[BLR cite: *Williams and Jones v. Humphreys Enterprises, Inc.*, 17 BLR 1-126 (1993)]

EDWARD F. WILLIAMS) BRB No. 88-0111 BLA
)
Claimant-Respondent)
)
v.)
)
HUMPHREYS ENTERPRISES,)
INCORPORATED)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)
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)
)
WALTER JONES) BRB No. 88-1437 BLA
) Claimant-Respondent)
)
v.)
)
HUMPHREYS ENTERPRISES,)
INCORPORATED)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of V.M. McElroy, Administrative Law Judge, United States Department of Labor.

Mark J. Botti (Arter & Hadden), Washington, D.C., for employer.

Christian P. Barber (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Orders (85-BLA-1277 and 85-BLA-1220) of Administrative Law Judge V.M. McElroy awarding medical benefits in two claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). In *Williams v. Humphreys Enterprises, Inc.,* Case No. 85-BLA-1277 (December 7, 1987)(unpub.), the administrative law judge found that claimant established twenty-three years of coal mine employment, and, based on the date of filing, April 14, 1980, applied the permanent criteria found at 20 C.F.R. Part 718. The administrative law judge determined that claimant established invocation of the presumption at 20 C.F.R. §718.305(a), and further found that employer failed to establish rebuttal of the presumption at 20 C.F.R. §718.305(b). Thus, medical benefits were awarded. In *Jones v. Humphreys Enterprises, Inc.*, Case No. 85-BLA-1220 (March 28, 1988)(unpub.), Administrative Law Judge McElroy found thirty and one-quarter years of coal mine employment, and, based on the date of filing, June 29, 1979, applied the interim criteria found at 20 C.F.R. Part 727. The administrative law judge concluded that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), and that employer failed to establish 20 C.F.R. §727.203(b) rebuttal. Thus, medical benefits were awarded to this claimant as well. In both cases, the administrative law judge determined that employer, Humphreys Enterprises, Incorporated (hereinafter referred to as Humphreys) was liable as the responsible operator, since claimant's place of last coal mine employment was Sunrise Coal Company (hereinafter referred to as Sunrise), and, subsequent to the cessation of claimant's coal mine employment, Sunrise's assets were purchased by Blackwood Fuel Company (hereinafter referred to as Blackwood), which is owned by Humphreys. Thus, the administrative law judge determined that Humphreys is the successor operator pursuant to 20 C.F.R. §725.493(a), and thus liable for benefits payable to both claimants. Employer appeals[1], asserting that the administrative law judge erred in finding that Humphreys was liable as the successor operator to

[1]By Order dated January 11, 1989, the Board granted employer's motion to consolidate both cases for purposes of briefing.

Sunrise. The Director, Office of Workers' Compensation Programs (the Director), has responded to employer's consolidated appeal by a motion to remand[2], conceding that Humphreys was erroneously named as responsible operator, and requesting remand for awards of benefits payable by the Black Lung Disability Trust Fund be instituted in both cases.

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

Both employer and the Director assert in this appeal that Humphreys was erroneously named as a successor responsible operator.[3] As employer asserts, the Board, in *Woodward v. Humphreys Enterprises, Inc.*, BRB No. 90-1618 BLA (December 13, 1991)(unpub.), has previously held that Humphreys is not a successor operator of Sunrise or Blackwood. The degree of control exercised by the acquiring corporation is determinative in resolving the issue of whether a company is a successor operator. *See generally Long v. Clearfield Bituminous Coal Corporation*, 1 BLR 1-149, 1-163 (1977). In this case, the administrative law judge's determination that Humphreys was the responsible successor operator in these cases was based solely upon the facts that Humphreys owned seventy-five percent stock in Blackwood, which owned and controlled Sunrise, and that Sunrise and Humphreys shared common officers. The record does not contain evidence sufficient to demonstrate that Humphreys controlled Blackwood or Sunrise. Mere majority ownership of stock does not, in itself, constitute control of daily coal mining operations. *See Long*, *supra*. Moreover, the record does not establish that the presence of common officers and directors resulted in Humphreys, as a legal entity, controlling the operations of Blackwood or Sunrise, inasmuch it was not proven that the common officers, if they were making decisions regarding the day to day coal

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[2]The Director has filed a Motion to Remand in these cases. The Board accepts the Director's Motion to Remand as his response brief, and herein decides these cases on their merits.

[3]In light of the fact that none of the parties have challenged the merits of administrative law judge's findings of entitlement pursuant to 20 C.F.R. Part 718 in *Williams*, and pursuant to 20 C.F.R. Part 727 in *Jones*, the administrative law judge's awards of benefits are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

mining operations of Sunrise, were acting in their capacities as officers of Humphreys.

Furthermore, it is noted that Blackwood was not, at any stage of these proceedings, named as a responsible operator in these claims, and no reason has been provided for the failure to name Blackwood in the cases at bar. It is conceded by the Director that Blackwood is an operating corporation, as evidenced by his assertion that both Blackwood and Humphreys share corporate directors and officers. It is also conceded that Blackwood owns the remains of Sunrise. Thus, the only theory which could link Humphreys to the cases at bar is its interest in Blackwood, and its derivative liability for obligations incurred by Blackwood and/or Sunrise. The regulations require that the employing operator remain primarily liable under certain conditions.[4] 20 C.F.R. §725.493(a)(2)(ii). Primary liability must be established for derivative liability to be established, and primary liability of Blackwood and Sunrise cannot be established in these cases, since neither was named responsible operator, and to do so at this juncture in the proceeding would offend due process and would not enhance efficient administration of the Act and expeditious processing of claims. *See Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). Accordingly, for the reasons set forth above, we reverse the determination of the administrative law judge, and hold that Humphreys is not the successor responsible operator in these cases.[5] Accordingly, we remand the cases to the district director for the entry of awards of medical benefits payable by the Black Lung Disability Trust Fund.

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[4]The primary operator remains liable if operating a mine for any period after June 30, 1973, and if capable of assuming its liability. 20 C.F.R. §725.492(a)(2) and (a)(4). It appears from the records that both Sunrise and Blackwood were operating subsequent to June 30, 1973. The financial capability of these operators was not addressed by the administrative law judge, because neither was named as a responsible operator in these cases.

[5]Employer further asserts that the administrative law judge erred in considering the affidavit of Carl Bransford of the Office of Worker's Compensation Programs in making his determinations regarding the successor operator, inasmuch as this evidence was admitted into the record in violation of the twenty day rule at 20 C.F.R. §725.456. Inasmuch as we have reversed the determination of the administrative law judge on this issue, we decline to further address employer's contention pursuant to Section 725.456.

Accordingly, the Decision and Orders of the administrative law judge are affirmed in part, reversed in part, and these cases are remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge