

BRB No. 01-0295 BLA

CLAYTON COLLEY)
)
 Claimant-Respondent)
)
 v.)
)
 APACHE COAL COMPANY) DATE ISSUED:
)
 and)
)
 OLD REPUBLIC INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Party-in-Interest) DECISION AND ORDER
 Appeal of the Decision and Order of Stuart A. Levin, Administrative Law
 Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington D.C., for
 employer/carrier.

Richard A. Seid (Eugene Scalia, 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, Chief Administrative Appeals Judge, SMITH and HALL,
 Administrative Appeals Judges.
 PER CURIAM:

Old Republic Insurance Company, Inc. (Old Republic) appeals the Decision and Order (99-BLA-1329) of Administrative Law Judge Stuart A. Levin 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).¹ The administrative law judge credited claimant with fifteen and three-quarters years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's December 7, 1998 filing date. Initially, the administrative law judge considered the issue of liability for the payment of benefits and determined that claimant's coal mine employment for Apache Coal Company (Apache Coal) ended after the first week in July 1986, finding that claimant left Apache Coal when the mines shut down following the miner's annual vacation. The administrative law judge further found that Old Republic provided the contract of insurance to Apache Coal at the time of claimant's termination, as it provided an insurance contract beginning on July 3, 1986. Therefore, the administrative law judge found that Old Republic is the responsible insurance carrier for any benefits due claimant and denied Old Republic's request to be dismissed from this case. Decision and Order at 3. The administrative law judge further found that Apache Coal was the properly named responsible operator, having been the last company to employ claimant for a period of at least one year. Decision and Order at 4. Consequently, the administrative law judge dismissed Piney Mountain Coal Company, Inc., a second named putative responsible operator, from liability in this claim. Addressing the merits of entitlement, the administrative law judge found that the parties did not challenge claimant's entitlement to benefits, which the administrative law judge also determined was supported by the medical

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety of 1969, amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board requested supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

evidence of record. Accordingly, the administrative law judge awarded benefits commencing as of December 1, 1998.

Old Republic contends that since it did not provide a policy of coverage at the time of claimant's last coal dust exposure while working for Apache Coal, it should be dismissed as the responsible carrier. Moreover, Old Republic contends that any liability for benefits should revert to the Black Lung Disability Trust Fund (Trust Fund), as Apache Coal alone is not financially capable of assuming liability for benefits and, thus, does not meet the regulatory definition of responsible operator as set forth at 20 C.F.R. §725.492(a).² In response, the Director, Office of Workers' Compensation Programs (the Director), concedes that Old Republic is not the proper responsible carrier because it did not provide a policy of coverage at the time of claimant's last coal dust exposure in the employ of Apache Coal and, therefore, the Director states that Old Republic should be dismissed from liability. However, the Director urges that the Board affirm the administrative law judge's finding that Apache Coal is the properly named responsible operator based on the concession by counsel for Old Republic, at the June 5, 2000 hearing, that Apache Coal is the responsible operator. In the alternative, the Director urges that the Board reject carrier's contention that Apache Coal is not capable of financially assuming liability. Claimant has not responded in this appeal.³

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,

² In a Reply brief, Old Republic reiterates its argument that Apache Coal should be dismissed as the responsible operator.

³ The parties do not challenge the administrative law judge's decision to credit claimant with fifteen and three-quarters years of coal mine employment, his finding of entitlement to benefits under 20 C.F.R. Part 718, commencing as of December 1, 1998, or his decision to dismiss Piney Mountain Coal Co., Inc. as a putative responsible operator. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable 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).

In finding that Old Republic is the properly named responsible carrier, the administrative law judge reasonably determined that claimant was last employed by Apache Coal until the end of the miner’s vacation, which included the last week of June 1986 and first week of July 1986. Decision and Order at 3; Hearing Transcript at 27-29. The administrative law judge further found that claimant’s last coal dust exposure was in June 1986, prior to the start of his vacation, based on claimant’s testimony that he did not return to work after the vacation. Decision and Order at 3; Hearing Transcript at 29. The administrative law judge also found that Old Republic’s insurance coverage of Apache Coal began on July 3, 1986 and, therefore, was the properly named responsible carrier because it covered Apache Coal prior to the last date of claimant’s employment with Apache Coal. Decision and Order at 3; Director’s Exhibit 15.

Old Republic contends that the administrative law judge erred in finding that it was the properly named responsible insurance carrier pursuant to 20 C.F.R. §726.203(a).⁴ Specifically, Old Republic argues that it is not the responsible carrier because it did not provide the insurance coverage for Apache Coal at the time of claimant’s last coal mine dust exposure while working for Apache Coal, as required under Section 726.203(a). In

⁴ Section 726.203(a) contains a mandatory endorsement that must be added to all standard workmen’s compensation insurance policies ensuring coverage to coal mine operators for benefits claims arising under the Act. 20 C.F.R. §726.203(a). This endorsement provides the criteria for determining the identity and liability of insurance carriers under the Act. The clause relevant herein states that the **insurer at the time of a claimant’s last coal dust exposure for an employer** is liable for the payment of any benefits to which claimant is entitled. 20 C.F.R. §726.203(a) (emphasis added); *see Swanson v. R.G. Johnson Co.*, 15 BLR 1-49 (1991); *Gilbert v. Williamson Coal Co.*, 7 BLR 1-289 (1984).

response, the Director concurs with Old Republic that it is not the properly named insurance carrier. The Director acknowledges that claimant's last date of coal mine dust exposure was in June 1986, predating the policy coverage by Old Republic and, thus, pursuant to Section 726.203(a), Old Republic is not the responsible insurance carrier. Consequently, the Director concedes that Old Republic must be released from liability for any benefits due claimant in this case.

In light of the Director's concession that Old Republic is not the properly named responsible carrier, as well as the regulatory criteria set forth at Section 726.203(a), we reverse the administrative law judge's finding that Old Republic is the responsible insurance carrier for this claim. 20 C.F.R. §726.203(a); *see Swanson v. R.G. Johnson Co.*, 15 BLR 1-49 (1991); *Gilbert v. Williamson Coal Co.*, 7 BLR 1-289 (1984). Accordingly, Old Republic is dismissed from liability for any benefits payable under this claim.

With regard to the issue of the proper responsible operator, the administrative law judge found that Apache Coal was the properly named responsible operator because it was the coal mine employer for which claimant had the last cumulative employment of at least one year. Decision and Order at 3-4. Initially, the administrative law judge stated that counsel for Old Republic agreed at the formal hearing that Apache Coal was the properly named responsible operator. Decision and Order at 3; Hearing Transcript at 50. However, the administrative law judge also discussed claimant's coal mine employment history, finding that Apache Coal was claimant's most recent coal mine employer of at least one cumulative year because it employed claimant from February 1985 through the end of the first week of July 1986, with claimant's only subsequent coal mine employment being two weeks in late 1986 with R & L Coal Company. Decision and Order at 3; Hearing Transcript 27-29. Consequently, the administrative law judge found that "[s]ince the evidence establishes Claimant worked more than one year for Apache Coal, Apache Coal is properly designated Responsible Operator." Decision and Order at 4.

In challenging the administrative law judge's determination that Apache Coal is the properly named responsible operator, Old Republic argues that Apache Coal does not meet the statutory definition of a responsible operator pursuant to 20 C.F.R. §725.492(a). Specifically, Old Republic argues that Apache Coal, without the availability of insurance proceeds, is not capable of assuming financial liability for the payment of benefits under Section 725.492(a)(4), because it has filed for bankruptcy and also has forfeited its corporate charter.

In response, the Director urges the Board to affirm the administrative law judge's finding that Apache Coal is the properly named responsible operator, arguing that the administrative law judge properly based this finding on the concession by counsel for Old Republic at the formal hearing. The Director argues that absent a showing of "manifest

injustice” this concession is binding on the parties and, therefore, Apache Coal was properly named responsible operator in this claim. The Director alternatively argues that the Board must reject Old Republic’s argument that Apache Coal cannot be liable for benefits, stating that the mere assertion that a company is in bankruptcy is not a sufficient basis to prove that the company is not capable of paying benefits.

Based on the facts of this case, we vacate the administrative law judge’s finding that Apache Coal was the properly named responsible operator and remand the case to the administrative law judge for further consideration. Contrary to the Director’s contention, the administrative law judge, in naming Apache Coal as the responsible operator, did not solely rely on the concession of counsel for Old Republic that Apache Coal was the responsible operator. Rather, the administrative law judge stated that counsel for Old Republic agreed that Apache Coal was the properly named responsible operator but considered the issue further and found that because Apache Coal was the last coal mine employer with which claimant had at least one cumulative year of coal mine employment, it was the proper responsible operator.⁵ Decision and Order at 3-4. However, the

⁵ At the June 5, 2000 formal hearing, the following exchange occurred between the administrative law judge and Ms. Williams, counsel for Old Republic:

Judge Levin: All right..... So, we have a coverage issue - so, I take it you’re not contesting now that Apache wouldn’t be the responsible operator, you’re making the argument now that even if they are they stand alone. They’re not insured or we have the wrong carrier named or how does it - do we need the carrier before Old Republic? Is that what you’re suggesting?

administrative law judge did not fully discuss whether Apache Coal otherwise meets the regulatory criteria set forth at Section 725.492(a). Specifically, the administrative law judge did not discuss whether Apache Coal, standing alone, is capable of assuming financial liability for the payment of benefits in this claim. Consequently, in light of the release of Old Republic as responsible insurance carrier for any benefits payable in this claim, we remand the case for the administrative law judge to determine whether Apache Coal is capable of assuming financial liability for benefits. 20 C.F.R. §725.492(a); *see Gilbert, supra*; *see also Borders v. A.G.P. Coal Co.*, 9 BLR 1-32 (1986).

On remand, the administrative law judge must consider whether Apache Coal, without the availability of insurance proceeds, is financially capable of assuming liability for continuing benefits pursuant to Section 725.492(a). As the Director correctly contends, the mere assertion that an employer is unable to pay benefits is not sufficient to establish that it is incapable of paying continuing benefits. *See Borders, supra*; *Gilbert, supra*; *see also Lester v. Mack Coal Co.*, 21 BLR 1-126, 1-133 (1999). However, herein, the record contains a memorandum from the Office of Workers' Compensation Programs discussing Apache Coal's filing of Chapter 7 bankruptcy as well as the revocation of its corporate charter in June 1988. Director's Exhibit 15. The administrative law judge, therefore, must determine whether the evidence of record establishes that Apache Coal is or is not financially capable of assuming financial responsibility for the continuing payment of benefits.

If, on remand, the administrative law judge finds that Apache Coal is not capable of assuming financial liability for payment of continuing benefits in this claim, then liability must transfer to the Trust Fund inasmuch as the dismissal of the other named putative responsible operator, Piney Mountain Coal Co., was not challenged by the parties. *See* discussion, *supra* at n.3. Moreover, since the Office of Workers' Compensation Programs did not name any other prior employers or insurance carriers, prior to the administrative law judge's adjudication of this claim on the merits, it is now forestalled from naming any additional parties. *See Tazco Inc. v. Director, OWCP [Osborne]*, 895 F. 2d 949, 13 BLR 2-313 (4th Cir. 1990); *Crabtree v. Bethlehem Mines Corp.*, 7 BLR 1-354 (1984).

Accordingly, the administrative law judge's Decision and Order is affirmed in part, reversed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

Ms. Williams: That would be my position, based on his testimony that he worked there longer than a year, the carrier - the correct carrier has not been named. That would be our position.

Hearing Transcript at 50.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge