

BRB No. 06-0888 BLA

O.Y.)	
(Widow of K.Y.))	
)	
Claimant)	
)	
v.)	DATE ISSUED: 07/24/2008
)	
GOLDEN CHIP COAL CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER on
Petitioner)	RECONSIDERATION

Appeal of the Order of Remand and Amended Decision and Order Granting Attorney Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor of Labor; 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, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration of the Board's decision in [*O.Y.*] v. *Golden Chip Coal Corp.*, BRB No. 06-0888 BLA (Nov. 23, 2007)(unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief and a supplemental response brief,

urging that reconsideration be denied. Employer filed a reply brief to the Director's responses.¹

In its decision, the Board held that the administrative law judge erred in applying *Boyd & Stevenson Coal Co. v. Director, OWCP [Slone]*, 407 F.3d 663, 23 BLR 2-288 (4th Cir. 2005), to dismiss employer as the responsible operator. [O.Y.], slip op. at 5. In so holding, the Board cited *Uninsured Employer's Fund v. Mounts*, 484 S.E. 2d 140 (Va. Ct. App. 1997), *aff'd*, 497 S.E.2d 464 (Va. 1998), in support of its conclusion that the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA) was not liable for benefits in this survivor's claim. *Id.* Further, the Board rejected employer's argument that a stipulation at the hearing on the miner's unsuccessful 1995 claim, that Coleman & Yates Coal Company (Coleman & Yates) was the responsible operator, collaterally estopped the Director from now asserting that employer is the responsible operator in this survivor's claim.² *Id.* Consequently, the Board vacated the administrative law judge's order remanding the case to the district director for the payment of benefits, reinstated employer as the responsible operator, and remanded the case to the administrative law judge for further consideration.³

In its Motion for Reconsideration, employer asserts that the Board erred in holding that *Slone* is inapplicable to this case. In *Slone*, the United States Court of Appeals for

¹ We accept employer's reply brief as part of the record, although it is filed out of time. 20 C.F.R. §802.217.

² As summarized in the Board's decision, the miner was last employed for more than one year by Coleman & Yates Coal Company (Coleman & Yates). Director's Exhibit 3. The miner's next most recent employer of more than one year was Golden Chip Coal Corporation (Golden Chip). *Id.* Coleman & Yates went out of business on September 30, 2000, and its insurer, Rockwood Insurance Company (Rockwood), had become insolvent on August 26, 1991. Director's Exhibit 12. Under Virginia law, claims filed against Rockwood before August 26, 1992, were to be paid by the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA), a reinsurer. *Id.* Because the survivor's claim in this case was filed on August 11, 2003, VPCIGA notified the district director that it could not cover the claim. Director's Exhibits 3, 12. Therefore, the district director identified Golden Chip as the responsible operator. [O.Y.] *v. Golden Chip Coal Corp.*, BRB No. 06-0888 BLA, slip op. at 2-3 (Nov. 23, 2007)(unpub.).

³ In light of the Board's reinstatement of employer as the responsible operator, the Board also vacated the administrative law judge's fee award against the Black Lung Disability Trust Fund. [O.Y.], slip op. at 6.

the Fourth Circuit held that VPCIGA was liable for a survivor's claim, even though the claim was filed after August 26, 1992, the deadline for filing claims for which VPCIGA would be held liable. The court observed that, under the statute, claimants currently receiving benefits were not required to file another claim when liability was transferred to VPCIGA because their claims were already known and would be forwarded to VPCIGA. *Slone*, 407 F.3d at 667-69, 23 BLR at 2-296-99. The court reasoned that VPCIGA was liable for payment of benefits in the survivor's claim because VPCIGA knew that the miner's claim was timely filed, that the miner was awarded benefits before the deadline, and that "once the miner died, the payments would not necessarily cease, but instead that the claim would continue if the miner had a surviving spouse or dependent." *Slone*, 407 F.3d at 668, 23 BLR at 2-299. The court held that because a survivor's claim arises out of the same injury as the miner's claim, it should be considered derivative of the miner's claim for purposes of VPCIGA coverage. *Id.*

In this case, by contrast, the Board held that VPCIGA was not liable for the survivor's claim, filed after August 26, 1992, because VPCIGA did not have notice of the miner's timely 1985 claim, since that claim was finally denied in 1989, prior to the one-year period during which VPCIGA was liable for claims against the insolvent carrier. *See Mounds*, 484 S.E.2d at 142; [*O.Y.*], slip op. at 4-5. The miner's second, unsuccessful claim, filed in 1995, did not provide VPCIGA with notice as it was filed three years after the August 26, 1992 deadline for VPCIGA coverage. *Id.* Employer's repeated assertion that VPCIGA had notice of the miner's claim cannot withstand scrutiny. There is no evidence of record that indicates that VPCIGA had notice of the miner's 1985 claim between August 26, 1991, and August 26, 1992, when VPCIGA was responsible for the payment of claims against Rockwood Insurance Company (Rockwood), the insurer for Coleman & Yates. Although employer points to Coleman & Yates' counsel's assertion at the October 15, 1996 hearing on the miner's 1995 claim that "there has been no question" that VPCIGA would assume the responsibility of the insolvent Rockwood, October 15, 1996 Transcript at 9, this statement could not bind VPCIGA, and, moreover, was contrary to VPCIGA's controversion filed on February 22, 1996, stating that it was not liable for the miner's 1995 claim because it was not filed before the August 26, 1992 deadline. Director's Exhibit 34 (miner's claim). Therefore, there is no merit to employer's assertion that VPCIGA had notice of the miner's claim before the August 26, 1992 deadline, based on the representations by counsel for Coleman & Yates at the 1996 hearing. Because the facts presented in this case differ materially from the facts that were presented in *Slone*, we reaffirm our decision that the administrative law judge erred in applying *Slone* to dismiss employer as the responsible operator.

Employer also asserts that the Board erred in citing the decision of the Virginia Court of Appeals in *Mounds* because, employer argues, the Virginia Supreme Court's subsequent decision in *Mounds* supports employer's position that it is not liable for

benefits in this case.⁴ However, we agree with the Director that the Virginia Supreme Court's decision in *Mounts* does not affect the outcome of this case, as it addresses the liability of a state uninsured employer's fund, and has no general application to federal black lung law, or to VPCIGA's liability in this case. See Director's Supplemental Response Brief on Motion for Reconsideration at 1-2.

Employer further asserts that collateral estoppel precludes the Director from asserting that employer is the responsible operator because the identity of the responsible operator was litigated in the miner's 1985 claim. Contrary to employer's assertion, collateral estoppel does not apply because the identity of the responsible operator in the miner's 1985 claim was not the same issue as the identity of the responsible operator in this survivor's claim, and because the identity of the responsible operator in the miner's 1985 claim was not critical to the denial of that claim. See *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137, 1-138 (1999)(*en banc*). Employer's remaining assertion, that the Director was bound by the stipulation that Coleman & Yates was the responsible operator in the miner's 1995 claim because the Director failed to dispute that stipulation, lacks merit. The Director reasonably did not participate in the miner's appeal of the denial of his 1995 claim because that claim was denied based on the administrative law judge's weighing of the medical evidence, and did not implicate the proper identity of the responsible operator. Therefore, we reject employer's arguments.

⁴ The Virginia Supreme Court in *Mounts* affirmed, as unchallenged on appeal, the holding of the Virginia Court of Appeals that VPCIGA was not liable for benefits. *Uninsured Employer's Fund v. Mounts*, 497 S.E.2d 464, 465 (Va. 1998). The court held that a different entity, the state's Uninsured Employer's Fund, was liable for benefits because the employer had violated its statutory duty to maintain insurance. *Mounts*, 497 S.E.2d at 467. The Board cited the decision of the Virginia Court of Appeals in *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997), for the proposition that VPCIGA is not liable for benefits in this case, because, as in *Mounts*, this claim was filed after VPCIGA's statutory deadline. The Board did not cite the Virginia Supreme Court's subsequent decision in *Mounts*. The United States Court of Appeals for the Fourth Circuit, in *Boyd & Stevenson Coal Co. v. Director, OWCP [Stone]*, 407 F.3d 663, 669, 23 BLR 2-288, 2-299 (4th Cir. 2005), distinguished the decision of the Virginia Court of Appeals in *Mounts*, but did not cite the Virginia Supreme Court's subsequent decision in *Mounts*.

Accordingly, the Motion for Reconsideration filed by employer is denied, and we reaffirm the holdings in our Decision and Order of November 23, 2007. 20 C.F.R. §802.409.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge