U.S. Department of Labor

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

BRB No. 20-0202 BLA

ROGER D. SARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BULLION HOLLOW ENTERPRISES, INCORPORATED	)	DATE ISSUED: 12/21/2021
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus and Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits (2018-BLA-05042) rendered on a claim filed on December 8, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the responsible operator. He determined Claimant established 15.14 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[2] and the removal provisions applicable to the ALJ rendered his appointment unconstitutional. It also challenges its designation as the responsible operator. On the merits, Employer argues the ALJ erred in finding Claimant is totally disabled, established at least fifteen years of qualifying coal mine employment, and

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

invoked the Section 411(c)(4) presumption, and in finding Employer did not rebut it. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting the ALJ had authority to decide the case. The Director, however, urges the Benefits Review Board to vacate the ALJ's finding that Employer is the responsible operator and remand the case for him to determine whether National Salvage Company, Incorporated (National Salvage) was Employer's successor operator. Employer filed a reply brief reiterating its contentions concerning the Appointments Clause and disagreeing with the Director's assertion that in order to avoid liability, it must demonstrate that National Salvage is financially capable of assuming liability.[3]

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.[4] 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).

Appointments Clause

Employer requests that the Board vacate the ALJ's Decision and Order and remand this case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 10-14, 16; Employer's Reply Brief

[3] Employer contends the Board should hold the case in abeyance pending a ruling by the United States Supreme Court in *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), on the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010). Employer's Brief at 30 n.11. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 24.

[5] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018), *citing Freytag v. Comm'r*, 501 U.S. 868 (1991). The Department of Labor has

at 1-5.[6] It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id*. The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 10-13. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at11, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate

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conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[6] Employer raised this issue before the ALJ in a Motion to Cancel Hearing and for Reassignment. At the hearing, the parties agreed that the ALJ did not take "any significant action" in this case prior to December 21, 2017, when the Secretary of Labor ratified his appointment. Hearing Transcript at 10-11. Further, the claim was not referred to the ALJ until April 17, 2018, after his appointment was ratified. Director's Opposition to Employer's Motion to Cancel Hearing and for Reassignment at 1 n.2. We therefore affirm the ALJ's denial of Employer's motion because he did not take any substantive action in the instant case prior to the Secretary of Labor's ratification of his appointment on December 21, 2017. *See* Decision and Order at 3; Hearing Transcript at 10-11.

[7] The Secretary issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Merck.

the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Merck and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Merck. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Merck "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified ALJ Merck's appointment. Employer's Brief at 14. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the ALJ's appointment.[8] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

We further reject Employer's allegation that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive civil service. Employer's Brief at 16. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169

[8] While Employer notes correctly that the Secretary's ratification letter was signed by an "autopen," Employer's Brief at 14, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Merck's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause. Thus, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 14-16; Employer's Reply Brief at 5-8. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 14-16; Employer's Reply Brief at 5-8. It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *See* Employer's Brief at 14-16; Employer's Reply Brief at 7-8.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single

Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained that "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Although Employer generally summarizes these cases, it has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[10] 20 C.F.R. §725.495(a)(1). The district director is initially charged

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

[10] 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

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)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation. 20 C.F.R. §725.495(d). If the reasons include the more recent operator's inability to pay for benefits, the district director must provide a statement that he has no record of insurance coverage or authorization to self-insure for that employer as of Claimant's last day of employment. *Id*. Such a statement in the record constitutes prima facie evidence that the subsequent employer is not financially capable of paying benefits. *Id*. If the record lacks such a statement, however, the subsequent employer is presumed to be financially capable of paying benefits. *Id*.

Additionally, if a successor relationship is established between two coal mine employers, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). 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 prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). If the successor operator is financially incapable of assuming liability for benefits, however, liability falls to its predecessor if the predecessor meets the definition of a potentially liable operator – namely, that it employed the miner for at least one year and is financially capable of paying benefits. 20 C.F.R. §§725.492(d), 725.494(c), (e), 725.495(a)(3).

On October 5, 2016, the district director identified National Salvage; Bullion Hollow Coal Company, Incorporated (Bullion Hollow Coal); and Employer/Bullion

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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).

Hollow Enterprises, Incorporated (Bullion Hollow Enterprises) as potentially liable operators and gave them thirty days from receipt of the Notice of Claim to file a response. Director's Exhibits 27, 31, 42. Bullion Hollow Coal and Bullion Hollow Enterprises timely responded, contesting liability on the grounds that they were not the operators who most recently employed Claimant for a cumulative period of one year. Director's Exhibits 34, 43. In addition, Bullion Hollow Enterprises stated "[i]nsurance coverage cannot be confirmed without a specific last date of exposure. Insurance coverage canceled September 28, 1992." Director's Exhibit 43.

On October 13, 2016, Bullion Hollow Enterprises' insurance carrier, Old Republic Insurance Company (Old Republic), asserted it should be dismissed because the operator's insurance policy was canceled on September 28, 1992 but Claimant's "last earnings of $24,053 in 1992 [as reflected on his Social Security Administration (SSA) earnings record] would take him into November 1992 as his last exposure date." Director's Exhibit 36. On November 3, 2016, the district director denied Old Republic's request for dismissal, stating there was insufficient evidence to determine when Claimant last worked for Bullion Hollow Enterprises and, therefore, "[u]ntil more evidence is provided regarding [Claimant's] last date of [coal mine employment] with this company, I will not be releasing any party to the claim." Director's Exhibit 37.

The district director subsequently issued the Schedule for Submission of Additional Evidence (SSAE) on January 19, 2017, designating Bullion Hollow Enterprises and Old Republic as the responsible operator and carrier. Director's Exhibit 45. The district director acknowledged that Bullion Hollow Enterprises is not the operator that most recently employed Claimant but stated it is the designated responsible operator "based on [Claimant's] Social Security Earnings Record, deposition, and a phone call to [Claimant]."[11] *Id*. Employer responded to the SSAE, contesting its designation as the responsible operator. It also requested that the district director reconsider his findings concerning Claimant's years of coal mine employment and further requested additional time to submit evidence. Director's Exhibits 48, 49, 52, 53. There is no indication in the record that Employer submitted additional evidence.

In a letter dated February 2, 2017, the district director acknowledged receipt of letters from Bullion Hollow Enterprises, Bullion Hollow Coal, and Old Republic

[11] The district director stated Claimant worked for National Salvage in 1993 "but the earnings did not meet the yearly average." Director's Exhibit 45. He also noted Claimant testified during a December 8, 2016 deposition that National Salvage changed its name back to Bullion Hollow and Claimant reported, via a telephone call, that he was not sure whether he worked at National Salvage for a full year. *Id*.

responding to the SSAE but indicated "[t]he only way we can dismiss Bullion Hollow Coal at this time is if Bullion Hollow Enterprises admits that they are the responsible operator." Director's Exhibit 40. The district director also clarified that the SSAE should have stated Employer failed to timely submit evidence to support its position. *Id.*

In a letter, dated August 3, 2017, National Salvage was notified that it was dismissed as a potentially responsible operator because, pursuant to 20 C.F.R. §§725.492; 725.495(d), the district director found National Salvage was not insured on November 19, 1993, which was determined to be Claimant's last date of employment with the company. Director's Exhibits 29-30. The district director also determined, pursuant to 20 C.F.R. §725.495(d), that Bullion Hollow Coal was not insured as of Claimant's late date of employment with it, which was listed as 1992. Director's Exhibit 35. In a separate letter, dated August 3, 2017, the district director dismissed Bullion Hollow Coal as the putative responsible operator based "upon review of the evidence in the file and in accordance with 20 CFR 725.492-3." Director's Exhibit 41.

That same day, the district director issued a Proposed Decision and Order awarding benefits, identifying Bullion Hollow Enterprises and Old Republic as the responsible operator and carrier. Director's Exhibit 54. The district director noted in support of his determination that the "[M]iner last worked for National Salvage in 1993, but the earnings did not meet the yearly average;" Claimant testified National Salvage changed its name back to Bullion Hollow Enterprises; and Claimant reported via a telephone call that he was not sure he worked for a full year for National Salvage. *Id.* Employer requested a hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 56, 59.

On February 6, 2020, the ALJ issued his Decision and Order awarding benefits. Regarding the responsible operator issue, the ALJ found Claimant did not work for a full year for his most recent coal mine employer, National Salvage, and thus held Bullion Hollow Enterprises liable for benefits as the responsible operator because it employed Claimant for one full year. Decision and Order at 14. The ALJ did not make a finding on whether National Salvage was a successor operator to Bullion Hollow, or a finding on the nature of the relationship between the two entities. Instead, he found insufficient evidence of record to establish Claimant worked for National Salvage for a full year in 1993, which is required for that company to be designated as the responsible operator. *Id.* In contrast, he found Claimant's SSA earnings records reflect that he worked for Bullion Hollow Enterprises from 1983 to 1992. *Id.*; Director's Exhibit 6. He further found evidence that Bullion Hollow Enterprises was not insured as of September 28, 1992, but no definitive evidence that Claimant continued working for it after that date. Decision and Order at 14; Director's Exhibit 36. He found Old Republic's assertion that Claimant worked until November 1992 to be speculative and contradicted by "notations" in the record that

Claimant informed the district director's representative that he stopped working in May or June of that year. Decision and Order at 14; Director's Exhibit 37.

On appeal, Employer contends National Salvage is a successor to Bullion Hollow Enterprises and Claimant worked for at least one year for Bullion Hollow Enterprises and National Salvage combined, thus making National Salvage the most recent operator to employ Claimant for one year. Employer's Brief at 17. Employer further argues the Director alone bears the burden to establish National Salvage is not financially capable of assuming liability for the claim because the district director provided "no statement" required by 20 C.F.R. §725.495(d) that National Salvage is not financially capable of assuming liability for benefits. Employer's Reply Brief at 8-9, *citing Hiff v. DM & M Coal Co.*, BRB No.19-0502 BLA (Nov. 30, 2020) (unpub.).

The Director argues the successor operator issue alone is not dispositive in determining Employer's status as the responsible operator. Director's Brief at 2, 4-7. He urges the Board to vacate, not reverse,[12] and to instruct the ALJ that, if he finds on remand that National Salvage is Bullion Hollow Enterprises' successor operator, he should then determine whether Employer established that National Salvage is financially capable of assuming liability for the claim. *Id.* He alleges it is unclear whether National Salvage is still in operation and financially viable to assume liability. Director's Brief at 7, *citing* 20 C.F.R. §725.495(c)(2). The Director contends that if Employer fails to establish that National Salvage is financially capable of assuming liability for the claim, the ALJ should again find Bullion Hollow Enterprises, the next most recent employer who satisfies the potentially liable operator criteria, is the responsible operator. *Id.* at 6-7.

We agree with Employer and the Director that the ALJ erred in not determining whether National Salvage was Bullion Hollow Enterprises' successor operator. Employer's Brief at 17-18; Director's Brief at 2, 4-5. Thus, we vacate the ALJ's determination that Bullion Hollow Enterprises is the responsible operator liable for benefits. However, we reject Employer's assertion that if National Salvage is its successor, the Director automatically bears the burden to prove National Salvage is financially incapable of paying benefits before liability will revert to Bullion Hollow Enterprises. Contrary to Employer's argument, the district director included a statement, as 20 C.F.R. §725.495(d) requires, that National Salvage is not financially capable of assuming liability

[12] Employer argues the ALJ's error warrants reversal and dismissal of Employer as the responsible operator. Employer's Brief at 17-18, 34. We disagree, as there are outstanding factual determinations for the ALJ to make regarding the relationship between the two entities. *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill gaps in the ALJ's opinion).

for benefits. *See* Employer's Reply Brief at 8-9 (unpaginated). Director's Exhibit 29 is clearly labeled as "Statement Required By 20 C.F.R. §725.495(d);" moreover, it provides that, after reviewing records of insurance and self-insurance information the DOL maintains pursuant to 20 C.F.R. Part 726, National Savage was not insured on November 19, 1993, the last date that Claimant was determined to have been employed by it.

That said, the Director concedes it is unclear whether the district director accurately identified Claimant's last date of employment with National Salvage as November 19, 1993. Director's Brief at 6. Resolution of this factual question, in turn, has implications for the adequacy of the district director's statement regarding National Salvage's inability to pay benefits. As noted, 20 C.F.R. §725.495(d) requires the district director to include in the record a statement indicating whether National Salvage had an insurance policy that "covers the claim." *See* 20 C.F.R. §725.494(e)(1). If National Salvage is Employer's successor, and the district director accurately concluded Claimant was last employed by National Salvage on November 19, 1993, his statement that National Salvage was not insured on that date meets the requirements of Section 725.495(d), thereby constituting prima facie evidence of National Salvage's financial inability to pay benefits. 20 C.F.R. §725.495(d). In that case, in order to avoid liability, Employer would retain the burden to prove National Salvage's financial ability to pay. 20 C.F.R. §725.495(c)(2).

If, however, Claimant was last employed by National Salvage sometime prior to November 19, 1993, the district director's statement indicates only that the company was uninsured at a time when Claimant was no longer working for it. It does not indicate National Salvage was also uninsured as of Claimant's last date of exposure with the company.[13] In that case, the district director's statement does not meet the requirements of

[13] The Director appears to agree with this assessment, as he sets forth an argument that *supports* transferring liability to the Trust Fund if National Salvage is found to be Employer's successor. He alleges Claimant's testimony indicates his last month of work with National Salvage was in August 1993 and, therefore, he infers National Salvage "would have been insured" at the time. Director's Brief at 6, *citing* Director's Exhibits 29, 44 at 11, 14; Decision and Order at 13 n. 21. If accurate, a finding by the ALJ that National Salvage was Claimant's most recent coal mine employer for one year and retains the financial ability to pay benefits through insurance suggests National Salvage, not Bullion Hollow Enterprises, should have been named the responsible operator. In that case, benefits must transfer to the Trust Fund. 20 C.F.R. §725.407(d). However, whether National Salvage is Employer's successor, whether Claimant ceased employment with National Salvage prior to November 19, 1993, and whether it was insured as of Claimant's last day of employment are all factual questions for the ALJ.

Section 725.495(d) and, therefore, National Salvage would be presumed financially able to pay. 20 C.F.R. §725.495(d).

On remand, the ALJ must address the nature of the relationship between Bullion Hollow Enterprises and National Salvage.[14] 20 C.F.R. §§725.492, 725.493. If he finds that these companies operated as one entity or that National Salvage was the successor operator to Bullion Hollow Enterprises, then the ALJ must further determine whether Claimant worked as a coal miner for these companies for a cumulative period of not less than one year. 20 C.F.R. §725.494(c).

If the ALJ determines that National Savage is Bullion Hollow Enterprises' successor, he must determine whether National Salvage is financially able to pay benefits. If Claimant's last date of employment with the company was prior to the district director's finding of November 19, 1993, the district director's statement that National Salvage was uninsured as of that date is not prima facie evidence that the company cannot pay this claim, in which case the law presumes it can. *See* 20 CFR 725.495(d). If the district director's finding regarding Claimant's last day of employment is accurate, however, Employer has the burden to prove National Salvage's financial ability to pay. 20 C.F.R. §725.495(c)(2).

In either case, if the ALJ finds National Salvage is a successor that employed Claimant for one year when combined with his employment with Bullion Hollow Enterprises, and is financially able to pay benefits, Bullion Hollow Enterprises is not the

[14] Employer does not dispute Claimant worked for National Salvage for less than a year. Rather, it argues Claimant's Social Security Administration (SSA) earnings records confirm the two companies had the same mailing address and Claimant's testimony establishes National Salvage was a successor to Bullion Hollow Enterprises; therefore, it contends the years he worked for the two companies may be aggregated to establish one year of employment. Employer's Brief at 17-18; Director's Exhibits 6, 44. At his deposition, Claimant testified that the companies changed names three times: "first start[ing] out Bullion Hollow Coal Company[,] . . . switch[ing] to Bullion Hollow Enterprises and then . . . National Salvage and . . . switch[ing] back to Bullion Hollow Enterprise." Director's Exhibit 44 at 11-12. He agreed that when the companies changed names, he worked with the "same people" and "same boss" and that "Bullion Hollow" and National Salvage were the same company. *Id.* at 11-12, 16. The Director asserts it is unclear Claimant had personal knowledge of the ownership structure and transfer of assets or whether he was speaking from conjecture. Director's Brief at 5.

responsible operator. Liability then must transfer to the Trust Fund. 20 C.F.R. §§725.495(c)(2), 725.407(d).

If, however, the ALJ finds National Salvage is not Bullion Hollow Enterprises' successor, or National Salvage lacks the financial ability to pay benefits, he may reinstate his finding that Employer is liable for benefits as Employer has not otherwise argued it is not the appropriately-named responsible operator, e.g., it does not dispute that it employed Claimant as a coal miner for at least one year or that it retains the financial ability to pay benefits.[15]

[15] Because the district director awarded benefits to Claimant and it is unclear whether Employer is liable for benefits, we decline to address, as premature, Employer's challenges to the following: the ALJ's length of Claimant's coal mine employment finding, his determination that Claimant invoked the Section 411(c)(4) presumption, and his finding that Employer did not rebut it.

Accordingly, the ALJ's Decision and Order Awarding Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge