

BRB No. 99-0258 BLA

BOBBY RAE BALLENGEE)	
)	
Claimant)	
)	
v.)	DATE ISSUED:
)	
STERLING SMOKELESS COAL)	
CORPORATION)	
)	
and)	
)	
OLD REPUBLIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents))
)	
DIRECTOR, OFFICE OF WORKERS)	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Michelle S. Gerdano (Henry J. Solano, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (97-BLA-0097) of Administrative Law Judge Daniel F. Sutton dismissing employer and carrier as responsible operators in this 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). In the Decision and Order, the administrative law judge found that the Director failed to submit evidence sufficient to establish that all of claimant's employers subsequent to Sterling Smokeless Coal Corporation (Sterling) are incapable of paying benefits. The administrative law judge stated that either Hansford Smokeless Collieries (Hansford) or Hendricks Mining (Hendricks) may be capable of paying benefits. Accordingly, Sterling and its carrier were dismissed as responsible operators and the case remanded for payment of benefits.¹ On appeal, the Director challenges the administrative law judge's dismissal of employer and carrier as responsible operators and the decision to hold the Black Lung Disability Trust Fund liable for payment of benefits. Neither employer, carrier, nor claimant has participated in this appeal.

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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The record contains the following information regarding claimant's coal mine employment history, starting with his most recent employer:

- 1) Green Mountain Energy (Green Mountain) - August 13, 1990 to September 13, 1993 (3 years and 1 month of employment).

¹Claimant filed the present application for benefits on March 3, 1995. See Director's Exhibit 1. The District Director issued a Notice of Finding of Entitlement on September 18, 1996 and directed Sterling Smokeless Coal Corporation (Sterling) to pay benefits. Director's Exhibit 55.

- 2) Stoney Coal Company (Stoney) - July 1, 1987 to August 11, 1990 (3 years and 6 weeks of employment).
- 3) Hansford - February 9, 1987 to June 30, 1987 (4 months of employment).
- 4) Hendricks - April 24, 1986 to February 6, 1987 (9-1/2 months of employment).
- 5) Maben Energy Corporation (Maben) - February 13, 1985 to December 8, 1985, April 13, 1983 to July 22, 1983, October 28, 1982 to December 18, 1982, March 15, 1982 to March 24, 1982 (15 months of employment).
- 6) Riteway Coal Company (Riteway) - 1984 (dates unknown).
- 7) Barrett Fuel Corporation (Barrett) - September 16, 1982 to October 25, 1982 (6 weeks of employment).
- 8) Consolidation Coal Company (Consolidation) - March 1982 to September 1982 (6 months of employment).
- 9) P G & H Coal Company (P G & H) February 1, 1982 to February 28, 1982 (1 month of employment).
- 10) Sterling - September 1972 to April 1979, July 1979 to January 1980, September 1980 to December 1981 (8 and 1/4 years of employment).

Director's Exhibits 6-13.

Social Security Administration records indicate that each employer for whom claimant worked had a separate tax identification number; that the mailing address for Green Mountain, Stoney, Barrett, and Maben was 41 Eagles Road, Beckley, West Virginia; and that the mailing address for Hansford was Helen M. Morris, Huntington, West Virginia, as "TTEE in Bankruptcy." Director's Exhibit 13. Claimant's employment at Green Mountain, Stoney, Hansford, Hendricks, Maben, and Barrett was verified by the same person at 41 Eagles Road, Beckley, West Virginia. Director's Exhibits 7-12.

The record reveals that Green Mountain was self insured and wholly owned by Adventure Resources (Adventure) and that Adventure was the insurance carrier for Green Mountain. Director's Exhibit 14. The Director identified Green Mountain as

the responsible operator in the Notice of Claim dated March 29, 1995.² Director's Exhibit 27. Employers Service Corporation (ESC) filed a controversion on behalf of Green Mountain on April 7, 1995. Director's Exhibit 28. By letter dated September 11, 1995, Adventure notified the Director that it was in bankruptcy. Director's Exhibit 37. In the letter, Adventure advised that along with seven other companies, Hendricks, Barrett, and Hansford were in Chapter 7 bankruptcy, and that among the eighteen companies in Chapter 11 bankruptcy were Adventure, Green Mountain, Maben, and Stoney. *Id.*

On January 19, 1996, the district director referred this case to the Office of Administrative Law Judges for a hearing. Director's Exhibit 36. The Director identified Green Mountain as the responsible operator and Adventure as its insurer in the list of parties. *Id.* Likewise, the Director marked the issue of responsible operator as contested. *Id.* Subsequent to this referral, ESC notified the Office of Administrative Law Judges, by letter dated February 15, 1995, that Adventure was in bankruptcy. Director's Exhibit 37. ESC further advised that Green Mountain was one of the Adventure companies; that several Adventure companies were either in Chapter 7 or Chapter 11 bankruptcy; that Green Mountain was currently in Chapter 11 bankruptcy; and that it was uncertain as to whether Green Mountain would be able to meet its financial obligations for federal black lung benefits. *Id.* Based on this letter, the Director filed a Motion to Remand with the Office of Administrative Law Judges. Director's Exhibit 43. Administrative Law Judge Frederick Neusner granted the Motion and remanded this case to the district director for further consideration of the responsible operator issue in an Order dated July 24, 1996. Director's Exhibit 47.

On remand, the Director released Green Mountain from liability and named Sterling as the responsible operator. Director's Exhibits 48, 52. The Director declined to name Green Mountain, Stoney, Hansford, Barrett, and Maben - companies for whom claimant worked after leaving his employment with Sterling - as

²Claimant filed his initial application for benefits in September 1993. Green Mountain was named as the responsible operator in the initial claim which was denied on March 6, 1994, on the grounds that the evidence failed to establish a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 35.

responsible operators because these companies were in bankruptcy. Director's Exhibit 49. The Director also declined to name Hendricks, Consolidated and P G & H, other companies for whom claimant worked after leaving Sterling, as responsible operators as claimant had worked for these companies less than one year. *Id.*

In addition to the above information, the Director submitted copies of the April 22, 1993 and the December 12, 1996 proofs of claim that he filed with the United States Bankruptcy Court for the Southern District of West Virginia in Adventure's bankruptcy proceedings.³ Director's Exhibits 58, 59. This evidence includes affidavits in which Mr. James DeMarce, the Director of the Division of Coal Mine Workers' Compensation, stated that Adventure and its subsidiaries and affiliates were authorized to self-insure contingent upon Adventure funding an irrevocable private Black Lung Trust approved by the Internal Revenue Service in 1984 (IRS Trust); that Adventure made a one time deposit in the IRS Trust; that the assets of the IRS Trust were exhausted as October 1996; that among the companies listed as subsidiaries and affiliates covered by the Adventure self-insurance authorization were Hendricks and Hansford; and that the Black Lung Disability Trust Fund (Trust Fund) began payment on approved Adventure claims in November 1996. *Id.* The Director also submitted copies of two Orders from the bankruptcy court regarding the sale of real property related to the Adventure bankruptcy. Director's Exhibits 60, 62.

After reviewing the evidence of record, the administrative law judge held that the Director failed to provide evidence sufficient to show that all of claimant's employers subsequent to Sterling are incapable of assuming liability under 20 C.F.R. §§725.492, 725.493, and transferred liability for the payment of benefits to the Trust Fund. Decision and Order at 13-14. In reaching this conclusion, the administrative law judge stated that although the evidence was supportive of a finding that none of the more recent operators is capable of assuming liability for benefits, the record does not provide a clear answer as to whether any of the operators subsequent to Sterling are capable of paying benefits.⁴ Decision and Order at 12. The administrative law judge explained that the Director's evidence refers to only 20 of Adventure's 46 companies, as well as Adventure's owner, Paul Kizer, as having filed for bankruptcy, and while it appears from the later evidence that Maben, Stoney and Green Mountain are involved in the bankruptcy, the record contains no evidence

³The 1993 proof of claim by the Director lists a bankruptcy petition number for Hansford and for Hendricks. Director's Exhibit 58.

⁴The administrative law judge described this evidence as the absence of any insurance policy and the exhaustion of the assets in the self-insurance benefit trust. Decision and Order at 12.

concerning the financial status of Hansford and Hendricks. Decision and Order at 12-13. The administrative law judge further stated that since the record shed no light on the relationship between Hansford and Hendricks and other Adventure companies, any inquiry into Hendricks or Hansford as successor operators to Maben, Stoney, or Green Mountain was precluded. *Id.* Thus, the administrative law judge stated that given the dearth of evidence and the statement of the bankruptcy court that eight to ten nonbankrupt affiliates were participating in the action before the bankruptcy court:

I am unable to conclude without resort to speculation that there are simply no assets sufficient to cover the Claimant's benefits in the possession of any entity which either employed the Claimant for a cumulative period of not less than one year subsequent to his employment with Sterling Smokeless or which could be held liable as a successor operator.

Decision and Order at 13. The administrative law judge further determined that the Director refused to name, on remand, any operator associated with Adventure solely on the basis of ESC's representations that the companies are in bankruptcy. *Id.* Finally, the administrative law judge found that the evidence submitted by the Director was hazy and limited on the complex corporate structure of Adventure and its financial situation, and, thus, inadequate to support a finding that none of the operators subsequent to Sterling possesses assets with which to pay benefits. *Id.*

The Director argues that the administrative law judge erred in finding the evidence insufficient to show that claimant's employers subsequent to Sterling were incapable of assuming benefits. The Director seeks reversal of the dismissal of Sterling as responsible operator and remand for the administrative law judge to reconsider the evidence with respect to the responsible operator issue. Specifically, the Director argues that Hansford and Hendricks cannot be responsible operators as claimant worked less than one year with each company. The Director also contends that the administrative law judge's suggestion that Hansford and Hendricks may be successor operators to Green Mountain and Stoney is not supported by the record. Additionally, the Director asserts that a reasonable inference can be drawn from the evidence of record that Hansford and Hendricks are not successor operators to Stoney and Green Mountain as claimant worked for both after he worked for Hansford and Hendricks; that since Green Mountain, Stoney and Maben are being liquidated under Chapter 7 bankruptcy, these companies could not be absorbed or reorganized into Hendricks or Hansford; that because the record demonstrates that the mines operated by Hansford and Hendricks were not the same mines as operated by Green Mountain, Stoney, and Maben, this evidence strongly suggests

that Hansford and Hendricks were not successor operators of Maben. Finally, the Director contends that the administrative law judge overlooked evidence proving that Hansford and Hendricks are in bankruptcy and that the existence of other Adventure companies that may retain assets is irrelevant.

We agree with the Director that the dismissal of Sterling as responsible operator cannot be affirmed. Initially, the Director correctly asserts that evidence of record reflects that claimant worked less than one cumulative year for either Hansford or Hendricks. Director's Exhibits 7, 8, 13. Thus, while the administrative law judge properly noted that only companies where claimant was employed for more than one cumulative year can be responsible operators, he improperly concluded that Hansford and Hendricks could be responsible operators, as claimant worked for each of these companies for less than one year. See 20 C.F.R. §725.493(a)(1); Director's Exhibits 7, 8, 13; *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986); *Sisko v. Helen Mining Co.*, 8 BLR 1-272 (1985); *Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348; *Snedeker v. Island Creek Coal Co.*, 5 BLR 1-91 (1982).

Moreover, contrary to the administrative law judge's finding that the Director's effort to establish that the employers subsequent to Sterling are not capable of assuming liability for the payment of benefits was inadequate, we hold that the Director offered substantial evidence that the employers for whom claimant worked more than one year following his departure from Sterling were in bankruptcy and, thus, incapable of assuming liability for payment of benefits. See 20 C.F.R. §§725.492(a)(2)-(4), 725.493(a)(4); Director's Exhibits 15, 37, 49, 58, 59; see also *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996). In particular, the Director offered as evidence copies of his proof of claims which included an affidavit from the Director of the Division of Coal Workers' Compensation advising that the funds in Adventure's IRS Trust had been depleted, and that the Trust Fund began payment on approved Adventure claims in November 1996. Director's Exhibits 49, 58, 59; Employer's Exhibit 9. The Director also submitted copies of two Orders from the bankruptcy court regarding the sale of real property related to the Adventure bankruptcy. Director's Exhibits 60, 62. In addition, the record contains uncontroverted evidence from Adventure and ESC that Maben, Barrett, Hansford, Hendricks, Stoney, and Green Mountain, as well as Adventure, filed for bankruptcy protection either under Chapter 7 or Chapter 11. Director's Exhibits 15, 37.

Concerning the issue of whether Hansford and Hendricks were successor operators capable of assuming liability for payment of benefits, the administrative law judge's conclusion that Hansford and Hendricks may possess assets with which to pay benefits is speculative, and thus, insufficient to support his inference that these companies could be held liable for benefits. Decision and Order at 12-13.

Similarly, the record lacks evidence to bolster the administrative law judge's assumption that Hansford and Hendricks are successor operators to Green Mountain, Stoney or Maben.⁵ In contrast, the record contains evidence sufficient to support the Director's position that Hansford and Hendricks had filed for bankruptcy, and that the physical location of the mines where claimant worked for Hansford and Hendricks was different from the physical location of the mines where claimant worked when employed by Maben, Stoney, and Green Mountain. Director's Exhibits 7-11, 58, 59. In addition, the evidence of record reflects that Adventure's self-insurance authorization included Hansford and Hendricks, and that Adventure was in bankruptcy. Director's Exhibits 15, 37, 49, 58. Finally, the record clearly shows that Hansford and Hendricks are separate entities for whom claimant worked less than one year. Director's Exhibits 7, 8, 13. Thus, the Director met his burden of providing evidence sufficient to demonstrate that all employers subsequent to Sterling are either incapable of assuming liability for the payment of benefits or employed claimant for less than one year and do not otherwise satisfy the definition of a responsible operator. We, therefore, vacate the administrative law judge's dismissal of Sterling and its insurer and remand this case to the administrative law judge for further findings regarding the identification of the proper responsible operator. The administrative law judge should resolve this issue promptly and then consider the merits of the claim for benefits.

⁵The Director correctly notes that claimant worked for Stoney and Green Mountain after he worked for Hansford and Hendricks. Director's Exhibits 7-9, 11, 13.

Accordingly, the Decision and Order of the administrative law judge dismissing Sterling and its carrier is vacated and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge