

BRB No. 88-3384 BLA

ELIZABETH GALLOWAY)
(Widow of LEE GALLOWAY))
)
 Claimant)
)
 v.)
)
 L. PARTIN COAL COMPANY) DATE ISSUED:
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

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

Keith A. Nagle (Denham and Nagle), Middlesboro, Kentucky, for employer.

Richard Zorn (Marshall J. Breger, 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: SMITH and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (86-BLA-4093) of Administrative Law Judge Daniel J. Roketenetz awarding benefits on

*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) (1988).

a miner's claim and a survivor's 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 the Director failed to prove that employer was properly designated as the responsible operator herein pursuant to 20 C.F.R. §§725.492 and 725.493, and thus dismissed employer as a party to this action and transferred liability for payment of benefits to the Black Lung Disability Trust Fund (Trust Fund). The administrative law judge further found that the evidence of record was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), and insufficient to establish rebuttal of that presumption. Accordingly, benefits were awarded on both the miner's and survivor's claims. On appeal, the Director challenges the administrative law judge's findings pursuant to Sections 725.492 and 725.493 and his transfer of liability to the Trust Fund. Employer responds, urging affirmance. Claimant has not

¹ The miner filed his claim for benefits on November 17, 1976. Director's Exhibit 1. Claimant, the miner's widow, filed her survivor's claim on February 23, 1977. Director's Exhibit 2.

participated in this appeal.²

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

² The administrative law judge's finding that the evidence is sufficient to establish entitlement to benefits on both the miner's and survivor's claims pursuant to 20 C.F.R. Part 727 is affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

The Director contends that the administrative law judge did not provide a valid reason for dismissing employer as a party to this action and transferring liability to the Trust Fund. We agree. The administrative law judge found that employer took all reasonable steps to call into question the identity of the miner's last coal mine employer; that the record contained sufficient evidence to establish that the miner may have performed duties as a miner while employed by Gap Trucking Company (Gap) for three years subsequent to his employment with employer; that the Director had ample opportunity to secure all necessary information before Gap went out of business in 1982, thus employer should not shoulder the burden of the Director's choice not to commit its limited resources to a full scale investigation into Gap's potential identity as the responsible operator herein; and that because a dispute existed between two or more operators as to which was liable, all such operators should have been notified pursuant to 20 C.F.R. §725.412(d). The administrative law judge further found that since he could not adequately determine from the record whether employer or Gap was the responsible operator herein, and as the deputy commissioner never notified Gap of its potential liability pursuant to Section 725.412(d), and was now precluded from doing so in light of Crabtree v. Bethlehem Steel Corp., 7 BLR 1-354 (1984), dismissal of employer and transfer of liability for payment of benefits to the Trust Fund was appropriate. Decision and Order at 7. The Director correctly maintains, however, that regardless of whether or not the miner was last employed as a miner for a period of not less than one year with Gap,

Gap cannot qualify as the responsible operator herein because the record reflects that Gap does not have the financial capacity to assume liability for payment of continuing benefits.³ See 20 C.F.R. §725.492(a)(4); Director's Exhibit 19. Consequently, the deputy commissioner's failure to notify Gap prior to 1982 of its potential liability pursuant to Section 725.412(d) does not constitute sufficient grounds for the dismissal of employer as a party to this action. See generally Lewis v. Consolidation Coal Co., 15 BLR 1-37 (1991). We therefore vacate the administrative law judge's dismissal of employer and transfer of liability to the Trust Fund, and remand this case for the administrative law judge to determine whether employer satisfies the requisite criteria for identification as the responsible operator herein pursuant to Sections 725.492 and 725.493.

Accordingly, the Decision and Order of the administrative law judge awarding

³ The deputy commissioner determined that Gap Trucking Company was not insured under the Act, had its corporate charter revoked on August 9, 1982, and had been out of business since 1982. Director's Exhibit 19. While the administrative law judge found that employer submitted evidence that Gap's co-owners also owned one or more coal mines, i.e., listings in the Directory of Mines, Hazard District, Letcher County for 1970 and 1975, see Decision and Order at 7, Employer's Exhibits 1, 2, said evidence does not establish that Gap, a dissolved corporate entity, is capable of assuming liability for the payment of continuing benefits pursuant to 20 C.F.R. §725.492(a)(4).

benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge