



BRB No. 18-0255 BLA

LARRY A. HERRON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY,	)	DATE ISSUED: 09/09/2019
INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

James E. Fleenor, Jr. (Fleenor & Green LLP), Tuscaloosa, Alabama, for claimant.

Jeannie B. Walston and Phillip G. Piggott (Starnes Davis Florie LLP), Birmingham, Alabama, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05534) of Administrative Law Judge Scott R. Morris, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on May 20, 2015.

The administrative law judge accepted the parties' stipulation to twenty-six years of underground coal mine employment and found claimant established total respiratory disability. He therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).<sup>1</sup> He further found employer did not rebut the presumption and awarded benefits. We affirm the award as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15-41.

Employer challenges only the administrative law judge's finding it is the operator responsible for the payment of benefits, arguing the district director should bear the consequences for failing to correctly identify the operator liable for the payment of benefits. Claimant responds in support of the award of benefits and takes no position concerning the responsible operator issue. The Director, Office of Workers' Compensation Programs (the Director), asserts that the administrative law judge applied an inappropriate standard in analyzing the responsible operator issue, and urges the Board to remand the case for further consideration.

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.<sup>2</sup> 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).

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<sup>1</sup> 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); 20 C.F.R. §718.305.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 33.

## Procedural History

Claimant submitted an Employment History Form (Form CM-911a) to the district director, indicating his coal mine employers were Southern Electric Generating Company/Drummond Company (employer) from 1970 to 1997, and Alabama Fuel, where he reportedly worked at a coal processing plant from 1997 to 2006. Director's Exhibit 3. Claimant also submitted pay stubs and W-2 forms from employer and Alabama Coal Recovery. Director's Exhibit 5. Claimant's Social Security Administration (SSA) earnings record reflects employment with Southern Electric Generating Company from 1970 to 1974, employer from 1974 to 1997, Warrior Investment Company (Warrior)<sup>3</sup> from 1997 to 1999, Synthetic American Fuel from 1998 to 2001, and Alabama Coal Recovery from 2001 to 2005.<sup>4</sup> Director's Exhibits 6, 7.

A claims examiner acting as an agent of the district director issued a Notice of Claim dated June 18, 2015, informing employer that it met the criteria for a "potentially liable operator." Director's Exhibit 23. She identified the basis for the notification as claimant's allegation that his last employment as a miner was with employer from 1997 to 2006, and W-2 forms and pay stubs from employer and Alabama Coal Recovery. *Id.* She further noted claimant's SSA records had been requested but not yet received. *Id.* Employer timely responded, conceding it is a potentially liable operator, but asserting:

Drummond [(employer)] may not be the responsible Operator. Claimant retired from employer in 1997 and may have been employed after that date with another coal mine Operator(s). Moreover, it appears Claimant worked several years at least for Alabama Coal Recovery. [Employer] has not been provided Claimant's earnings statement to fairly and adequately determine Claimant's post-employment[.]

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<sup>3</sup> Claimant testified at the hearing that Warrior Investment Company was known as Warrior Hauling when he began his employment. Hearing Transcript at 25.

<sup>4</sup> Claimant's Social Security Administration (SSA) earnings record shows he was employed by Synthetic American Fuel and Alabama Coal Recovery subsequent to his work for Warrior Investment Company (Warrior). Director's Exhibit 6. When claimant discussed his coal employment history at the hearing, he named "Alabama Fuel" as the operator he worked for after he left Warrior. Hearing Transcript at 13, 19. The administrative law judge identified claimant's last employer as "Alabama Fuel," while employer referred to "Alabama Coal/Fuel" or "Alabama Fuel." Decision and Order at 8; Employer's Brief at 6, 7, 15, 27; Hearing Transcript at 26-27, 29-30, 32. For the sake of clarity, we will refer to claimant's employment after Warrior as being with Alabama Fuel.

Director's Exhibit 24. Employer also stated it hired claimant on September 22, 1970 and laid him off on January 31, 1997.

On October 28, 2015, the claims examiner issued a Schedule for the Submission of Additional Evidence (SSAE), designating employer as the responsible operator. She stated employer met the potentially liable operator criteria set forth at 20 C.F.R. §725.494(a)-(e) and was "the operator that most recently employed the miner according to a company statement and the miner's [SSA] earnings record." Director's Exhibit 29. Employer responded to the SSAE, checking boxes on a form to indicate it contested its designation as the responsible operator and claimant's entitlement to benefits. Director's Exhibit 30.

On February 4, 2016, the claims examiner issued a Proposed Decision and Order awarding benefits and naming employer as the responsible operator.<sup>5</sup> Director's Exhibit 35. By letter dated February 18, 2016, employer stated, without elaboration, it disagreed with the Proposed Decision and Order and requested a hearing. Director's Exhibit 36. The case was subsequently transferred to the Office of Administrative Law Judges (OALJ) on April 7, 2016. Director's Exhibits 45, 46.

Employer deposed claimant on May 11, 2016. In a subsequent Motion for Summary Decision dated March 8, 2017, employer alleged that dismissal or remand was appropriate in light of claimant's deposition testimony establishing Warrior is the operator that most recently employed him for at least one year. The administrative law judge deferred a ruling until all parties had an opportunity to brief the issue. Consolidated Order dated April 11, 2017 at 1.

At the hearing on April 27, 2017, employer indicated it contested all aspects of the Proposed Decision and Order, including its designation as the responsible operator. Hearing Transcript at 5. When asked if anyone from the Department of Labor (DOL) contacted him regarding his employment with Ronnie Bryant, Warrior, or Alabama Fuel, claimant responded "no" and "not that I know of." *Id.* at 32-33. Claimant also testified that subsequent to working for employer, he worked for Ronnie Bryant at Warrior "for a few months" and "probably a little over a year." *Id.* at 12, 33-34.

At the end of the hearing, the administrative law judge instructed the parties to address the responsible operator issue in closing briefs, including whether remand to the district director was necessary. Hearing Transcript at 34-35. Employer asserted remand was not an option based on DOL's position that once a case is transferred to the OALJ for

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<sup>5</sup> We agree with employer that the claims examiner erroneously stated in the Proposed Decision and Order that employer failed to timely respond to the Notice of Claim. Director's Exhibit 35.

hearing, “[n]o remand for further development of the responsible operator issue is permissible.” Employer’s Post-Hearing Brief at 18, *quoting* 65 Fed.Reg. 79,920, 80,008 (Dec. 20, 2000). Employer therefore requested dismissal as the responsible operator because claimant had subsequent coal mine employment of at least one year with Warrior and Alabama Fuel. *Id.* at 26. Claimant took no position on whether employer was the properly designated responsible operator, but contended liability should be transferred to the Trust Fund if the administrative law judge dismissed employer. Claimant’s Post-Hearing Brief at 23-24. The Director did not appear at the hearing or file a post-hearing brief.<sup>6</sup>

### **The Administrative Law Judge’s Decision and Order**

The administrative law judge relied on claimant’s deposition and hearing testimony to find his work at Alabama Fuel, which involved crushing coal and mixing it with asphalt to make synthetic fuel, was not coal mine employment. Decision and Order at 8-10, *citing* Hearing Transcript at 18-19, Exhibit 1 to Motion for Summary Decision at 22-24. Based on claimant’s testimony and SSA earnings record, the administrative law judge further determined that subsequent to his tenure with employer, claimant worked for Warrior as a coal miner for 14.82 months between 1997 and 1999.<sup>7</sup> *Id.* at 12-13. Although the

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<sup>6</sup> On March 27, 2017 and April 27, 2019, counsel for the Director, Office of Workers’ Compensation Programs (the Director), filed a combined Notice of Appearance and Notice of Intent to File Brief. Counsel stated she would not attend the hearing on behalf of the Director, but intended to file a brief on the responsible operator issue following the hearing. There is no indication in the record that counsel filed a post-hearing brief on the Director’s behalf.

<sup>7</sup> The administrative law judge found claimant’s deposition and hearing testimony establish claimant’s work at Drummond ended in late January 1997 and began at Warrior approximately six months later. Decision and Order at 13; Hearing Transcript at 28; Exhibit 1 to Employer’s Motion for Summary Decision at 20-25. He concluded claimant worked for five months in 1997 for Warrior. Decision and Order at 13; Employer’s Exhibit 11 at 13. Relying on claimant’s SSA earnings record, he divided the 1997 earnings of \$16,275.04 by five months, to find claimant earned \$3,255.00 per month. Decision and Order at 13. Applying a presumed monthly salary of \$3,255.00, he found that claimant’s earnings of \$14,600.51 in 1998 constituted 4.48 months of work ( $\$14,600.51 / \$3,255.00 = 4.48$ ), and his earnings of \$17,384.99 in 1999 constituted 5.34 months of work ( $\$17,384.99 / \$3,255.00 = 5.34$ ). *Id.* Thus, the administrative law judge found claimant worked for Warrior for 14.82 months. ( $5 + 4.48 + 5.34 = 14.82$ ). *Id.* The Director does not specifically contest that claimant’s testimony, in conjunction with his SSA earnings records, could support a finding of greater than one year of coal mine employment with

administrative law judge found employer was not the most recent operator to employ claimant for one year, he concluded the district director properly identified employer as the responsible operator because employer did not demonstrate that Warrior is financially capable of paying benefits. *Id.* at 13-14.

### **Arguments on Appeal**

Employer alleges that because the district director did not identify all potentially liable operators, the administrative law judge erred by essentially ratifying the district director's flawed determination that employer is the operator that most recently employed claimant for at least one year. Employer argues the district director ignored evidence indicating claimant worked as a coal miner after he was laid-off by employer, thereby missing the opportunity to inquire more deeply into the identity of all potentially liable operators.<sup>8</sup> Employer further contends the district director did not comply with the regulation requiring an explanation as to why employer was designated the responsible operator when claimant had subsequent coal mine employment with Warrior.<sup>9</sup> Employer's Brief at 14-17. Based on this omission, employer asserts any later employer is presumed financially capable of assuming liability for the claim. Employer therefore argues the administrative law judge erred in placing the burden on employer to prove Warrior is insured or otherwise solvent. Finally, employer contends due process mandates that it be dismissed as the responsible operator and liability transferred to the Trust Fund. *Id.* at 17-27.

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Warrior. *See Skrack*, 6 BLR at 1-711. As discussed below, however, the Director correctly argues the administrative law judge erred in relying on claimant's testimony to render this finding without first determining whether employer established extraordinary circumstances for its admission.

<sup>8</sup> Employer cites claimant's application for benefits, employment history form, SSA earnings record, W-2 forms, pay stubs, and employer's response to the Notice of Claim, as containing references to coal mine employment with Alabama Fuel at a coal processing plant and with Alabama Coal Recovery subsequent to claimant's work for employer. Employer's Brief at 14-17; Director's Exhibits 3, 5-7.

<sup>9</sup> Employer also mentions claimant's work with Alabama Fuel but does not challenge the administrative law judge's finding that such work was not coal mine employment. Employer's Brief at 14. We therefore affirm this finding. *See Skrack*, 6 BLR at 1-711. Based on the administrative law judge's determination, Alabama Fuel cannot be a potentially liable operator. 20 C.F.R. §§725.491(a), 725.493(a)(1), 725.494(a).

The Director agrees with employer that due to the district director's failure to provide a statement regarding Warrior's insured status as required by 20 C.F.R. §725.495(d), "employer was not required to produce evidence concerning Warrior's financial situation." Director's Brief at 4. The Director further concurs with employer that Warrior is presumed to be financially capable of paying benefits, in the absence of a statement from the district director. *Id.* The Director also asserts, however, that the administrative law judge erred in finding Warrior employed claimant for at least one year, as he based that finding solely on claimant's testimony at deposition which, absent a showing of extraordinary circumstances, is inadmissible with respect to the responsible operator issue. *Id.* Although the Director maintains employer cannot make this showing, she nevertheless urges the Board to remand this case for the administrative law judge to render a determination on the issue. *Id.* at 5.

### **Analysis**

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. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the miner for a cumulative period of not less than one year. 20 C.F.R. §725.494(c). The Director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once a potentially liable operator has been identified by the Director, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another financially-capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

We reject employer's argument that the district director's failure to name Warrior and make a statement concerning its solvency constitutes a due process violation mandating transfer of liability to the Trust Fund. The regulations do not require the Director or the district director to correctly identify all potentially liable operators before designating a responsible operator. Rather, the Director bears only the burden to prove the designated responsible operator is a potentially liable operator.<sup>10</sup> 20 C.F.R. §725.495(b).

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<sup>10</sup> 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

Accordingly, once the district director identified employer as a potentially liable operator<sup>11</sup> and the designated responsible operator, the burden shifted to employer to establish that an operator employed claimant as a miner for at least one year subsequent to his tenure with employer. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1), 725.495(c)(2).

Although employer alleged in its response to the Notice of Claim that claimant may have had at least one year of coal mine employment with a subsequent operator, it did not develop any documentary evidence or provide notice of any liability witnesses while the claim was before the district director.<sup>12</sup> 20 C.F.R. §§725.408(b), 725.414(c), 725.456(b)(3). Failure to do so rendered any documentary evidence and witness testimony pertaining to operator liability, beyond that before the district director, inadmissible before the administrative law judge unless employer established “extraordinary circumstances.” 20 C.F.R. §§725.414(c), (d), 725.456(b)(1). Consequently, as discussed in greater detail below, claimant’s testimony could not enable employer to avoid liability, absent extraordinary circumstances. We therefore decline to dismiss employer as the responsible operator and transfer liability to the Trust Fund.<sup>13</sup>

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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).

<sup>11</sup> Employer has not contested its identification as a potentially liable operator at any stage of the proceedings. *See* Employer’s Brief at 14-17; Director’s Exhibit 24.

<sup>12</sup> In its brief on appeal, employer describes telephone and e-mail communications with the district director concerning its identification as the responsible operator but does not cite to any record evidence of these communications. Employer’s Brief at 27. Its Motion for Summary Decision before the administrative law judge is the first indication it was developing evidence on the responsible operator issue. Employer attached as Exhibits 1 and 2 claimant’s deposition testimony regarding employment at Warrior, and the results of its search of business records filed with the Alabama Secretary of State.

<sup>13</sup> The case cited by employer in support of its due process argument, *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197 (3d Cir. 1998), does not govern the resolution of the responsible operator issue. *Venicassa* was decided by the United States Court of Appeals for the Third Circuit, which does not have jurisdiction in this case. *See Shupe*, 12 BLR at 1-202; Hearing Transcript at 33. In addition, *Venicassa* is distinguishable, as the court held that the due process rights of *the miner* were violated when an award of benefits was vacated and the case was remanded to the district director for designation of the proper responsible operator. *Venicassa* 137 F.3d at 204. Furthermore, *Venicassa* was issued before the Department of Labor amended the regulations to place obligations on both the

We agree with employer and the Director, however, that the administrative law judge committed errors in finding employer is the responsible operator. In cases in which the designated responsible operator did not most recently employ the miner, the district director must explain the designation. 20 C.F.R. §725.495(d). If the operator that most recently employed the miner is financially incapable of assuming liability for the payment of benefits, the district director must submit a statement to that effect, which is prima facie evidence “the most recent employer is not financially capable of assuming its liability for a claim.” *Id.* “In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming liability for a claim.” *Id.* The failure of the district director to issue the required statement in the SSAE declaring that a subsequent operator, Warrior, is uninsured, triggered the presumption that Warrior is capable of assuming liability for the payment of benefits. *Id.* The administrative law judge therefore erred in placing the burden on employer to establish Warrior’s financial solvency.<sup>14</sup> *Id.*; Decision and Order at 13.

The Director also observes correctly that because no party identified claimant as a potential liability witness while his claim was before the district director, claimant’s deposition and hearing testimony are not admissible unless employer establishes extraordinary circumstances excusing its failure to timely provide notice. 20 C.F.R. §725.414(c). The administrative law judge did not determine, however, whether employer satisfied its burden before relying on claimant’s testimony to find employer established

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Director and the designated responsible operator to investigate the miner’s employment history, and to require that all evidence relevant to operator liability be submitted before the district director.

<sup>14</sup> We decline to address employer’s assertion that the Director must bear the consequences of errors made in designating the responsible operator because she has better tools for obtaining operator information, i.e., subpoena power. Employer’s Brief at 20-21. Our decision to vacate the administrative law judge’s finding that employer had the burden to establish Warrior’s ability to assume liability for the payment of benefits renders employer’s argument moot. Moreover, as employer demonstrated, information concerning Warrior is available in public records held by the Kentucky Secretary of State, and records of claimant’s coal mine employment were available to employer when this case was before the district director. Exhibit 2 to Motion for Summary Decision; Employer’s Brief at 27; Director’s Exhibits 3, 5-7, 24.

claimant worked for Warrior for at least one year.<sup>15</sup> 20 C.F.R. §725.495(c)(2); Decision and Order at 10, 12-13.

In light of the foregoing, we vacate the administrative law judge's findings employer failed to prove Warrior is able to pay benefits, but met its burden to prove Warrior employed claimant for at least one year. 20 C.F.R. §725.495(c)(1), (2); Decision and Order at 12-14. On remand, the regulations require that the administrative law judge presume Warrior is capable of assuming liability. 20 C.F.R. §725.495(d). He must then reconsider whether employer has satisfied its burden to prove Warrior employed claimant for at least one year. 20 C.F.R. §725.495(c)(2). In doing so, he cannot consider claimant's deposition and hearing testimony unless he determines employer has established extraordinary circumstances to excuse its failure to notify the district director it would rely on this testimony to challenge its designation as responsible operator. 20 C.F.R. §725.414(c). The administrative law judge must also weigh any other relevant evidence that is not subject to the requirement that employer establish extraordinary circumstances for its consideration.<sup>16</sup> If he determines employer has proven it is not the potentially liable operator that most recently employed claimant for at least one year, he must dismiss employer as the responsible operator. 20 C.F.R. §725.495(c)(2). He must then transfer liability for the payment of benefits to the Trust Fund. 20 C.F.R. §725.407(d).

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<sup>15</sup> The administrative law judge only addressed whether employer established extraordinary circumstances for the admission of *documentary* evidence relevant to its liability after the case was transferred to the Office of Administrative Law Judges. Decision and Order at 14 n.22, *citing* 20 C.F.R. §725.456(b). He found employer made no assertion of extraordinary circumstances to excuse the untimely development of documentary evidence. *Id.*

<sup>16</sup> As evidence exists independent of claimant's testimony from which the administrative law judge could render a finding on the length of coal mine employment with Warrior, we conclude the Director has not explained her assertion that the administrative law judge "should" find Drummond liable for benefits if extraordinary circumstances do not exist for admission of claimant's testimony. Director's Brief at 5.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge