U.S. Department of Labor

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

BRB Nos. 23-0050 BLA
and 23-0051 BLA

GLENDA SUE SMITH (o/b/o and Widow of SHERMAN SMITH, JR.)	)	
Claimant-Respondent	)	
v.	)	
AMHERST COAL COMPANY	)	
and	)	DATE ISSUED: 05/13/2024
ARCH COAL, INCORPORATED	)	
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 of Administrative Law Judge Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Olgamaris Fernandez (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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05892 and 2019-BLA-05894) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (BLBA or Act). This case involves requests for modification of the denials of a miner's claim[1] filed on February 11, 2015, and a survivor's claim filed on August 17, 2018.

The ALJ found Amherst Coal Company (Amherst) is the responsible operator and Arch Coal, Incorporated (Arch), is the responsible carrier. He credited the Miner with thirty-two years of underground coal mine employment and found Claimant[2] established complicated pneumoconiosis, thus invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Further, he found the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. He therefore determined Claimant established modification based on a change in conditions and a mistake in fact. The ALJ also concluded that granting modification would render justice under the Act, 20 C.F.R. §725.310, and awarded benefits in the miner's claim. In addition, he determined that, because the Miner was entitled to benefits at the time of his death, Claimant is automatically entitled to survivor's benefits under Section 422(*l*), 30 U.S.C. §932(*l*).

[1] The Miner filed a prior claim and withdrew it. Decision and Order at 2; Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Claimant is the widow of the Miner, who died on October 8, 2015. Director's Exhibit 54. Claimant is pursuing the Miner's claim on behalf of his estate, as well as her own survivor's claim. The Board consolidated the two claims for purposes of decision.

On appeal, Employer argues the ALJ erred in finding Arch is the liable carrier and in denying its discovery requests and submissions of liability evidence. Employer further contends the evidentiary limitations governing the submission of liability evidence violate provisions of the Longshore and Harbor Workers' Compensation Act (Longshore Act) incorporated into the BLBA, and the Administrative Procedure Act (APA).[3] The Director, Office of Workers' Compensation Programs (Director), responds, urging the Benefits Review Board to reject Employer's arguments and affirm the ALJ's determination that Arch is liable for benefits. Employer replied to the Director's response brief, 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.[4] 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).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Amherst is the correct responsible operator and that it was self-insured by Arch on the last day Amherst employed the Miner; thus, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 34; Employer's Brief at 2, n.2.

The Miner worked for Employer until 1981. Miner's Claim Director's Exhibit 4, 8, 46; Decision and Order at 6. Arch of West Virginia, Inc., a subsidiary of Arch, purchased Amherst in 1985 and owned all of its stock. Miner's Claim Director's Exhibit 23; Decision and Order at 12. In 2005, Arch sold Amherst to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Response Brief at 2; Employer's Brief at 13-14; Miner's Claim Director's Exhibit 15. On March 4, 2011, the Department of Labor (DOL) authorized Patriot to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Response Brief at 15; Miner's Claim Director's Exhibit 48. Although Patriot's self-insurance authorization made it retroactively liable for

[3] We affirm, as unchallenged on appeal, the ALJ's awards of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 34; Employer's Brief at 2 n.1.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989); Decision and Order at 6.

the claims of miners who worked for Arch, Patriot later went bankrupt and can no longer provide for those benefits. Employer's Post-Hearing Brief at 4-6. However, the ALJ found Arch remains liable for paying benefits to miners last employed by Amherst when Arch owned and provided self-insurance to that company. Decision and Order at 12-17.

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy: (1) The ALJ evaluated Arch's liability for the claim as a commercial insurance carrier rather than as a self-insurer; (2) without proof of coverage, the DOL improperly pierced Arch's corporate veil in holding it liable; (3) the sale of Amherst to Magnum released Arch from liability for the claims of miners who worked for Amherst, and the DOL endorsed this shift of liability; (4) the DOL's issuance of BLBA Bulletin No. 16-01 reflects a change in policy through which the DOL began to retroactively impose new liability on self-insured mine operators, a change that bypasses traditional rulemaking in violation of the APA; and (5) the ALJ deprived it of procedural due process by denying its requests for discovery and to submit evidence related to Arch's liability and BLBA Bulletin No. 16-01. Employer's Brief at 16-43; Employer's Reply Brief at 1-9.

The Board has previously considered and rejected these and similar arguments under the same determinative facts[5] related to the Patriot bankruptcy in *Bailey v. E. Assoc.*

[5] Employer asserts the ALJ erred by failing to address liability evidence admitted during the February 25, 2020 hearing, including the deposition testimony of Robert Briscoe concerning the legality of BLBA Bulletin No. 16-01. Employer's Brief at 25-30; *see* Hearing Transcript at 7. We reject Employer's assertions. Initially, as the Director asserts and as the ALJ repeatedly found in his Order, Employer failed to timely notify the district director of any documentary liability evidence or identify potential liability witnesses. Nor did it establish extraordinary circumstances for its failure to do so, which is required before an ALJ may consider such liability evidence not timely submitted to the district director. Director's Response Brief at 13 n.8 (citing 20 C.F.R. §§725.414(c); 725.456(b)(1); 725.457(c)(1); 65 Fed. Reg. 79,920, 79,976 (Dec. 20, 2000)). The ALJ's error was thus not in failing to consider this evidence but rather in admitting this evidence into the record. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (the evidentiary limitations set forth in the regulations are mandatory and must be enforced by the ALJ). Moreover, contrary to Employer's contentions, the ALJ specifically addressed Employer's arguments regarding BLBA Bulletin No. 16-01 and correctly found that Arch's liability is established under the Act and regulations, not the Bulletin or any internal DOL policy. Decision and Order at 16; August 5, 2022 Order at 5; *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 501 (D.C. Cir. 2018) ("[T]he Bulletin does not impose any liability on Arch under the

Coal Co., 25 BLR1-323, 1-332-39 (2022) (en banc); *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-312-18 (2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.

Employer further asserts the regulations limiting the submission of liability evidence to the ALJ violate provisions of the Longshore Act incorporated into the BLBA, and the APA, 5 U.S.C. §556(d), because they allegedly divest the ALJ of authority under those Acts to receive evidence and adjudicate issues de novo.[6] Employer's Brief at 43-44; Employer's Reply Brief at 10-11. We disagree. The BLBA incorporates the provisions of the Longshore Act and the APA "except as otherwise provided . . . by regulations of the Secretary." 30 U.S.C. §932(a). Thus, even if we were to accept Employer's interpretation of the regulations limiting the submission of liability evidence under the BLBA, the Secretary of Labor has the authority to adopt regulations that differ from the APA and the Longshore Act, and Employer has not contended that the regulations issued by the Secretary are inconsistent with that authority.[7] Director's Brief at 20-21 (citing *Nat'l*

BLBA or dispose of any benefits claim on the merits."). Given the ALJ's rational finding that the Bulletin does not govern Employer's liability in this case, Employer's related argument that Mr. Briscoe's testimony establishes the Bulletin was promulgated in violation of the APA is immaterial. *See Acosta*, 888 F.3d at 500-01; *Howard v. Apogee Coal Co.*, 25 BLR 1-305, 1-317 (2022); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[6] Employer also contends the regulations limiting the submission of liability evidence "render[ ] the district director an inferior officer in violation of *Lucia* [*v. SEC*]," 585 U.S. , 138 S. Ct. 2044 (2018). Employer's Brief at 44. As Employer has offered no explanation or argument to support this assertion, we decline to address it as inadequately briefed. *See Cox v. Benefits Review Bd.*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b). We similarly decline to address Employer's assertion that the evidentiary limitations have been "inconsistently enforced" because ALJs in other cases have allegedly misapplied the limitations. Employer's Brief at 45. Employer has not explained how alleged errors by ALJs in other cases have any bearing on the case before us. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[7] Further, the Board and the Fourth Circuit have upheld evidentiary limitations that might otherwise run afoul of the Longshore Act and APA as reasonable and valid exercises of the Secretary of Labor's authority to regulate evidentiary development in proceedings under the BLBA. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 (4th Cir. 2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004) (en banc).

Mining Ass'n v. Chao, 160 F. Supp. 2d 47, 70 (D.D.C. 2001), *rev'd in part on other grounds, Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002)).

Thus, we affirm the ALJ's determination that Amherst and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge