BRB No. 94-2398 BLA

RICHARD L. MUNCEY Claimant-Respondent v. JOSHUA INDUSTRIES, INCORPORATED and GRERDAN MINING COMPANY, INCORPORATED and LYBURN COAL COMPANY, INCORPORATED and WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND Employers/Carrier -Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Bradley J. Pyles (Crandall, Pyles & Haviland), Logan, West Virginia, for claimant.

Leah Q. Griffin (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Sarah M. Hurley (J. Davitt McAteer, 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (93-BLA-1450) of Administrative Law Judge Robert S. Amery awarding benefits on a claim[1] 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 credited claimant with "at least" twelve years and two months of coal mine employment, found a material change in conditions established pursuant to 20 C.F.R. §725.309(d), and determined that claimant suffered from totally disabling pneumoconiosis arising from coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(c). Decision and Order at 3-9. Accordingly, he awarded benefits effective September 1, 1993. The administrative law judge also concluded that the evidence established that claimant's two most recent employers[2] were financially incapable of assuming liability for benefits and therefore employer was the responsible operator pursuant to 20 C.F.R. §725.493(a)(4).

[1] Claimant is Richard L. Muncey, the miner, whose initial claim for benefits, filed on March 25, 1986, was finally denied on July 8, 1986. Director's Exhibit 59. A second claim, filed on March 23, 1989, was finally denied on August 18, 1989. Director's Exhibit 60. This claim for benefits, filed on August 11, 1992, was awarded on January 12, 1993. Director's Exhibits 1, 36.

[2] Those employers were Joshua Industries, Incorporated and Grerdan Mining Company, Incorporated. Director's Exhibits 2, 5-7.

On appeal, employer challenges its designation as the responsible operator. Claimant responds, indicating that he takes no position on this issue. The Director, Office of Workers' Compensation Programs (the Director), responds,[3] urging affirmance of the administrative law judge's responsible operator finding.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Employer contends that it must be dismissed as the responsible operator based on the Board's interpretation of Section 725.493(a)(4) in *Matney v. Trace Fork Coal Co*., 17 BLR 1-145 (1993). Employer's Brief at 4. Although the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, affirmed[5] the Board's dismissal of the named responsible operator in *Matney*, the court expressly declined to adopt the Board's interpretation of Section 725.493. *Director, OWCP v. Trace Fork Coal Co.,* [Matney], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995). Thus, contrary to employer's contention, Section 725.493(a)(4) does not preclude from responsibility prior operators who are not also successor operators. *See Matney*, 67 F.3d at 507, 19 BLR at 2-300; *Eastern Assoc. Coal Corp. v.*

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[3] On March 5, 1996, the Director timely requested an enlargement of time in which to file a response brief, which the Board denied by order dated April 28, 1996. However, the Director had already filed her response brief on April 4, 1996. Inasmuch as the Director's filing was received while her motion for extension was pending, we accept the Director's response brief, although filed out of time.

[4] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, entitlement date, and pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.203(b), and 718.204(c). *See Coen v. Director,*
OWCP, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[5] The Court in *Matney* affirmed the Board's holding in two respects: First, that Vernon Mining Company was not a responsible operator because of insufficient evidence presented by the Director regarding insurance and financial ability to pay benefits, and second, that Trace Fork Coal Company was properly dismissed and responsibility for benefits transferred to the Black Lung Disability Trust Fund due to our holding in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). *Matney*, 67 F.3d at 507-08, 19 BLR at 2-301-02.

Director, OWCP [Patrick], 791 F.2d 1129 (4th Cir. 1986). Therefore, we reject employer's contention.

Employer also contends that, pursuant to Section 725.495(a), "the corporate officers of Joshua Industries must be severally and personally liable for any payment of benefits" because they failed to obtain insurance coverage. Employer's Brief at 5-6. Employer's contention is meritless. Section 725.495(a),[6] which implements 30 U.S.C. §933(d), is a penalty provision for failing to secure the payment of benefits, not a provision for naming corporate officers individually liable as responsible operators. *See* 20 C.F.R. §725.495(a)-(f). Therefore, we reject employer's contention.

The record indicates that claimant's most recent employers do not qualify as responsible operators pursuant to Section 725.492 because they are out of business, insolvent, and were uninsured. Director's Exhibits 6-8, 47; *see* 20 C.F.R. §725.492(a)(4). Substantial evidence supports the administrative law judge's finding

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[6] Section 725.495(a) provides that:

> Any employer required to secure the payment of benefits . . . which fails to secure such benefits shall be subject to a civil penalty . . . of not more than $1,000 for each day during which such failure occurs; and . . . where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such civil penalty . . . ; and . . . shall be

severally personally liable, jointly with such corporation, for any payments or other benefit which may accrue under the act . . . .

20 C.F.R. §725.495(a).

that employer is properly designated as the responsible operator pursuant to Section 725.493(a)(4). *See Matney*, *supra*. Therefore, we affirm the administrative law judge's responsible operator finding.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge