

EDWARD F. WILLIAMS)	BRB No. 88-0111 BLA
)	
Claimant)	
)	
v.)	
)	
HUMPHREYS ENTERPRISES,)	
INCORPORATED)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: _____
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	
)	
)	
WALTER JONES)	BRB No. 88-1437 BLA
)	Claimant
)	
v.)	
)	
HUMPHREYS ENTERPRISES,)	
INCORPORATED)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	ORDER GRANTING RECONSIDERATION

By motion dated June 18, 1993, the Director, Office of Workers' Compensation Programs (the Director), timely requested reconsideration of the Board's Decision and Order in *Williams v. Humphreys Enterprises, Incorporated*, 17 BLR 1-126 (1993).¹ See 20

¹By Order dated January 11, 1989, the Board granted employer's motion to consolidate *Williams v. Humphreys Enterprises, Incorporated* with *Jones v. Humphreys Enterprises, Incorporated* for purposes of briefing.

C.F.R. §802.407(a). In *Williams*, the administrative law judge awarded benefits and determined that employer, Humphreys Enterprises, Incorporated (hereinafter referred to as Humphreys)

was liable as the responsible operator, since claimant's last place of coal mine employment was Sunrise Coal Company (hereinafter referred to as Sunrise), and, subsequent to the cessation of claimant's coal mine employment, Sunrise's assets were purchased by Blackwood Fuel Company (hereinafter referred to as Blackwood), seventy-five percent of which is owned by Humphreys. Humphreys appealed the administrative law judge's determinations that it was liable as the responsible operator. The Director filed a motion to remand, admitting that Humphreys was erroneously named as responsible operator, and requesting remand for the awards of benefits to be paid by the Black Lung Disability Trust Fund.

In *Williams*, the Board held that Humphreys is not a successor operator of Sunrise or Blackwood based upon the record before the administrative law judge in these cases. In reaching this determination, the Board held that the record was insufficient to demonstrate that Humphreys exercised the necessary degree of control over the operations of Sunrise and Blackwood to qualify as a successor operator based upon a transfer of assets pursuant to 20 C.F.R. §725.493. The Board also noted that Blackwood was not named as responsible operator at any stage of these proceedings, despite the fact that Blackwood is an operating corporation which owns the remains of Sunrise, and the only theory which could link Humphreys to the cases at bar is its ownership of stock in Blackwood. Thus, as primary liability of Blackwood was not established, the Board held that Humphreys' derivative liability could not be established at this stage of the proceedings. See *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). Therefore, the administrative law judge's finding of employer as responsible operator was reversed, and the case remanded for payment by the Black Lung Disability Trust Fund.

In this motion, the Director does not challenge the Board's decision in *Williams*, but asserts that the degree of control exercised by Humphreys should not be a factor to be considered in assessing liability to a responsible operator as this factor is not explicitly articulated in the regulatory language at Section 725.493. Rather, the Director contends that the regulation provides that a successor operator is liable by transferring all of its assets to another corporation or by the previous corporation ceasing to exist. See 20 C.F.R. §725.493. Thus, the Director argues that the only reason Humphreys was inappropriately identified as a successor operator to Sunrise was because Blackwood never ceased to exist, not because Humphreys did not control Sunrise or Blackwood. Employer filed a response to the Director's motion, requesting that the Board decline to address the Director's arguments, and, alternatively, contending that the relief requested be denied.

We grant the Director's motion, but deny the relief requested. Our decision in *Williams* was based upon the inadequacy of the evidentiary record to establish the requisite connection between Humphreys and Blackwood and Sunrise. While the Director's brief on reconsideration provides additional information regarding this connection, this information was not before the administrative law judge or the Board in its prior decision and cannot be considered in this request for reconsideration of the Board's decision on appeal. See *Bozick v. Consolidation Coal Co.*, 732 F.2d 64, 6 BLR 2-23 *remanded for reconsideration*,

735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984).

Furthermore, we reject the Director's assertion that the regulations preclude consideration of the degree of control as a determinative factor as to whether a corporation is a successor operator. Section 725.493 specifies that where the responsible operator of a mine transfers assets to another operator, the successor operator is liable for the payment of all benefits which would have been payable by the prior operator. See 20 C.F.R. §725.493(a)(2)(i). The only fact appearing in the record before the administrative law judge regarding a transfer of assets from Sunrise and Blackwood to Humphreys was a sale of seventy-five percent of stock from Blackwood to Humphreys. See *Williams*, 17 BLR 1-128. The regulatory language does not specify whether a mere sale of a majority of stock constitutes a transfer of assets as articulated in Section 725.493. Thus, when the record reveals a sale of stock, the factfinder must make the determination whether a transfer of assets has occurred.² The mere fact that a stock purchase was made is, in itself, insufficient to establish that the purchasing company was operating the mine, and that an actual transfer of assets contemplated under Section 725.493 had occurred. Therefore, under these circumstances, to demonstrate whether an actual transfer of assets had occurred, the evidence must establish that the operator purchasing the stock had control of the daily mining operations.³ See generally *Elliot Coal Mining Co. Inc. v. Director, OWCP* [Kovalchick], 956 F.2d 448, 16 BLR 2-24 (3d Cir. 1992). Thus, contrary to the assertion of the Director, our decision in *Williams* did not hold that the degree of control factor is to be substituted for the regulatory provisions at Section 725.493(a)(2) and (3). Rather, the administrative law judge should consider the degree of control factor to interpret whether the regulatory requirement that a transfer of assets has occurred pursuant to the provisions articulated under Section 725.493 has been satisfied. Accordingly, we reject the allegations of error articulated by the Director in her motion for reconsideration.

Accordingly, the Director's motion for reconsideration is granted, and the relief requested is denied.

SO ORDERED.

²20 C.F.R. §725.493(a)(2)(ii) notes that the stated congressional objective supporting section 422(i) of the Act is to prevent a coal operator from circumventing liability under this part by entering into corporate or other business transactions which make the assessment of liability against that operator a financial or legal impossibility.

³Section 3(d) of the Federal Coal Mine Safety and Health Act of 1977 Act reads:

. . . [the term] 'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine . . .

30 U.S.C. §802(d)(1986).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge