



BRB No. 17-0546 BLA

GARY COFFEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. COAL, INCORPORATED	)	
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF	)	DATE ISSUED: 08/23/2018
HARTFORD c/o ARROWPOINT CAPITAL	)	
SECURITY COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry A. Temin,  
Administrative Law Judge, United States Department of Labor.

Eugene E. Siler III, Williamsburg, Kentucky, for claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for  
employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05652) of Administrative Law Judge Larry A. Temin (the administrative law judge) on a subsequent claim<sup>1</sup> filed on February 9, 2015, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted employer's stipulation that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 arising from his coal mine employment<sup>2</sup> and is entitled to benefits, and found that the evidence supports employer's stipulation. The administrative law judge further determined that employer is the responsible operator. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that it is the responsible operator. Claimant and the Director, Office of Workers' Compensation Programs (the Director), have filed responses, urging affirmance of that finding and the award of benefits.<sup>3</sup>

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<sup>1</sup> Claimant's initial claim for benefits, filed on October 30, 2002, was denied by Administrative Law Judge William S. Colwell on March 27, 2007, for failure to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1 at 25-44. The Board affirmed the denial of benefits on April 29, 2008. *G.C. [Coffey] v. U.S. Coal, Inc.*, BRB No. 07-0646 BLA (Apr. 29, 2008) (unpub.).

<sup>2</sup> Claimant's most recent coal mine employment was in Tennessee. Director's Exhibits 1, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has at least fifteen years of underground coal mine employment, he has

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

The responsible operator is the "potentially liable operator" that most recently employed the miner for at least one year. *See* 20 C.F.R. §§725.494, 725.495(a)(1). An employer must meet five criteria to be considered a potentially liable operator: the miner must have worked for the operator for a cumulative period of at least one year; his employment must have included at least one working day after December 31, 1969; his disability or death must have arisen at least in part out of his employment with the operator; the operator must have been an operator after June 30, 1973; and the operator must be capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

The district director designates a responsible operator liable for the payment of benefits, with the initial burden on the Director to prove that the designated responsible operator is a potentially liable operator. 20 C.F.R. §§725.410(a)(3), 725.495(b). Once the district director has designated a responsible operator, that operator may be relieved of liability only if it proves that it is financially incapable of assuming liability for benefits, or that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(c)(1), (2).

In this case, the district director issued a Proposed Decision and Order on April 1, 2016, awarding benefits and finding that employer is the responsible operator liable for the payment of benefits. Director's Exhibit 30. Employer challenged its designation as the responsible operator, and requested a hearing and referral of the case to the Office of Administrative Law Judges. Director's Exhibits 31-32. Although counsel for all of the parties were present, claimant did not appear or testify at the hearing, believing it had been canceled. Administrative Law Judge's December 20, 2016 Order. Because employer stipulated that claimant has complicated pneumoconiosis, the parties agreed

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complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, his complicated pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b), he established a change in an applicable condition pursuant to 20 C.F.R. §725.309(c), and he is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11.

that the designation of the responsible operator was the only contested issue and requested a decision based on the record. *Id.*

Employer argued that Tennessee Coal Company should be designated as the responsible operator based in part on statements made by Administrative Law Judge William S. Colwell during claimant's initial claim for benefits. Decision and Order at 4, *discussing G.C. [Coffey] v. U.S. Coal, Inc.*, 2004-BLA-05925, slip op. at 7 (Mar. 27, 2007)(unpub.); Director's Exhibit 1 at 30-31. The administrative law judge first concluded that he was not bound by Judge Colwell's findings in claimant's prior claim regarding the responsible operator, and was free to reconsider the issue. Decision and Order at 4-5. Next, the administrative law judge found that claimant, who worked for Tennessee Coal Company after he worked for employer, was not employed at Tennessee Coal Company for at least one year. *Id.* at 5-6. He further found that employer failed to establish that Tennessee Coal Company was capable of paying benefits. Having determined that employer failed to establish that any of claimant's subsequent employers was a potentially liable operator, the administrative law judge found that employer is the responsible operator. *Id.* at 6.

Employer argues on appeal that the administrative law judge erred "in concluding that the Director is not collaterally estopped from denying that [employer] cannot be properly identified as the responsible operator in this case." Employer's Brief at 12. Employer notes that when Judge Colwell denied claimant's previous claim, he stated that "it appears that Tennessee Coal [Company] should have been designated by the district director as the operator liable for the payment of benefits on this claim."<sup>4</sup> *Coffey*, 2004-BLA-05925, slip op. at 7; Director's Exhibit 1 at 31. Noting that neither claimant nor the Director disputed Judge Colwell's observation when the previous claim was appealed to the Board, and that no new evidence has been offered in this claim, employer contends that collateral estoppel should prevent employer from being forced "to relitigate an issue already resolved in its favor." Employer's Brief at 13-14.

Employer's argument lacks merit. Contrary to employer's position, Judge Colwell did not resolve the responsible operator issue in employer's favor. Despite his remark that "it appears" the district director "should have" designated Tennessee Coal Company as the responsible operator, Judge Colwell nevertheless observed that if he had awarded

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<sup>4</sup> Pursuant to 20 C.F.R. §725.101(a)(32), Judge Colwell determined that claimant spent 125 working days at a Tennessee Coal Company mine site and, based on claimant's testimony that he worked for Tennessee Coal Company from December 1996 to August 1997 and continued to receive wages for six more months after being laid off, worked for the company for a full calendar year. Director's Exhibit 1 at 30-31.

benefits, he “would have been compelled to assess liability” against employer because it failed to present evidence before the district director that Tennessee Coal Company should have been held liable instead. *Coffey*, 2004-BLA-05925, slip op. at 7; Director’s Exhibit 1 at 31, *citing* 20 C.F.R. §§725.414(d)(absent extraordinary circumstances, documentary evidence pertaining to liability must be submitted to the district director), and 725.457(c)(1)(absent extraordinary circumstances, any witness offering testimony relevant to liability must be identified as a potential hearing witness while the claim is pending before the district director).

Furthermore, collateral estoppel bars relitigation of an issue that was previously litigated only when, among other requirements, the determination of that issue was necessary to the outcome of the prior proceedings. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014). Judge Colwell denied benefits because claimant failed to establish that he had pneumoconiosis or a totally disabling respiratory or pulmonary impairment, and the Board affirmed the denial for those reasons. *See G.C. [Coffey] v. U.S. Coal, Inc.*, BRB No. 07-0646 BLA, slip op. at 2-4 (Apr. 29, 2008) (unpub.). When benefits are denied, identification of the responsible operator is not necessary to the outcome. *Lawson*, 739 F.3d at 321. We therefore affirm the administrative law judge’s determination that collateral estoppel does not bar the district director from designating employer as the responsible operator in this subsequent claim.<sup>5</sup> Decision and Order at 5.

Employer also contends that the administrative law judge erred in determining that Tennessee Coal Company did not employ claimant for at least one year and therefore was not a potentially liable operator, pursuant to 20 C.F.R. §725.494(c). Employer’s Brief at 6-9; Decision and Order at 5-6. We disagree.

The administrative law judge noted some inconsistencies in the prior claim evidence regarding claimant’s recollection of his employment with Tennessee Coal Company. Decision and Order at 5. Claimant originally wrote on his CM-911a employment history form that he worked for Tennessee Coal Company in 1997 and 1998, but later wrote that he was employed from December 15, 1996 to August 3, 1997, and placed a question mark next to the end date. Director’s Exhibit 1 at 494-95, 500. At the hearing in his prior claim, claimant testified that he was “just guessing” about the dates of

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<sup>5</sup> Employer attempts to distinguish this case from *Lawson* on procedural grounds. Employer’s Brief at 16-17. Employer, however, fails to explain why the Sixth Circuit’s holding, that determining the responsible operator liable for payment of benefits is not “necessary” to the outcome of a claim for collateral estoppel purposes, when the claim is denied on the basis of medical evidence, should not apply here. *See Lawson*, 739 F.3d at 321.

his employment with Tennessee Coal Company. *Id.* at 111, 121. In the current claim, he again wrote on his CM-911a form that he worked for Tennessee Coal Company in 1997 and 1998. Director's Exhibit 4. The administrative law judge found claimant's Social Security earnings records to be the most probative evidence of the length of his employment with Tennessee Coal Company "because they are more detailed than the CM-911a forms the Claimant completed and more reliable than the uncertain testimony he provided regarding the dates of his employment." Decision and Order at 5. Claimant's Social Security earnings records show a total of \$22,660.54 in earnings from Tennessee Coal Company in 1997 only. Director's Exhibit 7 at 21.

Based on claimant's testimony in the prior claim about his wages, the administrative law judge determined that claimant earned approximately \$2,744.00 per month.<sup>6</sup> Decision and Order at 5-6; Director's Exhibit 1 at 112-13. Dividing claimant's total wages from Tennessee Coal Company by his estimated monthly earnings, the administrative law judge found that claimant worked there for approximately 8.3 months. Decision and Order at 6. Finally, although claimant testified in his previous claim that he received six months of severance pay after Tennessee Coal Company laid him off, the administrative law judge found no documentation to support claimant's assertion "that he received additional wages or remained on Tennessee Coal Company's payroll for any additional amount of time." *Id.*; Director's Exhibit 1 at 121-22. Therefore, the administrative law judge found that claimant was not employed by Tennessee Coal Company for at least one year.

Employer argues that claimant expressed no uncertainty when he testified in the previous claim that he received six months of severance pay after being laid off, and that the administrative law judge therefore erred in concluding that Tennessee Coal Company did not employ him for at least one year. Employer's Brief at 8-9. This argument lacks merit. The administrative law judge has the authority to make credibility determinations and weigh the evidence; the Board may not reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-

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<sup>6</sup> The administrative law judge relied on claimant's testimony that he worked full-time for Tennessee Coal Company at \$14.00 an hour, that he worked eight hours per day five days a week, and worked every other Saturday for eight hours, earning time-and-a-half. Decision and Order at 5, *citing* Director's Exhibit 1 at 112-13. Based on that testimony, the administrative law judge applied the following formula to calculate claimant's approximate monthly earnings: (40 hours per week x \$14.00 per hour x 4.3 (52/12) weeks per month) + (16 hours of overtime x \$21.00 per hour). Decision and Order at 6 n.12.

113 (1989). An administrative law judge need only use a reasonable method of calculation, supported by substantial evidence, to compute the length of claimant's coal mine employment. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). The administrative law judge permissibly relied on claimant's wages and total earnings to calculate that claimant worked approximately 8.3 months for Tennessee Coal Company, and explained that he would not credit claimant's unsupported assertion that Tennessee Coal Company continued to pay him for six months after he was laid off. *See Muncy*, 25 BLR at 1-27; Decision and Order at 5-6. Therefore, we affirm the administrative law judge's finding that claimant did not work for Tennessee Coal Company for at least one year.<sup>7</sup>

Because the administrative law judge permissibly determined that Tennessee Coal Company did not employ claimant for at least one year, Tennessee Coal Company is not a potentially liable operator pursuant to 20 C.F.R. §725.494(c). As a result, we affirm the administrative law judge's findings that employer failed to prove that "it is not the potentially liable operator that most recently employed the miner," pursuant to 20 C.F.R. §725.495(c)(2), and that employer therefore is the responsible operator.<sup>8</sup> Decision and Order at 6.

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<sup>7</sup> The Director argues that time during which a miner receives severance pay does not count as time toward a year of employment under 20 C.F.R. §725.101(a)(32), and that a miner cannot have an employment relationship with an operator pursuant to 20 C.F.R. §725.493 once a miner is laid off and begins receiving severance pay. Director's Brief at 4. Because we have affirmed the administrative law judge's finding on other grounds, we need not address the Director's argument. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

<sup>8</sup> Because the administrative law judge permissibly determined that claimant was not employed for a full year by Tennessee Coal Company, we need not address employer's arguments that the Director improperly failed to investigate whether Tennessee Coal Company was insured on the last day of claimant's employment, pursuant to 20 C.F.R. §725.495(d). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9-12. Similarly, we need not address employer's argument that 20 C.F.R. §725.495(c)(2) denies employer due process by placing the burden on it to demonstrate that Tennessee Coal Company "possesses sufficient assets to secure the payment of benefits[.]" *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 9-12.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

HALL, Chief

BETTY JEAN

Administrative Appeals Judge

JUDITH S. BOGGS

Administrative Appeals Judge

BUZZARD

GREG J.

Administrative Appeals Judge