BRB Nos. 01-0208 BLA
and 01-0208 BLA-A

KENNETH M. CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PMC COAL CO., INC., d/b/a PMI COAL CO., PMI COAL CO., INC.	)	DATE ISSUED:
	)	
PMC COAL CO., d/b/a PMI COAL CO., and TERRY MATNEY, PRESIDENT; STEVE HURLEY, VICE PRESIDENT, and RUFUS HARMAN, SECRETARY	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
BRIARFIELD COAL CORPORATION	)	
	)	
and	)	
	)	
KNOX CREEK COAL COMPANY	)	
	)	
Employers-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Granting Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for PMC Coal Company, Incorporated d/b/a PMI Coal Company.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for Briarfield Coal Corporation and Knox Creek Coal Company.

Edward Waldman (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

PMC Coal Company, Incorporated d/b/a PMI Coal Company, PMI Coal Company, Incorporated (PMC/PMI) appeals, and Briarfield Coal Corporation and Knox Creek Coal Company (Briarfield and Knox Creek) cross-appeal, the Decision and Order (00-BLA-0293) of Administrative Law Judge Linda S. Chapman awarding benefits 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).[1] The administrative law judge found that

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086

claimant established his entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge also found that PMC/PMI is the properly designated responsible operator in the instant claim. The administrative law judge thus dismissed from the case Briarfield and Knox Creek, other named coal mine operators for whom claimant allegedly worked prior to his employment from 1984 to 1987 with PMC/PMI.[2] Accordingly, benefits were awarded.

(D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The record reflects that Briarfield Coal Corporation was a subcontractor of Knox Creek Coal Company. Director's Exhibit 27.

On appeal, PMC/PMI challenges the administrative law judge's designation of it as the responsible operator, arguing that the Black Lung Disability Trust Fund (the Trust Fund) must assume liability for the payment of benefits as its insurer is insolvent and the Director failed to name its insurer's state-sponsored reinsurer. In support of their cross-appeal, Briarfield and Knox Creek argue that PMC/PMI and the Director, Office of Workers' Compensation Programs (the Director), have waived their right to challenge the administrative law judge's dismissal of Briarfield and Knox Creek as parties to the claim, which dismissal, they assert, was proper.[3] Briarfield and Knox Creek argue, in the alternative, that if the Director fails to prove that PMC/PMI is able to assume liability for the payment of benefits in this case, then the Trust Fund must be held liable. Briarfield and Knox Creek further allege error in the administrative law judge's award of benefits on the merits of the claim. The Director has filed a combined response brief wherein he urges affirmance of the administrative law judge's designation of PMC/PMI as the properly designated responsible operator and rejects the argument advanced by Briarfield and Knox Creek asserting that the Trust Fund must be held liable. The Director has declined to address the arguments advanced on cross-appeal alleging error in the administrative law judge's award of benefits on the merits of the claim. Claimant has not filed a brief in either appeal.[4]

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. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

PMC/PMI contends that the administrative law judge's designation of it as the responsible operator was irrational, unfair and inequitable. PMC/PMI argues that it fully complied with the requirements of the Act by securing and maintaining insurance which covered the period of claimant's employment with PMC/PMI. PMC/PMI asserts that it is not at fault and should not bear the consequences of the fact that its insurer, Rockwood Insurance Company (Rockwood), was liquidated and the claim is time barred from coverage by Rockwood's state-sponsored reinsurer, Virginia Property and Casualty Insurance Guaranty

[3]By Order dated September 20, 2001, the Board denied the motion filed by Briarfield Coal Corporation and Knox Creek Coal Company, requesting their dismissal from the case.

[4]In claimant's letter to the Board dated May 16, 2001, in which he referenced both the appeal in BRB No. 01-0208 BLA and the cross-appeal in BRB No. 01-0208 BLA-A, claimant indicated that, inasmuch as PMC/PMI did not challenge the administrative law judge's award of benefits, he would not file a response to the Petition for Review.

Association (VPCIGA).[5] PMC/PMI argues that, moreover, application of VPCIGA's 1992 time bar to the instant claim is irrational as a miner may file a claim even years after his or her employment with an operator ceases; that the Act requires only that a miner file within three years of being advised that he/she is totally disabled due to pneumoconiosis, *see* 30 U.S.C. §422(f)(1). PMC/PMI's Brief at 7. PMC/PMI thus contends that VPCIGA should be held responsible for the payment of benefits, but that because the Director did not name VPCIGA as a party to the case, the Trust Fund must assume liability for the payment of benefits. Citing *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998), PMC/PMI further contends that VPCIGA's liability under the Act cannot be limited by state law.

Pursuant to 20 C.F.R. §725.493(a)(1) (2000), the administrative law judge found that PMC/PMI was claimant's most recent employer of at least one year, ending in 1987; that claimant worked for PMC/PMI in Virginia, and that PMC/PMI ceased its operations in Virginia in 1988 and moved to West Virginia where, based upon records supplied by the Director, it "actually operates under the name of PMC Coal Co. DBA PMI Coal Co." Decision and Order at 7. The administrative law judge further found that Rockwood insured PMC/PMI from 1984 to 1988, and was placed in liquidation by the Pennsylvania Insurance Department as of August 27, 1991. The administrative law judge also found that VPCIGA, "which presumably guaranteed Rockwood in the Commonwealth of Virginia, can only honor claims filed prior to August 27, 1992 (DX 27)." *Id*. The administrative law judge thus concluded that PMC/PMI was without insurance for the purposes of this claim as its insurer was bankrupt and the state-sponsored reinsurer, VPCIGA, would not cover the claim, filed on March 12, 1999, as it was time-barred.

[5]In its brief, PMC/PMI refers to the Alabama Insurance Guaranty Association instead of the Virginia Property and Casualty Insurance Guaranty Association, as properly referred to by the administrative law judge.

The administrative law judge found, pursuant to 20 C.F.R. §725.492(a)(4), (b) (2000),[6] that there is no evidence of record to suggest that PMC/PMI does not exist or that it does not have sufficient assets to satisfy any liability under the Act. She thus determined that it was the responsibility of an employer, once named as a responsible operator, to prove its inability to assume liability for the payment of benefits. In this regard, the administrative law judge found that PMC/PMI had failed to come forward with any evidence indicating that it was no longer in business or that it was incapable of assuming liability. Specifically, the administrative law judge stated:

> While the record suggests that two mine sites operated by that company in Virginia may have been abandoned, this says nothing about the status of the company itself, which apparently moved to West Virginia.. Thus, based on the record before me, there is no evidence that this operator is not still in business, or that it is not able to pay benefits if awarded. The burden of disproving PMC's ability to pay is expressly *not* upon Briarfield or Knox Creek Coal, and these companies are hereby dismissed from liability.[] I find that PMC Coal Co. DBA PMI Coal Co. is properly designated as the responsible operator.

Decision and Order at 9.

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[6]The regulation at 20 C.F.R. §725.492(a)(4) (2000) provides that an employer shall be deemed capable of assuming liability for the payment of benefits if it obtained an insurance policy which qualifies under section 423 of the Act and 20 C.F.R. Part 726, or if it meets the qualifications to be a self-insurer, or if it possesses any assets that may be available for the payment of benefits.

The regulation at 20 C.F.R. §725.492(b) (2000) provides that in the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability for the payment of benefits.

We affirm the administrative law judge's designation of PMC/PMI as the responsible operator liable for the payment of benefits in the instant case. Substantial evidence supports the administrative law judge's finding that PMC/PMI was without insurance for the purposes of this claim as its insurer, Rockwood, was liquidated and the state-sponsored reinsurer, VPCIGA, would not cover the claim as it was not filed prior to August 27, 1992. Director's Exhibits 1, 27. The administrative law judge properly determined, however, that PMC/PMI remained liable for the payment of benefits notwithstanding the intervening insolvency of Rockwood and the fact that the claim was time barred from coverage by VPCIGA. Specifically, pursuant to 20 C.F.R. §725.492(a)(4) (2000), PMC/PMI is deemed capable of assuming liability for the payment of benefits if it, *inter alia*, possesses any assets that may be available for the payment of benefits. Further, the administrative law judge properly found that the Director proved that PMC/PMI exists, and that under 20 C.F.R. §725.492(b) (2000), in the absence of evidence to the contrary, such a showing is deemed sufficient evidence of PMC/PMI's capability of assuming liability for the payment of benefits. *See Gilbert v. Williamson Coal Co., Inc.*, 7 BLR 1-289, 1-294 (1984). In this regard, the administrative law judge specifically found that the record contained no evidence that PMC/PMI was no longer in business or that it was unable to pay benefits. Decision and Order at 9. We note, moreover, that PMC/PMI has not challenged these findings by the administrative law judge and does not assert that it is not in existence or that it is incapable of assuming liability for benefits awarded by the administrative law judge in the instant case.[7]

We next address PMC/PMI's contention that VPCIGA's liability for the payment of benefits awarded under the Act cannot be limited by state law. PMC/PMI's contention lacks merit. In *Williams*, one of the joint owners of the coal mine operator, Lovilia Coal Company (Lovilia), also worked as a miner. Although Lovilia purchased a commercial insurance policy from Bituminous Casualty Corporation (Bituminous) for its employees, which complied with the federal insurance requirements of the Act, Lovilia did not pay insurance premiums for its owners. The United States Court of Appeals for the Seventh Circuit rejected the argument advanced by the petitioners, Lovilia and Bituminous, that the Act does not require an insurer to pay benefits to a mine owner who did not purchase insurance for himself. The Seventh Circuit held that the Act requires that an insurance carrier provide benefits for all of a coal mine operator's black lung liability, and that the insurance carrier

[7]PMC/PMI's assertion that the Director did not demonstrate that Rockwood Insurance Company, although liquidated, is devoid of assets or that the state-sponsored reinsurer has no assets, is irrelevant. As the administrative law judge properly determined, pivotal to the identification of the party liable for the payment of benefits in the instant case is whether *PMC/PMI* is shown to exist and whether there is any evidence that it is not able to pay benefits. Decision and Order at 4-9; 20 C.F.R. §725.492(a)(4), (b) (2000).

bears the burden of collecting the premiums for all covered miners. The Seventh Circuit reasoned, therefore, that since Lovilia's insurance policy with Bituminous contained the Federal Coal Mine Health and Safety Act endorsement, Bituminous was liable for the payment of benefits in the miner's claim.

The facts in the instant case, however, are distinguishable from the facts in *Williams*. While the operator and its carrier in *Williams* attempted to circumvent the Act, the operator and its carrier in the case *sub judice* did not do so. Further, in *Williams*, Lovilia and Bituminous attempted to prohibit insurance coverage to the miner and his survivor by asserting that Lovilia's insurance coverage did not extend to its owners. In the instant case, no party asserts that PMC/PMI's insurance coverage provided by Rockwood did not extend to claimant. Further, VPCIGA's liability for the insurance coverage of claims insured by Rockwood extended only to claims filed prior to August 27, 1992 and did not exist at the time claimant filed the instant claim on March 12, 1999. Director's Exhibit 1. Since all proceedings against VPCIGA are time-barred for claims not filed prior to August 27, 1992, we reject PMC/PMI's contention that the Director erred in failing to name VPCIGA as a party to the claim.

Accordingly, the administrative law judge's Decision and Order - Granting Benefits is affirmed.[8]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[8]In light of our disposition in BRB No. 01-0208 BLA, we need not reach the cross-appeal filed by Briarfield and Knox Creek in BRB No. 01-0208 BLA-A.

BETTY JEAN HALL
Administrative Appeals Judge