U.S. Department of Labor

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

BRB No. 23-0436 BLA

JIMMY W. CROWLEY Claimant-Respondent v. WEST COAL CORPORATION/GREEN BRANCH MINING and ARROWOOD INDEMNITY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.[1]

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor;

[1] On June 5, 2024, John R. Sigmond of Penn, Stuart & Eskridge entered an appearance to represent the interests of the Tennessee Insurance Guaranty Association (TIGA). TIGA is a reinsurer that assumes the liabilities of its liquidated members in certain instances. Tenn. Ins. Code Ann. §56-12-101-121. Mr. Sigmond has not filed a pleading.

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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2021-BLA-05396) rendered on a claim filed on May 27, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer, Green Branch Mining, is the properly designated responsible operator. She also accepted the parties' stipulation that Claimant is entitled to benefits. Thus she awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Green Branch Mining is the responsible operator.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs responds, urging rejection of Employer's liability argument.

The Benefits Review 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[4] 20 C.F.R.

[2] 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 2, 8-9.

[3] 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 Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 8, 9; Hearing Tr. at 9.

[4] 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

§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 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).

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 6. We affirm this finding as unchallenged. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Nor does Employer allege it is financially incapable of assuming liability for benefits. Thus, it can avoid liability only by establishing that another financially capable operator more recently employed Claimant for at least one year.

Before the ALJ, Employer challenged its responsible operator designation by asserting that Key Mining, Incorporated (Key Mining) more recently employed Claimant; Key Mining is a successor operator to Green Branch Mining (Green Branch); and Claimant's employment with Key Mining and Green Branch should be combined to total at least one year. 20 C.F.R. §§725.492, 725.494; Employer's Post-Hearing Brief at 2-8. Thus it argued Key Mining should have been named the responsible operator. *Id*.

The ALJ rejected this argument, holding that Employer failed to establish a successor relationship between Key Mining and Green Branch. Decision and Order at 3-8. Employer argues the ALJ erred in making this finding. Employer's Brief at 2-11. We disagree as substantial evidence supports the ALJ's determination. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion).

A "successor operator" is "[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 of the assets thereof[.]" 20 C.F.R. §725.492(a). Successor liability also is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R.

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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).

§725.492(b)(1)-(3). When an operator is considered a successor operator, any employment with a prior operator shall also be deemed to be employment with the successor operator. 20 C.F.R. §725.493(b)(1). If the successor operator independently employed the miner after the transaction that gave rise to the successor operator's liability, it is primarily liable for the payment of benefits. *Id.*

The ALJ weighed deposition testimony from Roger West, the former president of Green Branch's parent company West Coal. Director's Exhibit 67. He testified that West Coal was the parent company of several subsidiaries. *Id*. at 9-11. One of its subsidiaries, he indicated, was Green Branch, which was still mining coal in May 1991. *Id*. at 12-13, 17. According to Mr. West, in that month West Coal's insurance carrier did not renew the operator's workers' compensation policy for its subsidiaries and, unrelatedly, the employees of the subsidiaries went on strike. *Id*. Although West Coal obtained a new policy and the workers returned to work in June 1991, he indicated the disruption caused West Coal to enter into an agreement with Key Mining/Charles Asbury under which Key Mining would mine coal from West Coal's mine sites, including Green Branch.[5] *Id*. at 22, 64-65.

Mr. West clarified the nature of the agreement, stating West Coal itself had leased the applicable mineral/land rights from another entity, Koppers Company, and West Coal made royalty payments to Koppers. Director's Exhibit 67 at 28-29, 50-51. Further, he stated Koppers was not comfortable with a sublease to Key Mining and indicated West Coal was still responsible for the royalty payments. *Id*. at 28-31. He testified that, under the agreement, Key Mining would mine the coal from the Green Branch mine site, bring it to West Coal's washing plant through its subsidiary Industrial Processing, then sell the coal it mined to West Coal. *Id*. If Key Mining sold the coal to another entity, West Coal would deduct royalty payments that needed to go to Koppers, along with the costs associated with using West Coal's washing plant. *Id*.

Although Mr. West characterized the agreement with Key Mining as a transfer of mines from West Coal to Key Mining, he conceded that West Coal continued to own all the equipment, including Green Branch's equipment, and that Key Mining only used the equipment. Director's Exhibit 67 at 43-44, 52. On cross-examination, Mr. West conceded that an insurance renewal agreement for West Coal's washing plant states that for the

[5] Mr. West stated the reason for entering into the mining agreement was that the employees of the subsidiaries were still unhappy and West Coal was still having problems with workers' compensation insurance. Director's Exhibit 67 at 64-65. He stated Charles Asbury was a good mining company that could step in because West Coal still needed to fulfill its contract to supply coal to the Tennessee Valley Authority. *Id*.

period from June 27, 1992 to June 27, 1993, the carrier should "[a]dd as a named insured: Green Branch Mining, Inc. and Allied Coal Corporation." *Id*. at 28-31, 76-77.

On appeal, Employer contends the evidence establishes that West Coal and Green Branch ceased to exist and that the relevant mine operations were all transferred to Key Mining. Employer's Brief at 2-10. We disagree.

The ALJ noted that for Key Mining to be a successor operator under 20 C.F.R. §725.492(a), Employer must "demonstrate that Key Mining acquired 'a mine, or substantially all the assets thereof, or acquired the coal mining business, or substantially all of the assets thereof, of a prior operator.'" Decision and Order at 8, *quoting* 20 C.F.R. §725.492(a). She found Mr. West's deposition testimony only establishes that "West Coal and Key Mining entered into a contract mining agreement in which West Coal retained exclusive ownership over the mining equipment" of Green Branch, along with Green Branch's "coal processing output, while Key Mining operated the mines themselves." *Id*. She also found West Coal retained control of the relevant mines because "Key Mining had an obligation to either sell the coal back to West for processing, or provide royalty payments." *Id*.

In addition, the ALJ found neither West Coal nor Green Branch ceased to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division under 20 C.F.R. §725.492(b). Decision and Order at 6-8. She found Mr. West's testimony establishes that Green Branch, through its parent company West Coal, "continued to exist after the execution of their agreement with Key Mining, and in fact even continued to participate in and profit from the extraction and processing of coal" from its mine. *Id*.

Based on the foregoing, the ALJ permissibly found Mr. West's deposition testimony insufficient to establish a successor relationship[6] between Green Branch and Key Mining.[7]

[6] Employer's reliance on *Elliot Coal Mine Inc. v. Director, OWCP* [*Kovalchick*], 17 F.3d 616 (3d Cir. 1994) is misplaced. Employer's Brief at 11. *Kovalchick* involved the issue of whether an entity constituted a coal mine operator and did not address whether a successor relationship existed between two entities.

[7] To the extent Employer asserts Claimant's testimony supports its successorship argument, we note Employer did not inform the district director that it was designating Claimant as a liability witness. Employer's Brief at 2. Absent notice to the district director of the name and address of a witness whose testimony pertains to liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c). Employer did not argue extraordinary circumstances before the ALJ, nor does it do so before the Board. Employer is thus precluded from relying on Claimant's testimony with respect to liability. *Id*.

See Tennessee Consol. Coal Co. v. Crisp, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. The Board cannot substitute its inferences for those of the ALJ. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's finding that the evidence does not establish a successor relationship between West Coal and its subsidiary Green Branch with Key Mining.

As Employer raises no further challenges, we affirm the ALJ's finding that Employer is the properly designated responsible operator. Decision and Order at 9.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge