

BRB No. 03-0359 BLA

LARRY G. AUTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 01/30/2004
Employer-Petitioner)	
)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2001-BLA-0593) of Administrative Law Judge Alice M. Craft rendered 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 Claimant filed his application for benefits on July 31, 2000. Director's Exhibit 1. In a Decision and Order Granting Benefits issued on January 31, 2003, the administrative law judge credited claimant with twelve years of coal mine employment,² found that he is totally disabled due to complicated pneumoconiosis, and awarded benefits. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304(a),(c). The award of benefits to claimant is unchallenged on appeal. Employer challenges the finding that it is the coal mine operator responsible for the payment of benefits.

The record indicates that claimant worked for the following coal mine operators during the latter years of his employment:

1977-1984	Consolidation Coal Co.
1988-1989	Nelson Coal Co.
1989-1990	NEI, Inc.
1991	Muncy Coal Co.
1993	Bailey Energy, Inc.
1996	Hard Hat Mining

Director's Exhibits 2, 4; Hearing Transcript (Tr.) at 15-21, 25-27. Claimant did not list NEI, Inc. (NEI) as an employer on his claim form, Director's Exhibit 2, but NEI was listed on claimant's Social Security Administration (SSA) earnings records for the years 1989 and 1990, at the same address as Nelson Coal Co. Director's Exhibit 4. The district director investigated Hard Hat Mining, Bailey Energy, Inc, Muncy Coal Co., and Nelson Coal Co., and determined that those employers did not meet the responsible operator

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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

criteria of 20 C.F.R. §725.492(a)(2000),³ because those companies had gone out of business, their corporate charters were revoked, and they had never been insured for black lung claims. Director's Exhibits 19, 40-44.

The district director identified Consolidation Coal Co. (Consolidation) as the responsible operator. Director's Exhibits 28, 31. The record contains no evidence that NEI was investigated to determine whether it qualified as a responsible operator. Consolidation contested its liability and requested a hearing. Director's Exhibits 34, 36.

At the January 30, 2002 hearing, claimant testified that NEI was a coal mine operator and that he worked for NEI for two-and-a-half to three years. Tr. at 17-18. Claimant testified further that Nelson Coal Co., NEI, Bailey Energy, Inc., and Hard Hat Mining were “the same outfit” owned by “the same man.” Tr. at 18. Counsel for the Director, Office of Workers’ Compensation Programs, (the Director), was present at the hearing and declined the opportunity to question claimant. Tr. at 30.

Consolidation argued to the administrative law judge that Consolidation was not the responsible operator because Nelson Coal Co. and NEI had more recently employed claimant for at least one year, *see* 20 C.F.R. §725.493(a)(1)(2000), and Consolidation alleged that the Director failed to investigate fully those operators. Employer’s Closing Brief at 4-5. The Director responded that Consolidation was properly designated as the responsible operator because Hard Hat Mining, Bailey Energy, Inc., Muncy Coal Co., and Nelson Coal Co. did not meet the responsible operator criteria. Director’s Closing Brief at 1-4. The Director’s brief made no mention of NEI.

In the Decision and Order Granting Benefits, the administrative law judge found that Consolidation was the responsible operator. She found that although claimant had other coal mine employers after his employment with Consolidation, the SSA records gave “no indication that those latter companies were in any way related, as the Claimant suggested in his testimony.” Decision and Order at 6. The administrative law judge determined that “the documentation submitted by the Director indicates otherwise,” and found that “the Director has met his burden of establishing that these companies lacked insurance . . . are not viable and cannot be held responsible.” *Id.*, citing Director's Exhibits 40, 41. The administrative law judge concluded that Consolidation was the most recent operator to employ claimant for at least one year and that otherwise met the

³ The revised regulations governing the identification of the responsible operator, 20 C.F.R. §§725.491-725.495, apply prospectively only and thus do not apply to this claim. 20 C.F.R. §725.2(c). Consequently, the prior version of 20 C.F.R. §725.492 applies to this case.

criteria for identification as the responsible operator. *See* 20 C.F.R. §§725.492(2000), 725.493(2000).

On appeal, employer contends that substantial evidence does not support the finding that it is the responsible operator because the Director inadequately investigated Nelson Coal Co. and conducted no investigation of NEI before assigning liability to Consolidation. Employer further asserts that it is not the responsible operator because the Director failed to require subsequent operators to maintain black lung insurance and did not pursue their corporate officers.⁴ Claimant has declined to participate in this appeal. The Director responds, urging affirmance of the finding that Nelson Coal Co. is not the responsible operator. However, the Director agrees that he did not investigate NEI, and that as a result, substantial evidence does not support the administrative law judge's finding that Consolidation is the responsible operator. Notwithstanding that claimant has successfully litigated his entitlement to benefits, the Director requests a remand to the district director "for the development of further evidence concerning NEI's ability to assume liability." Director's Brief at 6. Employer replies that it is too late to remand the case to the district director for further investigation of the responsible operator, and requests that benefits liability be transferred to the Black Lung Disability Trust Fund (the Trust Fund).

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).

Employer contends that substantial evidence does not support the finding that Nelson Coal Co. is not the responsible operator because the Director did not adequately investigate Nelson Coal Co. Employer's Brief at 8-9. For an operator to be identified as the responsible operator, the regulations require that the operator "be capable of assuming its liability for the payment of continuing benefits . . ." 20 C.F.R. §725.492(a)(4)(2000). The Director submitted evidence that Nelson Coal Co.'s corporate charter was revoked in 1990, that the company no longer exists as a business entity, and that it was never insured against Black Lung claims. Director's Exhibits 19, 40. The Director also submitted evidence that the district director attempted to notify Nelson Coal Co. of the claim and to

⁴ This particular argument fails for the reasons set forth by the Board in *Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999)(*en banc*)(Nelson and Hall, JJ., concurring and dissenting), and *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(*en banc*)(McGranery, J., concurring and dissenting), and will not be addressed further in this decision.

designate it as a responsible operator, Director's Exhibits 27, 29, but that the district director's mailings to Nelson Coal Co. were returned as undeliverable. Director's Exhibit 30. Contrary to employer's contention, the documentary evidence submitted by the Director constitutes substantial evidence that Nelson Coal Co. is incapable of assuming liability for the payment of continuing benefits. 20 C.F.R. §725.492(a)(i)-(a)(iii)(2000); *see England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-144 and n.6 (1993). We therefore affirm the finding that Nelson Coal Co. is not the responsible operator.

Employer argues that substantial evidence does not support the finding that it is the responsible operator because NEI subsequently employed claimant for at least one year and the record contains no evidence that NEI does not exist and cannot assume liability for the payment of benefits. Employer's Brief at 9-12. The Director responds that he did not investigate NEI and agrees that on this record, substantial evidence does not support the finding that Consolidation is the responsible operator. Director's Brief at 7-9.

The parties' contentions have merit. The responsible operator is "the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year," 20 C.F.R. §725.493(a)(1)(2000), and which meets the other criteria for designation as the responsible operator. *See* 20 C.F.R. §725.492(a)(2000). Under the regulations applicable to the current claim, 20 C.F.R. §725.2(c), it is the Director's burden to develop evidence regarding a putative responsible operator's ability to pay benefits. *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 507, 19 BLR 2-290, 2-301 (4th Cir. 1995). The record indicates that NEI apparently employed the miner for at least one year subsequent to Consolidation, Director's Exhibit 4; Tr. at 17-18, and the record contains no evidence that NEI does not exist as a business entity or that NEI or its carrier, if any, could not assume liability for the payment of benefits. *See* 20 C.F.R. §§725.492(a)(2000), 725.493(a)(1)(2000). Consequently, on this record, substantial evidence does not support the administrative law judge's finding that Consolidation is the responsible operator. We therefore reverse the administrative law judge's finding.

The Director requests a remand to the district director for investigation of whether NEI is an active company and whether it is capable of assuming liability or was insured on the last day of claimant's coal mine employment. Director's Brief at 6. Where the Director fails to proceed against all putative responsible operators at every stage of the claims adjudication, and claimant's entitlement to benefits has been fully litigated on the merits, the Board will not remand the case for further investigation of the responsible operator issue. *Collins v. J & L Steel*, 21 BLR 1-181, 1-186 (1999), *Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161, 1-168 (1999)(*en banc*)(Nelson and Hall, JJ., concurring and dissenting); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984). Concern for "due process, as well as the efficient administration of the Act, compels this result."

Crabtree, 7 BLR at 1-357 (rejecting a “piecemeal litigation” approach to determining the responsible operator).

Here, the Director proceeded against Consolidation alone, and substantial evidence does not support a finding that Consolidation is the responsible operator. As employer notes, the Director had the opportunity to request a remand from the administrative law judge when the Director learned at the hearing that NEI was a coal mine operator, but elected not to make a motion.⁵ As a result, the case proceeded and claimant has fully litigated his entitlement on its merits. Because the Director did not proceed against NEI at the hearing level, the Board will not now remand this case for further investigation of the responsible operator issue. *Collins*, 21 BLR at 1-186. To do so at this juncture could jeopardize claimant’s award and would permit piecemeal litigation of the responsible operator issue. *Crabtree*, 7 BLR at 1-357.

The Director’s arguments against applying *Crabtree* lack merit. The Director cites 20 C.F.R. §725.412(a)(2000), which provides in part that “[a]t any time during the processing of a claim . . . after sufficient evidence has been made available to the [district director], the [district director] may identify a coal miner [sic] operator . . . which may be liable for the payment of the claim” 20 C.F.R. §725.412(a)(2000). The regulation continues, “[s]uch identification shall be made as soon after the filing of the claim as the evidence obtained permits.” *Id.* The Director argues that only as of the hearing did “the ‘evidence obtained permit[]’ naming the second operator.” Director’s Brief at 9-10. Contrary to the Director’s analysis, to identify the responsible operator “as soon after the filing of the claim as the evidence obtained permits,” 20 C.F.R. §725.412(a)(2000), the Director had to request a remand at the hearing level when facts emerged regarding NEI’s status as a potential responsible operator. *Crabtree*, 7 BLR at 1-357 (requiring the Director to “proceed against all putative responsible operators at every stage of the claims adjudication”).

The Director incorrectly asserts that *Crabtree* does not bar remand for further investigation of the responsible operator because “[claimant] is entitled to benefits, and no party contests that entitlement.” Director’s Brief at 9. To the contrary, the fact that claimant has been awarded benefits squarely presents the due process and piecemeal litigation concerns of *Crabtree*. *Matney*, 67 F.3d at 508, 19 BLR at 2-301-02 (following *Crabtree* because “we are unwilling to potentially upset the finding that Matney is entitled to benefits, a matter already fully litigated on the merits”); *Crabtree*, 7 BLR at 1-

⁵ We have considered the Director’s proffered reasons for failing to request a remand at the hearing level to ascertain the responsible operator, Director’s Brief at 10 n.5, and we conclude that they amount to a request to approve piecemeal litigation. *Crabtree*, 7 BLR at 1-357.

357 (expressing concern that “a claimant who has established entitlement in the first round of proceedings may lose his award in a later round against another operator”).

The Director argues further that *Crabtree* does not bar a remand because the Director does not seek to name NEI as the responsible operator, but merely seeks to determine, by investigating NEI, whether Consolidation is in fact the proper responsible operator. Director’s Brief at 9. The Director ignores *Crabtree*’s concern with preventing piecemeal litigation. *Matney*, 67 F.3d at 508, 19 BLR at 2-301-02; *Crabtree*, 7 BLR at 1-357. If, as the Director suggests, Consolidation may again be identified as the responsible operator on remand, Consolidation will then be entitled to contest its responsible operator designation, request a second hearing before an administrative law judge, appeal to the Board, and so on. Permitting a second round of litigation on the responsible operator issue “obviously is not compatible with the efficient administration of the Act and expeditious processing of claims.” *Crabtree*, 7 BLR at 1-357; *see also Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 566, 22 BLR 2-349, 2-368 (6th Cir. 2002)(refusing to remand the case either to name a new responsible operator “or for further inquiry as to whether Kentland is in fact the proper responsible operator”). We therefore reject the Director’s argument.

In sum, the Director did not pursue NEI “at every stage of the claims adjudication,” *Collins*, 21 BLR at 1-186, and now, contrary to law, seeks a remand to the district director for further investigation of the responsible operator issue. *Matney*, 67 F.3d at 508, 19 BLR at 2-301-02; *Crabtree*, 7 BLR at 1-357. The Board must deny the Director’s request. *Collins*, 21 BLR at 1-186; *Mitchem*, 21 BLR at 1-168; *Crabtree*, 7 BLR at 1-357. Because no responsible operator is identified on this record, the Trust Fund must assume liability. *See* 26 U.S.C. §9501(d)(1)(B); *Crabtree*, 7 BLR at 1-357.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and reversed in part, and the case is remanded for the administrative law judge to modify her order concerning the terms of payment of benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge