

BRB No. 11-0201 BLA

DORIS L. JOHNSON)
)
 Claimant)
)
 v.)
)
 KLINE COAL COMPANY) DATE ISSUED: 11/30/2011
)
 and)
)
 AMERICAN MINING INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Motion for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Tennessee, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and Decision and Order on Motion for Reconsideration (2009-BLA-05869) of Administrative Law Judge Daniel F. Solomon, with respect to a claim filed on September 10, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ In his Decision and Order issued on July 19, 2010, the administrative law judge determined that Kline Coal Company (employer) timely challenged the district director's finding that it was the properly designated responsible operator. The administrative law judge further found that employer established that it did not meet the responsible operator criteria set forth in 20 C.F.R. §§725.491-725.494. Therefore, the administrative law judge dismissed employer and found that liability transferred to the Black Lung Disability Trust Fund (Trust Fund).

The Director filed a Motion for Reconsideration in which he argued that the administrative law judge erred in failing to consider claimant's testimony when analyzing the responsible operator issue. In his Decision and Order on Motion for Reconsideration issued on November 2, 2010, the administrative law judge reviewed claimant's testimony and again found that employer established that it was not the properly designated responsible operator. Accordingly, the administrative law judge dismissed employer from the claim. The administrative law judge further found that "as the wrong responsible operator has been identified, the determination below, that [c]laimant is entitled to benefits on the merits, stands." Decision and Order on Motion for Reconsideration at 2.

The Director appeals, arguing that the administrative law judge erred in discrediting the testimony of Mr. West, the president of one of the mining companies for which claimant worked, and in dismissing employer as the responsible operator. Employer responds, asserting that the administrative law judge's dismissal of it as

¹ Claimant filed an initial claim on March 16, 2007, and the district director issued a Proposed Decision and Order denying benefits on November 5, 2007. Director's Exhibit 1. However, claimant withdrew the claim the following day. *Id.* Accordingly, the 2007 claim was not considered in conjunction with the current claim. Decision and Order at 1; *see also* 20 C.F.R. §725.306(b).

responsible operator should be affirmed. Claimant has not filed a response brief in this appeal.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 supported by substantial evidence, is rational, and is in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Claimant's Coal Mine Employment History

On Form CM-911a, claimant reported that he was employed by River Basin Coal Company (River Basin) from 1989 until 1991, for Key Mining Company (Key Mining) from 1991 until 1992, and for Kline Coal Company (employer) in 1992. Director's Exhibit 3. The miner's Itemized Statement of Earnings from the Social Security Administration (SSA) reflects these dates and indicates that Key Mining and employer had the same mailing address. Director's Exhibit 5.

Claimant testified at the hearing on his claim that the last coal company he worked for was employer, in 1992, and that before that he worked for Key Mining. Hearing Transcript at 27, 34. Concerning his transfer from River Basin to Key Mining, claimant stated:

A . . . Key Mining is where River Basin was at.

Q Okay.

A See, there's three - - they changed company names I think three times while I was at River Basin.

Q Okay.

² We affirm, as unchallenged on appeal, the administrative law judge's determination affirming claimant's entitlement to benefits on the merits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The record reflects that claimant's coal mine employment was in Tennessee. Director's Exhibit 3. 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 (1989)(*en banc*).

A And when they - - when River Basin shut down, they transferred, I think, five or six of the men across the mountain there to [employer]. So that's where I worked last.

Id. at 36. Claimant testified that he did not know if West Coal Corporation (West Coal) owned employer or Key Mining, but stated that he “reckoned” that “all of us” were working for West Coal. *Id.* at 38-39. Claimant also stated that he had a different boss when he worked for employer than he had at Key Mining. *Id.* at 39. Claimant acknowledged that he did not actually know for whom anybody was working. *Id.* at 39-40.

Hubert Baldwin, secretary/treasurer of West Coal was deposed on May 4, 1998, in conjunction with another claim, and testified that River Basin was a subsidiary of West Coal. Director's Exhibit 15 (Baldwin Deposition) at 47. Roger West, former president of West Coal, was deposed August 7, 1997, in conjunction with another claim and testified that West Coal leased mining rights from the Koppers Company and that River Basin was a wholly-owned subsidiary of West Coal. Director's Exhibit 15 (West Deposition) at 10-11. Mr. West stated that, at some point before May 12, 1991, his miners went on strike and he needed someone with workers' compensation insurance to continue operating the lease. *Id.* at 19-22. Mr. West reported that he subsequently entered into an agreement with Mr. Asbury, President of Key Mining, under which Key Mining would extract the coal and transport it to a processing plant owned by West Coal. *Id.* at 30. Mr. West testified that he then laid off his miners and informed Mr. Asbury that he was free to hire them. *Id.* at 43-44. Mr. West also stated that, because the Koppers Company would not allow him to sublease the mineral rights to Key Mining, West Coal remained responsible for production, retained ownership of the mining equipment, and regularly sent engineers underground to inspect the equipment. *Id.* at 29, 44-45, 73-74.

Mr. West further testified that he no longer possessed copies of all of the contract mining agreements associated with the transaction, as they were lost in an office move. Director's Exhibit 15 (West Deposition) at 27-28. Nevertheless, Mr. West provided copies of documents that he testified were similar to the contracts he entered into with Mr. Asbury. *Id.* at 31. In an affidavit attached to Mr. West's deposition as an exhibit, Mr. Asbury stated that, in December 1991, he changed the name of Key Mining to Kline Coal and that mining operations ceased sometime prior to January 1993. Deposition Exhibit 5. Mr. West reported that West Coal, and its mining subsidiaries, are no longer in business and do not have any assets. *Id.* at 58, 94, 124, 133.

II. The Administrative Law Judge's Findings

In the administrative law judge's Decision and Order, he determined that Mr. West's testimony did not support a finding that employer is the successor operator to River Basin pursuant to 20 C.F.R. §725.492(e), as he stated that West Coal retained ownership of the mining equipment and the mineral rights at the mine sites. Decision and Order at 4. The administrative law judge further determined that there was no evidence to substantiate Mr. West's statement that River Basin's assets were transferred by contract to Key Mining and employer. *Id.* The administrative law judge also discredited Mr. West's testimony, that West Coal transferred River Basin's assets, as he found that Mr. West "may have had an economic interest in laying off liability to Key [Mining] and [employer]." *Id.* at 5.

With respect to the length of claimant's tenure with employer, the administrative law judge "accept[ed]" that if claimant worked for both Key Mining and employer, neither his hearing testimony, nor his SSA Itemized Statement of Earnings, establish that he did so for a cumulative period of at least one year, as required by 20 C.F.R. §725.494(c). Decision and Order at 5. The administrative law judge credited claimant's testimony that he worked eight hours per day, at an hourly rate of \$12.50, for both Key Mining and employer. *Id.* The administrative law judge then adopted employer's calculation, based on claimant's hourly wage and the SSA Itemized Statement of Earnings for 1991 and 1992, that claimant worked no more than 24.34 weeks for Key Mining and 8.19 weeks for employer. *Id.* The administrative law judge further credited claimant's testimony that Key Mining and employer are the same entity and acknowledged that to establish claimant's employment for a cumulative period of not less than one year for purposes of 20 C.F.R. §725.494(c), the evidence must establish that Key Mining and employer were successors to River Basin. Decision and Order at 5. Accordingly, he dismissed employer as the responsible operator. *Id.*

In the administrative law judge's Decision and Order on Motion for Reconsideration, he addressed the Director's argument that he did not fully consider claimant's testimony. Decision and Order on Motion for Reconsideration at 2. The administrative law judge reviewed claimant's testimony, that he did not know for whom he was working, and the administrative law judge "accept[ed]" that it was true. *Id.* Consequently, the administrative law judge again determined that employer "has proven that it was not the most recent operator to meet the requirements at 20 C.F.R. §§725.492 and 725.493." *Id.* Therefore, the administrative law judge again determined that employer is dismissed as the responsible operator in the claim. *Id.*

III. Arguments on Appeal

The Director asserts that Mr. West's testimony, contrary to the administrative law judge's determination, is supported by the record. The Director also contends that, because West Coal could avoid liability only by establishing that it does not meet the criteria for a responsible operator, Mr. West had no financial interest in establishing that employer was a successor to West Coal. The Director maintains, therefore, that the administrative law judge should not have determined that Mr. West had a motive to provide inaccurate testimony regarding West Coal's relationship with Key Mining and employer. The Director further states that the lack of written records does not necessarily negate Mr. West's testimony, as Mr. Baldwin's deposition testimony confirms that River Basin was a subsidiary of West Coal and Mr. Asbury's affidavit constitutes independent confirmation that a contract mining agreement existed between River Basin, Key Mining and employer in 1991 and 1992. The Director also argues that claimant's SSA Itemized Statement of Earnings confirms Mr. West's statements regarding the dates when the transfer between River Basin, Key Mining and employer occurred and that claimant's testimony confirms that River Basin changed its name to Key Mining, and then Kline, while he worked for them. Finally, the Director alleges that, in light of the administrative law judge's conclusion that Key Mining and employer were the same entity, Mr. West's deposition testimony was not unsubstantiated.

Employer responds, asserting that the Board is required to defer to the administrative law judge's credibility determinations. In support of the administrative law judge's findings, employer states that Mr. West had an interest in establishing that employer was a successor operator, as it was the Director's position, at the time of Mr. West's deposition, that West Coal was the responsible operator in a claim for benefits. Employer also maintains that the administrative law judge's determination, that Mr. West's testimony is unsubstantiated, is supported by the record, because the mining contracts with Key Mining were not entered into evidence, and there was some discrepancy about if, or when, West Coal and employer entered into a written agreement. Employer further explains that, although claimant testified that River Basin and Key Mining were the same company, he also admitted the he did not know for whom he was working at the time. Additionally, employer contends that, contrary to the Director's assertion, claimant's SSA Itemized Statement of Earnings does not identify the owner or controller of the listed companies, and reflects that River Basin and Key Mining maintained different business addresses. Finally, employer states that, even if Mr. West's testimony is credited, it does not establish that employer acquired, pursuant to 20 C.F.R. §725.492, the necessary mining rights from River Basin to qualify as a successor operator.

After reviewing the arguments on appeal and the administrative law judge's findings, we hold that the administrative law judge's dismissal of employer as

responsible operator is rational, supported by substantial evidence and consistent with applicable law. To hold that employer was properly designated as the responsible operator in this case, the record evidence must establish, *inter alia*, that employer is the operator that most recently employed claimant for a cumulative period of at least one year or that employer is the successor to River Basin and Key Mining. 20 C.F.R. §§725.492-725.495. The administrative law judge rationally found that the evidence was insufficient to prove that claimant worked for Key Mining and employer for at least one year, as required by 20 C.F.R. §725.494(c), because his testimony and the SSA Itemized Statement of Earnings established, at most, 32.53 weeks of employment. 20 C.F.R. §§725.101(a)(32), 725.494(c); see *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986); *Gration v. Westmoreland Coal Co.*, 7 BLR 1-90 (1984).

The administrative law judge also acted within his discretion as fact-finder in determining that Mr. West’s testimony was insufficient to establish that employer is a successor operator to River Basin under the criteria set forth in 20 C.F.R. §725.492, such that claimant’s employment with River Basin could be attributed to employer under 20 C.F.R. §725.495(c). In relevant part, 20 C.F.R. §725.492 provides:

Any 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, shall be considered a “successor operator” with respect to any miners previously employed by such prior operator.

....

In any case in which a prior operator transferred a mine or mines, or substantially all of the assets thereof, to a successor operator, or sold its coal mining business or substantially all of the assets thereof, to a successor operator, and then ceased to exist . . . the successor operator . . . shall be primarily liable for the payment of benefits to any miners previously employed by such prior operator.

....

An “acquisition,” for purposes of this section, shall include any transaction by which title to the mine or mines, or substantially all of the assets thereof, or the right to extract or prepare coal at such mine or mines, becomes vested in a person other than the prior operator.

20 C.F.R. §725.492(a), (d)(1), (e). As the administrative law judge found, Mr. West testified that West Coal contracted with employer to remove and process coal at the sites formerly mined by its subsidiaries, including River Basin, but West Coal continued to

monitor conditions at the mines and retained the mineral rights and ownership of the equipment. Decision and Order at 4; Director’s Exhibit 15 (West Deposition) at 29, 44-45, 73-74. Notwithstanding whether the administrative law judge properly discredited Mr. West’s testimony, as “suspect,” the administrative law judge’s ultimate conclusion, that the evidence does not establish Key Mining and employer were successors to River Basin, is supported by the record. Decision and Order at 4-5; 20 C.F.R. §725.492(d)(1), (e); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Ridings v. C & C Coal Co.*, 6 BLR 1-227, 1-231 (1983). We affirm, therefore, the administrative law judge’s determination that employer is not a successor to River Basin. Thus, we also affirm the administrative law judge’s dismissal of employer as responsible operator in this case.

Accordingly, the administrative law judge’s Decision and Order and Decision and Order on Motion for Reconsideration, dismissing employer as responsible operator, are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge