BRB No. 14-0036 BLA

TROY A. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NBL COAL COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 08/07/2014
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand and Decision and Order on Reconsideration (10-BLA-5813) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on November 4, 2008, and is before the Board for the second time. Director's Exhibit 3.

In its prior decision, upon review of employer's appeal, the Board affirmed the administrative law judge's award of benefits. *Moore v. NBL Coal Co.*, BRB No. 12-0385 BLA, slip op. at 5-8 (Apr. 11, 2013) (unpub.). However, the Board vacated the administrative law judge's finding that employer is the responsible operator. *Moore*, slip op. at 5. Specifically, the Board held that the administrative law judge erred by placing the burden of proof on employer to establish that it did not employ claimant for at least one year, when the burden was on the Director, Office of Workers' Compensation Programs (the Director), to establish that employer is a potentially liable operator, because it employed claimant for at least one year. *Moore*, slip op. at 3-5. Accordingly, the Board remanded the case for the administrative law judge to consider all of the relevant evidence, and determine whether the Director established that claimant's employment relationship with employer lasted at least one year. *Id*. at 5.

On remand, the administrative law judge considered documentary evidence indicating that claimant worked for employer from March 28, 1992, until March 23, 1993, and was not paid thereafter. Decision and Order on Remand at 2; Director's Exhibit 6. The administrative law judge also considered an October 27, 1993 opinion from the Virginia Workers' Compensation Commission (the Commission), denying claimant's claim for compensation for a back injury that he alleged occurred at work on March 23, 1993, as he was bending a roof bolt.[1] In its opinion, the Commission summarized the testimony of claimant, his wife, and Larry Lambert (part-owner of the mining company and a supervisor for employer), concerning events after March 23, 1993, which, the Director argued, evinced an ongoing employment relationship through at least May 10, 1993. Director's Exhibit 6 at 2-5; Decision and Order on Remand at 2.

The administrative law judge considered employer's position that claimant did not work for employer for one year, because he worked from March 28, 1992 until March 23, 1993, he was not injured at work that day, and his absence thereafter was not authorized. Decision and Order on Remand at 2. The administrative law judge also considered the Director's position, that an employment relationship between claimant and employer continued until at least May 10, 1993, because Mr. Lambert's testimony to the Commission indicated that claimant could have returned to work on May 10, provided he had a physician's authorization. *Id*. Based on the evidence and the arguments of the parties, the administrative law judge determined that the Director met his burden to establish that claimant's employment relationship with employer lasted at least one year. Therefore, the administrative law judge concluded that employer satisfied the criteria of a potentially liable operator, and is properly designated as the operator responsible for the

[1] The Commission denied the claim because claimant did not establish that a work-related injury occurred. Director's Exhibit 6 at 10.

payment of benefits. Decision and Order on Remand at 3-4. In a Decision and Order on Reconsideration, the administrative law judge reaffirmed his finding.

On appeal, employer argues that the administrative law judge erred in identifying it as the properly designated responsible operator. The Director responds in support of the administrative law judge's identification of employer as the properly designated responsible operator. Claimant did not file a response brief.

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.[2] 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).

To prove that a coal mine operator is a potentially liable operator, the Director must establish, inter alia, that the operator employed the miner for a cumulative period of not less than one year.[3] 20 C.F.R. §§725.494(c), 725.495(b); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 329, 24 BLR 2-1, 2-15 (4th Cir. 2007); *Armco, Inc. v. Martin*, 277 F.3d 468, 475, 22 BLR 2-334, 2-344 (4th Cir. 2002). A "year" is defined as "one calendar year . . . 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.'"[4] 20 C.F.R. §725.101(a)(32). In "determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." *Id*. An unpaid leave of

[2] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. 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, 1-202 (1989) (en banc).

[3] In addition to establishing that the miner worked for the operator for at least one year, the Director, Office of Workers' Compensation Programs, must also establish that the miner's disability or death arose out of employment with that operator; that the entity was an operator after June 30, 1973; that the miner's employment included at least one working day after December 31, 1969; and that the operator is financially capable of assuming liability for the claim. 20 C.F.R. §725.494(a)-(e). The above issues are not in dispute in this case.

[4] Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). Employer does not argue that claimant spent less than 125 working days in its employ.

absence may be counted where there is no evidence that the employment was terminated and the record indicates that claimant retained the right to employment. *See Elswick v. New River Co*., 2 BLR 1-1109, 1-1113-14 (1980).

In asserting that the administrative law judge erred in identifying it as the properly designated responsible operator, employer does not dispute that claimant worked for employer from March 28, 1992 until March 23, 1993. Employer's Brief at 3-5. Rather, employer asserts that the administrative law judge erred in counting the period between March 23, 1993 and May 10, 1993, to find that claimant worked for employer for not less than one year. Employer's Brief at 4-5. Specifically, employer contends that, while claimant alleged that he stopped work due to a work-related injury sustained on March 23, 1993, because the Commission ultimately denied the claim, claimant's absence from work after March 23, 1993 was not an "excused" or "approved" absence. Employer's Brief at 4-5. Thus, employer asserts, the period after March 23, 1993 cannot be counted for purposes of establishing one year of employment. *Id.* We disagree.

Contrary to employer's contention, whether a work-related injury occurred or did not occur is not determinative of the issue of whether the time after March 23, 1993 can be counted for the purposes of establishing that claimant had at least one year of employment with employer. Rather, the issue is whether, during the period of his absence, claimant continued to have an employment relationship with employer. *See Elswick*, 2 BLR at 1-1113-14; *see also BGL Mining Co. v. Cash*, 165 F.3d 26 (Table), 1998 WL 639171 (6th Cir., Sept. 11, 1998); 65 Fed. Reg. 79920, 79959 (Dec. 20, 2000).

In this case, the administrative law judge rationally relied on Mr. Lambert's testimony, as summarized in the October 27, 1993 opinion from the Commission, to find that claimant retained the right to work for employer at least until May 10, 1993. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988) (en banc); *Elswick*, 2 BLR at 1-1113-14; Decision and Order on Remand at 3. Specifically, the administrative law judge noted Mr. Lambert's testimony that claimant called employer on May 3, 1993 and "advised he was coming back to work the following Monday," and that, in response, Mr. Lambert "told claimant to bring a release from a physician." Decision and Order on Remand at 3; Director's Exhibit 6. However, Mr. Lambert testified, on May 10, 1993, claimant again called employer and said that he "couldn't come back to work" as planned. Decision and Order on Remand at 3; Director's Exhibit 6. The administrative law judge reasonably inferred that Mr. Lambert's testimony did not support a finding that claimant's employment was terminated before May 3, 1993, because Mr. Lambert's response to claimant on that date implied that claimant could return to work the following Monday, provided he brought a physician's authorization. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Tackett*, 12 BLR at 1-13;

Decision and Order on Remand at 3. The administrative law judge further found that there was no other evidence in the record that claimant was terminated. Decision and Order on Remand at 3. Thus, based on Mr. Lambert's testimony, the administrative law judge concluded that, as claimant retained the right to return to work until May 10, 1993, his employment relationship with employer lasted at least until that date. *Elswick*, 2 BLR at 1-1113-14; Decision and Order on Remand at 3. Therefore, the administrative law judge further concluded that the Director met his burden to establish that employer is a potentially liable operator because it employed claimant from March 28, 1992 until at least May 10, 1993, a period of at least one year. 20 C.F.R. §725.494(c), 725.495(b); Decision and Order on Remand at 3. As the administrative law judge's finding is rational and supported by substantial evidence, it is affirmed. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999). We, therefore, further affirm the administrative law judge's identification of employer as the properly designated responsible operator.[5] *See Mitchell*, 479 F.3d at 329, 24 BLR at 2-15; *Martin*, 277 F.3d at 475, 22 BLR at 2-344.

[5] On appeal, employer also argues that the administrative law judge erred in failing to address its request for an extension of time to file its remand brief, and its arguments on remand. Employer's Brief at 3. Contrary to employer's argument, a review of the administrative law judge's Decision and Order on Reconsideration reveals that the administrative law judge considered employer's arguments raised on remand, and concluded that they had already been addressed. *See* Decision and Order on Reconsideration at 1-2. Moreover, as the administrative law judge considered employer's arguments in his reconsideration decision, any error in the administrative law judge's failure to rule on employer's extension request to file its remand brief is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge