

BRB No. 90-1455 BLA

VERNON TILLER)
)
 Claimant)
)
 v.)
)
 KIM COAL COMPANY and GENERAL) DATE ISSUED:
 ENERGY CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Giles G. McCarthy, Administrative Law Judge, United States Department of Labor.

Eley A. Harris III (Mullins, Thomason & Harris), Norton, Virginia, for employer and carrier.

Edward Waldman (Thomas S. Williamson, Jr., 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, Acting Chief Administrative Appeals Judge, SMITH,
Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

*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).

Employer appeals the Decision and Order (89-BLA-1474) of Administrative Law Judge Giles J. McCarthy 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). The administrative law judge determined that General Energy Corporation (General Energy), insured by Liberty Mutual Insurance Company (Liberty Mutual), was properly designated the responsible operator herein pursuant to 20 C.F.R. §§725.492 and 725.493, as successor to Kim Coal Company (Kim Coal), the miner's last coal mine employer for more than one year. The administrative law judge credited the miner with fifteen and one-half years of qualifying coal mine employment, and found the evidence of record both sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(3), and insufficient to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded on the miner's claim, and inasmuch as the miner died on January 15, 1989 in payment status, the administrative law judge further found that his surviving spouse, Kate Tiller, was derivatively entitled to benefits without the necessity of filing a separate claim. Employer appeals, challenging the administrative law judge's designation of General Energy as the responsible operator herein, and his findings regarding the length of coal mine employment.¹ The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that General Energy is responsible for the payment of benefits as successor operator to Kim Coal. Claimant has not 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).

Employer initially contends that the administrative law judge erred in relying on the July 30, 1979 affidavit of Leon Cox and a January 23, 1980 letter from Liberty

¹ Employer further contends that the miner's death was not due to pneumoconiosis, and asserts that since the evidence of record establishes less than ten years of coal mine employment, the miner was not entitled to the presumptions at 20 C.F.R. §§727.203(a) and 718.301.

Mutual to support his finding that General Energy was a successor operator to Kim Coal. The administrative law judge accurately determined that Kim Coal operated as a partnership beginning July 16, 1969; was incorporated on August 29, 1972; changed its name to Flat Top Mountain Coal Co., Inc. on August 8, 1973; and sold its assets to Asia-Pacific

Management and Development Corporation (Asia-Pacific) on December 31, 1974, which changed its name to Pioneer General Corporation on June 2, 1975, and was dissolved by operation of law on June 1, 1978. Decision and Order at 7, 8; Director's Exhibit 49. The January 23, 1980 letter from Liberty Mutual to the district director, however, indicated that "[t]hrough Kim Coal Co. we have determined that 100% of the stock of Flat Top Mountain Coal Co. and all assets owned by Kim Coal Co. partnership were purchased by Asia-Pacific Management and Development Corp. The date of the purchase was Jan. 31, 1975. Out of the Asia-Pacific Management and Development Corp., General Energy Corp. was formed....Our company wrote a Workmen's Compensation insurance policy for General Energy Corp. with an effective date of Jan. 31, 1975. That policy was cancelled on May 4, 1976." Decision and Order at 7; Director's Exhibit 31. The administrative law judge further noted that the affidavit of Leon Cox, a former partner in Kim Coal who participated in its sale, stated that all assets of Kim Coal were sold to General Energy in February, 1975, see Director's Exhibit 49, and found that this evidence established the necessary link between Kim Coal and General Energy to support a finding that General Energy was the successor operator liable for payment of benefits. Decision and Order at 8.

Employer notes that the record contains no agreement of sale of Kim Coal assets to General Energy, nor Articles of Amendment changing the name of Asia-Pacific to General Energy, and argues that Liberty Mutual's letter was based on hearsay with no substantiation in the record other than Leon Cox' affidavit. Employer also maintains that Leon Cox was clearly mistaken in stating that the assets of Kim Coal were sold to General Energy in February of 1975, since the record establishes that they were instead sold to Asia-Pacific in December of 1974. We are not persuaded by employer's arguments, but agree with the Director that the sale of Kim Coal assets to Asia-Pacific did not preclude a transfer of those assets to General Energy at a later date. Moreover, the Director correctly asserts that hearsay evidence is freely admissible in administrative proceedings under the Act, see *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-188 (1983), and that since General Energy and Liberty Mutual offered no evidence to affirmately contradict the affidavit of Leon Cox or the information contained in Liberty Mutual's letter, e.g., documentation relevant to General Energy's creation as a corporation and evidence of its holdings during the period in question, the failure to produce such relevant evidence undermines employer's arguments on appeal. See *generally Hansen v. Oilfield Safety, Inc.*, 9 BRBS 490 (1978). We therefore affirm the administrative law judge's finding that General Energy, insured by Liberty Mutual, was properly designated the responsible operator herein, as supported by substantial evidence.

Employer next contends that the administrative law judge erred in crediting the

miner with fifteen and one-half years of qualifying coal mine employment. Specifically, employer asserts that the Social Security Administration (SSA) records reflect only two and one-half years of clearly identifiable coal mine employment, and that the administrative law judge's finding that the miner's employment with Ira N. Cabe in Haysi, Virginia constituted an additional thirteen years of qualifying coal mine employment is unsubstantiated by the record. We disagree. The administrative law judge accurately determined that the SSA records reflected fifty-two quarters of employment with Ira N. Cabe in Haysi, Virginia from 1956 through 1969, and that the miner's application for benefits listed coal mine employment in Haysi, although it did not specify the inclusive dates thereof or name Ira N. Cabe as the employer or contractor. Decision and Order at 4; Director's Exhibits 1, 2, 6. A review of the record reveals several affidavits of former coworkers as well as employment histories contained in medical opinions which indicate that the miner worked for contractor Ira Cabe as a bulldozer operator on strip mining jobs, see Director's Exhibits 9, 34; see *also* Director's Exhibits 15, 45. Additionally, prior to the miner's death, his attorney informed the district director by letter dated July 27, 1979, that most of the miner's work around coal was with the Ira Cabe Construction Company, opening up the mine shafts and running a bulldozer. See Director's Exhibit 21. The administrative law judge noted that counsel for employer admitted in his brief that approximately seven quarters of employment with Ira N. Cabe could be coal related, and since the administrative law judge determined that it was not possible from the record to distinguish what part, if any, of the miner's employment with Ira N. Cabe was not related to mining, he acted within his discretion in crediting the miner with a full thirteen years of covered employment for that employer. Decision and Order at 4; see *generally Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). We therefore affirm the administrative law judge's finding of fifteen and one-half years of coal mine employment, as supported by substantial evidence, and consequently we reject employer's contention that the presumptions contained at Section 727.203(a) were not available to the miner.

Inasmuch as employer did not allege any error in the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the miner established entitlement to benefits pursuant to 20 C.F.R. Part 727, and that his surviving spouse is derivatively entitled to benefits, as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge