No. 16-1849

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRONTIER-KEMPER CONSTRUCTORS, INC.,
Petitioner

v.

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

and

GRAT M. SMITH,
Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This appeal involves a 2008 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Grat M. Smith, a former coal miner. On August 20, 2014, ALJ Richard T. Stansell-Gamm issued a decision awarding

benefits and ordering the miner's former employer, Frontier-Kemper Constructors, Inc. (FKCI), to pay them. Joint Appendix (JA) 30. FKCI appealed this decision to the United States Department of Labor (DOL) Benefits Review Board (Board) on September 17, 2014, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C § 932(a). *See* JA 6.[1] The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award on May 31, 2016. JA 8. FKCI petitioned this Court for review on July 26, 2016. JA 1. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The miner's exposure to coal-mine dust - the injury contemplated by 33 U.S.C. § 921(c) - occurred in

[1] For purposes of this jurisdictional summary, we refer to the Index of Documents prepared by the Board (JA 3-7) for document dates that do not otherwise appear in the Joint Appendix.

Virginia (JA 151), within this Court's territorial jurisdiction. The Court therefore has jurisdiction over FKCI's petition for review.

STATEMENT OF THE ISSUES

There is no dispute that Mr. Smith is entitled to BLBA disability benefits. The sole question is whether FKCI is liable for those benefits. (If not, the Black Lung Disability Trust Fund will be liable.) The BLBA and its implementing regulations hold liable coal mine operators, including successor operators, that most recently employed the miner for a cumulative period of at least one year. A "successor operator" comes into existence when, *inter alia*, reorganization terminates the prior operator and changes its form or identity. In 1982, Frontier-Kemper Constructors Partnership (FKC) ceased to exist and was reorganized into the corporate entity FKCI.

The first question presented is whether FKC and FKCI are in a predecessor/successor operator relationship.

FKC employed Smith in 1973-74. This was before a 1977 statutory amendment clarifying that coal mine construction companies are "operators" and thus subject to coverage under the

Federal Mine Safety and Health Act, of which the BLBA constitutes Subchapter IV.

The second question presented is whether FKCI's liability arises from an impermissible retroactive application of this statutory amendment.

The ALJ found that between them FKC and FKCI employed Smith for slightly more than one year (FKC eight months, three weeks; FKCI three months, two weeks). The third question presented is whether this finding is supported by substantial evidence.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The BLBA provides disability benefits to miners who are totally disabled by pneumoconiosis. 30 U.S.C. §§ 901(a), 922, 932(c). Liability for those benefits generally falls on the miner's employer. *See* 30 U.S.C. § 932(c). The employer that is liable for a given BLBA claim is referred to as the "responsible operator." If no employer is found liable, the payment obligation falls to the Black Lung Disability Trust Fund. *See* 26 U.S.C. § 9501(d)(1)(B). 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).

The BLBA does not include its own definition of "operator," but incorporates the definition from the Federal Mine Safety and Health Act (FMSHA) which defines "operator" as "any owner, lessee or other person who operates controls, or supervises a coal or other mine or any independent contractor performing such services or construction at such mine[.]" 30 U.S.C. § 802(d).[2] At the time of Smith's employment with FKC in 1973-1974, the FMHSA defined

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[2] The BLBA, 30 U.S.C. §§ 901-944, is Subchapter IV of the FMSHA. The definitional provisions set forth in 30 U.S.C. § 802, including the definition of the term "operator," extend to the entire chapter, including Subchapter IV.

"operator" as "any owner, lessee, or other person who operates, controls or supervises a coal mine." 30 U.S.C. § 802(d) (1969). In 1977, Congress clarified the definition to ensure coverage of "any independent contractor performing services or construction at [a] mine." Pub. L. 95-164, Title I, §§ 101, 102(b), 91 Stat. 1290 (Nov. 9, 1977); *see* S. Rep. No. 95-181 (May 16, 1977), 1977 U.S.C.C.A.N. 3401, 3458, 1977 WL 16101, *59 (describing amendment as a clarification); *see also id.* at 1977 U.S.C.C.A.N. at 3414, 1977 WL at *14 (approving of *Bituminous Coal Operators' Ass'n. v. Sec. of the Interior*, 547 F.2d 240 (4th 1977) (holding construction companies liable for safety and health violations under the original FMSHA definition of operator). Soon thereafter, Congress conformed the BLBA's definition of "miner" to include any "individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." Pub. Law 95-239, § 2, 92 Stat. 95 (March 1, 1978) (codified at 30 U.S.C. § 902(d)).

The BLBA contains two other substantive provisions relevant to the potential liability of individual coal mine operators:

30 U.S.C. § 932(b), which requires operators to secure the payment of benefits, and 30 U.S.C. § 932(i), which sets forth criteria for assessing liability against successor operators. A "successor operator" is an entity that acquires a mine or substantially all its assets from a prior operator on or after January 1, 1970. 30 U.S.C. § 932(i)(1). The successor operator is liable for the payment of benefits that would have been payable by the prior operator "with respect to miners previously employed by such prior operator as if the acquisition had not occurred and the prior operator had continued to be an operator of a coal mine." *Id.*

Beyond these general rules, however, the Department's authority to impose liability on coal mine operators is extraordinarily broad.[3] 30 U.S.C. § 932(h). Typically, the black lung regulations impose liability on the most recent entity to employ

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[3] Section 932(h) directs the Secretary to promulgate regulations to "establish standards, which may include appropriate presumptions for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines," and to "establish standards for apportioning liability for benefits . . . among more than one operator, where such apportionment is appropriate."

the miner, provided that the employer qualifies as a "potentially liable operator" under 20 C.F.R. § 725.494.[4] 20 C.F.R. § 725.495(a)(1). Section 725.494, in turn, outlines five criteria an employer must satisfy to be a potentially liable operator, one of which is relevant in this case: the miner worked for the operator, or its successor, for a cumulative period of at least one year. 20 C.F.R. § 725.494(c).[5] The regulations define the term "year" as a period of one calendar year, or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days. 20 C.F.R. § 725.101(a)(32).

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[4] The responsible operator regulations, 20 C.F.R. §§ 725.491-.495, were revised in 2001. The amended regulations were intended to clarify the Department's method for identifying responsible operators and assign appropriate burdens of proof. 62 Fed. Reg. 3363 (Jan. 22, 1997). These rules apply to claims filed after January 19, 2001. 20 C.F.R. § 725.2(c).

[5] The five criteria for identification as a "potentially liable operator" are: (i) the miner's disability or death arose out of employment with that operator, (ii) the operator, or its successor, was an operator after June 30, 1973; (iii) the miner worked for the operator at least one year; (iv) the miner's employment with the operator included at least one working day after December 31, 1969; (v) the operator is financially capable of assuming liability for the claim. 20 C.F.R. § 725.494(a)-(e).

With regard to successor operator liability, the regulations provide that a successor operator is created when the prior operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. § 725.492(b)(1)-(3). A "successor operator" is defined as "[a]ny person who on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all the assets thereof[.]" 20 C.F.R. § 725.492(a). Finally, any employment with a prior operator is "deemed to be employment with the successor operator." 20 C.F.R. § 725.493(b)(1).

Procedurally, once a miner files a claim, a DOL district director determines, based on employment information provided by the miner and other sources, whether any potentially liable operators may be identified, *i.e.*, whether any mine operators that employed the miner appear to meet the section 725.494 criteria. 20 C.F.R. § 725.407(a). Based on the information developed, the district director designates the potentially liable operator that most recently employed the miner for at least one year as the responsible

operator. 20 C.F.R. § 725.418(d). The designated responsible operator may then contest that determination by requesting a hearing and decision by an administrative law judge. 20 C.F.R. § 725.421. In the event that the district director's designation is overturned, the Trust Fund becomes liable for the payment of benefits, if awarded. *See generally* 65 Fed. Reg. 79990-91, ¶ (b) (Dec. 20, 2000); *Director, OWCP, v. Trace Fork Coal Co*, 67 F.3d 503, 507-08 (4th Cir. 1995) (addressing responsible operator identification under prior regulations).

B. Relevant Facts

Because the issues on appeal involve Smith's employment for FKC and FKCI, we summarize only the evidence relevant to those companies and the miner's work for them.

In a letter to the district director, dated May 6, 2009, FKCI explained that FKC was a partnership formed in the 1970s by Frontier Constructors, Inc. and Kemper Construction Company, and that the partnership engaged in heavy construction projects in mining and non-mining settings. JA 256.

In correspondence to the district director, dated November 3, 2009, FKCI provided the following "Statement" regarding the relationship between FKC and FKCI:

> Effective as of the close of business on December 31, 1982, the partners of Frontier-Kemper Constructors (ID #37-0987432) transferred 100% of their partnership interest to a newly-formed corporation, Frontier-Kemper Constructors, Inc. (ID # 35-1545591), solely in exchange for common stock of the new corporation.
>
> This is a tax-free reorganization as described in IRS Code Section 351.
>
> All business activity subsequent to December 31, 1982 will be conducted by Frontier-Kemper Constructors, Inc. Accordingly, all tax payments will be made and reported under the new federal ID Number.

JA 324.

Social Security Administration (SSA) earning records indicate Smith had earnings for FKC in the fourth quarter of 1973 ($758.11), and in the first three quarters of 1974 ($4,730.85, $3939.16, $2,247.89). JA 220.

In a statement signed by Smith, memorializing a telephone call between Smith and the DOL claims examiner, Smith stated that did the same type of work for both FKC and FKCI. That is, he was

engaged in constructing air shafts and headings for underground coal mines.[6] He "put down mine shafts and headings for new coal-producing mines … removed rock and coal to make way for the mine shaft … some shafts close to 2000 feet deep … [and was] exposed to dust from breaking rock and coal seams." JA 317.

At the November 16, 2012, administrative hearing, Smith reiterated that for both FKC an FKCI, he worked building airshafts. JA 111, 120. He did not know precisely how long he worked for each company, but he worked until each project was done. JA 112, 122. He did not remember the exact date he started working for FKC in 1973, but reasoned that it must have been in early December 1973. Smith recounted that his wife's uncle, Harry Lowe, also worked at FKC at the same site and was killed in a mining accident on December 17, 1973. The miner explained that he must have been working for at least a week before the accident because he had worked the same shift as Mr. Lowe until shortly

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[6] A "heading" is "an interior level or airway driven in a mine." *See* http://www.coaleducation.org/glossary.htm.

before the accident, and "I remember thinking how fortunate I was not to have been there when it happened." JA 136.

Employment records from Centennial Coal Company state that Smith began working for the company on September 1, 1974. JA 160. Smith likewise indicated, in another signed statement memorializing a second telephone conversation with a DOL claims examiner, that it was possible that he left FKC on August 31, 1974, and started at Centennial on September 1, 1974, because "he left one job for the other" and "was never laid off." JA 326.

Last, a November 24, 2008, letter from FKCI states that Smith was hired on August 16, 2005, as a "Miner II" on the Laurel Fork Mine Project and was transferred to the Consol Buchanan Production Shaft Repair project on October 5, 2005. His employment with the company ended on November 30, 2005, when he was laid off at the end of the project. JA 174.

C. Course of the Proceedings and Decisions Below

1. Proceedings before the DOL District Director

Smith filed this claim on August 26, 2008. JA 147. The district director credited the miner with over fourteen years of coal

mine employment and awarded benefits after determining that the medical evidence established that Smith suffered from complicated pneumoconiosis which arose out of his coal mine employment. JA 385. (Complicated pneumoconiosis is the most serious form of the disease and results in an irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. § 921(c)(3).)

Piecing together various sources of evidence, including SSA earnings and corporate records, Smith's signed statements and pay stubs, and Virginia State Corporation Commission records, the district director summarized Smith's coal mine employment history as follows:

Company	Date of Employment
Heintzmann/Hi Tech	2006 (less than one year)
Abby Contractors	2005-2006 (less than one year)
FKCI	8/16/2005 – 11/30/2005
Phoenix Mining	1986 (less than one year)
Simmons Brothers	1985 (less than one year)
JJS Coal Co.	8/24/1981-12/22/1984
Grassy Branch	1980-1981 (less than one year)
J S & K Coal Corp.	1979-1981
Dominion Coal Corp	1978-1979 (less than one year)
Centennial Constructors	1971-1978 (with interruptions)
FKC	1973-1974

See JA 386-87.

The district director then determined that a predecessor/successor relationship existed between FKC and FKCI based on FKCI's statement explaining the transfer of partnership interests from FKC to FKCI in 1982. JA 388. The district director also found that Smith's employment for FKC and FKCI constituted coal mine employment even though his coal mine construction work for FKC occurred before 1978. The district director reasoned that when FKCI employed Smith in 2005, "it was aware or should have been aware of his employment with its predecessor, FKC, and it was also aware or should have been aware that such employment could be considered coal mine employment pursuant to the 1977 amendments." JA 388.

Finally, using the SSA earnings records, Smith's signed statements and company records, the district director determined that Smith's cumulative employment with FKCI (106 days) and FKC (263 days) totaled just over one year (369 days). JA 389. Accordingly, the district director found FKCI responsible for the payment of Smith's benefits. FKCI disagreed with this

determination and requested a *de novo* hearing before an administrative law judge.

2. The ALJ's Decision

The ALJ held a hearing on November 16, 2012, and awarded benefits in a single-spaced, forty-four page decision issued on August 20, 2014.[7] With regard to the responsible operator designation, the ALJ first found that the miner's coal mine construction work for FKC and FKCI was coal mine employment. He based this finding on the miner's testimony that his work for these companies entailed sinking coal mine airshafts through rock and coal seams, and that this work regularly exposed him to coal mine dust. JA 35.

The ALJ then determined that his cumulative employment with FKC and FKCI totaled more than one year. With respect to FKCI, the ALJ found three months and two weeks of employment

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[7] Like the district director, the ALJ determined that Smith suffered from complicated pneumoconiosis arising out of coal mine employment, and accordingly awarded benefits. JA 71.

based on FKCI's records showing Smith worked there from August 16, 2005 until November 30, 2005. JA 38.

As for FKC, the ALJ found eight months and three weeks of employment. He determined that Smith worked for FKC for the last three weeks of December 1973, because Smith recalled that he must have been working for at least a week before Mr. Lowe was killed on December 17, 1973, and Smith's SSA earnings records with FKC showed an average weekly wage of approximately $280 and total earnings of $758.11 in December 1973. JA 35.

Finally, the ALJ credited Smith with eight months of employment with FKC in 1974 (January through August) based on (1) Smith's testimony that he started working at Centennial right after he left FKC, (2) Centennial's employment records showing that Smith started on September 1, 1974, and (3) Smith's SSA earnings records which showed $2,247 with FKC in the third quarter of 1974, representing about two-thirds of his average quarterly earnings ($3,638) with FKC in 1974. JA 36 n.14.

The ALJ then determined that FKCI was a successor to FKC in light of FKCI's acquisition of FKC's assets in 1982. JA 40. The ALJ

thus added Smith's employment with FKC to that with FKCI and found one year and two weeks of cumulative coal mine employment. JA 40. Accordingly, the ALJ found FKCI liable for the claim because it was the most recent coal mine employer to employ Smith for at least one year.[8] JA 40.

3. The Board's Affirmance

The Board upheld the ALJ's finding that FKCI was the liable party. On appeal, FKCI argued that FKC did not meet the definition of operator at the time of Smith's employment with the company in 1973-1974, and therefore, FKCI was not a successor operator. FKCI also asserted that applying the amended statute and current black lung regulations to find that FKC was an operator was impermissibly retroactive.

The Board majority rejected these arguments. It observed that FKC was an operator at the time of its reorganization (and the creation of FKCI) in 1982. JA 11. Furthermore, the majority

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[8] The ALJ found that Smith's work for Heintzman/Hi Tech in 2006 did not qualify as coal mine employment, and that Smith worked less than one year in 2005-2006 for Abby Contractors. JA 40.

identified no retroactivity problem because Smith's employment with FKCI occurred in 2005, and he filed his claim in 2008. Both events, the Board reasoned, occurred long after the BLBA and regulations had been amended to include companies performing coal mine construction; therefore, FKCI had adequate opportunity to protect its interests. Thus, the majority affirmed the ALJ's finding that FKCI was a successor to FKC and that Smith's work for both companies could be combined. JA 12. The majority then affirmed the ALJ's findings that Smith cumulatively worked for at least one year for FKC/FKCI (JA 15) and that Smith suffered from complicated pneumoconiosis (JA 26).

One judge dissented arguing that holding FKCI liable based in part on Smith's 1973-74 FKC employment was an impermissible retroactive application of the later statutory amendment.

SUMMARY OF THE ARGUMENT

It is undisputed that FKC was performing coal mine construction services, and thus, was an operator when it reorganized into FKCI in 1982. FKCI is therefore the successor

operator to FKC. As such, Smith's employment with FKC is attributable to FKCI.

Admittedly, FKC employed Smith before the 1977 clarification of "operator" expressly covering coal mine construction companies. But that fact, standing alone, does not necessarily preclude its application here. The retroactivity inquiry turns on basic notions of fairness involving "fair notice, reasonable reliance, and settled expectations." And these point to imposing liability on FKCI. The statutory clarification had long been in place when the events triggering FKCI's liability occurred. FKCI was thus on fair notice of its liability and had ample opportunity to protect its interests. Moreover, even assuming a retroactive impact, it is permissible because the amendment was merely a clarification of the law. Thus, the 1977 amendment was properly applied here.

Finally, the ALJ's conclusion that Smith had more than one year of coal mine employment with FKC/FKCI is supported by substantial evidence. The Court should reject FKCI's contention that Smith did not work the entire months of July and August 1974 for FKC. In finding otherwise, the ALJ reasonably interpreted

Smith's testimony, in conjunction with Smith's SSA earning records and documentary evidence from Centennial Constructors.

ARGUMENT

A. Standard of Review.

This Court's review of decisions under the BLBA is "limited." *Harman Min. Co. v. Dir., Off. of Workers' Comp. Programs*, 678 F.3d 305, 310 (4th Cir. 2012). The Court exercises *de novo* review over the ALJ's and the Board's legal conclusions. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010).[9] But the Director's interpretation of the BLBA, as expressed in that Act's implementing regulations is entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Elm Grove Coal v. Dir., OWCP*, 480 F.3d 278, 292 (4th Cir. 2007); *Mullins Coal Co., Inc., of Va. v. Dir., OWCP*, 484 U.S. 135, 159 (1987); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997). The

[9] The retroactive application of statute is "a pure question of law" that "is, at bottom, a question of congressional intent." *Matherly v. Andrews*, 817 F.3d 115, 119 (4th Cir. 2016).

Director's interpretation of the BLBA in a legal brief is "entitled to respect … to the extent that [it has] the power to persuade." *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 388 (4th Cir. 2011) (internal citations and quotations omitted).

The Court defers to the ALJ's factual findings and credibility determinations so long as they are supported by substantial evidence. *Hobet Min., Inc. v. Epling*, 783 F.3d 498, 504 (4th Cir. 2015) ("We ask only whether substantial evidence supports the factual findings of the ALJ and whether the legal conclusions of the Board are rational and consistent with applicable law.")

B. The ALJ correctly held FKCI liable.

1. FKC was an operator and FKCI its successor.

Relying on the plain language of Section 932(i), FKCI argues that an operator cannot be a successor to a prior entity unless the former was itself an operator within the meaning of the BLBA.[10]

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[10] FKCI also vaguely asserts that the 2001 black lung regulations somehow expand the reach of the successor liability rules to capture the FKC/FKCI transaction. Pet. Br. at 19. FKCI is incorrect. The amended regulation governing successor operators, 20 C.F.R. § 725.492, "largely tracks the language" of the statutory (cont'd . . .)

Pet. Br. at 15. Focusing on the fact that Smith's employment for FKC occurred before the BLBA was amended to include coal mine construction companies as operators, FKCI reasons that FKC was not an operator and, therefore, FKCI cannot be considered a successor operator.

FKCI overlooks the fact that FKC was an operator when it reorganized into FKCI in 1982. At that time, the BLBA had covered coal mine construction workers as miners and imposed liability on their employers as coal mine operators for over four years. 30 U.S.C. §§ 802(d), 902(d). And it is equally clear as a factual matter that in 1982, FKC was an operator under the BLBA since it admittedly performed coal mine construction work. *See* JA 268 (stating that "[s]ince its inception [1971], Frontier Kemper has

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(. . . cont'd)
provision 30 U.S.C. § 932(i) and the prior regulation, and was intended to "clarify" the successor operator criteria and the priority for assignment of liability. 62 Fed. Reg. 3364 (Jan. 22, 1997). (FKCI even agrees that the current regulation "tracks the statutory bases" for successor liability. Pet. Br. at 19). In any event, both the statute and regulation cover the reorganization here (from a partnership to corporation). 30 U.S.C. § 932(i)(3)(B); 20 C.F.R. § 725.492(b)(1).

completed over 250 construction contracts involving nearly 185 miles of tunnels and slopes, and over 33 miles of vertical shafts").

Finally, by 1982, the BLBA successor operator provision had been in effect for four years and covered the exact kind of reorganization here. *See* Pub. Law 95-239, § 7, 92 Stat. 95 (March 1, 1978) (codified at 30 U.S.C. § 932(i)(3)(B) ("If an operator ceases to exist by reason of a reorganization or other transaction or series of transactions which involves a change in identity, form, or place of business or organization, however effected, the successor operator or other corporate or business entity resulting from such reorganization or other change shall be treated as the operator to whom this section applies.")). Accordingly, under the plain terms of the statute, FKC was an operator and FKCI its successor operator. *See Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 564 (6th Cir. 2002) (under BLBA's successor operator liability provision, if an operator ceases to exist as a result of a reorganization, the reorganized entity is liable as successor operator).

2. Assigning liability to FKCI is not impermissibly retroactive.

FKCI's real argument is that assigning liability to FKCI is impermissibly retroactive because Smith's employment with FKC occurred before the BLBA applied to coal mine construction companies. FKCI invokes *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and the presumption against retroactive legislation. Pet. Br. at 20. But the "commonsense, functional judgment" called for by *Landgraf* establishes FKCI's liability here.

Generally, courts apply the law in effect when they decide cases "unless doing so would give the statute retroactive effect." *Alexander S. v. Boyd*, 113 F.3d 1373, 1387 (4th Cir. 1997) (internal quotations omitted). To determine if there has been an impermissible retroactive effect, this Court has adopted a three-step inquiry:

> First, we must determine whether Congress has expressly prescribed the statute's proper reach. If so, the inquiry ends there. If we determine that Congress has not spoken with the requisite clarity, we must decide whether the statute would operate retroactively, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. However, a statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Finally, if we determine that the statute does have a retroactive effect, we

> will not apply it absent clear congressional intent favoring such a result.

Matherly, 817 F.3d at 119 (internal quotations and citations omitted).

This inquiry, however, does not occur abstractly or in a legal vacuum; rather, it "demands a commonsense, functional judgment" that "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Jaghoori v. Holder*, 772 F.3d 764, 771 (4th Cir. 2014) (internal quotation and citations omitted).

As an initial matter, the fact that Smith's work with FKC occurred before the 1977 amendment, standing alone, does not give rise to impermissible retroactivity. *Landgraf*, 511 U.S. at 269 (the mere fact that a statute is applied to events preceding the statute's enactment does not make its application impermissible). Indeed, the Seventh Circuit has affirmed the liability of a coal mine construction company based on both pre- and post-amendment coal mine construction work, although without addressing retroactivity concerns. *See R&H Steel Buildings, Inc. v. Director, OWCP*, 146 F.3d 514, 517 (7th Cir. 1998); *Roberts & Schaefer Co. v.*

Director, OWCP, 400 F.3d 992 (7th Cir. 2005); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding retrospective imposition of black lung liability on coal mine operators).

This Court's decision in *Hughes v. Heyl & Patterson, Inc.*, 647 F.2d 452, 456-57 (4th Cir. 1981), likewise illustrates that the retroactivity analysis involves more than comparing the timing of the conduct and statutory enactments. Although *Hughes* ultimately refused to apply the amended definition of coal mine operator, it did so only after considering whether, under the circumstances, the operator had a fair opportunity to defend against liability imposed by the amendment. (The Court applied the *pre-Landgraf* "manifest injustice" test under *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974)). In particular, the Court emphasized that the miner's claim had been filed, and his work had ceased, prior to the amendment's effective date. As a result, the operator could not protect itself against the subsequent liability: the company had been "denied the opportunity to obtain insurance coverage for such liability. The

manifest injustice of th[is] outcome[] is obvious." *Id.* at 454.[11] In short, if applying amendments to pre-amendment conduct was *per* invalid, *Hughes* would not have undertaken this second analytical step.

By contrast, the facts here and the "familiar considerations of fair notice, reasonable reliance, and settled expectations" favor a different result -- FKCI was clearly on notice of its potential liability and had the opportunity to protect itself. First, at the time of FKC's employment of Smith in 1973-74, it was on notice of potential black lung liability. FKCI's contention (Pet. Br. at 15-16) that coal mine construction companies were categorically excluded as operators before the 1977 amendment and thus not liable for BLBA benefits is incorrect. In *Bituminous Coal Operators' Ass'n. v. Sec. of the Interior*, 547 F.2d 240 (4th 1977), this Court held that the coal mine construction companies were liable for health and safety violations

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[11] The precedential effect of this finding is problematic, however, because the Court found the construction company liable "under the law as it existed at the time [the claim] was filed," 647 F.2d at 454; that is, under the original definition of operator. 647 F.2d at 457. *See* discussion *infra* at 29.

under Subchapters II and III of the FMSHA.[12] And in *Hughes*, 647 F.2d at 456-57, the Court ultimately found the construction company liable for black lung benefits under the original definition of operator because its control of the coal preparation facility at the start-up phase constituted the mining and processing of coal which exposed its workers to coal dust. Thus, although Smith's 1973-74 employment, by itself, imposed no black lung liability on FKC and FKCI, both were on notice that extended employment could have that effect.[13]

The fairness of applying the 1977 amendment is further confirmed by the fact that the events actually triggering FKCI's

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[12] Although the Bituminous Coal's holding did not extend to Subchapter IV (the BLBA), 547 F.2d at 245, all Subchapters utilized the same definition of "miner" and "operator" at that time. *Compare* 30 U.S.C. § 902(d) (1970) (BLBA definition of miner) *with* 30 U.S.C. § 802(g) (1969) (same)).

[13] FKCI cites two instances where coal mine construction companies were found not liable under the original definition. Pet. Br. at 15-16. But this fact simply evidences the uncertainty in the law at the time, *see Bituminous Coal*, 547 F.2d at 243, and does not undermine the point that FKC was on fair notice of its potential liability. A party that ignores adverse interpretations of the law does so at its peril.

liability for Smith's claim occurred *after* its enactment. The first of these events was the 1982 reorganization of FKC into FKCI. At that time, the BLBA covered coal mine construction workers as miners, imposed liability on their employers as coal mine operators, and allowed successor operator liability. 30 U.S.C. §§ 802(d), 902(d), 932(i). Thus, at the time of its creation, FKCI was on notice of its potential liability for BLBA benefits to coal mine construction workers employed by FKC as well as those employed by FKCI after the reorganization.

The second event necessary to impose liability on FKCI occurred in 2005, when FKCI hired Smith to work in coal mine construction, and caused his combined employment with FKC and FKCI to exceed the one-year floor to impose liability. 20 C.F.R. § 725.494(c). At this time, the 2000 revised regulations had been in effect for four years and the statutory amendments in effect for more than a quarter-century. By then, FKCI had ample opportunity to know the state of the law regarding operators and successor operators, and to conform its conduct accordingly. *See Tasios v. Reno*, 204 F.3d 544, 550 (4th Cir. 2000). Thus, prior to hiring

Smith, FKCI was on notice that it could be liable for any BLBA benefits awarded to him.

Accordingly, FKCI had the opportunity to protect its interests by securing commercial insurance or qualifying as a self-insurer. *Cf.*, *Hughes*, 647 F.2d at 454. FKCI could also have declined to hire Smith. Under these circumstances, FKCI clearly could have avoided, or least mitigated, the consequences of the statutory amendments and the revised regulations. "[The presumption against retroactivity] is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 46 (2006).

In short, because the conduct giving rise to FKCI's liability was not complete when the definition of operator was amended, the law does not have impermissible retroactive effect here. *See Landgraf*, 511 U.S. at 270 ("The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons *after the fact*.") (emphasis added). *See also McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13, 16 (1st Cir. 1993) ("Even when later-occurring

circumstance depends upon the existence of a prior fact, that interdependence without more, will not transform an otherwise prospective application into a retroactive one."); 2 *Sutherland Statutory Construction* § 41:4 (7th ed. 2014) ("Retrospective application of a law occurs only if the new or revised law was not yet in effect on the date that the relevant events underlying its application occurred.").

Finally, any retroactive effect (if there is one) comports with congressional intent. Congress described the 1977 enactment as a clarification of existing law, expressly approved of *Bituminous Coal,* and stated that "construction workers engaged in underground construction are generally exposed to the same hazards as underground miners." 1977 U.S.C.C.A.N. at 3424-25, 58. *Hughes* reached a similar conclusion in holding the construction company liable under the original law: "the [congressional] citation, with approval, of the case of *Bituminous Coal Operators' Association v. Secretary of Interior*, convinces this court that Congress considered mine construction companies engaged in mining, processing or

extracting coal to be covered as operators all along."[14] 647 F.2d at 457 n.5.

Congressional intent to apply the amendment to pre-enactment employment is further demonstrated in other BLBA provisions. Section 932(c) provides that liability may be imposed on an operator even if the disability arose only *in part* out of post-BLBA employment (*i.e.*, employment after 1969). 30 U.S.C § 932(c) (emphasis added). *See also* 20 C.F.R. § 725.494(d) (requiring the operator to have employed the miner only *one day* after 1969 in order to be considered potentially liable for the claim). This suggests that Congress did not intend for pre-enactment employment to be ignored in operator liability issues as long as there was some post-enactment employment as well.[15] By analogy,

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[14] The meaning of *Hughes'* qualifying phrase "engaged in mining, processing, or extracting" is unclear. *Bituminous Coal* unmistakably concluded that "a mine construction company may be deemed an operator even before coal extraction has begun." 547 F.2d at 246.

[15] Section 932(i) itself also suggests that liability could be imposed on a successor for work performed with the prior operator before the BLBA's inception. The provision covers any transaction (cont'd . . .)

Smith's pre-1978 employment should not be ignored in determining FKCI's liability. Thus, adding Smith's pre- and post-amendment employment together to find FKCI liable for the claim is both reasonable and consistent with congressional intent.

In sum, *Landgraf* and the presumption against retroactivity do not preclude holding FKCI liable for Smith's black lung benefits.

(. . . cont'd)
occurring on or after January 1, 1970, which suggests that a transfer occurring on that date would necessarily involve employment prior to 1969. 30 U.S.C. § 932(i)(1).

3. The ALJ reasonably found that Smith worked for FKC/FKCI for more than one year.

FKCI last challenges the ALJ's finding of one year of coal mine employment and focuses on the third quarter of 1974 (with FKC).[16] Pet. Br. at 21-25. The ALJ credited Smith with two months of coal mine employment during this period based on the following rationale:

> I find Mr. Smith was employed by the Frontier & Kemper Partnership through the end of August 1974 based on: a) Mr. Smith's credible testimony that he started working for Centennial right after he left Frontier & Kemper Partnership; b) Centennial's employment records, DX 9, which show that he returned to work for the company on September 1, 1974; and, c) Mr. Smith's SSA record which indicates he earned $2,247 with Frontier & Kemper partnership in the third calendar quarter of 1974 (July to September), DX 17, which represents about 2/3 of his average quarterly earnings of $3,638 with Frontier & Kemper Partnership in 1974, and equates to two out of three months in the third calendar quarter, that is, July and August.

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[16] FKCI also contends that Smith erroneously characterized the last two months of his employment with FKCI as mine shaft work rather than repair of a coal mine skip system. Pet. Br. at 25. This is a distinction without a difference. Both are coal mine construction work, and for both, Smith is presumed to have been exposed to coal mine dust, 20 C.F.R. § 725.202(a),(b); a presumption that FKCI has not contested.

JA 36 n. 14. FKCI argues that the ALJ should have credited Smith with only 8 weeks of work during this period because his quarterly earnings ($2,247) divided by his average weekly wage ($280) equate to 8.025 weeks of employment. FKCI overlooks the fact that the ALJ did not rely solely on the SSA records to calculate Smith's employment for this period. He relied on Smith's signed statement that he worked for FKC without a break and started at Centennial immediately after leaving FKC, and Centennial's employment records which show that Smith started there on September 1, 1974.

In determining the length of coal mine employment, an administrative law judge may apply any reasonable method of calculation. *See Migliorini v. Director, OWCP,* 898 F.2d 1292, 1294 (7th Cir. 1990); *Muncy v. Elkay Min. Co.*, 25 Black Lung Rep. (MB) 1-21-27, 2011 WL 6140705, *4 (Ben. Rev. Bd. 2011); *Osborne v. Eagle Coal Co.*, ___ Black Lung Rep. (MB) __, BRB No. 15-0275 BLA (Ben. Rev. Bd. Oct. 5, 2016) (published). The ALJ reasonably relied on the SSA records in conjunction with Smith's testimony and the documentary evidence to credit Smith with two months during this period.

FKCI argues that Smith's testimony must be discounted because it was equivocal. That is, Smith could not remember the exact date he left FKC and stated only that it was *possible* that he last worked for FKC on August 31, 1974. But the ALJ referenced Smith's signed statement that "he left one job for the other," and reasonably interpreted this evidence as indicating that there was no gap between his employment for these two companies.[17] Thus, the ALJ's finding that Smith worked for the entire two months of July

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[17] Given the passage of time since Smith worked for FKC, FKCI's nitpicking of his testimony and signed statements is unwarranted. FKCI complains that Smith's signed statements are unsworn and he was pressured into providing certain information. But the formal rules of evidence do not apply in black lung proceedings, *see* 30 U.S.C. § 932(a) (incorporating by reference section 23(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 923(a); 20 C.F.R. § 725.455(b); and Smith's signed answers -- in response to open-ended questions -- were not coerced. JA 324-25. Finally, FKCI can hardly complain about a lack of certitude when FKC and FKCI were in the best position to provide definitive evidence by furnishing Smith's complete employment records, which they failed to do. JA 256. *See* 31A C.J.S. Evidence § 254 (September 2016 update) (unexplained failure of party to produce relevant evidence in his or her possession or control may give rise to an adverse inference that the evidence would be harmful to the party). By contrast, another Smith employer during the 1970's – Centennial -- had no difficulty providing the start and stop dates of his employment. JA 160, 204.

and August is reasonable and should be affirmed. *Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 756 (4th Cir.1999) (ALJ decisions must be upheld if they "rest within the realm of rationality.).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) because it contains 7,138 words and 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 (14-point Bookman Old Style) using Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

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