BRB No. 12-0559 BLA

JAMES GARY WARREN, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLEETWOOD TRUCKING COMPANY, INCORPORATED	)	DATE ISSUED: 05/22/2013
	)	
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 Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Christopher Lyle McIlwain, Sr. (Hubbard, Wiggins, McIlwain & Brakefield, P.C.), Tuscaloosa, Alabama, for employer.

Helen H. Cox (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer, Fleetwood Trucking Company, Incorporated (employer or Fleetwood), appeals the Decision and Order Awarding Benefits (2011-BLA-05343) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on October 29, 2009. The administrative law judge initially found that claimant, who worked as a truck driver hauling coal, was employed as a miner under the Act, and he credited claimant with twelve years of coal mine employment.[1] The administrative law judge also determined that employer is the properly designated responsible operator. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence established the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and that claimant's pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that claimant established that he is totally disabled by a respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2), and that pneumoconiosis is a substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it is the responsible operator. Employer also challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Board to hold that employer is the properly designated responsible operator, and to affirm the award of benefits.[2] Employer filed a reply brief, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

[1] Because the administrative law judge found that claimant established fewer than fifteen years of coal mine employment, a recent amendment to the Black Lung Benefits Act, which became effective on March 23, 2010, does not apply to this case. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant was a miner under the Act, and established twelve years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's findings that claimant established the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), that he has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). *See Skrack*, 6 BLR at 1-711.

and is in accordance with applicable law.[3] 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).

Responsible Operator

We first address employer's challenge to the administrative law judge's responsible operator determination. 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).[4] 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).

Through its investigation, the district director determined that employer was an ongoing business and was financially capable of assuming liability for the payment of benefits. Director's Exhibit 16. Thus, on January 12, 2010, the district director issued a Notice of Claim, informing employer that it was identified as a potentially liable operator. Director's Exhibit 16. In the Notice, the district director acknowledged that claimant was more recently employed as a self-employed truck driver, but indicated that claimant did not qualify as a responsible operator. Director's Exhibit 16. The Notice further provided that "within 30 days of receipt of this Notice of Claim, you (or your insurer) must file a response . . . indicating your intent to accept or contest your identification as a potentially liable operator." *Id.* The Notice advised employer that if it wished to contest its status as a potentially liable operator, it "must state the precise nature of [its] disagreement by accepting or denying each of the five assertions listed" in

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] 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).

the Notice. Director's Exhibit 16. The Notice also emphasized to employer that if it did "not respond within 30 days of [its] receipt of the Notice of Claim," it would "not be allowed to contest [its] liability for payment of benefits on any of the grounds set forth in 20 C.F.R. 725.408(a)(2) . . . ."[5] Director's Exhibit 16. Further, the cover letter accompanying the Notice of Claim reiterated that "failure to respond within thirty (30) days will result in our finding that your company is the proper responsible operator and that you are financially able to assume liability for any benefits that may accrue from this claim." Director's Exhibit 16. The Notice of Claim was sent by certified mail to Mr. Lee Sellers, the president of Fleetwood, who signed the certified mail return receipt on March 9, 2010. Director's Exhibit 16. Fleetwood did not respond to the Notice of Claim.

On August 31, 2010, the district director issued a Schedule for the Submission of Additional Evidence, identifying employer as the responsible operator. Director's Exhibit 17. The Schedule stated that Fleetwood met the criteria of a potentially liable operator, and explained that, while Fleetwood was not the operator that most recently employed claimant, Fleetwood was the designated responsible operator because claimant's most recent employment was as a self-employed truck driver.[6] Director's Exhibit 17. The Schedule informed employer that "it may respond to this schedule by September 30, 2010, and accept or reject its designation. If the responsible operator does not respond, it will be deemed to accept its designation and to waive its right to contest its liability in any further proceedings." Director's Exhibit 17. The Schedule also informed employer that because it failed to respond to the Notice of Claim, it could no longer submit evidence challenging its status as a potentially liable operator. The Schedule was sent by certified mail to Mr. Lee Sellers, the president of Fleetwood, who signed the

[5] An operator that wishes to contest its identification as a potentially liable operator in a Notice of Claim must timely file a response in which it either admits or denies each of the following assertions: (1) that it was an operator for any period after June 30, 1973; (2) that it employed the miner for a cumulative period of not less than one year; (3) that the miner was exposed to coal mine dust while working for the operator; (4) that the miner's employment included at least one working day after December 31, 1969; and (5) that the operator is capable of assuming liability for the payment of benefits. 20 C.F.R. §725.408(a)(2)(i)-(v).

[6] The district director's Liability Analysis portion of the Schedule for the Submission of Additional Evidence set forth that claimant hauled coal and other products for multiple companies from August 2, 2002 to October 2, 2009. Director's Exhibit 17. The analysis concluded that, as claimant's most recent work was as an uninsured, self-employed coal truck driver, claimant was not considered to be a potentially liable operator. Director's Exhibit 17.

certified mail return receipt on September 9, 2010. Director's Exhibit 17. Employer submitted no response within the stated time period.

Instead, on October 19, 2010, Mr. Sellers telephoned the district director's office and left a voicemail message asking what he needed to submit in response to claimant's claim for benefits. Director's Exhibit 16. The following day, in a telephone conversation with a claims examiner, Mr. Sellers acknowledged that he received the Schedule for the Submission of Additional Evidence, and he asserted that claimant hauled only rock, sand, stone, and finished coal for employer. *Id.* The claims examiner referred Mr. Sellers to the instructions provided in the Schedule as to the documentation he needed to submit. On November 9, 2010, Mr. Sellers submitted a written statement asserting that Fleetwood did not fit the definition of a coal mine operator, that claimant did not fit the definition of a miner, and that claimant was not exposed to coal dust while working for Fleetwood.[7] Director's Exhibit 16.

In a Proposed Decision and Order dated November 30, 2010, the district director denied benefits, but determined that Fleetwood "is the coal mine operator designated responsible for the payment of benefits due claimant should this denial be reversed to an award of benefits as a result of subsequent proceedings." Director's Exhibit 19. The accompanying liability analysis noted that employer failed to file timely responses to the Notice of Claim or to the Schedule for the Submission of Additional Evidence. The Proposed Decision and Order acknowledged receipt of Mr. Seller's November 9, 2010 written statement, but concluded that this evidence was untimely. *Id.*

At claimant's request, the case was referred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 20. In response to the hearing notice, by letter dated June 3, 2011, employer notified the administrative law judge that it intended to allege that it was improperly identified as the responsible operator. Employer's Exhibit 1. At the hearing, claimant's counsel and employer's counsel elicited testimony from claimant that, after working for employer, he hauled coal for Cahaba Resources for over one year.[8] Hearing Tr. at 24-40. Additionally, Mr. Sellers testified, and he was asked

[7] Specifically, Mr. Sellers stated that Fleetwood hauled "some coal" that had been strip mined and placed on stock piles at least one-quarter mile from the mining operation, that claimant "was not a miner and did not work in or around a coal mine . . . . [H]e simply drove a truck to the stockpile where it was loaded by others while he remained in the cab of his air-conditioned truck. In short, he had no known exposure to coal mine dust." Director's Exhibit 16.

[8] At the hearing, counsel for employer and counsel for the Director, Office of Workers' Compensation Programs (the Director), disagreed as to whether claimant's testimony indicated that he hauled coal as an employee of Cahaba Resources, or as a self-

whether he or his company, Fleetwood Trucking, is financially capable of paying benefits. Hearing Tr. at 68. He responded, "No, sir." *Id*.

In his Decision and Order, the administrative law judge reviewed the evidence, claimant's testimony, and the arguments of the parties, and determined that employer is the properly designated responsible operator. Decision and Order at 4-5. The administrative law judge found that, by failing to timely submit evidence to the district director, employer waived its right to submit evidence before the administrative law judge challenging its identification as the responsible operator. Alternatively, the administrative law judge found that, even if he considered employer's evidence, employer failed to meet its burden to prove that it is financially incapable of assuming its liability for benefits.

Employer contends that the administrative law judge erred because claimant's testimony establishes that his last coal mine employment for over one year was with Cahaba Resources, not employer, and asserts that the district director would have uncovered this evidence had it conducted a more thorough investigation into claimant's employment history. Employer's Brief at 12, 14-15, 18-19. Employer contends that the district director's "fail[ure] to comply with its legal duty to investigate" resulted in an improper presumption that employer was the most recent operator to employ claimant, thereby depriving employer of due process of law. Employer's Brief at 16-17. Finally, employer asserts that, assuming it was the most recent operator to employ claimant, it has established that it is financially incapable of assuming liability for the payment of benefits. Employer asserts that, therefore, employer should be dismissed as the responsible operator, and liability should be transferred to the Black Lung Disability Trust Fund. Employer's Brief at 20-21. We disagree.

The regulations provide that "within 30 days after the district director issues a schedule [for the submission of additional evidence] . . . containing a designation of the responsible operator liable for the payment of benefits, that operator shall file a response with regards to its liability." 20 C.F.R. §725.412(a)(1). If the designated responsible operator "does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability, *and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim*." 20 C.F.R. §725.412(a)(2) (emphasis added). The district director issued the schedule on August 31,

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employed, independent contractor. Hearing Tr. at 55-61. Additionally, the Director's counsel informed the administrative law judge that employer did not timely respond to the Notice of Claim or to the Schedule for the Submission of Evidence, and thus, did not present any evidence to the district director at the time the district director was making the responsible operator determination. Hearing Tr. at 63-65.

2010, and notified employer that it had until September 30, 2010 to respond. As the administrative law judge found, employer did not respond to the district director's notification until October 19, 2010, when Mr. Sellers telephoned the district director. Decision and Order at 4; Director's Exhibit 16. While employer subsequently submitted a written statement, it was both untimely and unresponsive to the request for information delineated in the Schedule for the Submission of Additional Evidence. Director's Exhibit 16. We, therefore, agree with the Director that employer waived its right to contest its liability in any further proceeding conducted with respect to this claim, and we affirm the administrative law judge's determination that employer "is prohibited from challenging its status as responsible operator. . . ." Decision and Order at 4; 20 C.F.R. §725.412(a)(2); Director's Brief at 6.

We further affirm, as supported by substantial evidence, the administrative law judge's alternative finding that, even assuming employer's response was timely, employer did not meet its burden to establish either that Cahaba Resources more recently employed claimant *and* "possesses sufficient assets to secure the payment of benefits," or that employer does not possess sufficient assets to secure the payment of benefits. 20 C.F.R. §725.495(c)(1), (2); Decision and Order at 4-5. Contrary to employer's arguments, the administrative law judge properly found that employer had the burden of proof on those issues. Specifically, employer maintains that the district director did not thoroughly investigate whether claimant's more recent employment, hauling coal for Cahaba Resources, was as an independent contractor, as claimant asserted, or was performed as an employee of Cahaba Resources, such that Cahaba Resources should have been identified as a potentially liable operator. Employer asserts that the district director's failure to properly investigate before naming employer as a potentially liable operator deprived employer of due process. Contrary to employer's assertion, due process requires that employer be given the opportunity to mount a meaningful defense by being timely informed of the claim and be given the opportunity to develop evidence in response to the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Here, employer received timely notice of the claim, but failed to timely respond. Therefore, employer has not established that it was deprived of an opportunity to mount a meaningful defense. *See Holdman*, 202 F.3d at 883-84, 22 BLR at 2-32; *see also Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72, 23 BLR 2-124, 2-176-77 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001)(upholding the burden shifting provisions of the responsible operator liability regulations).

Further, the administrative law judge's findings are supported by substantial evidence. As the administrative law judge found, employer did not assert, or present evidence, that Cahaba Resources possesses sufficient assets to secure the payment of benefits. Therefore, whether claimant was more recently employed by Cahaba Resources

is immaterial. *See* 20 C.F.R. §725.495(c)(2). Nor has employer submitted any evidence to establish that Fleetwood does not possess sufficient assets to secure the payment of benefits. As the administrative law judge found, the mere fact that employer is uninsured does not relieve employer of liability for payment. *See* 20 C.F.R. §§725.494(e)(1)-(3), 725.495(c)(1). Accordingly, for all the foregoing reasons, we affirm the administrative law judge's determination that employer is the properly designated responsible operator. *See McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 1513, 12 BLR 2-108, 2-109 (11th Cir. 1988).

Pneumoconiosis Arising out of Coal Mine Employment

Employer next contends that the administrative law judge erred in finding that claimant's pneumoconiosis arose out his coal mine employment with Fleetwood. Employer's Brief at 21-27. Specifically, employer contends that claimant provided no medical evidence to establish that his pneumoconiosis arose out of coal mine employment with employer, and asserts that no other truck drivers employed by Fleetwood have been diagnosed with pneumoconiosis. Employer's Brief at 26. Employer also asserts that the administrative law judge's finding is flawed, because it is contrary to the district director's determination that claimant did not prove that his pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(c). Employer's Brief at 22. Employer's contentions lack merit.

Findings of fact made by the district director are not binding upon the administrative law judge, who must perform a de novo review of the evidence in order to determine whether entitlement to benefits has been established. *See* 20 C.F.R. §§725.351, 725.450, 725.452, 725.455(a); *see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Further, while the district director found fewer than ten years of coal mine employment established, the administrative law judge credited claimant with more than ten years of coal mine employment, a finding employer does not contest. Decision and Order at 5-6. Thus, the administrative law judge properly found that claimant is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b); Decision and Order at 7.

With respect to whether employer rebutted the presumption, the administrative law judge considered employer's contention that claimant was not exposed to coal mine dust while working for Fleetwood, but he permissibly found that more credible evidence, specifically, claimant's testimony that he was exposed to coal dust, belied that assertion. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); Decision and Order at 3-4, 7. Moreover, the administrative law judge found, and the record reflects, that employer put forth no medical evidence that claimant's pneumoconiosis was due to something other than coal mine dust exposure. Decision and Order at 7. We, therefore, affirm the administrative law judge's findings

that claimant is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment, and that employer failed to rebut the presumption. 20 C.F.R. §718.203(b); Decision and Order at 7. Because employer raises no other arguments regarding claimant's entitlement, we affirm the award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge