U.S. Department of Labor

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

BRB No. 17-0554 BLA

DOW S. PAULEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 09/17/2018
	)	
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 Denying Employer's Motion to Dismiss and Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Kathleen H. Kim (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Denying Employer's Motion to Dismiss and Awarding Benefits (2016-BLA-05120) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on September 26, 2014.[1]

The administrative law judge accepted employer's concession that claimant had thirty-five years of coal mine employment and that he is totally disabled due to complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[2] The administrative law judge also found that employer is the properly named responsible operator. Accordingly, the administrative law judge declined to dismiss employer as the responsible operator, and awarded benefits.

On appeal, employer does not challenge the award of benefits but asserts that the administrative law judge erred in finding that it is the responsible operator. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's finding that employer is the responsible operator.[3]

[1] This is claimant's second claim for benefits. His prior claim, filed on December 11, 2006, was denied on April 7, 2009 by Administrative Law Judge Paul C. Johnson, Jr., because claimant did not have complicated pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] Section 718.304 provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304.

[3] Employer conceded that claimant established thirty-five years of coal mine employment and the existence of complicated pneumoconiosis. Hearing Tr. at 6. In view of employer's concession that claimant has complicated pneumoconiosis, we hold as a matter of law that claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. We also hold as a matter

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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 Associates, Inc*., 380 U.S. 359 (1965).

Responsible Operator

Generally, the responsible operator is the potentially liable operator that most recently employed the miner for at least one year.[5] *See* 20 C.F.R. §§725.494, 725.495(a)(1). However, in cases in which the onset of complicated pneumoconiosis predates coal mine employment with an employer, that employer is relieved of liability as the responsible operator. *See* 20 C.F.R. §725.494(a); *Rowan v. Lewis Coal and Coke Co*., 12 BLR 1-31, 1-33 (1988); *Truitt v. North American Coal Co.*, 2 BLR 1-199, 1-205 (1979), *appeal dismissed sub nom. Director, OWCP v. N. Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980) (finding it irrational to hold employer liable for benefits when claimant was totally disabled due to complicated pneumoconiosis prior to going to work for employer).

The district director designated employer as the responsible operator liable for the payment of benefits. Citing *Truitt*, employer contested its designation and filed a Motion to Dismiss on July 6, 2015. In support of its motion, employer submitted evidence that claimant worked for it from 1971 to 1978 and again from 2003 to 2007. Employer also submitted an x-ray taken on August 2, 2002 that was read by Dr. Parker on May 26, 2015 as positive for complicated pneumoconiosis. On September 11, 2015, the district director

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of law that the evidence establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). We therefore affirm the administrative law judge's award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 2; Hearing Tr. at 5-6, 10.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] An employer must meet five criteria to be considered a potentially liable operator: (1) the miner worked for the operator for a cumulative period of at least one year; (2) his employment included at least one working day after December 31, 1969; (3) his disability or death arose at least in part out of his employment with the operator; (4) the operator was an operator after June 30, 1973; and (5) the operator is capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

issued a Proposed Decision and Order awarding benefits and denying employer's motion to be dismissed as the responsible operator. Employer requested a hearing and the case was referred to the Office of Administrative Law Judges.

The administrative law judge agreed that the evidence employer submitted before the district director was not sufficient to rebut the district director's designation of it as the responsible operator. On June 28, 2017, the administrative law judge issued a decision and order awarding benefits and declining to dismiss employer as the responsible operator. Decision and Order at 5.

Employer does not dispute that it is the last operator that employed claimant for a period of over one year. *See* 20 C.F.R. §725.494; Employer's Brief at 4. Employer argues, however, that because it submitted x-ray evidence establishing that claimant had complicated pneumoconiosis prior to the commencement of his 2003 employment with employer and after he worked for other coal mine operators, it cannot be held liable for the payment of benefits. Citing *Truitt*, employer asserts that liability must transfer to the Black Lung Disability Trust Fund as claimant's employment with it did not contribute to his disabling condition and at least one of the prior coal mine operators meets the requirements of a potentially liable operator. Employer's Brief at 3-7. We disagree.

Employer submitted evidence, and the record reflects, that claimant worked for it from 1971 to 1978 and again from 2003 to 2007,[6] and that he worked for various coal mine operators during the intervening period. Director's Exhibit 6. Employer also submitted a 2002 x-ray that was read as positive for complicated pneumoconiosis. As the Director correctly points out, there is a rebuttable presumption that a miner's disability arose in whole or in part out of his employment with the potentially liable operator.[7] Director's

[6] In a September 18, 2007 letter from employer, Terry Mason of Human Resources listed the dates of claimant's employment with employer as September 13, 1971 to January 25, 1973, April 23, 1973 to July 18, 1978, and May 14, 2003 to July 26, 2007.

[7] Section 725.494(a) provides, in relevant part, that:

> There shall be a rebuttable presumption that the miner's disability or death arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis or disability therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work caused, contributed to or aggravated the

Brief at 4, *citing* 20 C.F.R. §725.494(a). Therefore, to rebut that presumption and benefit from the *Truitt* exception, employer must show that none of claimant's employment with it "caused, contributed to or aggravated the progression" of claimant's loss of ability to perform his regular coal mine employment. 20 C.F.R. §725.494(a). Employer's evidence, showing that claimant had complicated pneumoconiosis prior to his 2003 employment with it, does not establish that claimant's work from 1971 through 1978 did not contribute to or aggravate the progression or advancement of claimant's inability to perform his regular coal mine employment. As employer offered no such evidence with respect to claimant's earlier employment with it, claimant's condition is presumed to have arisen at least in part out of that employment, irrespective of any later intervening employers. Thus, we agree with the Director that employer's evidence is not sufficient to establish that claimant's condition predated all of his employment with employer and, therefore, did not arise in whole or in part from that employment. *See* 20 C.F.R. §§725.494(a); 725.495(a)(1).

Moreover, employer's submission of x-ray evidence to support its assertion that claimant had complicated pneumoconiosis in 2002 is also unavailing. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a prior, final determination "and its necessary factual underpinning" that a miner was not entitled to benefits at that time must be accepted as legally correct. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1360-62, 20 BLR 2-227, 2-232-34 (4th Cir. 1996) (en banc), *cert. denied*, 519 U.S. 1090 (1997); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 615-16, 23 BLR 2-345, 2-360-61 (4th Cir. 2006). Here, employer previously advocated against a finding of complicated pneumoconiosis. Claimant's prior claim for benefits was denied by Administrative Law Judge Paul C. Johnson, Jr., on April 7, 2009 because claimant was unable to prove that he had complicated pneumoconiosis. 2009 Decision and Order. Consequently, employer cannot now repudiate the 2009 denial of the prior claim with evidence that claimant had complicated pneumoconiosis in 2002.[8] *See Rutter*, 86 F.3d at 1360-62, 20 BLR at 2-232-34.

Because employer did not meet its burden of proving that claimant's employment with it did not contribute in whole or in part to claimant's disability, we affirm the

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> 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).

[8] Similarly, claimant is precluded from receiving benefits prior to April 7, 2009, the date upon which the order denying the 2006 claim became final. *See* 20 C.F.R. §725.309.

administrative law judge's determination that employer is the responsible operator.[9] *See* 20 C.F.R. §725.494(a).

Accordingly, the administrative law judge's Decision and Order Denying Employer's Motion to Dismiss and Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

RYAN GILLIGAN
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I write in concurrence to stress that in this case claimant was not found to have complicated pneumoconiosis as of 2002, although employer introduced an x-ray to support its assertion that claimant had the disease in 2002. Rather, there was a 2009 decision denying benefits to claimant which was not appealed and, therefore, must be considered correct.[10] 2009 Decision and Order*; see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361, 20 BLR 2-227, 2-232 (4th Cir. 1996) (en banc), *cert. denied*, 519 U.S.

[9] Employer asserts that the administrative law judge erred in finding that it was collaterally estopped from presenting evidence of complicated pneumoconiosis to challenge its designation as the responsible operator. Employer's Brief at 7-12. Because the administrative law judge provided a valid reason for finding that employer's submission of an x-ray to support its assertion that claimant had complicated pneumoconiosis in 2002 was unavailing, the administrative law judge's error, if any, in invoking collateral estoppel is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1360-62, 20 BLR 2-227, 2-232-34 (4th Cir. 1996) (en banc), *cert. denied*, 519 U.S. 1090 (1997); Decision and Order at 3-5.

[10] In that earlier litigation, employer successfully contested the miner's claim of complicated pneumoconiosis. The evidence from the earlier claim is also a part of the record in this subsequent claim. *See* 20 C.F.R. §725.309(c)(2).

1090 (1997) (If the 1986 denial is 'final' in a legal sense, we must accept the correctness of its legal conclusion – [claimant] was not eligible for benefits at that time – and that determination is as off-limits to criticism by the respondent as by the claimant."); *see also Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 253-54, 24 BLR 2-369, 2-378 (3d Cir. 2011) (a medical determination predating a final denial of benefits must be deemed a misdiagnosis in view of the superseding denial of benefits).

With respect to this subsequent claim, employer stipulated that claimant now has complicated pneumoconiosis, and the administrative law judge found that the onset date of claimant's complicated pneumoconiosis was not clearly established by the evidence. The administrative law judge therefore awarded benefits as of September 2014 (the month and year the subsequent claim was filed). Employer has not contested the absence of a defined onset date as found by the administrative law judge.

As a consequence of all of the foregoing, claimant's complicated pneumoconiosis cannot legally be considered to have been established as of 2002 and employer, which is the last coal mine operator employing claimant as a miner, is the responsible operator.

JUDITH S. BOGGS
Administrative Appeals Judge