**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0352 BLA

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| DAVID L. GOODE (deceased) | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| PARAMONT COAL COMPANY VIRGINIA, LLC | ) | DATE ISSUED: 05/07/2018 |
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| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

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

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2013-BLA-05859) of Administrative Law Judge Paul R. Almanza awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on January 25, 2010.

Based on employer's concession, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found that claimant invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that it is the responsible operator.[1] Both claimant[2] and the Director, Office of Workers' Compensation Programs (the Director), have filed a response brief in support of the administrative law judge's determination that employer is the responsible operator.[3]

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[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] Claimant died on January 11, 2017, while his claim was pending before the Office of Administrative Law Judges. Employer's Brief at 1 n.1.

[3] Nine months after filing its brief in support of the petition for review, and seven months after the briefing schedule closed, employer moved to hold this case in abeyance pending a decision from the United States Supreme Court in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018). In its motion, employer argues for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-4. Because the Supreme Court will address in *Lucia* whether Securities and Exchange Commission administrative law judges are "inferior officers" within the meaning of the Appointments Clause, employer requests that this case be held in abeyance until the Court resolves the issue. *Id.* The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. We generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). While we retain the discretion in

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.[4] 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).

Claimant was employed by Paramont Mining Corporation[5] from 1980 to 1983. Director's Exhibit 7. After working for various other coal mine companies, claimant worked for employer from 2006 to 2009. *Id.*

If a miner worked for more than one coal mine operator during his career, the responsible operator is the most recent coal mine operator to employ the miner, provided that the operator qualifies as a "potentially liable operator." 20 C.F.R. §725.495. The regulation at 20 C.F.R. §725.494 sets forth five criteria for identifying a potentially liable operator: (i) the miner's disability or death arose out of employment with that operator; (ii) the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; (iii) the miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year; (iv) the miner's employment included at least one working day after December 31, 1969; and (v) the operator is financially capable of assuming liability for the claim. 20 C.F.R §725.494(a)-(e).

The administrative law judge found that employer was the most recent operator to employ claimant. Decision and Order at 10. The administrative law judge noted that the

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exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not attempted to show why this case so qualifies. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. Therefore, employer's motion to hold this case in abeyance is denied.

[4] The record reflects that claimant's most recent coal mine employment was in Virginia. Director's Exhibits 3, 6, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The administrative law judge interchangeably referred to this entity as Paramont Mining Corporation and Paramont Mining Company. Decision and Order at 5-8, 10-11. Claimant's Social Security Earnings Statement reflects that this company was Paramount Mining Corporation. Director's Exhibit 7. In its brief, employer refers to this company as Paramont Mining Corporation. Employer's Brief at 5.

evidence established that claimant had complicated pneumoconiosis as of May 10, 2006. *Id*. Because claimant began working for employer on May 18, 2006, at least eight days after he had developed complicated pneumoconiosis, the administrative law judge noted that employer could be considered a "potentially liable operator" only if it qualified as a successor operator. *Id*.

In addressing this issue, the administrative law judge found that employer "purchased the assets, including the coal mines," of Paramont Mining Corporation in 2002.[6] Decision and Order at 11. He therefore found that employer was a successor operator to Paramont Mining Corporation. 20 C.F.R. §725.492; Decision and Order at 11. As a result, the administrative law judge found that claimant's work with employer "relat[ed] back" to his tenure with Paramont Mining Corporation from 1980 to 1983. *Id*. at 11 n.5. The administrative law judge further found that employer did not rebut the presumption that claimant's disability arose in whole or in part out of his employment with an operator "with respect to which [employer] may be considered a successor operator" pursuant to 20 C.F.R §§725.492, 725.494(a). *Id*. at 13. The administrative law judge therefore designated employer as the responsible operator. *Id*.

Employer does not dispute the administrative law judge's finding that it acquired the assets of Paramont Mining Corporation. Employer's Brief at 6-7. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer is the successor operator to Paramont Mining Corporation.

Employer, however, argues that it does not meet the definition of a "potentially liable operator" because claimant was "conclusively presumed totally disabled due to pneumoconiosis prior to his employment . . . ." Employer's Brief at 6. We disagree. The regulations provide that where an operator is considered a successor operator, any employment with a prior operator "is deemed to be employment with the successor." 20 C.F.R. §725.493(b)(1); *see also Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 564-65, 22 BLR 2-349, 2-364-66 (6th Cir. 2002). Consequently, the administrative law judge

[6] The administrative law judge summarized the testimony of Vaughn R. Groves, a former Executive Vice President, General Counsel, and Corporate Secretary of Alpha Natural Resources, the parent company of employer. Decision and Order at 7-8. The administrative law judge found that Groves's testimony established that on June 6, 1986, "Pyxis Resource Company, a subsidiary of Pittson Company, purchased the stock of Paramont Mining Corporation, Paramont Coal Corporation, and Paramont Minerals Corporation." *Id*. at 10, *citing* Employer's Exhibit 1 at 7-9. Those three entities eventually merged into one entity, called Paramont Coal Corporation. *Id*. On October 29, 2002, the Pittson Company "entered into an agreement to sell the assets of the Paramont Coal Company" to employer. *Id*. That transaction closed on December 13, 2002. *Id*.

properly attributed claimant's coal mine employment with Paramont Mining Corporation from 1980 to 1983, which is presumed to have contributed to claimant's disability, to employer. Decision and Order at 13. The administrative law judge also found that employer did not rebut the presumption that claimant's disability arose in whole or in part out of his employment with Paramont Mining Corporation. 20 C.F.R. §725.494(a). The administrative law judge therefore found employer liable for benefits as the successor operator to Paramont Mining Corporation.

Employer accurately notes that claimant was employed by multiple potentially liable operators after he was employed by Paramont Mining Corporation. Employer's Brief at 8-9; *see* Director's Exhibit 7. As a result, employer asserts that Paramont Mining Corporation could not be independently liable as a responsible operator in this claim had employer not purchased its assets. *Id*. Employer, however, ignores the fact that it purchased the assets of Paramont Mining Corporation, thus becoming its successor operator. We agree with the Director that "whether an entity other than Paramont Mining [Corporation] might have been liable had [claimant] never worked for [e]mployer is irrelevant."[7] Director's Brief at 5. In this case, the administrative law judge properly found that employer is the most recent potentially liable operator to have employed claimant. 20 C.F.R. §§725.494, 725.495. We, therefore, affirm the administrative law judge's finding that employer is the responsible operator.

[7] Employer contends that the administrative law judge's interpretation of the successor operator regulations is in violation of Congressional intent, which was to prevent coal mine operators from circumventing liability by entering into corporate or business transactions making it difficult to impose liability upon them. Employer's Brief at 7. Because there is no evidence that employer or Paramont Mining Corporation attempted to circumvent liability for black lung benefits, employer asserts that it should not be liable for benefits as Paramont Mining Corporation's successor operator. We reject employer's argument. As the Director accurately notes, the intent of the parties is not relevant in determining the liability of a successor operator under the regulations. Director's Brief at 5. Employer has not pointed to any authority indicating otherwise.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.[8]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

[8] Our dissenting colleague argues that we have ignored Board precedent by imposing liability on an operator that did not expose claimant to coal dust prior to the date he was diagnosed with complicated pneumoconiosis. We have not. The regulations plainly state that "any employment with a prior operator shall also be deemed employment with the successor operator." 20 C.F.R. §725.493(b)(1). Claimant's work for Paramont Mining Corporation thus is attributed to employer. Claimant undeniably was exposed to coal dust during that work, which occurred prior to his initial diagnosis of complicated pneumoconiosis, satisfying the liability requirements in the cases cited by our colleague and codified in 20 C.F.R. §725.494(a). By combining the periods claimant worked for Paramont Mining Corporation and employer, employer meets the requirements of a potentially liable operator under 20 C.F.R. §725.494. Since employer indisputably is the potentially liable operator that most recently employed claimant, it was properly designated as the responsible operator. 20 C.F.R. §§725.493 – 725.495. Nothing in the two cases cited by our colleague -- neither of which involve successor operators -- conflicts with that finding. Those cases instead hold that an employer cannot be held liable for benefits if the onset date of total disability predates a claimant's commencement of coal mine employment with the employer. *See, e.g., Truitt v. North American Coal Co.*, 2 BLR 1-

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's affirmance of the administrative law judge's finding that employer is a successor operator to Paramont Mining Corporation pursuant to 20 C.F.R §725.492. I respectfully dissent, however, from the majority's affirmance of the administrative law judge's finding that employer is the responsible operator pursuant to 20 C.F.R §§725.494, 725.495. It is uncontroverted that as of May 10, 2006 (the x-ray showing complicated pneumoconiosis) claimant was entitled to benefits based upon the irrebutable presumption at Section 411(c)(3) of the Act. It is also uncontroverted that claimant began his work for employer after that date.

The Board has consistently held that in a case involving complicated pneumoconiosis, liability is established as of the date of determination of complicated pneumoconiosis (i.e. the date as of which complicated pneumoconiosis is shown to have existed). *See Swanson v. R.G. Johnson Co. and Hartford Insurance Group*, 15 BLR 1-49, 1-51 (1991) ("Liability is established as of the date of determination of complicated pneumoconiosis); *Truitt v. N. Am. Coal Corp*, 2 BLR 1-199, 1-203-04 (1979), *appeal dismissed sub nom. Director, OWCP v. N. Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). "Thus, coal mine employment subsequent to the establishment of complicated pneumoconiosis, although it may have a medical effect, does not change the legal liability imposed by Section 411(c)(3) of the Act." *Swanson*, 15 BLR at 1-51.[9]

Because legal liability in this case is imposed as of May 10, 2006, the responsible operator is the potentially liable operator that employed claimant closest in time to (but on or before) May 10, 2006. Employer is not that operator in its own right because it employed claimant after May 10. Under the facts of this case, it can only be held liable as the successor operator to Paramont Mining Corporation, which did employ claimant prior to May 10, 2006.

Paramont Mining Corporation would only be liable for the payment of benefits if the operators that employed claimant during or before the onset of claimant's complicated pneumoconiosis, but subsequent to Paramont Mining Corporation, could not be potentially liable operators pursuant to 20 C.F.R §725.494. As noted by employer below, the record contains evidence that Patriot Mining Corporation and Bluff Spur Coal Corporation more

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199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980). That did not occur here.

[9] The majority errs by reading the regulation pertaining to potentially liable operators and responsible operator without giving full effect to the irrevocable presumption established in statute and interpreted and applied in binding Board precedent.

recently employed claimant and that they meet the criteria under 20 C.F.R §725.494. Employer's Brief at 7. In addition, the record contains evidence that Patriot Mining Corporation was insured by Rockwood Casualty Insurance and Bluff Spur Coal Corporation was insured by American International South Insurance Company. Director's Exhibits 33, 40. Both companies appeared before the Director in this case after being notified that they had been identified as potentially liable operators and neither denied its financial capability. *Id*.

Both the administrative law judge and the majority err by ignoring Board precedent as to the effect of the irrebutable presumption at Section 411(c)(3) of the Act on liability in this case. They would make employer the most recent potentially liable operator on the basis of its employment of claimant beginning on May 18, 2006. Doing so ignores that Board precedent and Section 411(c)(3) impose liability on operators that employed claimant on or before May 10, 2006 (the date of determination of complicated pneumoconiosis), and preclude consideration of employment thereafter. Therefore, I would vacate the administrative law judge's finding that employer is the responsible operator and remand this case to the administrative law judge for further consideration of this issue. I would instruct the administrative law judge to address if employer met its burden of establishing that Patriot Mining Corporation or Bluff Spur Coal Corporation should have been designated as the responsible operator, and, further, whether employer should be dismissed from the claim and liability should transfer to the Black Lung Disability Trust Fund.

JUDITH S. BOGGS
Administrative Appeals Judge