U.S. Department of Labor

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

BRB No. 19-0058 BLA

RONNIE GENE THACKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EMILY ENTERPRISES, INCORPORATED	)	DATE ISSUED: 01/31/2020
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH	)	
	)	
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 Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05918) of Administrative Law Judge Patrick M. Rosenow pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2012) (the Act). This case involves a miner's claim filed on March 16, 2015.

Prior to issuing his Decision and Order Awarding Benefits, the administrative law judge denied employer's motion to hold the case in abeyance pending issuance of the decision of the United States Supreme Court in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). In his Decision and Order Awarding Benefits, the administrative law judge found the only issue before him was whether employer is the properly designated responsible operator, as the parties stipulated that claimant is entitled to benefits. He determined employer satisfied the definition set forth in the regulations and ordered employer to pay benefits to claimant.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he was not properly appointed under the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also challenges the administrative law judge's determination it is the responsible operator. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds and asserts employer forfeited its Appointments Clause challenge. The Director also urges the Board to reject employer's challenge to its designation as the responsible operator.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] The record reflects claimant's last coal mine employment occurred in Kentucky. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Appointments Clause

In light of the Supreme Court's holding in *Lucia*,[2] employer argues that the manner in which the administrative law judge was appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2.[3] Consequently, employer avers the award of benefits should be vacated, and the case remanded for a new hearing before a different, properly appointed administrative law judge. The Director responds, contending that by failing to raise the Appointments Clause in a substantive manner until the current appeal, employer has forfeited its argument. We agree with the Director.

In its January 31, 2018 motion, employer merely requested that the case be held in abeyance pending the Supreme Court's decision in *Lucia* and did not raise any specific challenge to the administrative law judge's authority to decide the case. The administrative law judge denied employer's motion on February 8, 2018. The Supreme Court issued its decision in *Lucia* on June 21, 2018, holding a party timely challenging the constitutional validity of an administrative law judge's appointment is eligible for a new hearing before a different, properly appointed administrative law judge. The administrative law judge issued his decision in this case on September 28, 2018, observing correctly that no party challenged his adjudicative authority in the period subsequent to the Supreme Court's

[2] On June 21, 2018, the Supreme Court decided in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), that Securities and Exchange Commission administrative law judges are inferior officers who were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Supreme Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id*.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

issuance of *Lucia*. Decision and Order at 3 n.17. Indeed, employer has not affirmatively asserted an Appointments Clause challenge until the present appeal.[4]

Because "[A]ppointments Clause challenges are not jurisdictional," they "are subject to ordinary principles of waiver and forfeiture." *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018). As previously indicated, obtaining the remedy of a new hearing before a different, properly appointed administrative law judge requires "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case." *Lucia*, 138 S. Ct. at 2055; *see Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018). We agree with the Director that employer's failure to challenge the validity of the administrative law judge's appointment prior to his decision on the merits resulted in forfeiture of its Appointments Clause challenge. *See Jones Bros.*, 898 F.3d at 856; Director's Response Brief at 10. Accordingly, we reject employer's contention that the administrative law judge did not lawfully adjudicate the claim before him. Employer's Brief at 7.

Responsible Operator

The responsible operator is the "potentially liable operator"[5] that most recently employed the miner for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the Director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

[4] The Director, Office of Workers' Compensation Programs, points out employer's request to hold the case in abeyance pending the resolution of *Lucia* was effectively granted because the administrative law judge's decision was not issued until after the Supreme Court issued *Lucia*. Director's Response Brief at 9 n.6.

[5] For a coal mine operator to be a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and 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). We affirm, as unchallenged on appeal, the administrative law judge's finding employer satisfies the criteria to be a potentially liable operator. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-8.

In this case, the district director initially notified Cheyenne Elkhorn Coal Company (Cheyenne Elkhorn) it was the potentially liable operator. Director's Exhibit 28. Cheyenne Elkhorn filed a motion requesting it be dismissed from the claim, as claimant worked for it for less than one full year. Director's Exhibit 37. The district director subsequently sent a Notice of Claim to employer. Director's Exhibit 38.

Employer responded and contested its designation as responsible operator. Director's Exhibits 44, 45. The district director then issued preliminary findings that claimant was entitled to benefits and employer is the responsible operator. Director's Exhibit 48. The district director also reported that although employer was not the most recent operator that employed claimant, claimant's Social Security Administration (SSA) earnings statements and employer's statements supported employer's designation as the responsible operator. *Id*. In addition, the district director dismissed Cheyenne Elkhorn from the claim. *Id*.

Employer responded and continued to argue that it is not the responsible operator. *Id*. Employer subsequently submitted a motion requesting its dismissal, asserting that claimant's SSA statements establish subsequent employment with R & B Enterprises (R & B) and claimant's deposition testimony establishes R & B is a successor to employer. *Id*. The district director denied employer's motion, stating:

> Pursuant to our records [employer] and R & B Enterprises are owned and operated by the same people but they are both two separate companies. The Mine Safety and Health Administration confirm[s] that there was one mine site [where] R & B Enterprises became a successor to [employer] in 2001, not 2000. The miner has testified that his last date of coal mine employment was in 2000. The Social Security Earnings Record also confirms [claimant] last worked in 2000.

Id.

In subsequent correspondence entitled "Statement Required by [20 C.F.R. §]725.495(d)," the district director reported that R & B, which may have more recently employed claimant, "was not covered by an insurance policy that included federal black lung coverage, or approved to self-insure its liability," on the date on which claimant last worked for R & B. Director's Exhibit 33. The district director then issued a Proposed Decision and Order awarding benefits and identifying employer as the responsible operator while acknowledging employer is not the coal mine operator that most recently employed claimant. Director's Exhibit 97. The district director further observed that because claimant's SSA statements show claimant worked for Cheyenne Enterprises Inc., Cheyenne Elkhorn, Diamond Star Mining, Inc., and R & B in 2000, none of these

companies employed claimant for a full year. *Id*. Employer requested a hearing and continued to allege that R & B is the responsible operator. Director's Exhibit 105.

The administrative law judge rejected employer's contention that R & B is a more recent employer or a successor operator[6] capable of paying benefits. Decision and Order at 8-11. He determined the evidence regarding R & B's status as a successor to employer was "unclear" and observed that even if R & B satisfied the one-year requirement by means of a successorship, it would still need to be deemed financially capable of assuming liability for the claim. *Id*. at 10-11. The administrative law judge found R & B did not satisfy this criteria based on the district director's statement that R & B "was not covered by an insurance policy that included federal black lung coverage, or approved to self-insure its liability." *Id*. at 11, *citing* Director's Exhibit 33. He further determined:

> [I]f Employer was a more recent employer of Claimant, Employer meets all the requirements of a potentially liable operator and would correctly be designated. If [R & B] was the more recent, a prima facie case exists that it does not satisfy all the potentially liable operator requirements. Liability then transfers to any successor of [R & B], of which no evidence has been presented, and finally to the next most recent employer who satisfies all the potentially liable operator requirements – here, Employer. Since Employer would be liable no matter which of these two was Claimant's most recent employer, I make no finding as to which employed Claimant more recently.

Id. The administrative law judge therefore concluded employer is the properly designated responsible operator. *Id*.

Employer argues that because "there is no statement from the [Department of Labor] that R & B is not financially capable of paying benefits," the administrative law judge improperly shifted the burden of proving R & B is capable of assuming liability for the claim to employer. Employer's Brief at 9. Employer also contends the administrative law judge erred by addressing the successor operator issue before determining which employer most recently employed claimant. *Id*. at 9-10. Lastly, employer alleges the administrative law judge did not adequately explain "why he did not give weight to the testimonial evidence" on R & B's status as a successor operator or transfer liability to the Black Lung Disability Trust Fund (Trust Fund) when he could not determine whether claimant last

[6] 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 operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a).

worked for employer. *Id*. at 11. The Director responds, maintaining that the district director issued a statement that R & B was unable to assume liability as it was uninsured in the year it employed claimant. Director's Response Brief at 13, *citing* Director's Exhibit 33. The Director also contends employer cannot establish R & B was a successor to employer at the time it employed claimant. *Id*. at 14.

Based on our review of the administrative law judge's findings and the parties' arguments on appeal, we affirm the administrative law judge's determination that employer is the responsible operator. Contrary to employer's assertion, the administrative law judge correctly determined the district director issued the statement required by 20 C.F.R. §725.495(d). Decision and Order at 11, *citing* Director's Exhibit 33. He also accurately observed the district director reported in this statement that R & B cannot assume liability because it was not covered by an insurance policy that included federal black lung coverage, nor was it approved to self-insure when it employed claimant in 2000. 20 C.F.R. §§725.495(b), (c)(2); Decision and Order at 11; Director's Exhibit 33. Thus, based on the district director's subsequent final designation of employer as the responsible operator, the burden shifted to employer to establish claimant worked for at least one year subsequent to his tenure with employer for an operator financially capable of assuming liability. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1), 725.495(c)(2).

We therefore reject employer's argument that transfer to the Trust Fund was required because the Director failed to satisfy her burden to establish the identity of the responsible operator before the claim was transferred to the administrative law judge for hearing. To the contrary, in finding the evidence essentially in equipoise on these issues, the administrative law judge permissibly concluded employer did not satisfy its burden to prove either that claimant worked more recently for R & B or that R & B is a successor operator to employer. 20 C.F.R. §§725.492(a), 725.495(c)(2); Decision and Order at 9-10. Finally, the administrative law judge also permissibly determined employer presented no evidence to establish R & B is financially capable of assuming liability for the claim. 20 C.F.R. §725.495(c)(2); Decision and Order at 11.

Based on the foregoing, we affirm the administrative law judge's finding that employer is the properly designated responsible operator. 20 C.F.R. §§725.494, 725.495(c); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 11. As employer conceded claimant's entitlement to benefits, and raises no further issues on appeal, we affirm the award of benefits.

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge