

BRB Nos. 06-0888 BLA
and 06-0888 BLA-S

O.Y.)	
(Widow of K.Y.))	
)	
Claimant)	
)	
v.)	DATE ISSUED: 11/23/2007
)	
GOLDEN CHIP COAL CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

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 (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order of Remand and Amended Decision and Order Granting Attorney Fees (05-BLA-6253) of Administrative Law Judge Linda S. Chapman on a survivor's 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 instant case is governed by the regulations that took effect on January 19, 2001, as it was filed on August 11, 2003. Director's Exhibit 2. In her Order of Remand dated July 25, 2006, the administrative law judge dismissed Golden Chip Coal Corporation (Golden Chip) as the responsible operator and remanded the claim to the district director for the payment of benefits. Subsequently, in an Amended Decision and Order Granting Attorney Fees dated November 16, 2006, the administrative law judge awarded an attorney's fee payable by the Black Lung Disability Trust Fund (the Fund).

On appeal, the Director challenges the administrative law judge's dismissal of Golden Chip as the responsible operator.¹ The Director also challenges the administrative law judge's fee award payable by the Fund. Employer responds in support of the administrative law judge's order dismissing it as the responsible operator. Employer agrees with the Director, however, that the Board must vacate the fee award if the Board vacates the order dismissing Golden Chip as the responsible operator. Claimant did not file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Dismissal of Golden Chip as the Responsible Operator

The miner worked for twenty-two years in coal mine employment. Director's Exhibit 1 (miner's claim).² His most recent employer of more than one year was

¹ By Order dated June 28, 2007, the Board rejected employer's argument that the Director, Office of Workers' Compensation Programs (the Director), lacks standing to raise this issue, and denied employer's motion to dismiss the Director's appeal. [*O.Y.*] *v. Golden Chip Coal Corp.*, BRB No. 06-0888 BLA (June 28, 2007)(Order)(unpub.). For the reasons previously stated therein, we reject employer's renewed assertion that the Director lacks standing to appeal the dismissal of the responsible operator.

² The record contains two sets of Director's Exhibits, one pertaining to the miner's lifetime claims for benefits, and the other pertaining to the survivor's claim.

Coleman & Yates Coal Company (Coleman & Yates). Director's Exhibit 3. His next most recent employer of more than one year was Golden Chip. *Id.* The miner filed two claims for benefits, both of which were unsuccessful. His first claim, filed on May 1, 1985, was finally denied by an administrative law judge on January 5, 1989. Director's Exhibit 47 (miner's claim). His second claim, filed on September 18, 1995, was denied by an administrative law judge on April 11, 1997. Director's Exhibit 1 (miner's claim). The Board affirmed the denial. [*K.Y.*] *v. Coleman & Yates Coal Co.*, BRB No. 97-1085 BLA (Mar. 27, 1998)(unpub.). The miner timely requested modification, which was denied by the district director on October 1, 1998. The miner did not pursue his second claim any further. He died on June 19, 2003, and claimant filed her claim for survivor's benefits on August 11, 2003. Director's Exhibit 3.

The district director notified Coleman & Yates and its insurer, Rockwood Insurance Company (Rockwood), that Coleman & Yates was the operator potentially responsible for the payment of survivor's benefits. Director's Exhibit 13. However, Coleman & Yates had been out of business since September 30, 2000, and Rockwood became insolvent on August 26, 1991. Director's Exhibit 12. Under Virginia law, claims against Rockwood were to be paid by a reinsurer, Virginia Property and Casualty Insurance Guaranty Association (VPCIGA), but only those claims that were filed prior to August 26, 1992 could be covered by VPCIGA. *Id.* Because claimant's survivor's claim was filed after August 26, 1992, VPCIGA notified the district director that it could not cover the claim. *Id.* Thereafter, the district director notified Golden Chip that it was potentially responsible for the payment of survivor's benefits. Director's Exhibit 15. Golden Chip controverted the claim. Director's Exhibit 17.

The district director denied survivor's benefits, and claimant timely requested modification. Director's Exhibits 22, 24. On May 4, 2005, the district director issued a proposed Decision and Order awarding benefits and designating Golden Chip as the responsible operator. Director's Exhibit 29. Golden Chip requested a hearing.

On February 10, 2006, Golden Chip moved to be dismissed as the responsible operator. Golden Chip argued that Coleman & Yates, as insured by Rockwood and reinsured by VPCIGA, was responsible for the payment of benefits. Although claimant's survivor's claim was filed after the deadline for filing claims against VPCIGA, Golden Chip relied on the decision of the United States Court of Appeals for the Fourth Circuit in *Boyd & Stevenson Coal Co. v. Director, OWCP [Slone]*, 407 F.3d 663, 23 BLR 2-288 (4th Cir. 2005), to argue that VPCIGA must cover the claim. In *Slone*, which involved

When reference is made to a Director's Exhibit pertaining to the miner's claims, it will be so indicated.

a survivor's claim filed after the VPCIGA deadline, the court held that the deadline did not apply to the survivor's claim where VPCIGA had paid benefits on the miner's claim, which was filed before the August 26, 1992 deadline. *Slone*, 407 F.3d at 668-69, 23 BLR at 2-297-99. Under those circumstances, the court held that the survivor's claim should be considered derivative of the miner's timely claim for purposes of VPCIGA coverage. *Id.*

Based on *Slone*, Golden Chip argued that, since the miner's first claim in this case was filed before August 27, 1992, the survivor's claim also had to be considered timely. The Director opposed Golden Chip's motion, arguing that *Slone* applied only where the miner's claim was filed before the 1992 deadline and was awarded.

The administrative law judge was persuaded that *Slone* applied. She found that, because the miner filed his initial claim before the August 26, 1992 deadline, VPCIGA had notice of his timely claim. The administrative law judge also found that, as in *Slone*, it was impossible for claimant to have filed her survivor's claim before August 26, 1992, because the miner was still alive at that time. Relying on *Slone*, the administrative law judge considered the survivor's claim to be filed before the statutory deadline, because it was derivative of the miner's 1985 claim. Accordingly, the administrative law judge dismissed Golden Chip and ordered that the case be remanded to the district director for the payment of benefits, consistent with the district director's May 4, 2005 award.³

On appeal, the Director argues that the administrative law judge's reliance on *Slone* was misplaced. The Director distinguishes *Slone* on the ground that the miner in *Slone* filed his claim and was awarded benefits before the August 26, 1992 deadline. The Director points out that in this case, the miner never was awarded benefits.

We agree that *Slone* does not apply to the facts of this case. In *Slone*, because the miner filed a claim and was receiving benefits on that claim from VPCIGA before August 26, 1992, VPCIGA was held to have notice of both the miner's claim and a potential survivor's claim. *Slone*, 407 F.3d at 669, 23 BLR at 2-299. The court noted that, in light of the miner's receipt of benefits, he had been notified that he did not need to refile his claim with VPCIGA before the August 26, 1992 deadline, since his claim was already known. *Slone*, 407 F.3d at 668, 23 BLR at 2-298. The miner received benefits on his claim from VPCIGA until his death in March 1999 and his widow promptly filed her claim in April 1999. The court reasoned that under those facts, principles of insurance law dictated that the survivor's claim should be treated as derivative of the

³ The administrative law judge did not order the Fund to assume liability for the payment of survivor's benefits. However, the effect of her dismissal of Golden Chip was to impose liability on the Fund. See 20 C.F.R. §725.490(a).

miner's timely claim. *Slone*, 407 F.3d at 668-69, 23 BLR at 2-299. Otherwise, the court noted, the survivor's claim would be barred by a filing deadline that was impossible for her to meet. *Id.*

Here, however, unlike the situation in *Slone*, the miner's claims were never in award status. The miner's 1985 claim was finally denied before August 26, 1992; neither Rockwood nor VPCIGA ever paid benefits on it. The miner did not file his next claim until after the deadline, and it, too, was denied. Thus, VPCIGA did not have notice of the miner's claim and a potential survivor's claim, because the miner's claim was not in award status by the August 26, 1992 deadline. *See Uninsured Employer's Fund v. Mounts*, 484 S.E. 2d 140 (1997). Accordingly, we conclude that the administrative law judge erred in applying *Slone* to dismiss Golden Chip as the responsible operator.

Further, we reject employer's alternative argument that a stipulation agreed to by Coleman & Yates and Golden Chip at the hearing in the miner's 1995 claim, that Coleman & Yates was the responsible operator, collaterally estops the Director from asserting that Golden Chip is the responsible operator in this claim. The identity of the responsible operator in the survivor's claim is not the same issue that was presented in the miner's 1995 claim.⁴ Additionally, the identity of the responsible operator, having been stipulated, was not actually litigated in the 1995 claim. Moreover, the identity of the responsible operator was not critical to the denial of the 1995 claim. Thus, three required elements of collateral estoppel are not established. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006); *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97, 98 (2000); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137, 1-138 (1999)(*en banc*). In any event, we note that the Director was not a party to the stipulation regarding the responsible operator in the 1995 claim, and did not agree to it. Employer does not explain how the Director would be bound by the stipulation under those circumstances.

Because the administrative law judge erred in dismissing Golden Chip, we vacate her Order of Remand and reinstate Golden Chip as the responsible operator.

⁴ Integral to the designation of the responsible operator is the financial capability of the operator to assume liability for benefits. *See* 20 C.F.R. §725.494(e). As an operator's financial situation may change over time, a stipulation in the 1995 claim as to the responsible operator is not the same issue presented in the current claim. *See generally Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*)(stating that *res judicata* does not apply where the issue is the miner's condition at two different times).

Consequently, we remand this case to the administrative law judge for consideration of the merits of claimant's survivor's claim, and any remaining issues as to the designation of the responsible operator.

Attorney's Fee Award

Following the administrative law judge's Order of Remand, claimant's counsel requested a fee of \$9,125. No objections to the fee petition were filed. In an Amended Decision and Order Granting Attorney Fees dated November 16, 2006, the administrative law judge reduced the hourly rate, disallowed several time entries, and awarded claimant's counsel a total fee of \$5,725, payable by the Fund.

The Director and Golden Chip correctly argue that the fee award is premature. Claimant's counsel is entitled to an attorney's fee only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a). We have reinstated Golden Chip as the responsible operator and claimant must now establish her entitlement to benefits. We therefore vacate the administrative law judge's fee award. If, on remand, claimant successfully prosecutes her claim, her counsel may then submit a fee request to the administrative law judge, and Golden Chip must be afforded a reasonable time to respond. See 20 C.F.R. §725.366.

Accordingly, the administrative law judge's Order of Remand and Amended Decision and Order Granting Attorney Fees are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge