BRB No. 23-0504 BLA

COLIN HALCOMB Claimant-Respondent v. LOCUST GROVE, INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/10/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2021-BLA-05346) rendered on a claim filed on June 19, 2019, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Locust Grove, Incorporated (Locust Grove or Employer) is the responsible operator and Kentucky Employers' Mutual Insurance is the responsible carrier. The ALJ credited Claimant with 18.51 years of coal mine employment and found he established a totally disabling pulmonary or respiratory impairment, thereby invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts it is not liable for benefits because Claimant's reclamation work for Employer from 1996 to 2005 was not coal mine employment and he was an independent contractor during that time, not an employee. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, filed a response brief urging the Benefits Review Board to reject Employer's arguments and affirm the award.

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.[2] 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 (1965).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R.

[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] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 3.

§725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[3] *Id*. Once the district director designates a potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits, or another operator more recently employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits.[4] 20 C.F.R. §725.495(c).

The ALJ accurately observed that whether Locust Grove is the responsible operator hinges on whether Claimant's reclamation work with it qualified as the work of a coal miner, Decision and Order at 6-8, and whether in performing that work Claimant was Locust Grove's employee or was an independent contractor, *id*. at 14-18.

Status as a Miner – Reclamation Work from 1996 to 2005[5]

Under the Act, a "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C.

[3] 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).

[4] Employer does not argue that it employed Claimant for less than one year, that it is financially incapable of assuming liability, or that Claimant was subsequently employed by another coal mine operator for at least one year. 20 C.F.R. §§725.494(a)-(e), 725.495(c).

[5] Claimant was once a part-owner of Locust Grove until it was sold. December 20, 2022 Hearing Transcript at 25-26; Director's Exhibit 51 at 7. The ALJ found that regardless of the date Locust Grove was sold to another owner, there is no evidence in the record that Claimant's self-employment earnings from 1984 to 2005 came from someplace other than Locust Grove. Decision and Order at 7. He found that Claimant received earnings during this period from a combination of work he performed while he was part-owner supervising and filling in for absent workers or from performing reclamation work. *Id*. The ALJ further observed "Employer has made no argument that the Claimant's self-employment work, whatever it happened to be, from 1984 to 1996 was not coal mine employment." *Id*. We affirm that finding as it is unchallenged on appeal. *See Skrack v.*

§902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (i.e., that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the claimant worked in the extraction or preparation of coal). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). The regulation at 20 C.F.R. §725.202(a) provides that "[t]here shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). The presumption can be rebutted by proving that the person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site; did not perform maintenance or construction of the mine site; or was not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(a)(1), (2).

Relying on portions of Claimant's deposition testimony,[6] Employer argued to the ALJ, and continues to assert in this appeal, that Claimant's reclamation work at Locust Grove from 1996 to 2005 did not constitute coal mine employment because there was no active mining performed and Claimant therefore had no coal mine dust exposure. Employer's Brief at 22-23; *see also* Employer's Post-hearing Brief at 13-15. However, as

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Island Creek Coal Co., 6 BLR 1-710, 1-711 (19838); Decision and Order at 7. Moreover, it is clear from the record that Claimant was not an owner of Locust Grove after 1996. December 20, 2022 Hearing Transcript at 25-26; Director's Exhibit 51 at 7-9.

[6] As the ALJ noted, Employer relies on the following exchange between Claimant and Employer's counsel:

Question:	Tell me what you did reclaiming.
Answer:	Well I helped put the wall back and --.
Question:	Were you --, were you operating equipment or supervising reclamation?
Answer:	Operating equipment.
Question:	What were you operating?
Answer:	Dozer, backhoe.
Question:	So I take it where you were working, there was no coal being produced?
Answer:	No, the last, when I worked for them --.
Question:	So from 1994 up until you retired in [2005] you did reclamation work?
Answer:	Right.

Director's Exhibit 51 at 8-9.

the ALJ properly observed, Employer's argument is misplaced because the relevant inquiry is the "situs" and "function" of his work and "not how dusty his work was." Decision and Order at 8; *see Forester*, 767 F.3d at 641; *Petracca*, 884 F.2d at 929-30.

Further we see no error in the ALJ's conclusion that Claimant's testimony did not support Employer's position that he was not a miner:

> To the extent that the Employer is trying to argue that the Claimant's reclamation work does not satisfy the situs and function test, because coal was no longer being produced after 1996, I am not convinced the record supports this argument. At his deposition, counsel for the Employer asked the Claimant whether counsel was correct to assume that no coal was being produced while the Claimant was doing reclamation work. The Claimant answered "no," but his attempt to then clarify this response was unfortunately cut off. Without his full answer, the Claimant's initial response of "no" is open to several interpretations. The "no" could mean that Claimant felt the Employer's counsel was incorrect in his assumption regarding the state of coal production after 1996. Alternatively, the "no" could mean that no coal was being produced.

Decision and Order at 8. The ALJ permissibly found Claimant's answer was "cut off," and thus his testimony was "unclear" as to whether he performed his reclamation work at active mine sites or not. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387 (6th Cir. 1999) (even if the facts permit an alternative conclusion, the appellate tribunal cannot "substitute its judgment for that of the ALJ"); Decision and Order at 8-9; Director's Exhibit 51 at 9. Additionally, the ALJ permissibly found Employer's argument undercut by Claimant's direct statements that he was exposed to coal dust while doing reclamation work for Locust Grove from 1997 to 2005. *See* Decision and Order at 9; Director's Exhibit 51 at 46.

Thus, we affirm the ALJ's finding that Claimant worked as a miner while performing reclamation work from 1996 to 2005. *See Forester*, 767 F.3d at 641; *Petracca*, 884 F.2d at 929-30; *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-78-79 (1988), *aff'd sub nom. Amax Coal Co. v. Fagg*, 865 F.2d 916, 919-20 (7th Cir. 1989) (miner's work as a reclamation bulldozer operator at a mine site is the work of a miner); Decision and Order at 9; Director's Exhibit 51 at 9, 46.

Claimant's Employment Status from 1996 to 2005

Employer alternatively argues it is not the responsible operator because Claimant was an independent contractor and not its employee. Employer's Brief at 14-28; *see also* Employer's Post-hearing Brief at 15-26. For the reasons that follow, we reject Employer's arguments and hold the ALJ properly determined Claimant's hearing testimony was

inadmissible as to liability and permissibly found Claimant's deposition testimony supported a finding that Claimant was an employee and not an independent contractor.

Claimant's Hearing Testimony

On July 12, 2019, the district director issued a Notice of Claim advising Employer that it had been identified as a potentially liable operator. Director's Exhibit 36. Employer controverted the claim on August 12, 2019, but did not designate any liability witnesses. Director's Exhibit 39. On March 18, 2020, the district director issued a Schedule for the Submission of Additional Evidence and designated Employer as the responsible operator. Director's Exhibit 41. On March 23, 2020, Employer submitted Claimant's deposition transcript to the district director. Director's Exhibit 51. On March 28, 2020, Employer continued to challenge its designation as responsible operator but did not identify any liability witnesses. Director's Exhibit 47; *see* 20 C.F.R. §725.408(b)(2). Thereafter, on September 21, 2020, the district director issued a Proposed Decision and Order naming Employer as the responsible operator and awarding benefits. Director's Exhibit 52. Employer requested a hearing, and the case was forwarded to the Office of Administrative Law Judges, where it was ultimately assigned to the ALJ. Director's Exhibits 58, 62. The ALJ held a hearing on December 20, 2022 at which Claimant testified.

Relying on Claimant's hearing testimony, Employer argued that Claimant was an independent contractor and not its employee from 1996 to 2005, and, as such, it was not liable for any benefits to which he may be entitled. Employer's Post-hearing Brief at 15-26. The ALJ observed, however, that Employer had not identified any liability witnesses to the district director as 20 C.F.R. §725.414(b), (c) requires. Decision and Order at 16. Because Employer failed to identify any liability witnesses, he found Employer could not rely on Claimant's hearing testimony to show it was improperly identified as the responsible operator. Decision and Order at 16; 20 C.F.R. §725.456(b)(1).

The regulation at 20 C.F.R. §725.414(c) provides:

> [A]ll parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the [ALJ] finds that the lack of notice should be excused due to extraordinary circumstances.

20 C.F.R. §725.414(c). The ALJ correctly found Employer is precluded from relying on Claimant's hearing testimony on the responsible operator issue because Claimant was not

designated as a liability witness at any point to the district director.[7] 20 C.F.R. §§725.414(c), 725.456(b)(1), (2); Decision and Order at 16. Thus, the ALJ properly declined to consider Claimant's hearing testimony on the liability issue. 20 C.F.R. §725.414(c); Decision and Order at 16.

Claimant's Deposition Testimony

Because Employer timely submitted Claimant's deposition to the district director, the ALJ considered whether it supports Employer's argument that Claimant was not its employee but an independent contractor.[8] Decision and Order at 16-18. At his January 29, 2020 deposition, Claimant stated that he "guessed" he was not Employer's employee although it paid him. Director's Exhibit 51 at 15. Claimant further testified that he used his own equipment and maintained his own insurance, namely workers' compensation insurance, while he was doing reclamation work for Employer. *Id*. at 15, 17.

The regulations define "operator" as any person who "[p]aid wages or a salary, or provided other benefits, to an individual in exchange for work as a miner." 20 C.F.R. §725.491(a)(2)(iii). The regulations further instruct that:

> In determining the identity of a responsible operator under this part, the terms "employ" and "employment" shall be construed as broadly as possible, and shall include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner. Any individuals who participate with one or more persons in the mining of coal, such as owners, proprietors, partners, and joint venturers, whether they are compensated by wages, salaries, piece rates,

[7] Where no party provides notice to the district director of the name and address of a witness whose testimony pertains to the liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c). Employer did not argue extraordinary circumstances to the ALJ and does not argue on appeal that extraordinary circumstances existed for its failure to identify the miner as a liability witness. 20 C.F.R. §725.456(b)(1); Director's Brief at 4 n.6.

[8] The ALJ found Employer timely submitted Claimant's deposition testimony to the district director. 20 C.F.R. §§725.414(d), 725.456(b)(1); Decision and Order at 16; Director's Exhibit 51. No party challenges its admission or the ALJ's reliance on it in making his liability findings.

> shares, profits, or by any other means, shall be deemed employees. It is the specific intention of this paragraph to disregard any financial arrangement or business entity devised by the actual owners or operators of a coal mine or coal mine-related enterprise to avoid the payment of benefits to miners who, based upon the economic reality of their relationship to this enterprise, are, in fact, employees of the enterprise.

20 C.F.R. §725.493(a)(1).

Employer argues Claimant's paystubs, other income records, and deposition testimony indicate he was an independent contractor.[9] Employer's Brief at 15-18. Employer points to Claimant's deposition testimony that he did not consider himself to be an employee of Employer, he carried his own insurance, and he used his own equipment in support of its argument that Claimant worked as an independent contractor. *Id*. at 18-22, 24-25. We are unpersuaded by Employer's arguments.

The ALJ permissibly found Claimant's deposition testimony that he did not consider himself Employer's employee and that he used his own equipment and carried his own insurance was not dispositive of whether he was an employee or an independent contractor when performing reclamation work for Employer from 1996 to 2005. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (credibility determinations are for the ALJ to decide); Decision and Order at 18; Director's Exhibit 51 at 15, 17. Rather, given the arguments presented here, the limited evidence that properly may be considered on the issue, and the broad language of the regulation, the ALJ acted within his discretion in relying on Claimant's uncontradicted deposition testimony that Employer paid him for his reclamation work, and derived a benefit from this work, to conclude Claimant was its employee as defined by the regulation. *See* 20 C.F.R. §725.493(a)(1) (defining employment as "broadly as possible" to include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner"); Decision and Order at 18; Director's Exhibit 51 at 15, 17.

[9] Employer refers to paystubs from 1971, 1976, 1977, 1979, and 1981 to 1983 for miscellaneous employers, and nonemployee compensation stubs for 1979, 1982, 1984, and 1993 from various entities. It also refers to Claimant's deposition testimony that Employer hired him in 1994. As the Director points out, this documentation is irrelevant in determining Claimant's employment status from 1996 to 2005. *See* Employer's Brief at 14-18; Director's Brief at 4-5; Director's Exhibits 7-9; 51 at 15.

As Employer raises no other challenges to the ALJ's determinations that it most recently employed Claimant for a cumulative period of one year and is capable of paying benefits, we affirm the ALJ's finding that Employer is the responsible operator. *See* 20 C.F.R. §725.495(c). Further, as Employer is not contesting any element of entitlement, we affirm the ALJ's determination that Claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 38-39.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge