U.S. Department of Labor

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

BRB No. 23-0451 BLA

ROBERT B. RULE Claimant-Respondent v. RHINO ENERGY, LLC and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/11/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Denise Hall Scarberry (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman 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, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2021-BLA-06067) rendered on a claim filed on February 7, 2017, 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. She accepted the parties' stipulations that Claimant worked for thirty-eight years in underground coal mine employment and has a totally disabling respiratory or pulmonary impairment, and thus found he invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator.[2] Claimant responds in support of the award of benefits and in support of Employer's argument that the holding of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-03 (6th Cir. 2019) should be applied in this case. The Director, Office of Workers' Compensation Programs, urges the Board to reject Employer's liability arguments.

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

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirty-eight years of underground coal mine employment and all elements of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.203(b), 718.204(b)(2), 718.305(b)(1), (c); Decision and Order at 6, 22.

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, 361-62 (1965).

The responsible operator is the potentially liable operator that most recently employed the miner for at least one year.[4] 20 C.F.R. §§725.494(c), 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.[5] 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 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).

The ALJ found Employer – Rhino Energy, LLC (Rhino) – is the potentially liable operator that most recently employed Claimant for a year or more and was thus properly named as the responsible operator. Decision and Order at 6.

Employer concedes it meets the criteria of a potentially liable operator; thus, we affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6; Employer's Brief at 6. However, Employer argues liability should transfer to the Black Lung Disability Trust Fund because Wildcat Energy, LLC (Wildcat) most recently employed Claimant for a year or more. Employer's Brief at 7-8.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 16.

[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 designated Employer as the responsible operator because she determined no subsequent operators employed Claimant for a period of at least one year. Director's Exhibit 46 at 11.

Specifically, Employer argues Claimant had at least 125 working days with Wildcat and the ALJ should have found this period constitutes a year of coal mine employment under *Shepherd*.[6] *Id.*

In cases arising out of the Fourth Circuit, the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 revisions to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-calendar year period is met, the ALJ must then determine whether Claimant worked for at least 125 working days within that period in order to be credited with a year of coal mine employment. *Id*.

Claimant testified he has approximately thirty-eight years of coal mine employment and worked at the same mine site for his two most recent employers – Rhino from mid-2012 through 2014 and Wildcat from January 2015 to October 2015. Director's Exhibits 3; 6 at 8; Hearing Tr. at 12, 17-21. Claimant explained Rhino operated the mine he worked at as a subcontractor to Wildcat, which owned the mine, but Rhino made the business decision to cease operating the mine at the end of 2014. Hearing Tr. 18-19. At that time, Wildcat began operating the mine and hired him on its payroll in January 2015. *Id.* at 19-21. However, later in 2015 Wildcat subcontracted operation of the mine out to another company; Claimant was not satisfied with the pay offered to him and thus decided to retire rather than begin working for the new subcontractor. *Id.* at 21.

Considering the evidence is uncontradicted, and the parties do not dispute, that Claimant worked for Wildcat for only ten months, from January to October 2015, we discern no error in the ALJ's finding that Claimant worked for Wildcat for less than a year. *See Mitchell*, 479 F.3d at 334-35; *Martin*, 277 F.3d at 474-75; *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); Decision and Order at 4-5; Director's Exhibits 3; 6 at 8; Hearing

[6] In *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019), the Sixth Circuit held a miner is entitled to credit for a full year of coal mine employment if he establishes 125 "working days" in a calendar year, "regardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year." A "working day" is "any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave." 20 C.F.R. §725.101(a)(32).

Tr. at 17-21. Further, as this case arises within the jurisdiction of the Fourth Circuit, we decline to hold the ALJ should have applied the regulatory interpretation set forth in *Shepherd*, as it does not apply in this case which is governed by Fourth Circuit law.[7]

Moreover, we agree with the Director's argument that, even if Employer established Claimant had a year or more of coal mine employment with Wildcat, it still would be liable for benefits as it does not identify any evidence showing Wildcat is financially capable of paying benefits. *See* 20 C.F.R. §725.495(c)(2); Director's Brief at 13-14.[8]

Finally, Employer also argues Wildcat is a successor operator to Rhino and Claimant's employment with the two operators should have been aggregated, thereby resulting in more than a year of coal mine employment with Wildcat. Employer's Brief at 10-12; *see* 20 C.F.R. §725.494(c). The Director responds, arguing the ALJ correctly found Employer cannot avoid liability simply by establishing Wildcat was its successor operator because Rhino meets the definition of a "potentially liable operator" set forth in 20 C.F.R. §725.494. Director's Brief at 14. We agree with the Director's argument.

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]"

[7] We reject Employer's argument *Shepherd* must be applied because the regulations were amended in 2013 and the Fourth Circuit's earlier interpretations of 20 C.F.R. §725.101(a)(32) are no longer applicable. Employer's Brief at 7-8. As the Director correctly points out, Employer has not explained how the amendment of 20 C.F.R. §725.101(a)(32)(i) from stating "[p]roof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, *shall not* establish more than one year" to "*does not* establish more than one year" voids earlier Fourth Circuit interpretations of that provision. 65 Fed. Reg. 79,920, 80,059 (Dec. 20, 2000) (emphasis added); 78 Fed. Reg. 59,102, 59,117 (Sept. 25, 2013) (emphasis added); Director's Brief at 12-14. Additionally, contrary to Employer's argument, 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 Trent v. Reebok Coal Co.*, BRB No. 21-0102 BLA (Jul. 17, 2023) (unpub.); *Mims v. Drummond Co.*, BRB No. 21-0314 BLA (Feb. 24, 2023) (unpub.); *Salaz v. Powderhorn Coal Co.*, BRB No. 21-0406 BLA (Oct. 31, 2022) (unpub.); *Smith v. Heritage Coal Co.*, BRB No. 20-0147 BLA (June 29, 2022) (unpub.).

[8] We note that although Employer asserts Wildcat is financially capable of assuming liability for the payment of benefits, it neither proffered evidence to that effect nor challenges the regulatory requirement it make a showing in this regard.

20 C.F.R. §725.492(a). It also is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). The existence of a predecessor-successor operator relationship alone does not automatically relieve Employer of liability. *See* 20 C.F.R. §725.492(d). The ALJ correctly observed such a relationship "shall not be construed to relieve a prior operator of any liability if such prior operator meets the condition set forth in [20 C.F.R.] §725.494 [for a potentially liable operator]." Decision and Order at 6; *see* 20 C.F.R. §725.492(d).

Because we have affirmed, as unchallenged, the ALJ's finding that Employer meets the conditions of 20 C.F.R. §725.494 and is a potentially liable operator, we discern no error in her finding that 20 C.F.R. §725.492(d) does not allow Employer to avoid liability merely by establishing Wildcat is its successor operator.[9] 20 C.F.R. §725.495(c); Decision and Order at 6.

Because it is rational and supported by substantial evidence, we affirm the ALJ's finding Employer is the properly named responsible operator. 20 C.F.R. §§725.494, 725.495(a); Decision and Order at 6.

[9] Additionally, we note the Director's argument that the record lacks any evidence of transactions establishing there is a successor operator relationship between Rhino and Wildcat. Director's Brief at 14-15.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge