

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 24-0066 BLA

JAMES A. YOUNG)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PRICE COAL COMPANY,)	
INCORPORATED)	
)	
and)	
)	
AMERICAN BUSINESS & MERCANTILE)	DATE ISSUED: 07/08/2024
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J.

Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Price Coal Company, Inc. (Employer or Price Coal) appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2020-BLA-05679) rendered on a claim filed on July 17, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹

The ALJ found Employer is the properly designated responsible operator. He also found Claimant established 15.21 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,² 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.³ 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

¹ This is Claimant's fourth claim for benefits. On July 11, 2003, the district director denied his prior claim, filed on May 1, 2002, because he failed to establish any element of entitlement. Director's Exhibit 4. Claimant took no further action until filing his current claim. Director's Exhibit 5.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

³ When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant failed to establish any element of entitlement in his

On appeal, Employer argues the ALJ erred in finding it is the properly designated responsible operator and thus the Black Lung Disability Trust Fund must assume liability for the payment of benefits.⁴ Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Benefits Review Board to reject Employer's arguments concerning its designation as the responsible operator.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.⁶ 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming

prior claim, he had to submit evidence establishing at least one element to obtain a review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 4.

⁴ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-22.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

⁶ For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

liability for benefits or that another “potentially liable operator” that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

In a Proposed Decision and Order, the district director determined Employer is the designated responsible operator, explaining:

[Claimant] was employed subsequent to [Price Coal in] 1987 as a miner by Radec Mining Inc., Radec Inc., and Double C Enterprises Inc. [He] was employed by Radec Mining Inc. and Radec Inc. for a period of less than 125 working days based on the Social Security earnings record. During [Claimant’s] employment with Double C Enterprises from 2008-2009, he earned an amount that would indicate an employment relationship spanning greater than 125 working days. However, during [Claimant’s] deposition with the attorney for Double C Enterprises, [he] stated that while employed with [it] he earned at least \$27 per hour, working shifts of 60-62 hours and 6 days per week. I contacted [Claimant] to confirm that this attestation was reliable, at which point [he] parroted the same information he provided to the attorney of the responsible operator, stating that he was very confident in that he earned \$27 per hour with Double C Enterprises, working 60-62 hours across a 6 day work week. Given [Claimant’s] multiple attestations, his time worked with Double C Enterprises has been recalculated, indicating that his employment relationship with [it] spanned 106.56 working days. Given that [Price Coal] was the last coal corporation to employ [Claimant] for a period of at least one year and 125 working days, [it is] deemed the potentially liable responsible operator.

Director’s Exhibit 60 at 2, 11. Thereafter, Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director’s Exhibits 66, 76.

Before the ALJ, Employer argued that it is not the responsible operator because Radec Mining, Inc. and Double C Enterprises more recently employed Claimant for more than one year.⁷ The ALJ found Employer failed to establish Claimant worked at least one year for either operator. Decision and Order at 8. He also found Employer failed to establish that either operator is financially capable of assuming liability for the claim. *Id.* Thus, he concluded Price Coal is the properly designated responsible operator.

⁷ Employer does not challenge the ALJ’s finding that it meets the criteria of a potentially liable operator; thus, we affirm this finding. 20 C.F.R. §725.494(a)-(e); *see Skrack*, 6 BLR at 1-711; Decision and Order at 6.

Employer argues the ALJ erred in relying on Claimant's deposition testimony to find neither Radec Mining, Inc. nor Double C Enterprises employed him for at least one year, even though the ALJ had already found Claimant's hearing testimony inadmissible for liability purposes.⁸ Employer's Brief at 4-8. However, Employer does not challenge the ALJ's finding that it did not satisfy its burden to establish either Radec Mining, Inc. or Double C Enterprises is financially capable of assuming liability for benefits; thus, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because Employer did not establish either Radec Mining, Inc. or Double C Enterprises is financially capable, Employer has failed to meet its burden to disprove its liability regardless of whether those companies more recently employed Claimant for one year. 20 C.F.R. §725.495(c)(2). Thus, any alleged error by the ALJ in finding Claimant did not work for either company for at least one year is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4-8.

We therefore affirm the ALJ's finding that Employer is the properly designated responsible operator. 20 C.F.R. §725.495(c)(2); Decision and Order at 8.

⁸ When the case was before the district director, Double C Enterprises timely submitted Claimant's October 3, 2019 deposition testimony as liability evidence, which the district director relied on in determining Employer is the designated responsible operator. Director's Exhibits 23; 60 at 11. Employer, however, failed to timely submit liability evidence before the district director. Before the ALJ, Claimant testified at the hearing about his employment with Radec Mining, Inc. and Double C Enterprises. Hearing Tr. at 32-33, 35-38, 51-60, 63-68. The ALJ found Employer is precluded from relying on Claimant's hearing testimony concerning his employment with Radec Mining, Inc. and Double C Enterprises because it failed to designate him as a liability witness when the case was before the district director. 20 C.F.R. §§725.414(c), 725.456(b)(1), (2); Decision and Order at 8.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge