

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 13-3563**

ARKANSAS COALS, INC. and OLD REPUBLIC INSURANCE CO.

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

ALBERT LAWSON

Respondents.

On Petition for Review of a Final Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
GARY K. STEARMAN
Counsel for Appellate Litigation
JONATHAN P. ROLFE
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director,
Office of Workers'
Compensation Programs

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	2
STATEMENT OF THE FACTS	5
A. Statutory and regulatory background	5
1. Designation of a responsible operator	5
2. Subsequent claims	10
B. Procedural history of this case	13
1. Lawson’s first claim	13
2. Lawson’s current claim	15
SUMMARY OF THE ARGUMENT	20
ARGUMENT	21
A. Standard of review	21
B. The naming of Arkansas Coals as responsible operator is consistent with DOL regulations and supported by substantial evidence	22
C. Section 725.309(d) and collateral estoppel permit the relitigation of the responsible operator designation in Lawson’s subsequent claim.	24

1. Under Section 725.309(d)(4), contested findings in a prior claim are non-binding in a subsequent claim once the claimant establishes a previously-denied element of entitlement.....	25
2. Collateral estoppel does not bar consideration of the responsible operator in this subsequent claim.	28
D. The Director was not required to modify the responsible operator designation in the prior denied claim.	32
CONCLUSION.....	36
CERTIFICATE OF COMPLIANCE.....	37
CERTIFICATE OF SERVICE.....	38

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Arch of Kentucky v. Director, OWCP</i> , 556 F.3d 472 (6th Cir. 2009).....	23
<i>Armstrong v. City of Melvindale</i> , 432 F.3d 695 (6th Cir.2006).....	23
<i>Banner v. U.S.</i> , 238 F.3d 1348 (Fed. Cir. 2001).....	30
<i>Bies v. Bagley</i> , 535 F.3d 520 (6th Cir. 2008).....	28
<i>Buck Creek Coal Co. v. Sexton</i> , 706 F.3d 756 (6th Cir. 2013).....	11, 27
<i>Buttermore v. Elec. Boat Corp.</i> , 46 BRBS 41, 2012 WL 6206509 (Ben.Rev.Bd. 2012).....	32
<i>Caney Creek Coal Co. v. Satterfield</i> , 150 F.3d 568 (6th Cir. 1998).....	21, 27
<i>Caudill Constr. Co. v. Abner</i> , 878 F.2d 179 (6th Cir. 1989).....	32
<i>Consolidation Coal Co. v. Worrell</i> , 27 F.3d 227 (6th Cir. 1994).....	32
<i>Cumberland River Coal Co. v. Banks</i> , 690 F.3d 477 (6th Cir. 2012).....	11, 21, 27
<i>Director, OWCP v. Oglebay Norton Co.</i> , 877 F.2d 1300 (6th Cir. 1989).....	5, 6
<i>Director, OWCP v. Trace Fork Coal Co.</i> , 67 F.3d 503 (4th Cir. 1995).....	7, 10

<i>Gen. Elec. Med. Sys. Europe v. Prometheus Health</i> , 394 Fed. Appx. 280 (6th Cir. 2010)	29
<i>Hughes v. Clinchfield Coal Co.</i> , 21 BLR 1-134, 1-137 (1999) (en banc).....	28
<i>Jonida Trucking, Inc. v. Hunt</i> , 124 F.3d 739 (6th Cir. 1997).....	29, 31
<i>Kentland Elkhorn Coal Corp. v. Hall</i> , 287 F.3d 555 (6th Cir. 2002).....	7, 32
<i>Lester v. Mack Coal</i> , 21 Black Lung Rep. (MB) 1-126, 1999 WL 297212 (Ben. Rev. Bd.1999) (en banc)	24
<i>Lisa Lee Mines v. Director, OWCP</i> , 86 F.3d 1358 (4th Cir. 1996) (en banc).....	26
<i>Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation</i> , 975 F.2d 683 (10th Cir. 1992).....	30
<i>M.R. v. Karst Robbins Coal Co.</i> , 2009 WL 3794427 (Ben. Rev. Bd. (Oct. 21, 2009) (unpub.).....	28
<i>Nat’l Satellite Sports, Inc. v. Eliadis, Inc.</i> , 253 F.3d 900 (6th Cir. 2001).....	27
<i>O’Keffe v. Aeroject-General Shipyards, Inc.</i> , 404 U.S. 254 (1971)	32
<i>Peabody Coal Co. v. Spese</i> , 117 F.3d 1001 (7th Cir. 1997) (en banc).....	26
<i>Sellards v. Director, OWCP</i> , 17 BLR 1-77, 1993 WL 42264 (Ben.Rev.Bd. 1993)	29
<i>Sharondale Corp. v. Ross</i> , 42 F.3d 993 (6th Cir. 1994).....	21

<i>Standefer v. United States</i> , 447 U.S. 10 (1980)	30
<i>United States v. Roberts</i> , No. 01-5230, 2003 WL 343237 (6th Cir. Feb. 12, 2003) (unpub.).....	30
<i>United States v. Salemo</i> , 81 F.3d 1453 (8th Cir. 1988).....	30
<i>USX Corp. v. Director, OWCP</i> , 978 F.2d 656 (11th Cir. 1992).....	29, 34

Statutes:

Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010).....	1
Black Lung Benefits Act, 30 U.S.C. §§ 901-944	1
Section 401(a), 30 U.S.C. § 901(a)	5
Section 411, 30 U.S.C. § 921	1
Section 411(a), 30 U.S.C. § 921(a)	1
Section 411(b)(3), 30 U.S.C. § 921(b)(3).....	1
Section 411(c)(1), 30 U.S.C. § 921(c).....	1, 2
Section 422(a), 30 U.S.C. § 932(a)	1, 2, 29, 32
Section 422(a), 30 U.S.C. § 932(c)	5
Section 422(h), 30 U.S.C. § 932(h).....	6
Section 423(d)(1), 30 U.S.C. § 933(d)(1).....	16
Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 901 <i>et seq.</i>	
Section 21, 33 U.S.C. § 921	1, 29
Section 22, 33 U.S.C. § 922	32

Regulations

Title 20, Code of Federal Regulations

20 C.F.R. § 725.309.....	33
20 C.F.R. § 725.309(d).....	10, 11, 24, 25, 29
20 C.F.R. § 725.309(d)(2)	11
20 C.F.R. § 725.309(d)(3)	11
20 C.F.R. § 725.309(d)(4)	11, 25, 26, 27, 33
20 C.F.R. § 725.401.....	8
20 C.F.R. § 725.407(a)	8
20 C.F.R. § 725.407(b).....	7, 8
20 C.F.R. § 725.408.....	8
20 C.F.R. § 725.410(a)(3)	8, 31
20 C.F.R. § 725.412.....	9
20 C.F.R. § 725.414(b).....	9
20 C.F.R. § 725.418(d).....	9
20 C.F.R. § 725.419(a)	9
20 C.F.R. § 725.455(a)	9
20 C.F.R. § 725.463.....	4, 11, 12, 25
20 C.F.R. § 725.491(b).....	24
20 C.F.R. § 725.492.....	7, 24
20 C.F.R. § 725.494.....	6
20 C.F.R. § 725.494(c)	6
20 C.F.R. § 725.494(e)	6
20 C.F.R. § 725.494(e)(1)-(3)	7
20 C.F.R. § 725.495(a)	7
20 C.F.R. § 725.495(a)(1)	22
20 C.F.R. § 725.495(a)(3)	7
20 C.F.R. § 725.495(b).....	9
20 C.F.R. § 725.495(c)(2)	10, 18, 22, 24
20 C.F.R. § 725.495(d).....	9, 10, 22
20 C.F.R. § 726.203(a)	16
20 C.F.R. § 725.609(b).....	16
20 C.F.R. § 802.205(a)	1, 29

Other

62 Fed. Reg. 3353-3356 (Jan. 2, 1997).....6, 7, 12, 25, 26

64 Fed. Reg. 54985 (Oct. 8, 1999)12, 26

64 Fed. Reg. 54999 (Oct. 8, 1999)10

65 Fed. Reg. 79973 (Dec. 20, 2000).....12, 26

Black’s Law Dictionary (7th ed. 2009).....30

Restatement (Second) of Judgments, § 27 (1982).....26

S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm.
On Educ. And Labor, 96 Cong., Black Lung Benefits Reform Act and Black
Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979).....7

This appeal involves an award of benefits granted to Albert Lawson under the Black Lung Benefits Act (“BLBA” or “the Act”), 30 U.S.C. §§ 901-44, as amended by the Affordable Care Act (ACA), Pub. L. No. 111-148, § 1556 (2010). Petitioners Arkansas Coals and its insurance carrier, Old Republic Insurance Co. (hereafter, collectively, “Arkansas Coals”), have petitioned this Court solely to review the ruling below that it is the party responsible for the payment of Lawson’s BLBA benefits. The Director, Office of Workers’ Compensation Programs, responds in support of the designation.¹

STATEMENT OF JURISDICTION

The jurisdictional prerequisites of Section 21(c) of the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. § 921(c), as incorporated by Section 422(a) of BLBA, 30 U.S.C. § 932(a), have been met. On June 28, 2011, the administrative law judge issued a decision awarding benefits. Pet. Apx. 18. Arkansas Coals appealed the decision to the Benefits Review Board on July 12, 2011, within the 30 days prescribed by the Act. 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a); *see* 20 C.F.R. § 802.205(a). Pet. Apx. 9. The Board had jurisdiction to review the ALJ decision pursuant to Section 21(b)(3) of the LHWCA, 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

¹ No party is challenging Lawson’s underlying entitlement to BLBA benefits, which he will continue to receive regardless of the outcome of this appeal.

On July 31, 2012, the Board affirmed the decision. Pet. Apx. 9. It declined to reconsider its decision on March 7, 2013, constituting a final decision within the meaning of 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). Pet. Apx. 8. Arkansas Coals filed a petition for review of the Board's final decision on May 3, 2013, within the 60-day period provided under Section 21(c) of the LHWCA, 33 U.S.C. § 921(c). The claimant in this case, Albert Lawson, last worked in the State of Kentucky and the injury, within the meaning of Section 21(c), occurred there. This Court thus has jurisdiction over the petition.

STATEMENT OF THE ISSUES

1. Congress intended for individual coal mine operators rather than the Black Lung Disability Trust Fund to bear liability for claims arising out of such operators' mines to the maximum extent feasible.² It further authorized the Department of Labor to issue standards for determining when pneumoconiosis arose out of employment in a particular coal mine and to apportion liability among operators. The Department's regulations provide, *inter alia*, that the coal mine

² The Black Lung Disability Trust Fund was established in 1977 to transfer responsibility for the payment of benefits from the Federal government to the coal industry. 20 C.F.R. § 725.490. It is financed by an excise tax on the sale of coal. 26 U.S.C. § 9501.

operator that has most recently employed the miner for one year and has the financial wherewithal to pay benefits will be liable for an awarded claim.

The DOL determined here that the coal company that most recently employed Lawson for a year did not have the financial capability to pay Lawson's benefits. DOL then named, pursuant to its regulations, Arkansas Coals as the responsible party because it was the second most recent and financially-capable employer. Under DOL's regulations, the burden then shifted to Arkansas Coals to demonstrate, as relevant here, that the more recent employer or its corporate executives were financially capable of paying benefits. The ALJ determined that Arkansas Coals's evidence fell far short of meeting its burden, and the Board affirmed that finding as supported by substantial evidence.

The first issue is whether substantial evidence supports the ALJ's determination that Arkansas Coals failed to demonstrate that a later employer could pay Lawson's benefits where the only evidence it presented on the issue was a former executive's testimony that was marred by faulty memory and only "obliquely" pointed to an unknown and unidentified company.

2. DOL's subsequent claim regulation permits full consideration of a claim filed more than one year after the denial of a prior claim where the claimant establishes a previously-denied element of entitlement with newly-developed evidence. Once established, the regulation provides that "no findings made in

connection with the prior claim, except those based on a party's failure to contest an issue (see 725.463) [or stipulated findings] shall be binding on any party in the adjudication of the subsequent claim." DOL explained in the rulemaking proceedings that this provision was necessary to protect the prevailing party in the denied claim from being permanently saddled with adverse findings that could not be contested when a claimant chose not to pursue a denied claim.

In Lawson's prior, denied claim, the designation of Arkansas Coals as the responsible operator was a contested issue before the ALJ, and DOL did not stipulate that the Trust Fund should be liable for the payment of benefits.

The second issue is whether the ALJ correctly permitted the relitigation of the responsible operator issue in Lawson's subsequent claim as DOL's regulations require.

3. Collateral estoppel prevents relitigation of an issue in a subsequent proceeding when, *inter alia*, a determination of the issue was necessary to the outcome of a prior proceeding and the party against whom estoppel is sought had a full and fair opportunity to litigate it in the prior proceeding.

The third issue has two sub-parts: first, whether the designation of a liable party is necessary to the outcome of a claim when the claim is denied and there is no liability; and second, whether the party so designated can or has any incentive to appeal when the claim is denied.

4. Under the BLBA, a party may initiate a modification proceeding to correct a mistake in a determination of fact. As such, it provides some relief from finality principles.

The fourth issue is whether the Director was required to use modification to correct the Trust Fund's designation as the liable party despite the denial of Lawson's claim when neither collateral estoppel nor DOL's regulations preclude it from relitigating the issue in a subsequent claim.

STATEMENT OF THE FACTS

The issues presented in this case are predominantly legal and procedural. Thus, we will summarize the relevant statutory and regulatory provisions, as well as the procedural history of the case.

A. Statutory and Regulatory Background

1. Designation of a responsible operator

The BLBA provides benefits to miners and their survivors for total disability or death arising from coal mine employment. 30 U.S.C. §§ 901(a), 922, 932(c). A coal mine operator is liable for benefits if the miner's disability or death arose "at least in part" out of coal mine employment with the operator after December 31, 1969. *Id.* § 932(c). It was Congress's intent to "ensure that individual coal operators rather than the trust fund bear liability for claims arising out of such operators' mines to the maximum extent feasible." *Director, OWCP v. Oglebay*

Norton Co., 877 F.2d 1300, 1304 (6th Cir. 1989) (quoting S.Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. On Educ. And Labor, 96 Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979)). Thus, under Section 422(h) of the Act, Congress provided the Secretary of Labor with authority to issue standards for determining when pneumoconiosis arose out of employment in a particular coal mine and to apportion liability among operators. 30 U.S.C. § 932(h).

The Department has determined that an employer is a “potentially liable operator” if, *inter alia*, “the miner was employed by the operator . . . for a cumulative period of not less than one year[,]” and “the operator is capable of assuming its liability for the payment of continuing benefits.” 20 C.F.R. § 725.494(c), (e).³ An operator is capable of assuming payment if it meets any of

³ The other conditions necessary to trigger an employer’s potential liability -- that the miner’s disability arose at least in part out of employment with it; that it operated a mine after June 30, 1973; and that it employed the miner after December 31, 1969 -- are not relevant to this case. *See* 20 C.F.R. § 725.494.

The Department created the class of “potentially liable operators” in 2000 as part of its revisions to the responsible operator regulations. DOL explained that the potentially liable operator class was intended “to deal with difficulties that the Department has encountered in effectuating Congress’s mandate that liability for black lung benefits be borne by individual coal mine operators to the maximum extent feasible.” 62 Fed. Reg. 3355 (Jan. 2, 1997) (citation omitted). The regulatory changes afford the district director significantly more flexibility in notifying potentially liable operators, but also impose greater responsibility: The (cont’d . . .)

three conditions: 1) it has obtained an insurance policy that covers the claim; 2) it qualified as a self-insurer and posted sufficient security to secure the payments of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits in the event the claim is awarded. 20 C.F.R. § 725.494(e)(1)-(3).

The Department has further determined that the operator meeting these requirements that most recently employed the miner shall generally be responsible for the payment of benefits. 20 C.F.R. § 725.495(a); *see generally Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 561-562 (6th Cir. 2002) (applying 1999 version of DOL responsible operator regulations). If the miner's most recent employer does not meet these criteria, and no successor operator is liable,⁴ the next-most-recent employer with whom the miner was employed for a cumulative period of at least one year is the "responsible operator," unless that operator also fails to meet the other regulatory criteria. *Id.* § 725.495(a)(3); *see generally Director, OWCP v. Trace Fork Coal Co.*, 67 F.3d 503, 507 (4th Cir. 1995). Thus,

(. . . cont'd)

revised regulations "do not allow a district director to name any additional operators after a case has been referred to the Office of Administrative Law Judges, in the absence of fraudulent concealment. . . . In order to offset this risk, the regulations also require potentially liable operators to produce any exculpatory documentary evidence while the case is still pending before the district director." 62 Fed. Reg. 3355-3356 (Jan. 2, 1997).

⁴ Generally speaking, a successor operator is a person who acquires from a prior operator a mine, substantially all its assets, or a coal mining business. 20 C.F.R. § 725.492.

if the miner's most recent employer is not capable of paying benefits, liability shifts to the second most recent operator (and, if that operator cannot pay benefits, to the third most recent operator, and so on). In the event that "there is no operator who is liable for the payment of [BLBA] benefits," the Black Lung Disability Trust Fund, which the Director represents, assumes liability on the claim. 26 U.S.C. § 9501(d) (1) (B).

The designation of a responsible operator and the development of supporting evidence take part within the context of the overall claims development process. It begins with proceedings before a district director, who "shall take such action as is necessary to develop, process, and make determinations with respect to the claim." 20 C.F.R. § 725.401. Upon receipt of the miner's employment history, the district director investigates whether one or more operators is potentially "liable for the payment of benefits as a responsible operator" and notifies them of the claim and their potential liability. *Id.* § 725.407(a), (b).

Each potentially liable operator then has 30 days to accept its designation or to contest it by specifically denying a requisite condition for holding it liable (such as it did not employ the miner after December 31, 1969, or is not capable of assuming liability). *Id.* § 725.408. The district director then reviews this information and designates and notifies the responsible operator liable for the payment of benefits. *Id.* § 725.410(a)(3). The designated responsible operator

then has thirty days to specifically agree or disagree with its designation. *Id.* § 725.412.

Further evidence may then be developed. *Id.* § 725.414(b). This includes both medical evidence relating to the claimant's entitlement to benefits and liability evidence relating to the proper responsible operator. The district director ultimately reviews the additional submitted evidence and issues a "proposed decision and order," which not only expresses his views on claimant's entitlement to benefits but also represents "the district director's final designation of the responsible operator liable for the payment of benefits." 20 C.F.R. § 725.418(d). Any party dissatisfied with a district director's proposed decision may request a *de novo* hearing before an administrative law judge. 20 C.F.R. §§ 725.419(a), 725.455(a).

At the hearing, the Director bears the initial burden of proving that the operator designated by the district director as liable for the claim is a "potentially liable operator," *i.e.*, employed the miner for a full year and is financially capable of paying benefits. 20 C.F.R. § 725.495(b). If the district director has designated a responsible operator other than the employer who last employed the claimant as a miner, the district director must include a statement explaining the reasons for the designation. *Id.*, § 725.495(d). If one of the reasons given is that a later operator is not capable of assuming its liability for the payment of benefits, the district

director must state that he has searched the Office of Workers' Compensation Program insurance files and that there is no record of insurance coverage for that employer that covers the claim, or of authorization for that employer to self-insure. *Id.* § 725.495(d). Such a statement is deemed *prima facie* evidence that the more recent employer is not financially capable of assuming its liability. *Id.* The designated responsible operator then has the burden of proving that the more recent employer has secured the payment of benefits or possesses sufficient assets to secure the payment of benefits. 20 C.F.R. § 725.495(c)(2).⁵

2. Subsequent claims

A subsequent claim is one filed more than one year after the effective date of a final order denying the claimant's previously-filed claim. 20 CFR § 725.309(d). Consideration of a subsequent claim involves two steps. First, to ensure that the previous denial's finality is respected, "the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim

⁵ The Department of Labor promulgated 20 C.F.R. § 725.495 in 2000, in part as a response to the Fourth Circuit's decision in *Director, OWCP v. Trace Fork Coal Co.*, 67 F.3d 503 (4th Cir. 1995). In the preamble to the revised regulation, the Department explained that in *Trace Fork*, the court explicitly observed that "[t]he Black Lung Benefits Act and its accompanying regulations do not specifically address who has the burden of proving the responsible operator issue." 67 F.3d at 507. In the absence of specific guidance, the court concluded that the Secretary bore this burden. With the promulgation of the revised regulation, the Department simply filled the "void noted by the court." 64 Fed. Reg. 54999 (Oct. 8, 1999).

establishes at least one applicable element of entitlement,” namely, “an element of entitlement upon which the prior denial was based.” 20 C.F.R. § 725.309(d)(2),(3)); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012) (adopting Director’s interpretation of 725.309(d)); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759-60 (6th Cir. 2013) (rejecting argument that the subsequent claim regulation violates res judicata). If the claimant fails to establish a previously-denied element with new evidence, the subsequent claim will be denied. 20 C.F.R. § 725.309(d).

If the new evidence establishes a condition of entitlement previously decided against the claimant, the subsequent claim is allowed and all of the evidence, old and new, is considered to determine whether the claimant is entitled to benefits. In doing so, “no findings made in connection with the prior claim, except those based on a party’s failure to contest an issue (see 725.463), shall be binding on any party in the adjudication of the subsequent claim.” 20 C.F.R. § 725.309(d)(4). In addition, a party will be bound in the subsequent claim to findings that it stipulated to in the initial claim. *Id.* Aside from these exceptions, the findings of the previous claim are effectively reset.

In the rulemaking proceedings adopting the subsequent claim regulation, DOL repeatedly explained that this provision was necessary to protect a prevailing party in the initial claim from being saddled with findings that it could not contest

due to the claimant's failure to pursue his claim:

Paragraph (d)(4) recognizes that, once a change in one of the applicable conditions has been established, the relitigation of issues previously decided is not precluded. The only exceptions are those issues to which the parties stipulated and those issues which were not contested pursuant to § 725.463. For example, assume that in a prior adjudication an administrative law judge found that the claimant was a miner but that he did not suffer from pneumoconiosis. The ALJ accordingly denied benefits, and the claimant did not appeal. In a subsequent claim, the claimant establishes that he now suffers from pneumoconiosis, and argues that the operator is precluded from relitigating his status as a miner. The claimant is incorrect. Because the operator was not aggrieved by the denial of benefits, it could not appeal the ALJ's decision to the Benefits Review Board to seek reversal of the finding that the claimant was a miner. The operator thus did not have a full and fair opportunity to litigate the claimant's status, and may not be bound by the prior finding. For the same reason, once a claimant establishes a change in an applicable condition of entitlement, such as the extent of disability, he is not precluded from relitigating any other condition of entitlement, such as the existence of pneumoconiosis.

62 Fed. Reg. 3353 (January 22, 1997); *see also* 64 Fed. Reg. 54985 (October 8, 1999) (rejecting comment that miners should not have to relitigate favorable findings in prior denied claim, explaining that “[j]ust as the rules of issue preclusion would not allow a coal mine operator to rely on the miner’s previous inability to prove one element of entitlement when the miner’s condition with respect to another element has changed, those rules also prohibit a miner from relying on a previous finding which the opposing party did not have an opportunity to fully litigate. Where a miner’s claim was denied, and the miner did not file an appeal, the party opposing entitlement had no opportunity to seek to overturn findings that were favorable to the miner.”); 65 Fed. Reg. 79973 (December 20,

2000) (“One commenter’s suggestion that an administrative law judge’s determination in the original proceeding that an X-ray is not worthy of credit precludes any further litigation of that issue in a subsequent proceeding simply reflects a misunderstanding of the tenets of issue preclusion. Where that finding was not essential to the original denial of benefits, because the ALJ ultimately denied benefits on another basis, or used alternative bases, issue preclusion would not prevent a second factfinder from making a different finding, based on his independent weighing of the evidence, in connection with an additional claim.”).

B. Procedural history of this case

1. Lawson’s first claim

Mr. Lawson filed his first claim on May 23, 1990. Pet. Apx. 19. The district director named Arkansas Coals as the responsible operator. DX 1-217. Arkansas Coals contested its designation, claiming it was not the operator that most recently employed Lawson for one year. DX 1-214. The issue was thus joined and went to an ALJ following the district director’s determination that Lawson did not qualify for black lung benefits and Lawson’s request for hearing. DX 1-173, 191, 199-200.

Prior to the ALJ hearing, Arkansas Coals requested its dismissal as the responsible operator, claiming that Lawson worked for another operator, Martin T. Mining & Exploration Company (“MTM”), for more than one year after working

for Arkansas Coals. Resp. Apx. 15. The Director opposed the motion, explaining that MTM was not insured on the date of Lawson's last employment and its corporate charter had been dissolved. Resp. Apx. 12. Accordingly, the Director contended that Arkansas Coals was the properly named responsible operator. *Id.*

The ALJ denied Arkansas Coals' motion to dismiss. Pet. Apx. 55-56. The ALJ found that there was a "substantial dispute as to issues of fact" that was properly resolved following an evidentiary hearing. DX 1-132. Accordingly, the ALJ allowed the Director to introduce evidence supporting his contention at the hearing. *Id.*

Meanwhile, Arkansas Coals vigorously prepared its defense to the merits of Lawson's claim. The medical evidence before the ALJ overwhelmingly supported the district director's denial of benefits -- 33 of 35 x-ray readings were negative for pneumoconiosis, six of eight medical opinions diagnosed no pneumoconiosis, the eight pulmonary function studies and arterial blood gas tests did not reveal a disabling lung impairment, and no doctor opined that Lawson had a totally disabling respiratory disease. Pet. Apx 44-54 (ALJ's description of the medical evidence). On June 24, 1992, following the hearing, the ALJ denied benefits, deciding the first element of entitlement (the existence of pneumoconiosis) against Lawson. Pet. Apx. 40, 54.

As a result, no party was liable to pay any benefits under the BLBA.

Nonetheless, the ALJ found the Trust Fund would have been liable if benefits were awarded because it failed to appear at the hearing and submit evidence supporting its contention that MTM was not financially capable of paying benefits. Pet. Apx. 43.

Mr. Lawson -- the only party aggrieved by the denial-- did not appeal the ALJ's decision, and it became final.

2. Lawson's current claim

Mr. Lawson filed the instant, subsequent claim on February 25, 2009. Pet. Apx. 19. The district director reviewed Lawson's social security earnings records to ascertain Lawson's history of mining history and found (as pertinent here):

<u>Company</u>	<u>Date of Employment</u>
Arkansas Coals	1980-1982
Wilmar Coal	1982
Champion Coal	1984
H & L Coal	1985
Martin T. Mining & Exploration Co.	1986-1988
Coker Coal	1988
D & E Coal (Jason Coal)	1989

DX 22-2; 34-9. The earnings records further revealed that of these seven companies, Lawson worked only for Arkansas Coals and MTM for at least one full year. DX 22; *see also* DX 4; DX 1-451. Furthermore, DOL records showed that

MTM was not insured when Lawson last worked for it and was not authorized to self-insure.⁶ DX 22. Accordingly, the district director initially named Arkansas Coals as a potentially responsible operator, *id.*, and then again as the responsible operator following the submission of additional evidence from Arkansas Coals, including Lawson's deposition (DX 21).⁷ DX 27, 29-3, 34-9.

Arkansas Coals continued to contest its designation as the responsible operator and requested a hearing following the district director's proposed decision and order awarding benefits. DX 25, 44-5-6. Before the ALJ, Arkansas Coals claimed that the district director was collaterally estopped from naming it as the responsible operator based on the first ALJ's finding in Lawson's original claim that the Trust Fund would have been liable if benefits had been awarded. Second, Arkansas Coals argued that substantial evidence did not support the district

⁶ The record does not reflect whether MTM ever procured the required insurance. But regardless, here, as in most cases, it is the date of Lawson's last employment with MTM that would trigger an insurer's liability (if there were one). *See* 20 C.F.R. § 726.203(a).

⁷ The district director also notified MTM's corporate officers of their potential personal liability if benefits were awarded, MTM was identified as the responsible operator, and the corporate officer had the financial ability to pay benefits. DX 8, 9. *See* 30 U.S.C. 933(d)(1) (corporate officers may be jointly and severally liable for benefits awarded against corporation that failed to secure payment of benefits); 20 C.F.R. § 725.609(b). One officer responded to the notice cryptically indicating that MTM "worked under contract for B.M.C. 5A State File 17582." DX 10.

director's finding that it was Lawson's most recent, financially-capable employer of at least one year. Pet. Apx. 21.

The ALJ rejected both arguments. With regard to collateral estoppel, the ALJ held that, under the law of the Sixth Circuit, the material question was whether the responsible operator determination "was necessary to the outcome of the case." Pet. Apx. 22. Relying on Board precedent, the ALJ held it was not: "In a case where benefits are denied, the Director, as the protector of the Trust Fund, has no incentive to challenge the responsible operator finding on appeal." *Id.* (citations omitted). Accordingly, the ALJ held that Board precedent simply "does not allow for estoppel in this case." *Id.*

Second, the ALJ held that the district director correctly identified Arkansas Coals as the proper responsible operator. The ALJ recognized that the record showed that Mr. Lawson worked for Arkansas Coals from 1980 through 1982 and then for MTM from 1986 through 1988. Pet. Apx. 22, 23. (The parties did not dispute that Lawson worked for less than one year with each of the five other coal companies during the 1980s. Pet. Apx. 23; *see supra* at 15).

The ALJ further found, pursuant to Section 725.494, that the district director submitted the requisite statements demonstrating that he had investigated MTM and found that the company was no longer in operation, was uninsured during the period of Mr. Lawson's last exposure, lacked authorization to self-insure, and thus

was no longer capable of assuming liability for benefits. Pet. Apx. 23-24. This evidence, the ALJ explained, shifted the burden to Arkansas Coals to demonstrate that MTM “ha[d] secured the payment of benefits or possesses sufficient assets to secure payment of benefits.” *Id.* at 24 (*citing* 20 C.F.R. § 725.495(c)(2)).

According to the ALJ, Arkansas Coals’s evidence -- the deposition of Wesley Gearheart, a part owner of MTM -- “at best” “obliquely point[ed] in the direction of the company ‘RMJ’ as a potential source of insurance coverage.” That testimony, however, was “marred by faulty memory,” and “f[e]ll far short of carrying the Employer’s burden.”⁸ Furthermore, the ALJ found no evidence demonstrating Arkansas Coals’s inability to assume liability and he accordingly ruled that it was the responsible operator. Pet. Apx. 24.

The Board affirmed the ALJ on all issues. Pet. Apx. 10-14. First, it held that the ALJ properly rejected Arkansas Coals’s attempt to invoke collateral estoppel. It explained that “the doctrine of collateral estoppel [is] not applicable because the determination of the responsible operator issue was not necessary to support the [initial denial],” and, “in light of the denial of benefits, the Director, as the protector of the Trust Fund, had no incentive to challenge the responsible

⁸ There is no evidence in the record—social security earnings records or Mr. Lawson’s testimony or written employment histories—identifying a company named “RMJ.”

operator finding made in connection with [Lawson's] initial claim." Pet. Apx. 12, (citations omitted).

Second, the Board held that substantial evidence supported the ALJ's decision to designate Arkansas Coals as the responsible operator. Pet. Apx. 13. It affirmed the ALJ's determination that the district director had provided an adequate statement explaining his designation of Arkansas Coals and the requisite documentation demonstrating MTM's inability to pay. Pet. Apx. 14. It further upheld, as within the ALJ's discretion, his finding that Arkansas Coals had put forth no reliable evidence that "MTM or any other more recent operator satisfied the regulatory criteria" and thus "had failed to meet its burden of proving that it is not the potentially liable operator that most recently employed the miner." *Id.* Accordingly, the Board concluded that Arkansas Coals was the properly named responsible operator.⁹ *Id.*

On March 7, 2013, the Board denied Arkansas Coals's motion for reconsideration. Pet. Apx. 8.

⁹ The Board also agreed with the Director that the record did not support Arkansas Coals's "implication" that Coker Coal was a successor operator to MTM. Pet. Apx. at 14 n.10.

SUMMARY OF THE ARGUMENT

Arkansas Coals is the correctly designated responsible operator: it is the financially-capable coal mine operator that most recently employed Lawson for one year. Admittedly, MTM later employed Lawson for more than a year, but DOL's investigation revealed it incapable of paying benefits, and, as the ALJ reasonably found, Arkansas Coals's attempt to prove otherwise "f[e]ll far short of carrying Employer's burden."

Moreover, relitigation of the responsible operator issue did not violate principles of finality, including collateral estoppel. DOL's subsequent claim regulation specifically provides that none of the contested findings made in connection with a prior denied claim are binding on any party in the adjudication of a subsequent claim once a claimant establishes a previously-denied element of entitlement. As DOL explained during the rulemaking proceedings for this regulation, this provision is necessary, *inter alia*, to protect the prevailing party in the prior denied claim from being saddled in later proceedings with adverse findings that it cannot, and had no incentive to, appeal. In addition, collateral estoppel is inapplicable here because the responsible operator designation was not necessary to the denial of Lawson's claim based on the absence of pneumoconiosis.

Last, Arkansas Coals’s contention that the Director was required to litigate the responsible operator issue after Lawson’s first claim had been finally denied on the merits has no basis in the BLBA or otherwise. Such a rule would lead to needless litigation over liability for future claims that may never even be filed, let alone awarded.

ARGUMENT

A. Standard of review

Arkansas Coals challenges the legal sufficiency of the decisions below regarding issue preclusion. This Court’s review of the Board’s legal conclusions is plenary. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998) (citation omitted). The Director’s interpretation of the BLBA and its implementing regulations is, however, entitled to deference. *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994). This Court will “defer to an agency’s interpretation of its own regulation, advanced in a brief, unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’” *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 485 (6th Cir. 2012).

The ALJ’s decision, affirmed by the Board, that Arkansas Coals did not meet its burden to demonstrate that a more recent employer possesses sufficient assets to secure the payment of benefits is reviewed under the substantial evidence standard. “Substantial evidence is defined as relevant evidence that a reasonable

mind might accept as adequate to support a conclusion.” *Id.* at 483 (quotation marks omitted). “A decision that rests within the realm of rationality is supported by substantial evidence.” *Id.* (internal alterations and quotation marks omitted).

B. The naming of Arkansas Coals as responsible operator is consistent with DOL regulations and supported by substantial evidence.

The ALJ’s decision precisely followed the applicable regulatory framework, and his factual findings are easily supported by substantial evidence. As detailed above, the responsible operator is the “potentially liable operator” that most recently employed the miner for a full year and, *inter alia*, is capable of assuming liability for the payment of benefits. 20 C.F.R. § 725.495 (a) (1). Where the employer that most recently employed the miner is not designated because it is not financially capable of paying benefits, the district director is required to provide a statement that he has searched the requisite insurance files and found no record of insurance coverage or authorization to self-insure. 20 C.F.R. § 725.495(d). Here, the district director did that. He submitted a standardized “Statement Required by 20 C.F.R. § 725.495(d)” attesting that the most recent employer to employ Mr. Lawson, MTM, was not covered by an insurance policy, self-insured, or otherwise capable of assuming liability for payment of continuing benefits. Resp. Apx 19. That statement, the ALJ found, fulfilled the district director’s initial burden that MTM was not financially capable, *see* 20 C.F.R. § 725.495(d), and thus shifted the

burden to Arkansas Coals to demonstrate that MTM (or its corporate officers) possessed sufficient assets to secure the payment of benefits. *See* 20 C.F.R. 725.495(c)(2).

Arkansas Coals's only evidence -- the speculative testimony of MTM executive Wesley Gearheart -- fell far short of meeting its burden, as the ALJ ruled. Indeed, the testimony, which the ALJ properly characterized as only "obliquely point[ing] in the direction of the company 'RMJ,'" and "marred by faulty memory," Pet. Apx. 24, does not come close to establishing that "the more recent employer possesses sufficient assets to secure the payment of benefits" or showing that MTM officers or any successor company had the financial means to pay benefits.¹⁰ Accordingly, the ALJ's designation of Arkansas Coals as the responsible operator is in accordance with law and supported by substantial evidence. *See, e.g., Arch of Kentucky v. Director, OWCP*, 556 F.3d 472, 477 (6th Cir. 2009) ("Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion") (citation omitted).¹¹

¹⁰ Mr. Gearheart also testified that he did not remember if Lawson worked for MTM for a full year, that he did not have a clear understanding of MTM's relationship to the other entities, and that he could not identify corporate assets or the assets of corporate officials. Pet. Apx. 65-67.

¹¹ Arkansas Coals briefly advances two arguments that it did not make before the ALJ and therefore has waived. *Compare* (Pet. Br. at 20-21) *with* Resp. Apx. 4-6 (cont'd . . .)

C. Section 725.309(d) and collateral estoppel permit the relitigation of the responsible operator designation in Lawson’s subsequent claim.

Arkansas Coals’s main argument is that collateral estoppel prevents the

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(Employer’s Post-Hearing [ALJ] Brief at 3-5); *See Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir.2006) (“It is well-settled that this court’s function is to review the case presented [below], rather than a better case fashioned after an unfavorable order.” (internal punctuation and citation omitted)).

The arguments are wrong regardless. First, it claims that Coker Coal should have been named the responsible operator because it was MTM’s successor operator. The Board properly rejected this argument. Pet. Apx. 14 n.3. Arkansas Coals produced no evidence that Coker Coal, if it were a successor, was financially capable of assuming liability. Moreover, the evidence did not demonstrate a successor relationship. Although the two companies apparently had common ownership, they were different companies, worked different mine sites, and there was no evidence of a transfer of assets between them. Pet. Apx. 66; DX 21-4, 6; *see* 20 C.F.R. § 725.492 (defining successor operator as one that acquires substantially all the assets of a prior operator). Contrary to Arkansas Coals’s characterization, Pet. Br. 3 (citing DX 1-61, 63), Lawson did not testify that Coker bought out MTM, and Mr. Gearheart, the MTM executive, did not testify to that either.

Second, Arkansas Coals argues that the corporate officers of MTM should have been named as the responsible operators. Pet. Br. 20-21. But corporate officers may not be named in their own right as “operators,” 20 C.F.R. § 725.491(b), although the sufficiency of their reachable assets may be a basis for shifting liability to the unsecured corporation, 20 C.F.R. § 725.495(c)(2), and an enforcement proceeding may be brought against them to pay benefits *jointly owed* by the corporation. *Id.*; *Lester v. Mack Coal*, 21 Black Lung Rep. (MB) 1-126, 1-130-31, 1999 WL 297212 (Ben. Rev. Bd.1999) (en banc). At bottom, Arkansas Coals argues that the liability here is properly borne by either Coker Coal, MTM, or its former executives. But in order to absolve itself of liability, Arkansas Coals merely had to demonstrate that one of these entities had the ability to pay. *Id.* Its assertion that it was the Director’s obligation to prove such facts completely ignores the regulatory framework.

relitigation of the responsible operator designation in Lawson’s subsequent claim because an ALJ found the Trust Fund liable when he denied Lawson’s prior claim. Arkansas Coals, however, ignores DOL’s subsequent claim regulation, 20 C.F.R. § 725.309(d), which is directly on point and, as this Court has explained, reasonably effectuates principles of finality. Moreover, collateral estoppel presents no bar here because the designation of the responsible operator was not necessary to the denial of Lawson’s first claim, and the Director, as the prevailing party below, could not appeal the Trust Fund designation.

1. Under Section 725.309(d)(4), contested findings in a prior claim are non-binding in a subsequent claim once the claimant establishes a previously-denied element of entitlement.

As an initial matter, Arkansas Coals does not challenge that Lawson established a change in a previously-denied element of entitlement. Thus, Section 725.309(d)(4)’s mandate that “no findings made in connection with the prior claim . . . shall be binding on any party in the adjudication of the subsequent claim” directly controls the outcome here. This provision clearly allows the relitigation of the responsible operator issue in Lawson’s subsequent claim.¹²

¹² Findings related to issues that were not identified as contested by the district director, 20 C.F.R. § 725.463, and stipulated findings are binding in a subsequent claim under 20 C.F.R. § 725.309(d). The Department excluded such agreed-to findings because “a party’s waiver of its right to litigate a particular issue represents a knowing relinquishment of that right, [and] such waiver should be (cont’d . . .)

The Director explained during rulemaking proceedings that this provision was consistent with claim and issue preclusion principles and protected *all* parties from being saddled in later litigation with prior, unchallengeable, adverse findings. *Supra* at 11-13 (quoting at length DOL’s rulemaking explanations). For example,

A black lung claimant must prove every element of his claim. If he loses on one, or two, or three elements, the end result is the same: a denial. For this reason, if he loses on more than one element, but only one is in fact a correct basis for denial, the law does not impose a duty upon him to file a meaningless appeal to “correct” the erroneous alternative holdings. Otherwise, “the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening them.” Restatement (Second) of Judgments § 27, comment *i*. (1982). Accordingly, holdings in the alternative, “either of which independently would be sufficient to support the result, [are] not conclusive with respect to either issue standing alone.” *Id.*

Lisa Lee Mines v. Director, OWCP, 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc); accord *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) (en banc); 65 Fed. Reg. 79973-74.

For coal companies and the Trust Fund, Section 725.309(d)(4)’s mandate

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given the same force and effect in subsequent litigation of the same issue.” 62 Fed. Reg. 3353. Neither exception applies here, however. *See* DX 1-173 (identifying in the prior claim responsible operator designation as an issue for the ALJ to decide); DX 1-1-134-137 (Director’s opposition to motion to dismiss). Certainly, the Director’s failure to attend the hearing and submit supporting evidence (which was produced in the subsequent claim) does not represent a “knowing relinquishment” of the right to litigate the issue, especially in light of the Director’s prior opposition and the overwhelming medical evidence against Lawson’s entitlement in the prior claim.

was needed for the simple reason that, having prevailed in the prior claim, no opportunity to challenge adverse findings arose. 62 Fed. Reg. 3353; 64 Fed. Reg. 54985; 65 Fed. Reg. 79973. Furthermore, any adverse findings were not essential to the *denial* of the claim, and so their relitigation did not offend collateral estoppel. 65 Fed. Reg. 79973 (“Where th[e] finding was not essential to the original denial of benefits, because the ALJ ultimately denied benefits on another basis, or used alternative bases, issue preclusion would not prevent a second factfinder from making a different finding”).

In sum, DOL’s subsequent claim regulation faithfully adheres to issue preclusion principles. *See generally Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759 (6th Cir. 2013) (upholding subsequent claim regulation against res judicata attack); *Cumberland River Coal Company v. Banks*, 690 F.3d 477, 482 (6th Cir. 2012) (adopting Director’s interpretation of subsequent claim regulation). It is also consistent with the Act. *Banks*, 690 F.3d at 482. Thus, the Court’s analysis need go no further. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 572 (6th Cir. 1998) (Director’s interpretation of BLBA found in regulation, adopted after notice-and-comment rulemaking, is entitled to *Chevron* deference). Section 725.309(d)(4) plainly makes the prior responsible operator designation non-binding and allowed the ALJ in this subsequent claim to reach a different result.

2. **Collateral estoppel does not does not bar consideration of the responsible operator designation in this subsequent claim.**

Collateral estoppel also presents no bar to relitigating the responsible operator issue in Lawson's subsequent claim. Collateral estoppel prevents the litigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation. *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 908 (6th Cir. 2001). For collateral estoppel to apply, four elements must be met: 1) the precise issue must have been raised and actually litigated in the prior proceeding; 2) determination of the issue must have been necessary to the outcome of the prior proceeding; 3) the prior proceeding must have resulted in a final judgment on the merits; and 4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* Arkansas Coals cannot establish the second and the fourth elements.

First, the designation of the liable party, *i.e.*, the responsible operator, was hardly necessary to the outcome in the prior claim. That outcome was a denial of benefits based on a failure of the medical evidence to prove the existence of pneumoconiosis. "To say that X is 'necessary' to Y is the same thing as saying that it is impossible for Y to exist unless X also exists." *Bies v. Bagley*, 535 F.3d 520, 525 (6th Cir. 2008). The denial of benefits due to the absence of medical

proof stands on its own footing and is clearly independent of the naming of a responsible operator. *See M.R. v. Karst Robbins Coal Co.*, 2009 WL 3794427, at *6 (Ben. Rev. Bd. (Oct. 21, 2009) (unpub.)) (Because “the determination as to the responsible operator was not necessary to support the denial of benefits,” collateral estoppel did not prevent the designation of a different responsible operator.); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc) (determination that miner suffered from pneumoconiosis was not essential to a denial of his claim on the ground that he was not totally disabled, and thus collateral estoppel did not prevent relitigation of the existence of pneumoconiosis in survivor’s claim).¹³

Second, collateral estoppel is improper here because the Director, as a prevailing party when the first claim was denied, could not appeal the ALJ’s

¹³ Obviously, the designation of the responsible operator is essential to an *award* of benefits. In that case, the designation determines who must pay the award. That entity also has the ability to fully litigate the liability issue because, having *lost* the case, it can appeal its designation as the liable party. But that scenario is completely divorced from the one here. A subsequent claim proceeding by definition requires that the prior claim was *denied*. 20 C.F.R. § 725.309(d).

Notably, Arkansas Coals blindly ignores this fundamental difference between awarded and denied claims. It largely relies on cases where there had been an award of BLBA benefits or civil damages. Pet. Br. at 11, 16, 19 (discussing *USX Corp. v. Director, OWCP*, 978 F.2d 656 (11th Cir. 1992); *Gen. Elec. Med. Sys. Europe v. Prometheus Health*, 394 Fed.Appx. 280, 2010 WL 3521918 (6th Cir. 2010); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997)).

finding that the Trust Fund would be liable if the claim was awarded. *See* 20 C.F.R. § 802.205(a) (parties “adversely affected or aggrieved” by ALJ decision may appeal to Board); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1993 WL 42264, at *2 (Ben.Rev.Bd. 1993) (recognizing that Director was not aggrieved party and could not fully litigate, *i.e.*, appeal, claimant’s status as miner in prior denied claim); *see also* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (only persons “adversely affected or aggrieved” by Board orders may appeal to courts of appeals). The Trust Fund, and by extension the Director, simply was not aggrieved by the prior denial as its “personal, pecuniary, or property rights” remained unaffected. *See* Black’s Law Dictionary at 1144 (7th ed. 2009) (defining “aggrieved”). In short, when a claim is denied, the so-called “responsible party” is in fact responsible for *nothing*.

Consequently, Arkansas Coals has also failed to establish “the full and fair opportunity to litigate” element of collateral estoppel. *United States v. Roberts*, No. 01-5230, 2003 WL 343237, at *2 (6th Cir. Feb. 12, 2003) (unpub.), citing *Standefer v. United States*, 447 U.S. 10, 23, n.18 (1980) (“The estoppel doctrine . . . is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct. In the absence of appellate review, or of similar procedures, such confidence is often unwarranted.”); *United States v. Salemo*, 81 F.3d 1453, 1464 (8th Cir. 1988) (“The inability of a party to appeal

from an adverse determination in the prior proceeding is a major factor to be considered [in determining whether there was a full and fair opportunity].”).

In addition, the Director, having prevailed, lacked any incentive to appeal. *Banner v. U.S.*, 238 F.3d 1348, 1354 (Fed. Cir. 2001) (incentive to litigate a factor in the “full and fair opportunity” element); *Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 689 (10th Cir. 1992). Arkansas Coals’s argument that the Director lacked a credible basis to appeal, Pet. Br. at 18, is speculative and misses the point: it is the “opportunity” and “incentive” to litigate that matters, not the chances of ultimate success. Here, there simply was no reason or basis for appeal because there was no actual Trust Fund liability.¹⁴

¹⁴ The only case that Arkansas Coals cites, *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997), for its argument that the Director waived his right to litigate the responsible operator does not apply here. In *Jonida*, the designated responsible operator “made no effort” to respond to the district director’s identification of it as the liable party, and thus, was deemed to have accepted liability under then-governing regulations. 124 F.3d at 744. (The same result would obtain under current regulations. See 20 C.F.R. § 725.408(a)(3)) The court then refused to excuse the company’s failure to respond based on supposedly faulty information the company had received from the claimant. *Id.* *Jonida* is thus distinguishable on several grounds. First, the responsible operator issue here was contested before the district director and the ALJ. Second, *Jonida* did not involve a subsequent claim, as Arkansas Coals alleges, but concerned a claimant’s original claim. Consequently, the governing subsequent claim regulation here, which was promulgated after *Jonida* and makes contested prior findings non-binding, was not implicated. Third, the claim in *Jonida* had been awarded and the company was required to pay benefits, unlike here where the Trust Fund had no duty to pay benefits following the initial denial.
(cont’d . . .)

D. The Director was not required to modify the responsible operator designation in the prior denied claim.

Arkansas Coals argues that the relitigation of the responsible operator issue in Lawson’s subsequent claim was improper because the Director failed to seek modification of the Trust Fund designation in Lawson’s prior denied claim. Pet. Br. 10-12. This contention turns upside down the well-established principles of finality and the law governing modification. It has the same ultimate flaw as Arkansas Coals’s collateral estoppel argument: it seeks to punish DOL for not challenging the previous order, which ordered it to pay nothing.

It is undoubtedly correct that Section 22 of the Longshore Act, 33 U.S.C. 922, incorporated into the BLBA by 30 U.S.C. 932(a), provides relief from the rules of finality and “vests a [district director] with broad discretion to correct mistakes of fact.”¹⁵ *Consolidation Coal co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994) (quoting *O’Keffe v. Aeroject-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Buttermore v. Elec. Boat Corp.*, 46 BRBS 41, 2012 WL 6206509

(. . . cont’d)

¹⁵ Section 22 provides in relevant part that “[u]pon his own initiative, or upon the application of any party in interest . . . , on the ground of a change of condition or because of a mistake in a determination of fact by the [district director], the [district director] may, at any time prior to one year after the date of the last payment of compensation. . . or at any time prior to one year after the rejection of a claim[,] review a compensation case. . . and . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

(Ben.Rev.Bd. 2012). It is also true, that, at the time of Lawson's first claim, the district director could use modification to correct an erroneous designation of a responsible party in certain circumstances. *See Caudill Constr. Co. v. Abner*, 878 F.2d 179, 181 (6th Cir. 1989); *but cf. Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 566-568 (6th Cir. 2002) (refusing to remand case for renaming of responsible operator where it would require miner to relitigate entitlement to benefits).

But there is no *requirement* that a party initiate modification. Nor is there a clear reason for the party opposing entitlement to do so following the denial of a claim. The claimant may accept the denial and that may be the end of the matter. And if the claimant later files a subsequent claim, the procedures set forth in Section 725.309 apply, and the claimant faces the additional hurdle of proving with new evidence a previously-denied element of entitlement, or the claimant loses again. Forcing the prevailing party to seek modification and forgo these advantages is simply wrong.

Indeed, Arkansas Coals's approach seeks to punish the prevailing party for not initiating modification – findings in the denial that are not subject to collateral estoppel (such as the responsible operator designation) become unchallengeable simply because modification was not chosen. This argument loses sight that modification provides some *relief* from principles of finality; it does not make

them more stringent. And once modification is time-barred, the usual rules of finality and/or Section 725.309 apply. As shown above, both collateral estoppel and Section 725.309(d)(4), the governing regulatory section, allow the relitigation of the responsible operator designation. The mere availability of modification following the initial denial does nothing to change that.¹⁶

At bottom, the rule Arkansas Coals suggests serves no valid purpose. Requiring employers and the Director to continue to litigate responsible operator issues after the claim is denied--either by modification or appeal--constitutes a trap for the unwary and a waste of time and resources. The initial denial may be the end of the claimant's efforts, and a subsequent claim may never be filed. But if

¹⁶ Arkansas Coals's reliance on *USX Corp. v. Director, OWCP*, 978 F.2d 656 (11th Cir. 1992), is misplaced. There, the miner's claim was awarded and USX was ordered to pay, which it did for several years. USX then requested that the Trust Fund assume the payment of benefits based on congressional amendments. DOL agreed and the Trust Fund paid benefits for four years. DOL then realized it had mistakenly assumed payment and sought to shift payment back to USX through modification. The court held that DOL was required to correct its mistake within one year of its agreement to assume payment – which the court believed was the statutory deadline for seeking modification. It explained that USX was entitled to rely on DOL's decision after one year and “[t]o hold otherwise would offend fundamental concepts of finality and *res judicata*.” 978 F.2d at 659 and at n.3.

By contrast, here, there was a denial of benefits, not an award, and thus no payment was required; also DOL did not voluntarily agree to pay Lawson's benefits, and accordingly, the “fundamental concepts of finality” that the court referenced actually *support* the relitigation of the responsible operator issue.

one is filed, the issue can be decided when it counts --when payment is on the line, and not merely when it is an abstract or speculative possibility.

CONCLUSION

The Director requests that the Court affirm the decisions of the ALJ and the Board designating Arkansas Coals as the responsible operator in this case.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

s/Jonathan Rolfe
JONATHAN ROLFE
Attorney, U.S. Department of Labor
Office of the Solicitor
Frances Perkins Building
Suite N-2119
200 Constitution Ave, N.W.
Washington, D.C. 20210
(202) 693-5660
rolfe.jonathan@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 8893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point New Times Roman font.

s/Jonathan Rolfe
JONATHAN ROLFE
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2013, an electronic copy of this brief was served through the CM/ECF system on all parties.

s/Jonathan Rolfe
JONATHAN ROLFE
Attorney
U.S. Department of Labor