BRB No. 00-1139 BLA

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| WILLIAM A. McKENDREE | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| BENTLEY COAL COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| and | ) | |
| | ) | |
| S & C COAL COMPANY | ) | DATE ISSUED: |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMIGO SMOKELESS COAL COMPANY | ) | |
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| Employer-Respondent | ) | |
| | ) | |
| and | ) | |
| | ) | |
| W.H. SEMONES | ) | |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order Remanding Case to the District Director

for Payment of Benefits and the Order Granting Director's Motion for Reconsideration and Affirming Decision and Order Remanding Case to the District Director for Payment of Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

James M. Phemister and Robert C. Garrison (Washington and Lee University School of Law, Legal Practice Clinic), Lexington, Virginia, for claimant.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Remanding Case to the District Director for Payment of Benefits and the Order Granting Director's Motion for Reconsideration and Affirming Decision and Order Remanding Case to the District Director for Payment of Benefits (98-BLA-1296) of Administrative Law Judge Daniel F. Sutton on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] In the Decision and Order, the administrative law judge determined

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined

that dismissal of S & C Coal Company, Bentley Coal Company, Mr. W.H. Semones, and Amigo Smokeless Coal Company is appropriate. The administrative law judge noted that claimant had earnings from Unity Mining Company in 1980, 1981 and 1982; however, Unity Mining Company was not named as a putative responsible operator. Having dismissed all named putative responsible operators, the administrative law judge determined that liability for benefits must be borne by the Black Lung Disability Trust Fund. The administrative law judge ordered that the case be remanded to the district director for continuation of the payment of benefits previously awarded.

The Director filed a Motion for Reconsideration. The administrative law judge agreed with the Director's assertion that he had incorrectly calculated the amount of claimant's earnings from Unity Mining Company (Unity) reported on the Social Security records, which the administrative law judge agreed totaled $13,550.00 between 1980 and 1982. However, the administrative law judge rejected the Director's contention that the administrative law judge erred by dismissing Amigo Smokeless Coal Company (Amigo) as the responsible operator. The administrative law judge, therefore, remanded the case to the district director for the payment of benefits.

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that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On appeal, the Director asserts that the administrative law judge erred in finding $13,550.00 to be a sufficient amount to establish that claimant worked for at least one year for Unity. Thus, Director urges the Board to vacate the administrative law judge's dismissal of Amigo, which the Director contends is the most recent employer of at least one year with the financial ability to assume liability for the payment of benefits. The Director asserts that the district director's correct decision not to pursue Unity is not a valid basis for dismissing Amigo. The Director asks the Board to reverse the administrative law judge's dismissal of Amigo and, since Amigo contested entitlement, the Director urges the Board to remand the case to the administrative law judge for a finding on the merits of entitlement. Only claimant responds, urging the Board to affirm the administrative law judge's Decision and Order.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge summarized the evidence relevant to identifying the responsible operator. In view of the Director's concession that S & C Coal Company (S & C) has been dissolved and is not financially capable of assuming liability for black lung benefit payments, and in view of the Director's concession that Bentley Coal Company (Bentley) did not employ claimant for a cumulative year, the administrative law judge determined that the motions to dismiss these parties were warranted. In addition, the administrative law judge dismissed Mr. W.H. Semones, in view of the Board's holding in *Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-163 (1999), that corporate officers could not be held liable as responsible operators for the payment of black lung benefits. The administrative law judge further found that dismissal of Amigo is appropriate:

> because the Director failed to resolve the responsible operator issue in a preliminary proceeding or proceed against all putative responsible operators at every stage of the proceeding....In this regard, the record, as discussed above, shows that the Claimant has reported earnings from Unity Mining,

[2]While the regulations pertaining to the designation of responsible operators have been revised, the revised regulations apply only to cases filed after January 19, 2001.

> Inc. of $4,200.00 in 1982, $25,000.00 in 1981 and $350.00 in 1980. DX 3. Although these earnings on their face would appear to clearly represent cumulative periods of not less than one year, Unity Mining was not named as a putative responsible operator and, even more troubling, there is no indication in the record that any investigation was ever conducted into the nature of these reported earnings or the financial status of Unity Mining. I recognize that the statement from S & C's bookkeeper that the Claimant was employed by S & C from 1974 to March 21, 1982 raises the possibility that Unity Mining may have been related to S & C, but this is pure speculation and hardly constitutes substantial evidence that Unity Mining is incapable of paying benefits...Since the Director did not fully develop evidence regarding the ability of a Unity Mining to assume financial liability and instead chose to proceed against Amigo as a prior operator, Amigo was entitled to be dismissed, and liability for the Claimant's benefits must continue to be borne by the Trust Fund.

Decision and Order at 9-10 (citations omitted).

In his Order on Reconsideration, the administrative law judge agreed with the Director's assertion that the administrative law judge had erred in his description of claimant's Social Security earnings records, and corrected his findings, stating that the Social Security earnings records show that claimant had $13,550.00 in total earnings from Unity between 1980 and 1982; $350.00 in 1980, $9,000.00 in 1981 and $4,200.00 in 1982. The administrative law judge further stated:

> while I agree with the Director that I incorrectly calculated the amount of the Claimant's earnings from Unity Mining as reported in the Social Security records, I do not agree that I erred in not holding Amigo liable as the responsible operator. Here, the evidence indicates that the Claimant's employment with Unity Mining began in 1980 and ended in 1982. Since the Claimant's period of employment with Unity Mining clearly extended more than one year, the burden fell to Unity Mining (or the Director as the proponent of Amigo's liability in lieu of Unity Mining or any subsequent employer) pursuant to 20 C.F.R. §725.493(b) to show that the actual number of days worked by the Claimant did not total 125....the Director offered no evidence, apart from the Social Security earnings records, concerning the Claimant's employment with Unity Mining, and I can not agree with the Director's assertion that $13,550.00 is not indicative of a full year of regular employment. Moreover,...it is the Director's responsibility to develop evidence to support imposition of liability on an employer which was not the most recent to employ a miner for cumulative periods of not

> less than one year. This, the Director plainly failed to do. Consequently, Amigo's motion to be dismissed was properly granted, and liability for the Claimant's benefits was properly assigned to the Trust Fund in view of the Director's failure to fulfill its responsibility to develop evidence to support identification of a responsible operator.

Order on Reconsideration at 3-4 (citations and footnote omitted). In a footnote, the administrative law judge stated:

> it is noted that the Claimant's $13,500.00 in reported earnings from Unity Mining over a three-year period would translate to $108.40 per day, assuming a minimum of 125 days worked, or a pay rate of $13.55 per hour, assuming a minimum of eight hours per day. Obviously, it is possible that the Claimant worked less than 125 days for Unity Mining, but a theoretical possibility is not a sufficient evidentiary basis for imposing benefits liability on a predecessor employer.

Order on Reconsideration at 4, n.1.

The Director asserts that the administrative law judge erred in finding claimant's total earnings of $13,550.00 from Unity sufficient to establish that claimant worked for Unity for at least one year. The Director urges the Board to vacate the administrative law judge's dismissal of Amigo based on this alleged error. Specifically, the Director maintains that the administrative law judge imposed the wrong burden of proof on the Director by focusing on the Director's failure to establish the exact number of days claimant worked for Unity. Instead, the Director contends that he has fulfilled his duty of investigating an operator as a potential responsible operator when he has shown that claimant worked less than one full calendar year with that operator, as that operator would not satisfy the regulatory criteria for being a responsible operator. The Director states that the district director "rationally reviewed claimant's earnings with Unity and reached the logical conclusion that they did not reflect earnings over one calendar year." Director's Brief at 9. The Director states, "Claimant's earnings with Unity clearly reflected employment of less than twelve months; therefore, the district director was under no duty to investigate that operator further." Director's Brief at 9-10. In addition, the Director notes that since claimant did not have a cumulative year of employment with Unity, the issue of whether that work was regular employment should not arise. Further, the Director maintains that the administrative law judge's finding is based on an erroneous understanding of the "125 day rule." The Director asserts that since the administrative law judge relied upon this erroneous basis for dismissing Amigo, the Board should reverse the dismissal of Amigo and remand the case for consideration of the

merits of entitlement.[3]

According to 20 C.F.R. §725.493(a)(1)(2000), the employer with which claimant had the most recent period of cumulative employment of not less than one year shall be the responsible operator. The applicable regulation states:

> From the evidence presented, the identity of the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year and, to the extent the evidence permits, the beginning and ending dates of such periods, shall be ascertained. For purposes of this section, a year of employment means a period of 1 year, or partial periods totaling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for purposes of paragraph (a) of this section.

20 C.F.R. §725.493(b)(2000).

The Board has held that in order to determine whether employment constitutes a cumulative year, the administrative law judge must make a threshold determination of the beginning and ending dates of employment with an operator. *See Sisko v. Helen Mining Co.*, 8 BLR 1-272 (1988); *see also Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348 (1985). In *Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, noted that the Act and the regulations do not address who has the burden of proof on the responsible operator issue, but stated that the

[3] We affirm the administrative law judge's dismissal of Bentley Coal Company, S & C Coal Company, and Mr. W.H. Semones, as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

regulations require the Director to identify, notify and develop evidence regarding potential responsible operators. In *Matney*, the Court stated, "Because the regulations give the Director, not [a putative responsible operator], the power to develop evidence on this issue, the ALJ reasonably could require the Director to develop the evidence more fully than was done in this case." *Matney*, 67 F.3d at 507, 19 BLR at 2-301.

The record, in the instant case, contains Social Security earnings records which indicate employment with S & C in 1978, 1979, 1980, 1981 and 1982; and employment with Unity in 1980, 1981 and 1982. The Social Security earnings records show subsequent coal mine employment in 1983 with Semones & McKinney/Bentley, in 1984 with Semones & McKinney, and in 1988 with Oceana 1. Director's Exhibit 3. Claimant's coal mine employment history, form CM-911a, lists coal mine employment with Amigo intermittently from 1949 through 1974, with Consolidation Coal Co. intermittently from 1962 through 1970,[4] with S & C, which it notes was Bentley Coal Co., from January 1974 through March 1984, and with Oceana 1 from January 1988 through June 1988. This form does not indicate any employment with Unity. Director's Exhibit 2.

The record contains employment records and reports describing claimant's employment with his various employers. A letter from the bookkeeper at S & C indicates that claimant was employed as a miner at S & C from 1974 through March 21, 1982. Director's Exhibit 7. Amigo's employment records indicate intermittent employment from 1949 through January 22, 1974. Director's Exhibit 6. A letter from Mr. W.H. Semones, as the president of Bentley, states that claimant stopped working on March 2, 1984. Director's Exhibit 8. A June 29, 1988 letter to employees of Oceana 1, states that the company closed operations on June 29, 1988. A handwritten note at the top of this letter indicates that claimant started working at Oceana 1 on January 15, 1988. Director's Exhibit 9.

Claimant submitted an affidavit addressing his coal mine employment history, signed on April 17, 1997.[5] In his affidavit, claimant states:

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[4] Consolidation Coal Company was dismissed as a potential responsible operator on August 31, 1995. Director's Exhibit 10.

[5] Although claimant testified at the hearing, his testimony did not address specific dates of employment with the various potential responsible operators. *See* Hearing Transcript at 62-72. The record also contains a form CM-913, Description of Coal Mine Work, where claimant describes the duties of his last coal mine employment. Claimant does not identify the name of his employer, but notes that his job title was "Foreman" and states that $135.00 per day was his "Highest or current rate of pay." Director's Exhibit

> My last full year of coal mine employment was in 1981. My employer was S & C Coal Company, in Wyoming County, West Virginia, and my last date of employment, for that company, was March 1982. I did have subsequent coal mine employment in 1983, 84 and 85; however, this employment was temporary and sporadic, and I was not employed for a full year during any time in 1983-1985. My wages for 1983-1985 are indicative of a very limited employment, during this time. I have not worked in any coal mine related employment after 1985.

Director's Exhibit 81.

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The record contains no evidence as to whether Unity exists, whether employment records exist to verify the specific dates of claimant's employment, or whether Unity has insurance coverage to assume liability under the Act. The Director had a duty to more clearly establish that the most recent operator is not liable, pursuant to 20 C.F.R. §725.493(a)(1)-(3)(2000), before proceeding to name the next most recent qualifying operator which meets the requirements of 20 C.F.R. §725.492(2000). *See* 20 C.F.R. §725.492(a)(4)(2000); *see generally Sisko, supra.* Accordingly, we hold that the record reflects that the Director, who has the duty to develop evidence on the responsible operator issue, failed to effectively proceed against all putative responsible operators and has not established a proper basis for relieving Unity of its potential liability pursuant to Section 725.492(2000). Moreover, we hold that it was reasonable for the administrative law judge to require the Director to more fully develop the evidence on the responsible operator issue. *See generally Matney, supra*. Consequently, we affirm the administrative law judge's dismissal of Amigo as a party to this case and the administrative law judge's finding that the Black Lung Disability Trust Fund is therefore liable for the payment of claimant's benefits.[6]

[6] The administrative law judge's calculations based on 125 days of employment and claimant's total salary were made in response to the Director's assertion, in its Motion for Reconsideration, that $13,550.00 is not indicative of a full year of regular employment. While the administrative law judge's calculation of claimant's total salary from Unity divided by 125 days is an inappropriate method for determining the extent of claimant's coal mine employment with Unity, this calculation does not detract from the administrative law judge's ultimate decision, inasmuch as the administrative law judge has provided a valid alternative basis for his findings. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Accordingly, the administrative law judge's Decision and Order Remanding Case to the District Director for Payment of Benefits and his Order Granting Director's Motion for Reconsideration and Affirming Decision and Order Remanding Case to the District Director for Payment of Benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge