

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0517 BLA

ROY L. MASSENGALE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
GREEN BRANCH MINING, INCORPORATED)	DATE ISSUED: 09/23/2016
)	
and)	
)	
THE FIRE & CASUALTY COMPANY OF CONNECTICUT)	
)	
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 Award of Claim of Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

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

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia for
employer/carrier.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer, Green Branch Mining, Incorporated (Green Branch) appeals the Decision and Order Award of Claim (2013-BLA-06002) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on February 29, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially found that Green Branch is the properly designated responsible operator. Based on his determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.¹ The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer's sole argument is that it is not the responsible operator because claimant later worked for two coal companies that must be considered successor operators liable for benefits. Claimant responds, asserting that the administrative law judge properly found that employer is the responsible operator. In the alternative, claimant contends that liability for benefits should transfer to the Black Lung Disability Trust Fund. The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge properly found that the evidence is insufficient to prove that Stoney Ridge Coal Company (Stoney Ridge) is a successor operator. However, the Director asserts that remand is required for the administrative law judge to

¹ Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

address whether Green Branch can prove that Key Mining Incorporated (Key) is a successor operator liable for payments of benefits in this case.²

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.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations impose liability for the payment of benefits on the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year. 20 C.F.R. §§725.494(c), 725.495(a)(1). It is the designated responsible operator's burden to prove either that it does not possess sufficient assets to secure the payment of benefits or that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(c). If a successor relationship is established, as discussed *infra*, a miner's tenure with a prior and successor operator may be aggregated to establish the required one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c).

An itemized statement of earnings report from the Social Security Administration indicates that claimant worked for: Green Branch from 1982-1989 and 1990-1991; Lower Fork Mining Company (Lower Fork) in 1988 and 1989; Stoney Ridge in 1991, Key Mining in 1991; and Kline Coal Company (Kline) in 1992.⁴ Director's Exhibit 6. Green Branch, Lower Fork and Stoney Ridge share the same mailing address P.O. Drawer 517, Oneida, Tennessee, while Key and Kline share the same mailing address, P.O. Box 66, Jacksboro, Tennessee. *Id.*

² We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment, invocation of the rebuttable presumption at Section 411(c)(4), and that employer did not rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Accordingly, we affirm the award of benefits.

³ The record reflects that claimant's coal mine employment was in Tennessee. Director's Exhibit 3; Hearing Transcript at 9. Accordingly, this case arises within the jurisdiction 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).

⁴ We affirm, as unchallenged, that claimant's separate employment periods with Stoney Ridge Coal Company (Stoney Ridge), Key Mining Incorporated (Key) and Kline Coal Company (Kline) do not encompass one year. *See Skrack*, 6 BLR at 1-711.

The district director found that both Stoney Ridge and Key were subsidiaries of West Coal Corporation (West). Director's Exhibit 20. It is undisputed that claimant's separate employments with Stoney Ridge, Key and Kline do not encompass a year. *Id.* The district director initially identified Kline as a potentially liable operator, but later dismissed Kline, citing testimony provided in *Johnson v. Kline Coal Co.*, BRB No. 11-0201 (Nov. 30, 2011) (unpub). *Id.* Notices of claim were then issued to Green Branch and Lower Fork on November 5, 2012. Director's Exhibit 21. Neither Stoney Ridge nor Key was identified as potentially liable operators. The district director later dismissed Lower Fork by letter dated February 22, 2013. Director's Exhibit 22. In a Proposed Decision and Order denying benefits issued on June 21, 2013, Green Branch was identified as the responsible operator. Director's Exhibit 29. On Form CM-1025, Operator Response to Schedule for Submission of Additional Evidence, Green Branch contested its designation as the responsible operator. Director's Exhibit 32. Pursuant to claimant's request, the case was referred to the Office of Administrative Law Judges for a formal hearing. *Id.*

During a deposition conducted on August 21, 2012, claimant testified that Green Branch, Lower Fork and Stoney Ridge were owned by West. Director's Exhibit 20 - Deposition Transcript (DT) at 19-22. Claimant testified that he went to Key after Stoney Ridge, but he was unsure whether Key was also operated by West. DT at 19-20. He described that his co-workers were the same at Stoney Ridge and Key, but that the mines were in different locations and his bosses were different. *Id.* at 20.

At the hearing held on April 16, 2015, claimant testified that he worked for several companies owned by West, and that Lower Fork and Green Branch were in the same seam of coal on opposite sides of the mountain. Hearing Transcript at 17. He said that Stoney Ridge "was on the other mountain." *Id.* at 18. Claimant stated that when Green Branch closed its mine, he was transferred to Stoney Ridge as they "had equipment over there" and "were already mining it." *Id.* at 21. According to claimant, "my co-workers and I worked with at Green Branch, we all went to Stoney Ridge on second shift." *Id.* Claimant indicated that while he was working for Stoney Ridge, Green Branch equipment was being moved to Key: "We worked on second shift till they got the equipment moved over there and then we went to Key Mining." *Id.* He described Key as being at "Braden Flats," on a different mountain than Stoney Ridge. *Id.* at 21. Claimant was uncertain of the relationship between Key and West. *Id.* at 24.

In its post-hearing brief, employer argued that it is not the responsible operator liable for benefits. Employer contended that Stoney Ridge and Key are successor operators of Green Branch, and that claimant's employment with Green Branch may be combined with his employment by those companies to establish the requisite one year of

employment with either company subsequent to Green Branch. Employer maintains that claimant's testimony establishes that Key acquired substantially all of the assets from Green Branch because Green Branch employees moved Green Branch equipment to Key, which employer asserted also created a successor operator relationship.

In addressing the responsible operator issue in his Decision and Order, the administrative law judge stated:

I do not accept the allegation that [c]laimant was transferred from Green Branch to Stoney Ridge. The Director's rendition[,] that Stoney Ridge was on another mountain, and while many of his co-workers went to work there, [c]laimant's supervisor was different and equipment was already there[,] is more accurate. Claimant testified he worked for Stoney Ridge while equipment was being moved to Key, and I infer that he remained in place. I accept that he was unaware of the relationship between West and Key but testified there was no relationship between Kline and West Coal, though he also testified Key and Kline were supposed to have bought West Coal out. I accept the argument that the Benefits Review Board held that Kline was not a successor to River Basin, a West Coal subsidiary. Roger West testified that West Coal and its mining subsidiaries are no longer in business and do not have any assets. *See Johnson v. Kline Coal Co.*, BRB No. 11-0201 [BLA] (November 30, 2011) ([Director's Exhibit] 20).⁵

Therefore, I find that Employer Green Branch is the correct responsible operator.

Decision and Order at 5.

Green Branch argues that the administrative law judge's analysis of the responsible operator issue does not satisfy the Administrative Procedure Act⁶ because he

⁵ The district director also dismissed Kline as a potentially liable operator, citing *Johnson v. Kline Coal Co.*, BRB No. 11-0201 BLA (November 30, 2011). Director's Exhibit 20.

⁶ The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented." 5 U.S.C. §557(c)(3)(A).

did not adequately explain why he was unwilling to accept claimant's uncontroverted testimony that he was transferred from Green Branch to Stoney Ridge. Green Branch further argues that, contrary to the administrative law judge's findings, the relationship between Kline and West Coal and between Kline and River Basin or any other West Coal Company is not at issue. Green Branch maintains that the administrative law judge failed to address its contention that claimant's testimony constitutes sufficient evidence to establish a successor relationship between Green Branch and Stoney Ridge, and Green Branch and Key, pursuant to 20 C.F.R. §725.492(a).

The Director urges the Board to affirm the administrative law judge's determination that employer failed to prove that Stoney Ridge was the successor of Green Branch. However, the Director acknowledges that the administrative law judge erred in not considering whether Green Branch proved that Key is a successor operator and urges the Board to remand the case for consideration of this issue. We agree with the Director.

A "successor operator" is defined as "[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). Additionally, 20 C.F.R. § 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). In any case in which an operator is a successor operator, any employment with a prior operator shall also be deemed to be employment with the successor operator. 20 C.F.R. §725.493(b)(1).

In this case, the administrative law judge permissibly concluded that there is insufficient evidence to establish that Stoney Ridge was the successor operator of Green Branch. As noted by the administrative law judge, claimant testified that each company's mining occurred in different locations, there was no Green Branch equipment moved to Stoney Ridge, claimant's supervisor at Stoney Ridge was different from the one he had at Green Branch, and an unknown number of Green Branch employees went to work at Stoney Ridge.⁷ Decision and Order at 5; Hearing Transcript at 18-19. Furthermore, claimant's testimony does not establish that Stoney Ridge acquired a mine or mines, substantially all of the assets or the mining business, from Green Branch, requisites for

⁷ Claimant testified at the hearing that he was transferred to Stoney Ridge from Green Branch and did not fill out a new employment application form. Hearing Transcript at 18. Claimant indicated that several employees were transferred at the same time, that "[t]hey already had equipment over there" but he "had a different supervisor." *Id.* at 19.

proving a successor relationship.⁸ *See* 20 C.F.R. §725.492(a). There also is no evidence that “essentially all” of the employees from Green Branch to Stoney Ridge were transferred, as claimant described the number of employees as “a lot[,]” “several[,]” and “some” at the hearing.⁹ Hearing Transcript at 19, 21. Therefore, we affirm the administrative law judge’s finding that Stoney Ridge does not qualify as a successor operator. Decision and Order at 5; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

However, Green Branch and the Director correctly assert that the case must be remanded in order for the administrative law judge to specifically address Green Branch’s assertion that Key is a successor operator. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must address all relevant evidence in evaluating whether a successor relationship exists between employer and Key.¹⁰

⁸ The administrative law judge erred in concluding that claimant was not transferred from Green Branch to Stoney Ridge, as claimant specifically testified that he was transferred. However, this error is harmless as there is insufficient evidence to establish a successor relationship between Green Branch and Stoney Ridge even accepting that claimant was transferred there. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁹ The Director, Office of Workers’ Compensation Programs (Director), does not concede that the transfer of employees, by itself, would establish a successor relationship. Director’s Brief at 2 n.1.

¹⁰ If the administrative law judge determines that Key qualifies as a successor operator, claimant’s years of employment with Green Branch and Key may be aggregated to establish the required one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c).

Accordingly, the administrative law judge's Decision and Order Award of Claim is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge