U.S. Department of Labor

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

BRB Nos. 21-0406 BLA
and 21-0406 BLA-A

RALPH SALAZ (deceased)	)	
	)	
Claimant	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
POWDERHORN COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 10/31/2022
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits Payable by the Black Lung Disability Trust Fund of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office PLLC), Pikeville, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and Employer cross-appeals, Administrative Law Judge (ALJ) Stewart F. Alford's Decision and Order Awarding Benefits Payable by the Black Lung Disability Trust Fund (2017-BLA-06275) rendered on a claim filed on January 23, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found the district director incorrectly designated Powderhorn Coal Company (Powderhorn) as the responsible operator liable for the payment of benefits. Relying on the holding in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019),[1] the ALJ determined that because Claimant[2] worked for Rocky Mountain Miners Incorporated (Rocky Mountain) for at least 125 days subsequent to his employment with Powderhorn, Rocky Mountain was the most recent coal mine operator to employ Claimant for a cumulative period of one year. Accordingly, because the ALJ found Powderhorn was not the responsible operator, liability for benefits transferred to the Black Lung Disability Trust Fund (Trust Fund). Additionally, because the ALJ found that there was no party contesting Claimant's entitlement to benefits, he awarded benefits.

On appeal, the Director argues the ALJ erred in finding Powderhorn was incorrectly named as the responsible operator and in transferring liability for the payment of benefits to the Trust Fund. Employer responds, urging an affirmance of the ALJ's responsible operator determination. Claimant has not filed a response brief. Employer also cross-appeals, arguing that if the ALJ's determination that the Trust Fund is liable for payment

[1] The United States Court of Appeals for the Sixth Circuit held in *Shepherd* that 125 days may constitute a year of coal mine employment even if the miner did not have a calendar year employment relationship. *Shepherd*, 915 F.3d at 403.

[2] On October 12, 2022, Claimant's counsel filed a letter informing the Benefits Review Board that Claimant died on August 30, 2022 and his wife, Pamela Salaz, is pursuing his claim on his behalf.

of benefits is not affirmed, then the case should be remanded for adjudication on the merits of entitlement. Neither Claimant nor the Director filed a response to the cross-appeal.

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.[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).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[4] 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 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 potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits or 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).

If the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation.[5] 20 C.F.R. §725.495(d). If the district director fails to identify the proper

[3] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because Claimant performed his last coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6 n.3; Director's Exhibits 3, 5.

[4] 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).

[5] The district director acknowledged Employer is not the operator that most recently employed Claimant "but is the designated responsible operator because the [C]laimant's

responsible operator prior to the claim's transfer to the Office of Administrative Law Judges, the improperly designated operator must be dismissed, and the Trust Fund must assume liability for benefits. *See* 20 C.F.R. §725.407(d); *Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (regulations place "the risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund").

In the current case, it is undisputed that Claimant worked in coal mine employment for Powderhorn from 1982 to 1987 and 1991 to 1999, and for Rocky Mountain in 2000 for more than 125 working days but less than a full calendar year. Decision and Order at 11, 15 n.8, 16 n.9; Director's Brief at 3, 4 n.2; Employer's Brief at 5-6; Director's Exhibit 23 at 8; Director's Exhibit 5. The ALJ acknowledged that *Shepherd* is not controlling in this case and that the Board has not applied *Shepherd's* holding outside the jurisdiction of the Sixth Circuit. Decision and Order at 13-14. However, because he agreed with the reasoning of *Shepherd*, he applied it to the facts of the case. Consequently, the ALJ concluded that Rocky Mountain is liable for benefits because, applying *Shepherd*, the evidence establishes Claimant worked for it for at least 125 working days during a calendar year after he worked for Powderhorn.[6] *Id*. Because he concluded Powderhorn was incorrectly identified as the responsible operator, the ALJ found that liability for the payment of benefits transferred to the Trust Fund. *Id*. at 16.

The Director argues the ALJ erred in concluding that Claimant's employment with Rocky Mountain established a year of coal mine employment and therefore also erred in transferring liability to the Trust Fund. The Director contends the ALJ's determination is contrary to 20 C.F.R. §725.101(a)(32) and Board precedent. We agree with the Director's position.

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

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last coal mine employer of record did not employ the [C]laimant for a cumulative period of at least one year." Director's Exhibit 26; *see* 20 C.F.R §725.494(c).

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant worked for 217 days for Rocky Mountain. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11, 15; Director's Brief at 4.

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 days, within which 125 days were spent working and being exposed to coal mine dust." 65 Fed. Reg. at 79,959. 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); Director's Brief at 6 & n.3. 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

[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 Court 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.

Shepherd was issued. *See 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 Tenth 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 Rocky Mountain 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 4-6; *see also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Further, Employer does not dispute it employed Claimant for at least one cumulative year of coal mine employment and that it is financially capable of paying benefits. *Skrack*, 6 BLR at 1-711; Decision and Order at 11, 16 n.9; Employer's Brief at 4-6. We therefore reverse the ALJ's finding that the Trust Fund is liable for benefits and hold that Powderhorn is the responsible operator.

Based on his erroneous responsible operator determination, the ALJ failed to specifically address the merits of Claimant's claim for benefits and awarded benefits as unchallenged. We therefore remand the case for the ALJ to consider the contested issues that the parties have identified and determine if Claimant has established his entitlement to benefits. Decision and Order at 16; Employer's Brief at 3, 6; Employer's Brief before the ALJ at 5-10.

Accordingly, the ALJ's Decision and Order Awarding Benefits Payable by the Black Lung Disability Trust Fund is affirmed in part and reversed in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge