U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0314 BLA

MOSE MIMS	)	
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Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 02/24/2023
	)	
	)	
Employer- Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

Jeannie Bugg Walston (Webster Henry), Birmingham, Alabama, for Employer.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Decision and Order (2020-BLA-

05680) rendered on a subsequent claim filed on April 27, 2018[1] pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Pursuant to Employer's Motion for Summary Decision, the ALJ issued an Order Granting Employer's Motion for Summary Decision and Denying Director's Cross-Motion for Summary Decision (Order Granting Employer's Motion) on February 1, 2021, wherein she dismissed Employer as the responsible operator and thus shifted liability for Claimant's benefits to the Black Lung Disability Trust Fund (Trust Fund). Subsequently, on February 24, 2011, the ALJ issued a Decision and Order Awarding Benefits, finding Claimant entitled to benefits pursuant to the parties' representation that no issues were in controversy other than responsible operator.

On appeal, the Director challenges the ALJ's finding that Employer was not the correct responsible operator and thus that the Trust Fund is responsible for payment of benefits. Employer responds, urging affirmance of the ALJ's responsible operator determination. Claimant has not filed a response. The Director filed a reply, reiterating his arguments.[2]

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and 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 Assocs., Inc.*, 380 U.S. 359 (1965).

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" for at least one year.[4] 20 C.F.R. §§725.494(c), 725.495(a)(1). The ALJ determined a subsequent

[1] This is Claimant's fifth claim for benefits. *See* Director's Exhibits 1-4. Claimant's most recent prior claim, filed on February 15, 1996, was denied by the district director for failure to establish any element of entitlement and became final on February 1, 2000. Director's Exhibit 4.

[2] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant is entitled to benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

[4] In addition, the evidence must establish the miner's disability or death arose out of coal mine employment with that operator; the entity was an operator after June 30, 1973;

operator, Warrior Met Coal, LLC, f/k/a Jim Walters Resources, Inc.- Walter Energy (Warrior Met),[5] employed Claimant for one year after his work with Employer. Order Granting Employer's Motion at 6-9.

The Director argues the ALJ erred in finding Warrior Met employed Claimant for at least one year based on the holding of the United States Court of Appeals for the Sixth Circuit in *Shepherd*, under which an ALJ may determine an operator employed a miner for a full year of coal mine employment when 125 working days are established, regardless of whether a calendar year employment relationship is established. Director's Brief at 4-9; *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401 (6th Cir. 2019). The Director argues that, because this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, the ALJ should have followed the two-step analysis set forth in the regulations, requiring the ALJ to first determine if the operator employed Clamant for a calendar year before determining if he worked 125 days during that year. Director's Brief at 5-7. The Director submits the evidence does not establish a calendar year of employment with Warrior Met and Employer therefore should not have been dismissed.[6] *Id.* at 1. Employer responds that the ALJ correctly applied *Shepherd* to find Warrior Met more recently employed Claimant for a year. Employer's Response at 10-17. We agree with the Director's argument that the ALJ erred in applying *Shepherd*.

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which a miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003) (pre-2000 regulation required ALJ to determine whether the miner worked for an operator for one calendar year and then determine whether the miner worked for 125 days during the one-year period). In promulgating the amended regulations, the Department of Labor (DOL) stated that "in order to have one year of coal mine employment, the regulation contemplates an employment relationship totaling 365

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the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

[5] Throughout the record this operator is also referred to as Jim Walter and JWR.

[6] The Director also correctly indicates that an ALJ cannot dismiss an operator designated as the responsible operator, "except upon the motion or written agreement of the Director." Director's Brief at 1 n.1, *citing* 20 C.F.R. §725.465(b). The Director, however, indicates the dismissal seems harmless given Employer's appearance here. *Id.*

days, within which 125 days were spent working and being exposed to coal mine dust." 65 Fed. Reg. 79,920, 79,959 (Dec. 20, 2000). It also specifically noted its disagreement with cases decided under a previous version of the regulations which held that a miner receives credit for a full year of employment for each partial period of a calendar year where the miner worked at least 125 days.[7] *Id*. at 79,960. Instead, the DOL clarified that it "believes the partial periods must be aggregated until they amount to one year of coal mine employment comprising a 365-day period. Only then should the factfinder determine whether the miner spent at least 125 working days as a coal miner during the year." *Id*.

Consistent with the Director's interpretation, the Board has recognized a two-step approach in determining whether a miner established at least one year of coal mine employment. *See Clark*, 22 BLR at 1-280; *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007) (one-year employment relationship must be established, during which the miner had 125 working days). Namely, the ALJ must first determine whether the miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36. If the threshold requirement of a one-year period is met, then the ALJ must determine whether the miner worked for at least 125 days during that one-year period. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment). Moreover, the Board has continued to apply the two-step interpretation of the regulation to cases arising in jurisdictions other than the Sixth Circuit even after *Shepherd* was issued. *See Salaz v. Powderhorn Coal Co.*, BRB Nos. 21-0406 BLA and 21-0406 BLA-A (Oct. 31,

[7] Consistent with the Director's position, the Board in *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc), expressed disagreement with the decisions of the United States Courts of Appeals for the Seventh and Eighth Circuits in *Landes v. Director, OWCP*, 997 F.2d 1192 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192 (8th Cir. 1989). The Board noted that although *Landes* and *Yauk* held that the 125-day rule requires that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment, neither case addressed whether the 125-day rule at 20 C.F.R. §718.301(b) should be applied only *after* the miner has established a calendar year of coal mine employment. Consequently, except in those cases arising within the jurisdiction of the Seventh and Eighth Circuits, the Board in *Croucher* declined to hold that the 125-day rule set out at 20 C.F.R. §718.301(b) mandates that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment. *Croucher*, 20 BLR at 1-73-74.

2022) (unpub.); *Hayes v. Cowin & Co., Inc.*, BRB No. 20-0156 BLA, 4 (May 20, 2021) (unpub.); *Lusk v. Jude Energy, Inc.*, BRB No. 19-0505 BLA (Oct. 21, 2020) (unpub.).

The Eleventh Circuit, whose law applies to this case, has not adopted the holding expressed in *Shepherd*, and the ALJ's rationale for finding a year of coal mine employment with Warrior Met is inconsistent with the DOL's contemporaneous explanation of the wording of the current regulation in the preamble to its rulemaking, its long-standing interpretation of the statute and regulation, and Board precedent. *See supra* at 5-6; *see also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Consequently, the ALJ erred in applying *Shepherd* to determine Claimant was employed by Warrior Met for at least one year, and we therefore vacate the ALJ's determination that the Trust Fund is liable for benefits and the dismissal of Employer as the responsible operator. *See* Order Granting Employer's Motion at 8-9.

We therefore vacate the ALJ's finding that Claimant established 1.56 years of employment with Warrior Met. *Id.* Consequently, we vacate the ALJ's finding that Warrior Met is the responsible operator and her dismissal of Employer as responsible operator and remand the case for further consideration of this issue. *Id.* at 9-10.

Thus, on remand, the ALJ must determine whether Claimant was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36. If the threshold requirement of a one-year period is met, then the ALJ must determine whether Claimant worked for at least 125 days during that one-year period. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36; *Martin*, 277 F.3d at 474-75. However, "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment," the ALJ may use the method at 20 C.F.R. §725.101(a)(32)(iii) to determine the length of Claimant's employment with Warrior Met. 20 C.F.R. §725.101(a)(32)(iii).

In determining if Claimant worked for Warrior Met for one calendar year, the ALJ must determine if the evidence is sufficient to establish the beginning and ending dates of his employment.[8] 20 C.F.R. §725.101(a)(32)(ii). Specifically, Warrior Met's "Personnel

[8] The ALJ erred in applying the method at 20 C.F.R. §725.101(a)(32)(iii), without first determining if the exact dates of Claimant's employment could be ascertained from the available data. 20 C.F.R. §725.101(a)(32)(ii). Specifically, "[t]o the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment must be ascertained." 20 C.F.R. §725.101(a)(32)(ii). However, if the beginning and ending dates cannot be ascertained, then the ALJ may look to other evidence and methods to determine length of coal mine employment, including the average earnings statistics. However, proof that Claimant's earnings exceed the average 125-day earnings as reported by the Bureau of Labor Statistics in Exhibit 610 for a given year does not, by itself,

Profile" states that Claimant began working for Warrior Met on August 9, 1985, was laid off on April 14, 1986, and retired on May 1, 1986. Director's Exhibit 7. However, Claimant repeatedly indicated that he worked there continuously from August 1985 to November 1986. Director's Exhibit 3 (Form CM-911a); Director's Exhibit 4 (1998 Hearing Transcript at 28); Director's Exhibit 36 at 58, 94. Claimant's Social Security Earnings Record provides earnings with Warrior Met of $12,598.23 in 1985 and $11,362.57 in 1986. Director's Exhibit 10. Claimant testified in this claim that he believed he worked for Warrior Met for "[p]robably three years." Director's Exhibit 53 at 6. His son indicated in the same deposition that Claimant worked there "longer than a year." *Id.* at 8.

If the ALJ again finds Warrior Met employed Claimant for one year, she may reinstate her finding that liability for Claimant's benefits rests with the Trust Fund.[9] 20 C.F.R. §725.407(d). If, however, the ALJ finds the evidence insufficient to establish Warrior Met employed Claimant for one year, she must find Employer liable for Claimant's benefits, as it does not contest it meets the criteria as a potential responsible operator or that it is capable of paying benefits. 20 C.F.R. §§725.494(a)-(e), 725.495(c)(2).

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establish the threshold of one year of coal mine employment. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-281 (2003).

[9] The Director asks that, on remand, the ALJ also be instructed to consider Employer's alternative argument that collateral estoppel bars Employer from being identified as the responsible operator, given it was dismissed as the responsible operator in the prior claim by ALJ Gerald M. Tierney. Director's Brief at 10. Collateral estoppel bars relitigation of an issue that was previously litigated only when, among other requirements, the determination of that issue was necessary to the outcome of the prior proceedings. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006); *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc). Because Claimant's prior claim was denied, identification of the responsible operator was not necessary to the outcome of the prior proceedings. *Lawson*, 739 F.3d at 321 (collateral estoppel does not bar reconsideration of the responsible operator issue in a subsequent claim because the identification of a responsible operator is not a necessary finding where benefits are denied). Consequently, we hold that as a matter of law collateral estoppel does not bar Employer from being named as the responsible operator. *Collins*, 468 F.3d at 217; *Lawson*, 739 F.3d at 320-21; *Hughes*, 21 BLR at 1-137.

Accordingly, the ALJ's Decision and Order is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge