



BRB No. 17-0335 BLA

THOMAS N. BROACH, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TAGGART GLOBAL)	DATE ISSUED: 03/28/2018
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Henry C. Bowen (Jenkins Fenstermaker, PLLC), Huntington, West Virginia, for employer.

Gary Stearman (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05781) of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed on December 20, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

In an Order issued on January 23, 2015, the administrative law judge determined that employer is the responsible operator and denied its motion to be dismissed from the case. In a Decision and Order issued on February 22, 2017, the administrative law judge credited claimant with sixteen years of qualifying coal mine employment¹ pursuant to the parties' stipulation, and found that claimant established a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). The administrative law judge thus determined 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).² The administrative law judge further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the determination that employer is the responsible operator.³

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. 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant's most recent coal mine employment was in West Virginia. Director's Exhibit 3; Hearing Transcript (Tr.) at 60-61. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is 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.

³ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established his entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). In order for a coal mine operator to meet the regulatory definition of a “potentially liable operator,” the miner’s disability or death must have arisen at least in part out of employment with the operator and the operator must have employed the miner for a cumulative period of not less than one year. 20 C.F.R. §725.494(a), (c).⁴

The term “operator” includes “[a]ny . . . person who [e]mploys an individual . . . in coal mine construction in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment.” 20 C.F.R. §725.491(a)(2)(i). In determining the identity of the responsible operator, the terms “employ” and “employment” are “construed as broadly as possible,” and “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.” 20 C.F.R. §725.493(a)(1).

It is undisputed that claimant worked as a welder, pipe fitter, and millwright in coal mine construction, primarily in repairing and refurbishing processing plants at active coal mines. Decision and Order at 3. The disputed issue before the district director and the administrative law judge was the identity of claimant’s employer from 1998 until 2004, when claimant’s coal mine employment ended. According to claimant, he worked for Southern Cross Construction Co. (Southern Cross) during that period. Hearing Transcript (Tr.) at 30, 48-49, 53; Director’s Exhibit 9 at 1. Based on the evidence that was developed during the district director’s investigation of the responsible operator issue, the district director designated “Southern Cross/Taggart Global” as the responsible operator. Director’s Exhibit 35. Employer, however, argued that Diversified Management LLC (Diversified Management), an employee leasing company that supplied employees to subcontractors, was claimant’s actual employer. Order Denying Motion to Dismiss (Order) at 2; Director’s Exhibit 28.

⁴ The regulation at 20 C.F.R §725.494 further requires that the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973, that the miner’s employment included at least one working day after December 31, 1969, and that the operator is financially capable of assuming liability for the payment of benefits. 20 C.F.R §725.494(a)-(e).

The administrative law judge found that, contrary to employer's contention, Southern Cross employed claimant from 1998 to 2004, and that Southern Cross and Taggart Global had "shared corporate identities." Order at 5. Specifically, the administrative law judge determined that the evidence⁵ established that claimant was employed by Southern Cross in coal mine construction work beginning around 1996⁶ and ending in 2004. Order at 7-8. The administrative law judge noted that although claimant's Social Security Administration (SSA) earnings records reflected that Diversified Management paid claimant from 1997 to 2004, claimant testified that his actual employer was Southern Cross, for which Diversified Management performed payroll processing. *Id.* Based on the evidence of record, the administrative law judge found that Southern Cross directed, supervised, and exercised control over claimant's coal mine construction work and thus, was claimant's employer. Order at 8-9.

The administrative law judge further found that Taggart Global either shared a corporate identity with Southern Cross, was a successor to Southern Cross, or both. Specifically, based on an examination of corporate records, the administrative law judge found that Southern Cross was a subsidiary of Sedgman USA, LLC (Sedgman), which later became Taggart Global USA, LLC (Taggart Global). Order at 3-4. Further, the evidence indicated that Southern Cross had the same business address that Taggart Global used as its registered office address. *Id.* at 4. Because Southern Cross/Taggart Global most recently employed claimant for at least one year, the administrative law judge found that employer was properly designated as the responsible operator.

Employer argues that the administrative law judge erred in finding that it is the responsible operator, because it is not an "operator" and it did not employ claimant. Employer argues that claimant's actual employer was Diversified Management. Employer's Brief at 4-8. We disagree.

⁵ Specifically, the administrative law judge considered the documentary evidence, claimant's testimony at the January 29, 2014 hearing and at two earlier depositions, the transcripts of which were submitted while the case was still before the district director, claimant's answers to interrogatories, and the hearing testimony of employer's Associate General Counsel, Melissa Struzzi-Englesberg. Order Denying Motion to Dismiss (Order) at 2-5, 7-9.

⁶ The record is not clear regarding exactly when claimant began working for Southern Cross, but the record indicates that claimant's work began sometime between 1994 and 1999. Director's Exhibits 3, 33. The parties do not dispute that the relevant time period that claimant worked for Southern Cross or, as employer contends, Diversified Management, lasted for at least one calendar year.

The administrative law judge noted that claimant's SSA records show that claimant's wages were paid by Diversified Management from 1997 to 2004. Order at 6-9; Director's Exhibits 5-6; Tr. at 28, 47-48. However, claimant testified at the hearing that he actually worked for Southern Cross. Tr. at 30, 48-49, 53. According to claimant, Southern Cross instructed him where to report for work, depending on whether the work was union or non-union.⁷ *Id.* at 30, 48-49, 53. Claimant stated that he was told that Diversified Management was brought in only to handle "the payroll and benefits." *Id.* at 48. Claimant provided similar testimony at depositions taken on April 24, 2012 and January 25, 2013.⁸ Director's Exhibits 25 (April 24, 2012 deposition at 19-23), 33 (January 25, 2013 deposition at 24, 42-43). According to claimant, if he needed assistance with any personnel issues, he would report to the personnel manager for Southern Cross. Director's Exhibit 25 (April 24, 2012 deposition at 19-23).

The administrative law judge evaluates the credibility of the evidence of record, including witness testimony. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Contrary to employer's argument, the administrative law judge permissibly found that claimant's "credible testimony" established that Southern Cross directed, supervised, or controlled the work performed by claimant during the relevant time period. Order at 9; *see Stallard*, 876 F.3d at 670; *Lafferty*, 12 BLR at 1-192.

⁷ At the hearing, claimant testified that he would be assigned to either Warfield Construction, which he described as "the union side" of Southern Cross, or Alcorn Erectors, which he described as "the non-union side." Tr. at 30, 48. During his April 24, 2012 deposition, claimant stated that Alcorn Erectors was part of Southern Cross. Director's Exhibit 25 (April 24, 2012 deposition at 27). During a January 25, 2013 deposition, claimant testified that he was not employed by Warfield Construction or Alcorn Erectors, and that the construction work was only subcontracted to them by Southern Cross. Director's Exhibit 33 (January 25, 2013 deposition at 35).

⁸ Claimant stated that he began working for Southern Cross in 1996, and that Diversified Management handled the payroll. Director's Exhibit 25 (April 24, 2012 deposition at 19-23). He stated that Southern Cross told him where he would be working. *Id.* At the January 25, 2013 deposition, claimant similarly testified that Southern Cross told him which job site to report to and directed his work when he was on the job sites. Director's Exhibit 33 (January 25, 2013 deposition at 24, 42-43). He stated that he believed he worked for Southern Cross, and that it was his understanding that Diversified Management began to handle the payroll processing in 1997. *Id.* at 25-29.

Further, the administrative law judge permissibly found that the documentary evidence and the testimony of employer's Associate General Counsel, Melissa Struzzi-Englesberg,⁹ supported claimant's testimony that he was employed by Southern Cross. Order at 7-9; *Stallard*, 876 F.3d at 668; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Specifically, the documentary evidence included claimant's responses to employer's interrogatories, in which claimant repeatedly disputed that he was employed by Alcorn Erectors; claimant stated that he was hired by Lyle Spaulding, President of Southern Cross, and worked there until 2004. Director's Exhibit 33. Claimant reiterated that his work assignments and job sites were directed by Southern Cross. *Id.* Moreover, on the Form CM-911a associated with his claim, claimant listed Southern Cross as his employer from September 1996 to March 2004. Director's Exhibit 3.

The administrative law judge noted that Ms. Struzzi-Englesberg testified that the employees of Diversified Management would have reported to Southern Cross's offices, and Southern Cross would have told them which mine sites to report to for work. Order at 8; Tr. at 75. Ms. Struzzi-Englesberg also authenticated a contract between Diversified Management and its client, Sedgman, and stated that it was a form contract that would mirror the contract executed by Diversified Management and Southern Cross. Tr. at 69-71; *see* Director's Exhibit 33. As the administrative law judge noted, the purpose of the contract was to establish "a shared employment relationship with regard to certain employees at [c]lient's worksite," and it specified that the client (Sedgman or Southern Cross) would be responsible for "the day-to-day supervision and control" of the employees with respect to the services offered by the client.¹⁰ Order at 8-9; Director's Exhibit 33. Sedgman would also have the power to make "decisions or take action which is governed by employment related laws." *Id.*

The administrative law judge concluded that "[c]laimant's testimony, Ms. Struzzi-Englesberg's testimony, and the shared employment [a]greement" demonstrated that "Sedgman/Taggart retained the right to direct, control, or supervise the work performed

⁹ Ms. Struzzi-Englesberg testified that she works for Forge Group North America, LLC, which was formerly known as Taggart Global, LLC. Tr. at 65.

¹⁰ Moreover, the contract provided that the employees covered by the contract would be considered employees of both the client and Diversified Management. Director's Exhibit 33. The client would record the time that the employee worked, verify the accuracy of the employee's wages, and report them to Diversified Management. *Id.* Diversified Management would pay the employee, and the client would reimburse Diversified Management for the cost of the payroll, plus an administrative fee. *Id.*

by claimant,” and that “Southern Cross would have shared this same relationship with Diversified [Management]” Order at 9. Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that claimant was employed by Southern Cross during the relevant time period. 20 C.F.R. §725.493(a)(1); *see Stallard*, 876 F.3d at 668.

Employer also challenges the administrative law judge’s designation of Taggart Global as responsible operator. Employer contends that Taggart Global was separate and independent from Southern Cross. Employer’s Brief at 8-10. Employer’s contention lacks merit.

Based on her analysis of online corporate histories, records from the Pennsylvania Department of State and West Virginia Secretary of State,¹¹ documents in the record, and the testimony of Ms. Struzzi-Englesberg, the administrative law judge detailed “the complex and frequently changing corporate structure” of the various entities involved in this case.¹² Order at 3. The administrative law judge found that Southern Cross was founded as a construction subsidiary of Sedgman, which was the predecessor of Taggart Global. Order at 3-4. The administrative law judge noted that Southern Cross and Taggart Global, LLC both shared the same registered agent address.¹³ *Id.* The

¹¹ The administrative law judge took official notice of the relevant corporate filing histories of the Pennsylvania Department of State and the West Virginia Secretary of State. Order at 3; *see* 29 C.F.R. §18.84.

¹² The administrative law judge noted that Sedgman, LLC was founded in 1999, and subsequently changed its name to Taggart Global, LLC and then to Forge Group North America, LLC. Order at 3-4; Tr. at 69-70. Southern Cross Construction Co. was founded in 1995 and subsequently changed its name to Taggart Site Services Group, LLC, and then to DRA Taggart Site Services, LLC. Order at 4; Director’s Exhibit 25. In West Virginia, DRA Taggart Site Services was doing business as SCCC (Southern Cross Construction Company). Order at 4; Director’s Exhibit 25. DRA Taggart Site Services later changed its name to Forge Group Site Services, LLC. Order at 4. In Pennsylvania, a Southern Cross Construction Company was incorporated in 2010, and was actively operating at the time of the administrative law judge’s Order. Order at 4. Southern Cross Construction Co., Taggart Site Services Group, LLC, DRA Taggart Site Services, LLC, and Forge Group Site Services, LLC, were listed as the active owners of the Pennsylvania corporation, Southern Cross Construction Company. *Id.* at 4.

¹³ The administrative law judge noted that corporate filing records list Southern Cross Construction Company’s principal place of business as 4000 Town Center Boulevard, Canonsburg, Pennsylvania, which is also the registered office and mailing

administrative law judge further found that Ms. Struzzi-Englesberg's testimony supported the existence of a corporate relationship among these entities. Specifically, Ms. Struzzi-Englesberg testified that when she was investigating the claim on behalf of Taggart Global, LLC, she had "contacted our West Virginia office where the old Southern Cross records were kept." *Id.* at 4-5; Tr. at 65-66. Because it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that Taggart Global had a shared corporate identity with Southern Cross. *See Stallard*, 876 F.3d at 668; *Ridings v. C & C Coal Co.*, 6 BLR 1-227, 1-231 (1983) (affirming an administrative law judge's determination that two successive coal mine employers with the same officers and mailing address were a single entity); Decision and Order at 3-5.

The administrative law judge also rationally found that Taggart Global and Southern Cross were "sister companies" and subsidiaries of Taggart Global USA, LLC at the time of claimant's employment. Order at 3-5; *see Stallard*, 876 F.3d at 668. The administrative law judge explained that, in 1996, Taggart Global USA, LLC (under its former name Sedgman USA, LLC) acquired Southern Cross as a construction subsidiary. Order at 3-4; Director's Exhibit 25. Further, Ms. Struzzi-Englesberg testified that at one point, Taggart Global USA, LLC owned both Southern Cross and Taggart Global, LLC.¹⁴ Order at 3-4; Director's Exhibit 25; Tr. at 67, 79.

As the administrative law judge noted, the definition of operator includes any person who "may be considered a successor operator" pursuant to 20 C.F.R. §725.492. 20 C.F.R. §725.491(a)(2)(ii). 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). In any case in which an operator is a successor, employment with a prior operator shall also be deemed to be employment with the successor operator. 20 C.F.R. §725.493(b)(1). As the administrative law judge found that Southern Cross was a subsidiary of the corporate predecessor of Taggart Global, she reasonably found that Taggart Global is a successor operator to Southern Cross. *See* 20 C.F.R. §725.492(a); Order at 4-5.

address for Southern Cross Construction Co., Taggart Site Services Group, LLC, and DRA Taggart Site Services. Order at 4. Moreover, the administrative law judge noted that this address is the registered office address for Taggart Global, LLC (now Forge Group North America, LLC). *Id.*

¹⁴ Ms. Struzzi-Englesberg testified that Taggart Global USA, LLC was owned by Forge Group, Inc. at the time of the hearing. Tr. at 79.

Notwithstanding the administrative law judge's finding that Southern Cross and Taggart Global have a shared corporate identity, employer argues that neither company can be considered an operator because neither was engaged in the business of coal mining. Employer's Brief at 8-11. Employer's argument lacks merit. Included within the definition of an operator is "any independent contractor performing services or construction at such mine," or any other person who "[e]mploys an individual . . . in coal mine construction in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment." 20 C.F.R. §725.491(a)(1), (2)(i). As the administrative law judge further noted, "any parent entity or other controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities." 20 C.F.R. §725.491(e).

In this case, claimant's credible testimony was sufficient to establish that he was engaged in coal mine construction work while working for Southern Cross during the relevant time period. *See Stallard*, 876 F.3d at 668. Specifically, claimant testified that when he was working for Southern Cross, he was engaged in construction work at active coal mine facilities and was exposed to coal mine dust, with the exception of three months when he was "putting up a concrete bin." Tr. at 28-29, 31-32, 39-41, 58-59. Therefore, we reject employer's argument that neither Southern Cross nor Taggart Global can be considered an operator. *See* 20 C.F.R. §725.491(a)(1), (2)(i), (e).

Employer argues further that it cannot be the responsible operator because claimant did not have significant periods of coal dust exposure while in its employ, and he did not regularly engage in coal mine employment for at least 125 working days during a calendar year. Employer's Brief at 11-12. This argument lacks merit. Claimant is presumed to have been "regularly and continuously exposed to coal mine dust during the course of [his] employment." 20 C.F.R. §725.491(d). It is employer's burden to rebut this presumption by "showing that [its] employee was not exposed to coal mine dust for significant periods during such employment." *Id.* Employer submitted no evidence to rebut the presumption. Moreover, claimant testified that he was regularly and continuously exposed to coal mine dust when working for Southern Cross. Tr. at 28-29, 31-32, 39-41, 58-59. Further, he testified, without contradiction, that his work was full-time. Director's Exhibit 33 (January 25, 2013 deposition at 35-36). Therefore, we reject employer's argument that claimant was not regularly exposed to coal mine dust while in its employ, and was not regularly employed during a calendar year.

Employer next argues that it is not the responsible operator because claimant's disability did not arise at least in part out of his employment with Southern Cross. Employer's Brief at 10-11. The regulation at 20 C.F.R. §725.494(a) provides a rebuttable presumption that the miner's disability arose in whole or in part out of his employment with the potentially liable operator. Employer has offered no evidence to rebut this

presumption. Employer's argument is therefore rejected. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that employer is the responsible operator.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge