

BRB No. 88-2948 BLA

ANDREW LEZARK )  
 )  
 Claimant )  
 )  
 v. )  
 )  
 MEARS COAL COMPANY )  
 )  
 Employer-Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Petitioner ) DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John B. Bechtol (Reed Smith Shaw & McClay), Pittsburgh, Pennsylvania, for employer.

Elizabeth J. Shapiro (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, 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: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and CLARKE, Administrative Law Judge.\*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Director), appeals the Decision and Order and Supplemental Decision and Order (88-BLA-586) of Administrative Law Judge Michael P. Lesniak awarding medical benefits and attorney fees on a claim 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). The Director did not contest claimant's entitlement to medical benefits, and employer conceded the issue at the hearing. The administrative law judge, however, found that employer had been improperly named as the responsible operator. Accordingly, the administrative law judge dismissed employer as a party defendant, and transferred liability for payment of medical benefits and attorney's fees to the Black Lung Disability Trust Fund (Trust Fund). The Director appeals, contending that the evidence establishes that employer is the properly designated responsible operator herein. Employer responds, urging affirmance.

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. §932(a); O'Keeffe v. Smith,

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The Director contends that since claimant's last coal mine employment was with employer, and was for a period of more than one year, the administrative law judge erred in failing to consider and apply the provisions of 20 C.F.R. §§725.492(a)(2), (a)(4), and 725.493(a)(2)(ii). We agree. The administrative law judge found that employer was not properly named as the responsible operator because employer established that subsequent to 1970, it sold the mine where claimant was last employed to Hillsdale Coal Company, and thus Hillsdale, not employer, was the successor operator. Decision and Order at 2, 3; Hearing Transcript at 15-19. The Director, however, correctly notes that where a prior operator who most recently employed the miner for at least one year transfers its mine to a successor operator thereafter, it remains primarily liable for the payment of benefits if it is financially capable and operated any mine after June 30, 1973.<sup>1</sup> See Sections 725.492(a)(2), (a)(4), and 725.493(a)(2)(ii); Zaccaria v. North American Coal Corp., 9 BLR 1-119 (1986); Ariotti v. North American Coal Corp., 9 BLR 1-119

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<sup>1</sup> We reject employer's contention that the provisions of Section 725.493(a)(2)(ii) only apply where a prior operator transfers a mine to a successor operator for an improper purpose, e.g. in an attempt to escape liability, and not in cases such as this where the transfer was purely a business transaction. The regulation does not contain alternative provisions which depend for their application on the prior operator's motive for transfer of ownership. 20 C.F.R. §725.493(a)(2)(ii).

(1986), aff'd sub nom. North American Coal Corp. v. Director, OWCP [Ariotti], 854 F.2d 386, 11 BLR 2-216 (10th Cir. 1988). Consequently, we vacate the administrative law judge's dismissal of employer as a party defendant and his transfer of liability for payment of medical benefits and attorney fees to the Trust Fund, and remand this case for the administrative law judge to address the evidence of record pursuant to Sections 725.4929a)(2), (a)(4) and 725.493.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order are vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

DAVID A. CLARKE, JR.  
Administrative Law Judge