U.S. Department of Labor

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

BRB No. 24-0352 BLA

FRED R. HACKNEY, JR. Claimant-Respondent v. HACKNEY FUEL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 08/15/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dierdra M. Howard, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Victoria Yee (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for

Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, JONES, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Dierdra M. Howard's Decision and Order Awarding Benefits (2022-BLA-05186) rendered on a subsequent claim[1] filed on August 10, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Employer, Hackney Fuel Company, Inc., is the properly designated responsible operator. She further credited Claimant with 20.7 years of qualifying coal mine employment and found he established a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). She further determined Employer did not rebut the presumption and therefore awarded benefits.

[1] Claimant filed six prior claims, two of which he withdrew and thus are considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibit 46 at 7. Of the remaining four prior claims, only the most recent one is of record because the other claim files were destroyed based on age and records retention schedules. Director's Exhibit 54; Employer's Exhibit 15. The district director denied Claimant's most recent prior claim filed on January 30, 2018, for failure to establish a totally disabling pulmonary or respiratory impairment. Employer's Exhibit 15 at 25.

[2] 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.

[3] When a claimant files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see*

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. Claimant filed a response brief urging the Board to affirm the ALJ's award of benefits, but did not take a position on the responsible operator issue. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a response brief urging the Benefits Review Board to affirm the ALJ's responsible operator determination. Employer filed a reply to Claimant's response, reiterating its contention that the ALJ erred in her responsible operator determination and asserting that as Claimant did not take a position on the responsible operator issue, it should not have to pay attorney's fees for Claimant's unnecessary response brief. In addition, Employer filed a reply to the Director's response, reiterating its contention that the ALJ erred in her responsible operator determination.[4]

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.[5] 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.[6] 20 C.F.R. §725.495(a)(1). The district director is initially charged

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White v. New White Coal Co., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failing to establish total disability, Claimant had to establish that element of entitlement to obtain review of his current claim on the merits. *See White*, 23 BLR at 1-3; Employer's Exhibit 15 at 25.

[4] We affirm, as unchallenged on appeal, the ALJ's award of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 22 at 29, 33.

[6] 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

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 either that 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).

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." 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id.* In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id.* If the district director fails to identify the proper responsible operator prior to the claim's transfer to the ALJ, the improperly designated operator must be dismissed and the Black Lung Disability Trust Fund (Trust Fund) must assume liability for benefits. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 20 C.F.R. §725.407(d); 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 [Trust Fund]").

In this case, the district director identified Employer as a potentially liable operator despite acknowledging that it was not the most recent operator to employ Claimant for one year. Director's Exhibit 21. Claimant's most recent coal mine employment for one year was with M P & M Coal Company, Inc, (M P & M), where he worked from 1983 to September 1, 1987. *Id.* However, the district director did not designate M P & M as the responsible operator because it was no longer in business and its insurer, Rockwood Insurance Company (Rockwood), became insolvent and incapable of paying benefits.[7] *See*

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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).

[7] The district director's statement pursuant to 20 C.F.R. §725.495(d) asserted there was no record of M P & M maintaining insurance coverage as an operator or having authorization to self-insure. Director's Exhibit 21. But according to the Director, it was "further ascertained that . . . [M P & M's] insurer, Rockwood Insurance Company, had filed for bankruptcy in the Commonwealth Court of Pennsylvania, which had entered an order establishing a Claims Bar date of September 24, 2010 against all claims subsequent." Director's Post-Hearing Brief at 2. Additionally, the district director in Claimant's prior

20 C.F.R. §725.495(d); Employer's Exhibit 15 at 154; Director's Exhibit 21. Therefore, the district director designated Employer, as insured by Old Republic Insurance Company (Old Republic), as the responsible operator because it was the next most recent operator capable of paying benefits, having employed Claimant from 1974 to 1982. Director's Exhibit 21.

The ALJ determined that the district director properly designated Employer as the responsible operator. Decision and Order at 19. Specifically, she noted the district director properly provided statements regarding why Claimant's most recent employer, M P & M, could not be designated as the responsible operator, as 20 C.F.R. §725.495(d) requires. *Id.* at 18. She further found that Employer failed to rebut this prima facie evidence that M P & M was financially incapable of assuming liability nor showed that Employer itself is financially incapable of assuming liability. *Id.* In addition, the ALJ found Employer did not establish that M P & M was a successor operator to Employer, and consequently rejected its argument that Old Republic is not the responsible carrier because it did not insure M P & M on the last day of Claimant's coal mine employment with it (in 1987). *Id.*

Employer does not dispute it is a potentially liable operator or that Old Republic insured it on the last day of Claimant's coal mine employment with it. Employer's Brief at 12-17. Rather, it argues the ALJ erred in not finding that Employer is the same business entity as M P & M, or M P & M is a successor to Employer,[8] and therefore Claimant last

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claim issued a 20 C.F.R. §725.495(d) statement declaring "the insurance provider [] Rockwood Insurance Company became insolvent as of September 24, 2010, and [was] no longer able to meet its obligations." Employer's Exhibit 15 at 154. The record reflects that the Commonwealth Court of Pennsylvania placed Rockwood Insurance Company into liquidation on August 21, 1991, and established September 24, 2010, "as the claims bar date for the estate." Director's Exhibit 28 at 1 n.1.

[8] If a successor relationship is established between two coal mine employers, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). 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[.]" 20 C.F.R. §725.492(a). If the successor operator is financially incapable of assuming liability for benefits, however, liability falls to its predecessor if the predecessor meets the definition of a potentially liable operator – namely, that it employed the miner for at least one year and is financially capable of paying benefits. 20 C.F.R. §§725.492(d), 725.494(c), (e), 725.495(a)(3).

worked for the combined entity in 1987.[9] *Id.* Consequently, it argues the ALJ erred in finding Old Republic is the responsible insurer when it did not insure this combined entity on the last day of Claimant's employment. *Id.* Employer's arguments are unpersuasive.

Employer offered Claimant's testimony to demonstrate that Employer and M P & M should be considered a combined entity. Director's Exhibit 22; Hearing Transcript; *see* Employer's Brief at 12-15. It also provided a report from Dunn & Bradstreet, Director's Exhibit 26, listing M P & M's address in Grundy, Virginia, the same town in which Employer's address was listed in Claimant's Social Security Earnings Records (SSER), Director's Exhibits 5, 6.[10]

First, contrary to Employer's argument, the ALJ adequately explained why she discredited Claimant's testimony as vague and contradictory regarding the alleged relationship between the companies. *See* Employer's Brief at 11-13. In a deposition dated August 22, 2016, Claimant testified his brother owned Hackney Coal Company (Hackney Coal),[11] then "changed the name of his company" to Hackney Fuel (Employer) and then to M P & M, but that Claimant had "no idea" why. Director's Exhibit 22 at 11-12, 17. Responding to whether "Hackney Fuel [Employer] and M P & M are the same company," Claimant answered that "the same man owned it" and "it may have been another one he had. I can't remember." *Id.* at 12. Although Claimant testified at his deposition that "all [his brother] did was change [the] name" of the company, he testified at the hearing that the companies had mines at different locations because they would "work out and then . . . find another place to go to," and they added additional equipment over time. *See* Director's Exhibit 22 at 12; Hearing Transcript at 22-23. Given these statements, the ALJ permissibly found Claimant's testimony vague and contradictory, and insufficient to establish a relationship between the companies. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946,

[9] Employer does not dispute it had a qualifying insurance policy issued by Old Republic under Policy No. BC-47319 from January 4, 1982 until January 4, 1983, covering the period when it last employed Claimant. Employer's Exhibit 15 at 154; Employer's Brief at 17.

[10] Employer also offered the statements of two Old Republic employees, who the ALJ found "had no knowledge concerning any of the companies owned in whole or in part by Claimant's brother, nor did they offer any insight as to the relationship between, or the corporate structure of, any of those entities." Decision and Order at 16. We affirm the ALJ's finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[11] Prior to working for Employer (Hackney Fuel), Claimant worked for Hackney Coal Company (Hackney Coal) from 1972 to 1974. Director's Exhibit 5.

949 (4th Cir. 1997); *Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility); Decision and Order at 16.

The ALJ did not specifically address the Dunn & Bradstreet report, but any error in doing so is harmless. The Dunn and Bradstreet Finance Analytics report for M P & M lists its address in Grundy, Virginia. Director's Exhibits 26. While Employer is correct that Claimant's SSER lists the addresses for Hackney Coal and Employer (Hackney Fuel) in Grundy, Virginia, they are both listed at two wholly different street addresses/box numbers. Director's Exhibit 5. Further, the SSER lists M P & M at a different location in Vansant, Virginia. *Id.* Moreover, in another report from Dunn & Bradstreet, M P & M's address is listed both as unknown and then at a second location in Vansant, Virginia. Director's Exhibit 27 at 1 and 6. Employer has not explained how five different addresses for three companies clarifies their corporate structure and demonstrates that they constitute a single entity. Thus, the ALJ's finding that the evidence as a whole did not address the corporate structure of the companies or the relationship between them equally applies to the Dunn & Bradstreet report which simply lists a different address for M P & M Coal Company in the same town as the other companies. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 16; Director's Exhibits 22, 26. Moreover, as the ALJ noted, the SSER still lists the companies as separate entities with separate addresses, tax numbers, and business filings. Director's Exhibit 5. We thus affirm, as supported by substantial evidence, the ALJ's determination that the evidence as a whole is insufficient to establish Employer is the same entity as or a predecessor to M P & M.[12] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 16.

Employer further argues that it should be dismissed, and liability transferred to the Trust Fund, because the district director failed to investigate, name, and notify the Virginia Uninsured Employer's Fund (Uninsured Employer's Fund) and the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA) of their potential liability for this

[12] Employer cites *Sterling Smokeless Coal Corp. v. Dir., OWCP* [*Ballengee*], 72 F. App'x 942 (4th Cir. 2003) and *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555 (6th Cir. 2002) to support its position that a miner's testimony is sufficient to establish a successor-operator relationship. Employer's Brief at 14-15. However, as the ALJ found Claimant's testimony in this case to be vague and contradictory, a finding which we have affirmed, Employer's arguments fail. Moreover, the ALJ accurately found that these cases are distinguishable as neither involved insolvent successor operators. *See Ballengee*, 72 F. App'x at 947; *Hall*, 287 F.3d at 565; Decision and Order at 16 n.79.

claim. Employer's Brief at 17-33. The Director responds that the Uninsured Employer's Fund applies only to cases arising under the Virginia Workers' Compensation Act, not federal law, and that he is not obligated to notify a party of a claim for which it cannot be held liable as a matter of law. Director's Response Brief at 8. Similarly, the Director asserts that the VPCIGA coverage is not available because the claim was filed after the claims bar date for insolvent insurers. *Id.* at 8-9. We agree with the Director's position.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has previously found the VPCIGA is not responsible for claims filed after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. *RB & F Coal, Inc. v. Mullins,* 842 F.3d 279, 283, 286-87 n.9 (4th Cir. 2016). In this case, that claims deadline was September 24, 2010, Director's Exhibit 29; Claimant filed his claim a decade later on August 10, 2020. Director's Exhibit 2. Thus, as in *Mullins*, "the district director had no duty to notify the [VPCIGA] or name it as a party" for claims for which "the Guaranty Association is not liable."[13] *Mullins*, 842 F.3d at 283.

Likewise, the Uninsured Employer's Fund cannot provide coverage for this claim. Employer submitted no evidence before the district director or the ALJ showing that the Uninsured Employer's Fund would cover this claim. The Virginia legislature created the Fund to provide for workers' compensation benefits awarded against any uninsured or self-insured employer under any provision of the Virginia Workers' Compensation Act. Va. Code §65.2-1201(A). Thus, the Fund is specifically for workers' compensation claims arising under Virginia law, and because this claim arises under federal law, the Fund cannot provide coverage.[14] *Id*. Consequently, as with the VPCIGA, the district director had no duty to notify the Uninsured Employer's Fund as a party. *Mullins,* 842 F.3d at 283.

[13] Employer's reliance on *Boyd & Stevenson Coal Co. v. Director, OWCP* [*Slone*], 407 F.3d 663 (4th Cir. 2005), and *Island Fork Construction v. Bowling*, 872 F.3d 754 (6th Cir. 2017), for the proposition that the VPCIGA is liable for this claim is misplaced. *Slone* is distinguishable from this case because the claim was filed before the final bar date for filing claims. 407 F.3d at 667. In *Bowling*, a Sixth Circuit case which is not binding here, the court analyzed whether the Kentucky Insurance Guaranty Association is liable for a black lung claim but said nothing about time-barred claims. 872 F.3d at 759-60.

[14] We reject Employer's assertion that *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997), *aff'd*, 497 S.E.2d 464 (Va. 1988), and *Uninsured Employer's Fund v. Flanary*, 497 S.E.2d 913 (Va. Ct. App. 1998), *aff'd*, 257 Va. 237 (Va. 1999), stand for the proposition that the Uninsured Employer's Fund is liable for this claim.

Because Employer failed to establish another potentially liable operator more recently employed Claimant for one year and is financially capable of assuming liability, we affirm the ALJ's finding that Employer is the properly designated responsible operator and Old Republic is the responsible carrier.[15] Decision and Order at 19.

Both cases are distinguishable from this case because they involved Virginia state workers' compensation claims.

[15] Employer contends the Trust Fund should assume liability because the Director failed to monitor M P & M and require it to adequately insure against its potential liability and failed to investigate whether any of M P & M's officers or directors were capable of paying benefits before naming Employer as the responsible operator. Employer's Brief at 22, 30-32. We disagree. Employer did not argue the Director failed to adequately monitor M P & M before the ALJ and, therefore, it forfeited this issue. *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 207 (4th Cir. 2022); Employer's Closing Brief. Moreover, even if Employer's argument were properly before us, the Director is under no obligation to investigate M P & M's officers. *See* 20 C.F.R §725.609 (granting the Director the *discretion* to impose a penalty or hold liable officers of a corporation). Having put forward prima facie evidence that M P & M is not financially capable of assuming liability, the district director met its obligation and the burden shifted to Employer to show that M P & M possesses sufficient assets to pay benefits including, if necessary, by "presenting evidence" that its owner, partners, or president, secretary, and treasurer "possess assets sufficient to secure the payment of benefits . . . ." 20 C.F.R. §725.495(c); *see Lester v. Mack Coal Co*., 21 BLR 1-126 (1999) (en banc); *Mitchem v. Bailey Energy, Inc*., 21 BLR 1-161, 1-169-70 (1999) (en banc).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge