

BRB Nos. 96-1137 BLA,
96-1137 BLA-A and 96-1137 BLA-B

MARY LOU STAMPER)	
(Widow of MANUEL STAMPER))	
)	
Claimant)	
)	
v.)	DATE ISSUED:
)	
TARHEEL COALS, INCORPORATED)	
)	
and)	
)	
LOST MOUNTAIN MINING COMPANY)	
)	
Employers-Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER
Cross-Respondent)	

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for Tarheel Coals, Incorporated.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for Lost Mountain Mining Company.

Jennifer U. Toth (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, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and Tarheel Coals, Incorporated (Tarheel) and Lost Mountain Company (Lost Mountain) each separately cross-appeals the Decision and Order (93-BLA-1351) of Administrative Law Judge Paul H. Teitler (the administrative law judge) 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). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Robert D. Kaplan credited the miner with four and three-quarter years of coal mine employment and adjudicated the miner's claim pursuant to the regulations contained in 20 C.F.R. §410.490. Judge Kaplan found the evidence sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.490(b). Judge Kaplan also found the evidence insufficient to establish rebuttal of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.490(c). Further, Judge Kaplan found the miner entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.418(a). Accordingly, Judge Kaplan awarded benefits in the miner's claim, and found that Lost Mountain, as successor operator to Tarheel, was the responsible operator pursuant to 20 C.F.R. §725.493.

In response to Lost Mountain's appeal and the Director's cross-appeal, the Board vacated *in toto* Judge Kaplan's Decision and Order awarding benefits, and remanded the case to the district director for further findings on, and proper identification of, the responsible operator. *Stamper v. Lost Mountain Mining Co.*, BRB Nos. 87-3490 BLA and 87-3490 BLA-A (Feb. 28, 1990)(unpub.). Subsequently, in an Order on Motion for Reconsideration *En Banc*, the Board granted Lost Mountain's Motion for Reconsideration *en banc*, but denied the relief requested¹ and affirmed its prior Decision and Order. *Stamper v. Lost Mountain Mining Co.*, BRB Nos. 87-3490 BLA and 87-3490 BLA-A (Order on Motion for Reconsideration *En Banc*) (Mar. 7, 1991). On remand, the district director denied both the miner's claim and the survivor's claim,² and claimant³ requested a hearing

¹The Board declined to distinguish *Director, OWCP v. Ogelbay Norton Co.*, 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989), based on the facts of the instant case, and the Board declined to apply the rationale set forth in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), to the instant case because *Ogelbay* specifically rejected the Board's decision in *Crabtree*.

²After noting that Tarheel and Lost Mountain are each potentially liable as the responsible operator in this case, the district director found that the miner's work as a night watchman did not constitute coal mine employment under the Act. Consequently, the district director did not attempt to develop the record further regarding Lost Mountain's alleged purchase of Tarheel.

³Claimant is the widow of the deceased miner, Manuel Stamper, who died on October 7, 1987. Director's Exhibit 38. The miner filed his claim on December 4, 1979,

before the Office of Administrative Law Judges. Director's Exhibit 38. In a Decision and Order issued on February 28, 1996, the administrative law judge found that the miner's work qualified as coal mine employment under the Act, and credited the miner with four and three-quarter years of coal mine employment. Further, the administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §410.490(b)(1)(i). In addition, the administrative law judge found that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §410.490(b)(2).⁴ Hence, the administrative law judge found the evidence sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §410.490(b). The administrative law judge also considered both the miner's claim and the survivor's claim under 20 C.F.R. Part 410, Subpart D, and awarded benefits. However, the administrative law judge declined to render specific findings on the responsible operator issue and held the Director liable for benefits. The administrative law judge indicated that Tarheel was the miner's last coal mine employer, however, the administrative law judge declined to render a decision on the designation of the proper responsible operator because the Board previously instructed the district director to render a decision on this issue, and the district director had failed to follow the Board's instructions. Nevertheless, the administrative law judge did order the Director to pay benefits to claimant until the proper responsible operator has been designated. On May 16, 1996, the administrative law judge issued a Decision and Order which denied the Director's request for modification of the administrative law judge's Decision and Order awarding benefits.⁵

Director's Exhibit 1, and claimant filed her survivor's claim on December 7, 1987, Director's Exhibit 38.

⁴The administrative law judge also found the evidence sufficient to establish a material change in conditions under 20 C.F.R. §725.309. We note, however, that the instant case does not involve a duplicate claim.

⁵The Director argued that the administrative law judge could not bifurcate the issues of entitlement and responsible operator. Moreover, the Director argued that the Black Lung Disability Trust Fund cannot be held liable for the payment of benefits unless the Director has determined that claimant is entitled to benefits.

On appeal, the Director contends that the administrative law judge erred in calculating the miner's length of coal mine employment. The Director also contends that the administrative law judge erred by failing to consider whether the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(1)-(4). Further, the Director contends that the administrative law judge erred by failing to order Tarheel to pay benefits as the responsible operator. On cross-appeal, Tarheel contends that the administrative law judge erred by finding that the miner's work as a night watchman qualifies as coal mine employment under the Act, and in calculating the miner's length of coal mine employment. Tarheel also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §410.490(b)(1)(i), and that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §410.490(b)(2). In addition, Tarheel contends that the administrative law judge erred by failing to consider whether the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(1)-(4). Furthermore, Tarheel contends that the Black Lung Disability Trust Fund (Trust Fund) should be permanently held liable for the payment of benefits to claimant. Additionally, on cross-appeal, Lost Mountain contends that the administrative law judge erred by finding that the miner's work as a night watchman qualified as coal mine employment under the Act. Lost Mountain also contends that the administrative law judge's decision on the merits cannot be affirmed. Moreover, Lost Mountain contends that the Trust Fund should be permanently held liable to pay benefits to claimant.⁶ Claimant has not filed a brief 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁶The Director filed a brief in response to the appeals of both Tarheel and Lost Mountain, which reiterates his prior contentions. Tarheel filed a brief in reply to the Director's response brief which reiterates its prior contentions. Lost Mountain filed a letter in reply to the Director's response brief and Tarheel's reply brief which reiterates its prior contention that it should be dismissed as a party in this case.

Initially, we address the parties' contentions with regard to the designation of the proper responsible operator.⁷ The Director contends that the administrative law judge erred by failing to order Tarheel to pay benefits to claimant. On cross-appeal, Tarheel and Lost Mountain contend that the Trust Fund should be held permanently liable for benefits to claimant because the Director has failed to follow the Board's prior instructions to develop evidence on remand regarding the responsible operator issue, and specifically, Lost Mountain's status as a successor operator. Although the administrative law judge identified Tarheel as the responsible operator based on its status as the miner's last coal mine employer, he declined to render a finding with regard to the proper responsible operator because the Board had previously remanded this issue to the district director. As previously noted, the district director did not designate a responsible operator because he found that the miner's work as a night watchman did not qualify as coal mine employment under the Act. However, in its prior decision, the Board specifically instructed the district director to render further findings and properly identify the responsible operator because the evidence was insufficient to establish that Lost Mountain was liable as the successor operator. See *Stamper v. Lost Mountain Mining Co.*, BRB Nos. 87-3490 BLA and 87-3490 BLA-A, slip op. at 4 (Feb. 28, 1990)(unpub.).

While the district director retained both Tarheel and Lost Mountain as potential responsible operators, the record indicates that there may be other entities potentially liable as responsible operator, which have not been made a party to this case.⁸ See Director's Exhibit 37. As a potential responsible operator, each of these entities is entitled to notice of potential liability and an opportunity to participate in this case by developing evidence with regard to the issues of the responsible operator and entitlement to benefits. See generally *Caudill Construction Co. v. Abner*, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989); *Warner Coal Co. v. Director, OWCP [Warman]*, 804 F.2d 346, 9 BLR 2-158 (6th Cir. 1986); *Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577 (1984). Thus, since the district director did not follow the Board's instructions to identify the proper responsible operator, we again vacate the administrative law judge's Decision and Order *in toto*, and remand the

⁷Tarheel argues that the Board does not have appellate jurisdiction of this case because of the interlocutory nature of the administrative law judge's decision. However, as the Director notes, the Black Lung Disability Trust Fund is directly aggrieved by the administrative law judge's decision because the administrative law judge has ordered the Director to pay benefits to claimant until a proper responsible operator has been designated. In addition, the administrative law judge made conclusive judgments on the merits. See *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Therefore, we reject Tarheel's assertion that the Board does not have jurisdiction to hear this appeal.

⁸For instance, Lost Mountain did not directly purchase Tarheel. Instead, several companies have been involved in the purchase of Tarheel. Additionally, in between the time periods in which the miner worked for Tarheel, he also worked for Alcan Construction Company in 1974 and 1975. Director's Exhibit 4. Both Alcan Construction Company and Tarheel shared the same job site and the same post office box. Director's Exhibit 4.

case to the district director to render further findings and properly identify the responsible operator.⁹

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated *in toto*, and the case is remanded to the district director for further findings on, and proper identification of, the responsible operator.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

⁹We note that the administrative law judge's analysis on the merits of both the miner's claim and the survivor's claim contains numerous errors. However, since the proper responsible operator has not been designated and there may be additional entities involved which have not yet been made parties to this case, we decline to address the administrative law judge's findings on the merits of these claims. When the merits of these claims are reached on remand, the finder of fact is instructed to make findings of fact and conclusions of law which comport with the Administrative Procedure Act, 5 U.S.C. §557 (c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and apply the regulations and case law which currently govern these claims.

NANCY S. DOLDER
Administrative Appeals Judge