must pay claimant's benefits. *Id.*

⁴ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established his entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The first four criteria are that the miner's disability or death arose at least in part out of employment with the operator; that the operator was an operator after June 30, 1973; that the miner worked for the operator for at least one year; and that the miner's employment with the operator included at least one day after December 31, 1969. *See* 20 C.F.R. §725.494(a)-(d).

Specifically, employer first argues that the Kentucky Insurance Guaranty Association Act (the KIGA Act), which created KIGA, excludes claims for benefits under the BLBA from KIGA's coverage.⁶ *Id.* at 3-6. Employer therefore contends that KIGA cannot be made to pay benefits to claimant. *Id.* at 5. Alternatively, employer argues that even if claims under the BLBA are within the scope of KIGA's coverage, the KIGA Act places limits on coverage that would prevent KIGA from being able to guarantee payment of continuing benefits to claimant, and thus would prevent employer from assuming liability for the payment of benefits, pursuant to 20 C.F.R. §725.494(e). *Id.* at 6-7.

We begin with employer's first contention. KIGA does not cover insurance claims on policies for "ocean marine insurance," which is defined to include coverage written in accordance with the Longshore and Harbor Workers' Compensation Act (LHWCA), or with "[a]ny other similar federal statutory enactment." KY Rev. Stat. Ann. §§304.36-030(1)(f), 304.36-050(10)(b)-(c) (West 2006). Additionally, KIGA does not cover claims on "[a]ny insurance provided, written, reinsured, or guaranteed by any government or governmental agencies." KY Rev. Stat. Ann. §304.36-030(1)(h). Because the BLBA incorporates certain provisions of the LHWCA, employer contends that claims under the BLBA are excluded from KIGA's coverage as claims for "ocean marine insurance." Employer's Brief at 3-5. Employer also argues that, because the Trust Fund pays benefits where no responsible operator exists, the Trust Fund constitutes "insurance provided, written, reinsured, or guaranteed" by a government agency. Employer's Brief at 5-6. These arguments lack merit.

As the Board reasoned in *Ratliff v. Appleton & Ratliff Coal Corp.*, BRB No. 14-0415 BLA, slip op. at 4 (Sept. 30, 2015) (unpub.), *appeal docketed*, No. 15-4255 (6th Cir. Nov. 16, 2015), KIGA excludes "ocean marine insurance" that covers "loss, damage, or expense arising out of or incident to ownership, operation, chartering, maintenance, use, repair, or construction of any vessel, craft, or instrumentality in use in ocean or inland waterways" KY Rev. Stat. Ann. §304.36-050(10). In contrast, insurance obtained to secure liability under the BLBA covers benefits payable based on a determination that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment or that the miner's death was due to pneumoconiosis arising out of coal mine

⁶ Employer recognizes that the Board rejected this argument in *Ratliff v. Appleton & Ratliff Coal Corp.*, BRB No. 14-0415 BLA, slip op. at 3-5 (Sept. 30, 2015) (unpub.), *appeal docketed*, No. 15-4255 (6th Cir. Nov. 16, 2015). Employer's Brief at 9 (unpaginated). Employer notes that *Ratliff* is on appeal before the Sixth Circuit, and states that it has filed this appeal to the Board to preserve the issue in this case. *Id.* at 9-10.

employment. 30 U.S.C. §§901, 933; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205, 726.203(a), (c). Thus, the mere fact that the BLBA contains certain provisions that are also contained in the LHWCA does not alter the BLBA's status as a distinct statute that is not subject to the KIGA Act's exclusion of coverage for "ocean marine insurance." KY Rev. Stat. Ann. §§304.36-030(1)(f), (h). Further, because the BLBA covers benefits arising from employment in coal mining, it is not "similar" to statutes such as the LHWCA, which provide for insurance against risks arising from "ocean marine" activities as defined in the KIGA Act. 30 U.S.C. §901; KY Rev. Stat. Ann. §304.36-050(10)(b)-(c).

In addition, as in *Ratliff*, employer's insurance policy in this case was not "provided, written, reinsured, or guaranteed" by a government agency, *see* KY Rev. Stat. Ann. §304-36-030(1)(h), but by a commercial provider.⁷ Director's Exhibit 20; Director's Brief at 8. Furthermore, we agree with the Director that the Trust Fund does not "guarantee" an employer's insurance policy. Director's Brief at 8. If an operator is not a potentially liable operator pursuant to 20 C.F.R. §725.494 because its insurance carrier is insolvent, the Trust Fund does not automatically step in; rather, the potentially liable operator that next most recently employed the miner will become the responsible operator. *See* 20 C.F.R. §725.495(a)(3). Only when no liable operators can be identified does the Trust Fund assume payment of benefits. *See* 26 U.S.C. §9501(d); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1214, 24 BLR 2-155, 2-159 (10th Cir. 2009). Therefore, we reject employer's contention, and affirm the administrative law judge's determination that claims for benefits under the BLBA fall within the scope of KIGA's coverage. *See Ratliff*, BRB No. 14-0415 BLA, slip op. at 4-5; Order at 2-4.

Next, we address employer's alternative argument that, even if KIGA covers BLBA claims, employer cannot be designated the responsible operator because KIGA's coverage limits prevent it from guaranteeing the payment of continuing benefits to claimant, and thus prevent employer from assuming its liability for the payment of benefits, pursuant to 20 C.F.R. §725.494(e). Employer's Brief at 6-7. Specifically, employer contends that it cannot guarantee that payment of benefits to claimant will continue, because the KIGA Act caps KIGA's payments on an individual claim at \$300,000, and caps the aggregate of payments on claims against a particular insurance carrier at \$10,000,000. *See* KY Rev. Stat. Ann. §304.36-080(1)(a)(3), (b); Employer's Brief at 6-7. This argument lacks merit.

⁷ Employer's insurance carrier was Frontier Insurance Company. Director's Exhibit 20.

As the Director notes, and as the administrative law judge found, employer's argument is speculative, with no evidence that claimant will require more than \$300,000 in benefits payments, or that the aggregate coverage limit of \$10,000,000 has been reached or will be reached. Order at 4; Director's Brief at 8-9. Moreover, we agree with the Director that the possibility the Trust Fund may assume payment of benefits at some point in the future if KIGA is unable to continue payments does not excuse KIGA from assuming liability for payments now. Director's Brief at 9 n.5. We therefore reject employer's contention, and affirm the administrative law judge's finding that the statutory limits on KIGA's coverage do not relieve it of liability for the payment of benefits to claimant. Order at 4.

Therefore, we affirm the administrative law judge's determination that KIGA is responsible for payment of claimant's benefits as a guarantor of employer's insurance coverage, pursuant to 20 C.F.R. §725.494(e)(1). Decision and Order at 7; Order at 4. We therefore affirm the administrative law judge's finding that employer is the responsible operator, pursuant to 20 C.F.R. §725.495. *Id.* Because employer has not challenged the administrative law judge's determination that claimant established each of the elements of entitlement, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge