U.S. Department of Labor

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

BRB No. 23-0450 BLA

JAMIE HAMILTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC	)	
	)	
and	)	
	)	
AIG	)	DATE ISSUED: 06/13/2024
	)	
Employer/Carrier-Petitioners	)	
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Alice B. Catlin (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy 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: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2021-BLA-05734), rendered on a claim filed November 26, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the responsible operator. He accepted the parties' stipulation that Claimant has complicated pneumoconiosis arising out of coal mine employment and therefore found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §§718.304, 718.203. Thus, he awarded benefits.

On appeal, Employer challenges its designation as the responsible operator.[1] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to reject Employer's argument. Employer has replied, reiterating its contentions.

The 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.[2] 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, 362 (1965).

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established entitlement to benefits. *See Skrack v. island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.203(b), 718.304; Decision and Order at 3.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Employer's Exhibit 2 at 8; Director's Exhibit 6.

the potentially liable operator that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, 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 potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

Employer argues the ALJ erred in finding it is a potentially liable operator. Employer's Brief at 6-14. For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) 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).

Under condition (a), a miner's disability or death from pneumoconiosis arises "in whole or in part out of work in or around a mine" if such work "caused, contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment." 20 C.F.R. §725.494(a). The regulations further establish a rebuttable presumption that the miner's disability or death "arose in whole or in part" out of his employment with a potentially liable operator; unless rebutted, "the responsible operator shall be liable to pay benefits to the claimant[.]" *Id*.

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 4-8. He specifically rejected Employer's argument that it rebutted the presumption that Claimant's disability arose in part out of his employment with Employer because he was first diagnosed with pneumoconiosis after his subsequent employment as an inspector with the Mine Safety and Health Administration (MSHA). *Id*.

On appeal, Employer argues the ALJ erred in so finding. Employer's Brief at 6-14. We disagree.

As the ALJ observed, Claimant stopped working for Employer in June 2007 and started working for MSHA as a mine inspector thereafter. Director's Exhibit 6. He stated MSHA informed him during an employment physical in 2007 that he had lung problems, but not black lung. Hearing Transcript at 24. After another MSHA physical in 2010, he stated that MSHA told him he had possible pneumoconiosis. *Id*. He began visiting Dr.

Ammisetty for further evaluation, and the physician informed him it was possible he had pneumoconiosis. Hearing Transcript at 24-25; Director's Exhibit 6; Employer's Exhibit 2 at 14-16. After a 2016 MSHA physical identified abnormal findings, Claimant stated he began visiting Dr. Sikder, who made the first firm diagnosis of simple clinical pneumoconiosis.[3] *Id.* By 2019, Dr. Sikder diagnosed Claimant with complicated pneumoconiosis. *Id.*

The ALJ considered the medical opinions and Claimant's testimony, employment history form (CM-911a), x-rays, and treatment records relevant to the onset of his complicated pneumoconiosis. Decision and Order at 4-8. The ALJ accurately found that the record contains no medical evidence dated prior to 2007, the year Claimant last worked for Employer and began his work at MSHA. Decision and Order at 8. He further found Claimant's testimony establishes only that he first became aware of lung problems in 2006 and a possible pneumoconiosis diagnosis in 2010. *Id.* Noting that pneumoconiosis is a progressive and irreversible disease, the ALJ found there is no basis in the record to conclude Claimant's complicated pneumoconiosis did not arise, at least in part, out of his work with Employer. *Id.* The ALJ thus found Employer did not rebut the presumption at 20 C.F.R. §725.494(a).

Employer asserts that it rebutted the presumption through Claimant's testimony, which establishes he was first diagnosed with clinical pneumoconiosis nine years after he worked for Employer. Employer's Brief at 8-14. It contends that because there is "no medical evidence to link" Claimant's coal mine dust exposure with Employer to the pneumoconiosis he was diagnosed with in 2016, the ALJ should have found the presumption rebutted. *Id.*

Contrary to Employer's argument, by operation of 20 C.F.R. §725.494(a), Claimant's complicated pneumoconiosis is presumed to have arisen at least in part out of his work for Employer. The burden thus shifts to Employer to establish, by affirmative evidence, that Claimant's disabling pneumoconiosis did not arise in whole or in part out of such work. 20 C.F.R. §725.494(a); *see Paramont Coal Co. Virginia, LLC. v. Goode*, 774 F. App'x 134 (4th Cir. 2019) (unpub.). Employer has not produced affirmative evidence to satisfy its burden. While the evidence of record may establish when Claimant first became aware he had pneumoconiosis, there is no evidence to establish that Claimant's

[3] Claimant's treatment records from the University of Kentucky Specialty Care Clinic from February 5 to October 20, 2020, also indicate Claimant has "been followed by Dr. Sikder since 2016 for coal workers['] pneumoconiosis[.]" Employer's Exhibit 1 at 1-15.

prior work with Employer did not cause, contribute to, or aggravate the progression or advancement of his condition. *See* 20 C.F.R. §725.494(a).

Further, as the Director correctly argues, Employer was precluded from relying on Claimant's testimony to support its burden because he was not designated as a liability witness[4] at any point while the claim was before the district director.[5] 20 C.F.R. §§725.414(c), 456(b)(1), (2).

Employer has therefore not identified any basis to overturn the ALJ's finding the evidence of record is insufficient to establish Claimant's complicated pneumoconiosis did not arise at least in part out of his work for Employer. Decision and Order at 8. Thus, we affirm the ALJ's finding that Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 8. Further, because Employer has not established that another potentially liable operator that is financially capable of assuming liability more recently employed Claimant for at least one year, we affirm the ALJ's finding that Employer is the responsible operator. 20 C.F.R. §725.495(c)(2); Decision and Order at 8.

[4] If no party provides notice to the district director of the name and address of a witness whose testimony pertains to liability of a potentially liable operator, the witness's testimony "relevant to the liability of a potentially liable operator will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c). Employer did not argue extraordinary circumstances before the ALJ, nor does it do so before the Board.

[5] To the extent the ALJ did consider Claimant's testimony and found it insufficient to rebut the presumption at 20 C.F.R. §725.494(a), his error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the ALJ's Decision and Order Awarding Benefits in an Initial Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge