BRB No. 05-0822 BLA

ROGER L. WEIS Claimant-Respondent v. MARFORK COAL COMPANY, INCORPORATED and A.T. MASSEY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/30/2006 DECISION and ORDER *EN BANC*

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer, Marfork Coal Company (Marfork), appeals the Decision and Order (04-BLA-5096) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. The administrative law judge also found that Marfork was liable for the payment of benefits. Accordingly, the administrative law judge awarded benefits. On appeal, Marfork argues that the administrative law judge erred in designating it as the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, requesting that the Board affirm the administrative law judge's determination that Marfork is liable for the payment of claimant's benefits. In a reply brief, Marfork reiterates its previous contentions. Claimant has not filed a response brief.[1] Pursuant to the Board's Order dated January 13, 2006, oral argument was held in this case on February 22, 2006 in Louisville, Kentucky.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Background

Claimant filed a claim for benefits on July 9, 2002. Director's Exhibit 3. At the time that he filed his claim, claimant was working for Marfork.[3] Director's Exhibits 3, 4.

On August 23, 2002, the district director issued a "Notice of Claim," notifying Marfork that it had been identified as a "potentially liable operator." Director's Exhibit 15. Pursuant to 20 C.F.R. §725.408(a)(1), Marfork was required to file a response within thirty days, indicating its intent to accept or contest its identification as a potentially liable operator. *Id.* If Marfork elected to contest its status as a potentially liable operator, it was required to accept or deny five assertions. These assertions, set out at 20 C.F.R.

---

[1]Claimant's entitlement to benefits in this case is not disputed.

[2]On February 6, 2006, claimant notified the Board that he waived his appearance at the scheduled Oral Argument. On February 17, 2006, Marfork filed an "Oral Argument Brief."

[3]Claimant commenced his coal mine employment with Marfork Coal Company (Marfork) on November 1, 1994. Employer's Exhibit 3.

§725.408(a)(2),[4] are limited to information about an employer's employment of a miner and the employer's status as an operator. Marfork was provided with ninety days to submit documentary evidence in support of its position. *See* 20 C.F.R. §725.408(b)(1).

Marfork, through Accordia Employers Service, submitted its response on September 5, 2002. Director's Exhibit 16. Although Marfork controverted the claim and denied all five assertions set out at 20 C.F.R. §725.408(a)(2),[5] it did not submit any documentary evidence in support of its position within the prescribed ninety day period. *See* 20 C.F.R. §725.408(b)(1).

After the district director completed development of the medical evidence under 20 C.F.R. §725.405, including the pulmonary examination authorized by 20 C.F.R. §725.406, and received the evidence and responses submitted pursuant to 20 C.F.R. §725.408, he issued a "Schedule for the Submission of Additional Evidence" on January 28, 2003. *See* 20 C.F.R. §725.410; Director's Exhibit 17. Based upon a review of the evidence, the district director made the following preliminary conclusions:

---

[4]Section 725.408(a)(2) provides that:

> If the operator contests its identification, it shall, on a form supplied by the district director, state the precise nature of its disagreement by admitting or denying each of the following assertions. In answering these assertions, the term "operator" shall include any operator for which the identified operator may be considered a successor operator pursuant to §725.492.
> (i) That the named operator was an operator for any period after June 30, 1973;
> (ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;
> (iii) That the miner was exposed to coal mine dust while working for the operator;
> (iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and
> (v) That the operator is capable of assuming liability for the payment of benefits.

20 C.F.R. §725.408(a)(2).

[5]Marfork also stated that, based upon the information currently available, it appeared that it "may be the potential responsible operator." Director's Exhibit 16.

> 1. The claimant would be entitled to benefits if we issued a decision at this time; and
> 2. [Marfork] is the responsible operator liable for the payment of benefits.

Director's Exhibit 17.

The district director found that claimant was entitled to benefits because the presence of complicated pneumoconiosis had been established. Director's Exhibit 17. The district director also set out his reasons for designating Marfork as the responsible operator. *Id.* The district director further stated that:

> The designated responsible operator may respond to this schedule by February 27, 2003, and accept or reject its designation. If the responsible operator does not respond, it will be deemed to accept its designation and to waive its right to contest its liability in any further proceedings.
>
> The designated responsible operator listed above may now submit to this office additional documentary evidence relevant to liability, and may identify witnesses relevant to liability that the designated responsible operator intends to call if the case is referred to the Office of Administrative Law Judges. 20 C.F.R. §725.414(b), (c). Absent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the Office of Administrative Law Judges. 20 C.F.R. §725.456(b)(1). In addition, the designated responsible operator may no longer submit evidence relevant to its status as a potentially liable operator; operators notified of their potential liability were required to submit all such evidence within 90 days after receiving notification. 20 C.F.R. §725.408(b)(2). Accordingly, the designated responsible operator may now submit only that evidence relevant to whether another potentially liable operator should have been designated the responsible operator. Other potentially liable operators may also submit evidence relevant to liability.

Director's Exhibit 17.

In accordance with 20 C.F.R. §725.410(b), the district director notified the parties that, if they wished to submit liability evidence or identify liability witnesses, they were required to do so within sixty days. Director's Exhibit 17. The district director allowed the parties an additional thirty days in which to submit evidence in response to any evidence submitted by another party. *Id.* The district director further stated that:

> Any party may request that these time periods be extended by showing good cause. A request for an extension must be filed before the dates listed above.

Director's Exhibit 17.

Marfork, through Accordia Employers Service, submitted its response on February 20, 2003. Director's Exhibit 18. In a cover letter dated February 11, 2003, Accordia Employers Service stated:

> Based upon the evidence of record, Marfork Coal Company, Inc. agrees they [sic] may be the correct responsible operator in this claim. However, Marfork Coal Company, Inc. reserves the right to contest the responsible operator issue should additional documentary or testimonial evidence demonstrate another company should be designated the responsible operator.

Director's Exhibit 18.

However, in an enclosed "Operator Response to Schedule for Submission of Additional Evidence" form dated February 11, 2003, Marfork checked a box agreeing that it was "the responsible operator within the meaning of the Black Lung Benefits Act, liable for any benefits to which the claimant is finally determined to be entitled." Director's Exhibit 18.

Marfork did not submit any liability evidence or identify any liability witnesses within the sixty days allowed by the district director's schedule. 20 C.F.R. §725.410(b). Marfork did not request an extension of time in which to submit such evidence.

In a Proposed Decision and Order dated July 7, 2003, the district director found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Director's Exhibit 19. The district director designated Marfork as the responsible operator liable for the payment of claimant's benefits. *Id.*

Marfork subsequently requested that the case be forwarded to the Office of Administrative Law Judges for a formal hearing.[6] Director's Exhibits 20, 21, 25. The

---

[6]On August 11, 2003, Marfork filed a list of contested issues. Director's Exhibit 23. Although Marfork contested claimant's entitlement to benefits, it did not challenge

case was forwarded to the Office of Administrative Law Judges on September 18, 2003.[7] Director's Exhibit 26.

In a "Notice of Hearing" dated June 3, 2004, the administrative law judge notified the parties that a hearing would be held on October 19, 2004. The administrative law judge stated, *inter alia*, that:

> The identified responsible operator shall serve notice upon all parties not less than 30 calendar days prior to the scheduled hearing date, with a copy to the undersigned, if it intends to allege that it was improperly identified as the Responsible Operator, including a brief statement of particulars setting forth the reasons and copies of documents relied upon, if not already a part of the administrative file.

Notice of Hearing at 2.

By letter dated August 23, 2004, Marfork responded to the administrative law judge's Notice of Hearing, stating:

> [P]lease be advised that we are the correct responsible operator named by the Department of Labor because [claimant] last worked a full year of coal mine employment while working at Marfork Coal Company. The Employer is not liable for the payment of benefits in this case, however, because the Claimant's disability did not arise out of his employment with Marfork Coal Company. *Hendrick v. Sterling Smokeless Coal Co.*, 6 BLR 1-1029 (1984); *Truitt v. North American Coal Co.*, 2 BLR 1-199 (1979).
>
> These issues will be set forth in more detail at the scheduled hearing.

Marfork's August 23, 2004 Letter at 1-2.

At the October 19, 2004 hearing, Marfork submitted, *inter alia*¸ two interpretations of a May 22, 1992 x-ray. On August 17, 2004, Dr. Wiot, a B reader and Board-certified radiologist, interpreted claimant's May 22, 1992 x-ray as positive for complicated pneumoconiosis. Employer's Exhibit 1. On August 18, 2004, Dr. Meyer, a

---

its designation as the responsible operator. *Id.*

[7]The district director prepared a Form CM-1025 list of contested issues. Director's Exhibit 26. The district director did not list "Responsible Operator" as a contested issue. *Id.*

B reader and Board-certified radiologist, also interpreted this x-ray as positive for complicated pneumoconiosis. *Id.* These x-ray interpretations were admitted into the record without objection. *See* Transcript at 7-8. Marfork argued that this evidence established that claimant's disability did not arise out of his employment with Marfork since claimant already suffered from complicated pneumoconiosis when he commenced his employment with Marfork. *Id.* at 9-10.

Marfork and the Director each submitted post-hearing briefs. Because the uncontradicted medical evidence established that claimant suffered from complicated pneumoconiosis prior to the time that he commenced his employment with Marfork, Marfork argued that it could not be held liable for the payment of claimant's black lung benefits. The Director, however, argued that Marfork failed to submit its evidence of pre-existing complicated pneumoconiosis when the case was before the district director. Because Marfork failed to establish "extraordinary circumstances" for submitting its x-ray evidence at the hearing, the Director argued that this evidence should not be given any weight in determining Marfork's liability for the payment of claimant's benefits. Marfork argued that extraordinary circumstances exist because it did not discover evidence of pre-existing complicated pneumoconiosis until August 2004, when it received the doctors' interpretations of the 1992 x-ray. Marfork, therefore, argued that it could not have raised the issue of pre-existing complicated pneumoconiosis at the district director level. The Director disagreed, arguing that Marfork's failure to develop its evidence regarding liability for benefits in a timely manner does not constitute extraordinary circumstances.

The Administrative Law Judge's Findings

The administrative law judge found that Marfork had waived its right to contest its liability for the payment of claimant's benefits.[8] Decision and Order at 9. The

---

[8]The administrative law judge explained that:

> The district director issued the Schedule for the Submission of Evidence on January 28, 2003. On February 11, 2003, [Marfork] submitted the Operator Response to the Schedule for Admission of Additional Evidence, in which it accepted liability for the payment of benefits to which Claimant is entitled. [Marfork] again had an opportunity to submit documentary evidence relevant to liability, but it did not submit any evidence. As [Marfork] accepted its liability for the payment of benefits, I find that [Marfork] waived its right to contest its liability in any further proceeding. 20 C.F.R. §725.412(a)(2).

administrative law judge also rejected Marfork's contention that "extraordinary circumstances" existed pursuant to 20 C.F.R. §725.456(b)(1) to justify consideration of the interpretations of claimant's May 22, 1992 x-ray.[9] Decision and Order at 10. The administrative law judge, therefore, did not consider this admitted evidence.

The administrative law judge finally rejected Marfork's argument that it was not liable for benefits because claimant's total disability due to pneumoconiosis did not arise out of coal mine employment with Marfork. The administrative law judge stated that:

> The Act states "no benefit shall be payable by an operator on account of death or total disability due to pneumoconiosis which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969, when it was operated by such employer." 30 U.S.C. §932(c)(1). In *Truitt*, the Board held that once a claimant is found to have complicated pneumoconiosis, he is irrebuttably presumed to be totally disabled due to pneumoconiosis, and 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. 2 BLR at 1-204. I previously found that the 1992 x-ray interpretations and Dr. Hippensteel's opinion cannot be used to establish that [Marfork] is not liable for the payment of benefits. The first diagnosis of complicated pneumoconiosis was on the April 22, 1996 x-ray. (DX 12). Claimant has been employed with Marfork since November 1, 1994. (EX 3). Therefore, I find that the evidence establishes that Claimant's total disability arose, at least in part, out of employment with Marfork. I find that [Marfork] is liable for payment of benefits.

Decision and Order at 11.

Decision and Order at 9 (exhibit references omitted).

[9]The administrative law judge rejected Marfork's argument that the Department of Labor failed to give adequate notice in the rulemaking process that an operator is required to develop medical evidence relevant to liability while a claim is pending before the district director. The administrative law judge found that "an operator's burden to produce evidence as to its liability for payment of benefits was clearly addressed in the rulemaking process, and therefore the Regulations are valid and applicable to this claim." Decision and Order at 11.

Responsible Operator

Marfork argues that the administrative law judge erred in designating it as the responsible operator. In this case, the administrative law judge's award of benefits was based upon the fact that the evidence was sufficient to establish the existence of complicated pneumoconiosis. A claimant is eligible for benefits beginning with the first month in which complicated pneumoconiosis is found to have existed. However, where the evidence establishes that a miner's complicated pneumoconiosis predates the commencement of his coal mine employment with an employer, the Board has recognized that the employer should not be liable for the payment of the miner's black lung benefits. *See Truitt v. North American Coal Co.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980). The Board has reasoned that "it would be irrational to hold the employer liable for black lung benefits for total disability due to pneumoconiosis when the claimant was totally disabled due to pneumoconiosis prior to going to work for the employer." *Truitt*, 2 BLR at 1-205.

In this case, Marfork sought to introduce x-ray evidence establishing that claimant suffered from complicated pneumoconiosis prior to the time that he commenced his coal mine employment with Marfork.[10] Marfork, however, did not submit this evidence to the district director. Section 725.456(b)(1) provides, in pertinent part, that "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Because Marfork's x-ray evidence was not submitted to the district director, the administrative law judge found that this evidence could only be considered if Marfork established "extraordinary circumstances" to justify its admission into the record.

In his decision, the administrative law judge rejected Marfork's contention that it established extraordinary circumstances for its failure to submit the interpretations of claimant's 1992 x-rays while the case was before the district director. 20 C.F.R. §725.456(b)(1). The administrative law judge explained that:

> I find that the evidence in the Director's exhibits was sufficient to put [Marfork] on notice that Claimant had been diagnosed with complicated pneumoconiosis by several physicians and that it was possible that his complicated pneumoconiosis developed before his employment with

---

[10] Marfork does not currently dispute any of the five assertions set out at Section 725.408(a)(2) and, in fact, acknowledges their accuracy. *See* Marfork's Brief at 15. Thus, there is no dispute that Marfork qualifies as a "potentially responsible operator."

> Marfork. Based on [Marfork's] failure to develop its evidence at the district director's level in light of this evidence, I find that it has not demonstrated "extraordinary circumstances." Therefore, I find that the 1992 x-ray interpretations and Dr. Hippensteel's opinion, which was based in part on the 1992 x-ray interpretations, cannot be used to establish that [Marfork] is not liable for the payment of benefits.

Decision and Order at 10.

We initially reject Marfork's contention that the revised regulations make it clear that x-ray interpretations and other medical records are not the type of "documentary evidence" referenced by 20 C.F.R. §725.456(b)(1). The comments accompanying the revised regulation at 20 C.F.R. §725.456 reveal that the Department of Labor (the Department) anticipated that all evidence relevant to the liability of another party would be submitted while the case was before the district director. The comments provide that:

> The Department acknowledges….that operators will still be required to submit evidence regarding their potential liability for the claim to the district director while the claim is being adjudicated at the earliest stage. Under the former regulations, an operator did not have to submit any evidence to support its denial of liability until the case was referred to the Office of Administrative Law Judges for a formal hearing. In a number of cases, where no party requested a hearing, the operator did not need to develop or submit this evidence at all. Thus, the commenter's observation that the revised regulations will require the "up-front" development of evidence is well-taken with respect to operator liability evidence. In both its initial notice of rulemaking and its second notice of proposed rulemaking, however, the Department explained its intention to require potentially liable operators to submit evidence relevant to their employment of the miner and their financial capability to pay benefits at the earliest possible stage. 62 FR 3355-56 (Jan. 22, 1997); 64 FR 54990-91 (Oct. 8, 1999). **In these final regulations, the Department has also required operator development and submission of any evidence relevant to the liability of another party during the district director's claims processing.** Evidentiary development as to other parties will be necessary, however, only in that small percentage of claims in which the identity of the responsible operator is in serious question. *See* §725.414(b). The Department continues to believe that these requirements are justified by the Department's need to ascertain the positions of potentially liable operators on these issues while the case is pending before the district director, especially given the fact that potentially liable operators other than the designated responsible operator will no longer be parties once a case has

> been referred to the Office of Administrative Law Judges. In addition, the Department continues to believe that the increased costs that operators will have to bear as a result of this "front-loading" will not be significant.

65 Fed. Reg. 79999-80000 (Dec. 20, 2000) (emphasis added).

Marfork accurately notes that the comments do not explicitly address the submission of "medical records" as a means of escaping liability for the payment of benefits. However, the comments reveal the Department's intent that operators be required to submit "any evidence" relevant to the liability of another party while the case is before the district director. The term "any evidence" necessarily includes "medical evidence." In the comments, the Department explained that its requirements are justified by the Department's need to ascertain the positions of potentially liable operators on liability issues while a case is still pending before the district director, especially given the fact that potentially liable operators other than the designated responsible operator are no longer parties to the case, once it is referred to the Office of Administrative Law Judges. Consequently, we hold that x-ray interpretations and other medical records are included in the term "documentary evidence" referenced in 20 C.F.R. §725.456(b)(1).

Marfork next contends that Section 725.456(b)(1) cannot be interpreted to require an employer to develop all of its "medical evidence" at the district director level. Marfork argues that such an interpretation would be contrary to Section 725.456(b)(2).[11] Marfork's Brief at 9-12. Contrary to Marfork's argument, an employer is not required to develop all of its medical evidence at the district director level. However, if an employer does not submit *evidence pertaining to the liability of a potentially liable operator* to the district director, it cannot be admitted into the record "in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Marfork ignores the fact that Section 725.456(b)(2) is "[s]ubject to the limitations in paragraph (b)(1)." Thus, if evidence is excluded under 20 C.F.R. §725.456(b)(1),[12] it cannot be admitted pursuant to 20 C.F.R.

---

[11]Section 725.456(b)(2) provides that:

> Subject to the limitations in paragraph (b)(1) of this section, any other documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all parties at least 20 days before a hearing is held in connection with the claim.

20 C.F.R. §725.456(b)(2).

[12] Section 725.456(b)(1) provides that:

§725.456(b)(2).

Marfork also notes that Section 725.456(b)(2) does not require a party to develop all of its medical evidence while a case is before the district director. Marfork, therefore, argues that it permissibly developed its 1992 x-ray evidence in accordance with Section 725.456(b)(2). Marfork's argument, however, again fails to account for the fact that Section 725.456(b)(2) expressly provides that it is "[s]ubject to the limitations in paragraph (b)(1)." Marfork's submission of interpretations of claimant's May 22, 1992 x-ray was not intended to controvert claimant's entitlement to benefits. At the hearing, Marfork's counsel acknowledged that this x-ray evidence was intended to establish that claimant suffered from complicated pneumoconiosis prior to the time that he commenced his coal mine employment with Marfork. *See* Transcript at 9-10. Thus, Marfork submitted the interpretations of claimant's 1992 x-ray for the purpose of attempting to impose liability for claimant's benefits on another operator or the Black Lung Disability Trust Fund.

Marfork finally argues that an operator will never be able to accept its designation as the responsible operator at the district director level because it will have no way to determine whether a miner suffered from complicated pneumoconiosis prior to his employment with the operator. We disagree. In this case, the record reflects that, on January 28, 2003, the district director issued a "Schedule for the Submission of Additional Evidence," wherein he made a preliminary conclusion that claimant was entitled to benefits based on the presence of complicated pneumoconiosis. Director's Exhibit 17. Consequently, Marfork was provided with adequate notice that claimant's entitlement to benefits might be premised upon the existence of complicated pneumoconiosis.

In the "Schedule for the Submission of Additional Evidence," the district director provided Marfork with sixty days in which to submit liability evidence or identify liability witnesses. Director's Exhibit 17. Marfork, however, did not submit any evidence regarding whether another potentially liable operator should be designated the

---

> Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances. Medical evidence in excess of the limitations contained in §725.414 shall not be admitted into the hearing record in the absence of good cause.

20 C.F.R. §725.456(b)(1).

responsible operator. Marfork also failed to avail itself of an opportunity to request an extension of time in which to submit such evidence.[13]

At the hearing, Marfork, for the first time, submitted evidence supportive of a finding that claimant suffered from complicated pneumoconiosis prior to the time that he commenced his coal mine employment with Marfork. However, because this evidence had not been submitted to the district director, it could not be admitted in the absence of "extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Marfork did not provide any explanation to the administrative law judge for its failure to develop this evidence while the case was pending before the district director.

The Administrative Procedure Act provides that "[s]ubject to published rules of the agency and within its powers," 5 U.S.C. §556(c), administrative law judges have the power to, among other things, "dispose of procedural requests or similar matters." 5 U.S.C. §556(c)(9). An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Under the facts of this case, the administrative law judge reasonably concluded that employer failed to establish "extraordinary circumstances" to justify consideration of the interpretations of claimant's May 22, 1992 x-ray. 20 C.F.R. §725.456(b)(1). The administrative law judge, therefore, properly determined that the interpretations of claimant's 1992 x-ray rendered by Drs. Wiot and Meyer could not be relied upon by Marfork to establish that it is not liable for the payment of claimant's benefits.[14] We, therefore, affirm the administrative law judge's designation of Marfork as the responsible operator.[15]

---

[13]In his "Schedule for the Submission of Additional Evidence," the district director informed Marfork that the deadline for the submission of liability evidence could be extended by showing good cause. Director's Exhibit 17. The district director, however, informed Marfork that any such request had to be filed before March 29, 2003. *Id.* There is no evidence that Marfork requested an extension of time in which to submit liability evidence.

[14]Marfork argues that, because the uncontradicted evidence establishes that claimant contracted complicated pneumoconiosis before he commenced his coal mine employment with Marfork, it cannot be held liable for the payment of benefits. Marfork's Brief at 6-8. We agree with the Director, Office of Workers' Compensation Programs, that Marfork's argument "simply ignores the fact that the [administrative law judge] effectively excluded [Marfork's] proffered evidence and determined that [Marfork] could not rely on that evidence." Director's Brief at 6.

[15]In light of our affirmance of the administrative law judge's designation of

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's decision both to hold employer liable for payment of benefits and to find the onset date for commencement of benefits to be April 1, 1996. The administrative law judge misapplied the revised regulations to impose liability on employer, in contravention of 30 U.S.C. §932(c); and to determine claimant is entitled to benefits as of April, 1996, despite uncontradicted, credible evidence he is entitled to benefits as of May, 1992. Review of the administrative law judge's decision shows that it is unsupported by the evidence, it misapplies the regulations and it contravenes fundamental principles of the Black Lung Benefits Reform Act.

Background

Marfork as the responsible operator, we need not address the administrative law judge's finding that Marfork waived its right to contest its liability in any further proceeding when it accepted its liability for the payment of benefits while the case was before the district director. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

By letter dated August 27, 2004, employer sent to the administrative law judge, claimant, and the Director, copies of two interpretations of a May, 1992 x-ray, finding complicated pneumoconiosis by radiologists who were both Board-certified and B readers. At the hearing on October 19, 2004, this evidence was admitted without objection. Employer argued that this evidence demonstrates that it could not be held liable for payment of benefits because the evidence proves that claimant had complicated pneumoconiosis more than two years before he began work for employer in November, 1994; and employer objected to counsel for the Director's belated request that the original x-ray be made available to his doctors. The administrative law judge overruled the objection and directed the parties to file briefs in thirty days.

In his post-hearing brief, the Director, Office of Workers' Compensation Programs (the Director), argued that the revised regulations barred as untimely, consideration of this evidence pertaining to the responsible operator issue. The Director asserted that employer had been provided an opportunity to submit this evidence when the claim was before the district director,[16] and that 20 C.F.R. §725.456(b)(1) precludes the administrative law judge's admission of this evidence pertaining to operator liability, absent a showing of "extraordinary circumstances," which employer failed to make.[17] The Director added that following the hearing he had determined it was unnecessary to have his experts review the x-ray. Director's Post-hearing Brief at 2 n.1.

---

[16]In his post-hearing brief, the Director, Office of Workers' Compensation Programs (the Director), describes employer's window of opportunity to submit evidence of liability to the district director: After employer received Notice of Claim on August 23, 2002, employer had ninety days to offer evidence pertaining to liability; after the Schedule for Submission of Additional Evidence was issued on January 28, 2003, employer had until February 27, 2003 to contest its designation as responsible operator, and until March 29, 2003 to submit evidence supporting its contention. Director's Post-hearing Brief at 4.

[17]Section 725.456(b)(1) provides in relevant part:

> Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances.

20 C.F.R. §725.456(b)(1).

Employer argued that preclusion of the x-ray interpretations from consideration on the issue of liability contravenes the statutory mandate contained in 30 U.S.C. §932(c): "no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis . . . which did not arise, at least in part, out of employment in a mine during a period . . .when it was operated by such operator…." The crux of employer's argument is that because the x-ray evidence of complicated pneumoconiosis establishes that under the Act claimant is presumed to have been totally disabled prior to working for employer, 30 U.S.C. §921(c)(3), claimant's disability did not arise in whole or in part out of that employment and employer cannot be held liable under the Act. Employer also asserted that because the Director did not give adequate notice in the rule-making process, he cannot rely upon the revised regulations to require employer to submit all medical evidence relevant to liability to the district director prior to transfer of the case to the Office of Administrative Law Judges, and that because the medical evidence was developed while the case was before the Office of Administrative Law Judges, extraordinary circumstances existed for its admission.

The administrative law judge rejected employer's contentions holding: that employer had waived its right to contest liability when the claim was before the district director; that 20 C.F.R. §725.456(b)(1) applied to bar consideration of the x-ray interpretations on the issue of liability; and that the x-ray interpretations could not support finding a date for commencement of benefits in view of the statutory prohibition against holding an employer liable for payment of benefits to a miner whose entitlement precedes his work for the designated employer. Accordingly, the administrative law judge held employer liable and determined that claimant's benefits should commence as of April 1996.

I believe that review of the revised regulations and the comments elucidating those revisions reveals that the Department of Labor (the Department) had not considered the possibility that medical evidence could be decisive in determining liability, and that the Department had not anticipated the possibility that an operator could be improperly designated because the Act may require imposition of liability on an operator more remote in time. The record shows that the administrative law judge was prompted by the argument of the Director to misapply the regulations to the facts of this case. As a result, he erred in holding employer liable and in ignoring the evidence of record when determining the date for commencement of benefits.

Waiver

The majority does not attempt to defend the first reason that the administrative law judge provided for holding employer liable: that employer had waived its right to contest liability on two Department forms: Schedule for the Submission of Additional Evidence, Director's Exhibit 17 and Operator Response to Schedule for Additional Evidence,

Director's Exhibit 18. Decision and Order at 9. Examination of these documents reveals that they do not support the administrative law judge's determination that employer waived objection to its designation as the liable operator.

The administrative law judge found that the Schedule for the Submission of Additional Evidence, Director's Exhibit 17, had provided employer with an opportunity to submit "additional documentary evidence relevant to liability…," Director's Exhibit 17 at 3, and that employer had not done so. Decision and Order at 9; Director's Exhibit 18. The Schedule for the Submission of Additional Evidence states that the time has expired for employer to submit evidence contesting its potential liability pursuant to 20 C.F.R. §725.408(b)(2). The findings which employer is deemed to have conceded are set forth in 20 C.F.R. §725.408(a)(2)(i)-(v):

> (i) That the named operator was an operator for any period after June 30, 1973;
> (ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;
> (iii) That the miner was exposed to coal mine dust while working for the operator;
> (iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and
> (v) That the operator is capable of assuming liability for the payment of benefits.[18]

---

[18]The district director issued the Schedule for the Submission of Additional Evidence after receiving the response to the Notice of Claim, in which the district director advised employer it had been designated a potentially liable operator. Director's Exhibit 15. In that notice, the district director had narrowly circumscribed the ways in which employer could dispute its designation:

> If you wish to contest your status as a potentially liable operator, you must state the precise nature of your disagreement by accepting or denying each of the five assertions listed in . . . the Operator Response to Notice of Claim. *The assertions are limited to information about your employment of the miner and your status as an operator*. If you deny any of the five operator assertions, you have 90 days from your receipt of this notice to submit documentary evidence in support of your response.

Director's Exhibit 15 at 2 (emphasis added).

Section 725.408(a)(2) identifies all of the criteria requisite for determining a potentially liable employer as set forth in 20 C.F.R. §725.494, except the first: "The miner's disability or death arose at least in part out of employment. . . during a period when the mine or facility was operated by such operator. . . . " 20 C.F.R. §725.494(a). The problem presented in the case at bar goes back to this omission because the procedures provided in the revised regulations were based upon the erroneous assumption, which the majority shares, that all of the criteria relevant to a potentially liable employer were covered by the Operator Response to Notice of Claim. In fact, the regulations and form limited employer's response to the criteria set forth in Section 725.408(a)(2). The schedule advises employer that it "may now submit only that evidence relevant to whether another potentially liable operator should have been designated the responsible operator." Director's Exhibit 17 at 3.[19]

Examination of the relevant regulations, as interpreted by the Department, reveals that the evidence referenced by that statement is evidence that another, potentially liable employer more recently employed claimant. 20 C.F.R. §725.410(a) commands the district director to issue a Schedule for the Submission of Additional Evidence after he receives the evidence and responses submitted pursuant to Section 725.408. The contents of the schedule are set forth in Section 725.410(b), which states, *inter alia*, that the schedule shall allow employer to submit evidence relevant to liability of the designated operator, but "[a]ny such evidence must meet the requirements set forth in §725.414 in order to be admitted in the record." The provisions bearing on requirements for evidence pertaining to liability in Section 725.414 are subsections (b) and (c). Subsection (b), entitled *Evidence pertaining to liability*, provides in relevant part:

> Except as provided by §725.408(b)(2), the designated responsible operator may submit evidence to demonstrate that it is not the potentially liable operator that most recently employed the claimant.

20 C.F.R. §725.414(b)(1). Subsection (c), entitled *Testimony*, provides in relevant part:

> All parties shall notify the district director . . . of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator.

---

[19]The schedule also advised, "The designated responsible operator listed above may now submit to this office additional documentary evidence relevant to liability, and may identify witnesses relevant to liability that the designated responsible operator intends to call if the case is referred to the Office of Administrative Law Judges. 20 C.F.R. §725.414(b), (c)." Director's Exhibit 17 at 2.

20 C.F.R. §725.414(c).[20] Obviously, since subsection (c) applies exclusively to testimony, it has no bearing on the issue presented in the case at bar: admission of x-ray interpretations.

In the preamble to the final regulations, the Department explained that "[Sections] 725.408 and 725.414 are designed to provide the district director with all of the documentary evidence relevant to the determination of the responsible operator liable for the payment of benefits." 65 Fed. Reg. 79976 (Dec. 20, 2000). Under Section 725.408, employer provides all documentary evidence pertaining to the employer's employment of the claimant and its status as a financially capable operator. *Id.* Section 725.414 provides for the admission of evidence to determine which of the potentially liable operators should be held liable:

> Under §725.414, an operator may submit documentary evidence *to prove that a company that more recently employed the miner should be the responsible operator*.

65 Fed. Reg. 79976 (Dec. 20, 2000) (emphasis added).

That the statement on the schedule references a potentially liable employer who more recently employed claimant is also confirmed by a statement in the preamble to the final regulations responding to a commenter concerned about the imposition of increased costs on employers. That statement, however, is preceded by a sentence which the Director cites to show that employer was on notice that it was required to submit the x-ray interpretations to the district director because they bear on the "liability of another party…":

> In these final regulations, the Department has also required operator development and submission of any evidence relevant to the liability of another party during the district director's claims processing.

---

[20] In the comments to the revised regulations, the Department explained that it anticipated that the vast majority of the witnesses referenced in subsection (c) would be "'fact witnesses,' *i.e.*, witnesses whose testimony will establish certain facts pertaining to the miner's employment." 65 Fed. Reg. 80001 (Dec. 20, 2000). Other witnesses would be experts, such as a person called to testify about the coal mine industry's use of certain terms in a coal mine lease. *Id.*

65 Fed. Reg. 79999 (Dec. 20, 2000); *see* Director's Brief at 6. Apparently, the Director overlooked the next sentence which makes plain that the evidence of liability of another party which must be presented to the district director is evidence that another operator is the most recent potentially liable employer of claimant:

> Evidentiary development as to other parties will be necessary, however, only in that small percentage of claims in which the identity of the responsible operator is in serious question. *See* §725.414(b).

65 Fed. Reg. 80000 (Dec. 20, 2000). As discussed *supra*, the Department interpreted Section 725.414(b) as providing for the designated responsible operator's submission of only that evidence which relates to claimant's most recent potentially liable employer. The Department made the point repeatedly in the comments to the revised regulations that if a designated operator wants to prove another operator should be held liable, it must obtain documentary evidence of a more recent employer of claimant. The Department believed that a designated employer, which satisfied the liability criteria of Section 725.408, could establish the liability of another employer only in those rare cases where the most recent employer was not designated the responsible operator:

> Under the revised regulations, potentially liable operators will be required to submit evidence to the district director in each case regarding their employment of the miner. *See* §725.408. In addition, in the small number of cases in which the Department does not name the miner's most recent employer as the responsible operator, the earlier employer that has been designated the responsible operator may incur additional costs in attempting to establish that a more recent employer should be held liable for the payment of benefits. In comparison to the costs of developing medical evidence, however, the Department believes that the additional costs imposed by the regulations will not be significant.

65 Fed. Reg. 79984 (Dec. 20, 2000).

The comments reflect that Section 725.414(b) is the only provision authorizing submission of documentary evidence by a designated employer to prove the liability of another employer:

> Section 725.408 does not govern the introduction of evidence relevant to the liability of other operators that employed the miner. Instead, the evidence required by §725.408 is limited to evidence relevant to the notified operator's own employment of the miner and that operator's financial status. Documentary evidence relevant to another operator's liability is required later pursuant to the schedule established

> pursuant to §725.410(b), and in accordance with the limitations set forth in §725.414(b).

65 Fed. Reg. 79986 (Dec. 20, 2000).

Accordingly, when Section 725.410(b) is considered together with Section 725.414, in accordance with the Department's interpretation in the rule-making record, it becomes clear that after the time has expired to submit evidence relevant to the criteria of Section 725.408(a)(2), *i.e.*, ninety days after employer receives notification of liability, the only additional evidence relevant to liability which employer was permitted to submit was evidence of claimant's most recent, potentially liable employer. Thus, the statement on the schedule that employer may submit evidence relevant to the designation of another employer as responsible operator allowed employer to submit only that evidence pertaining to whether another potentially liable operator more recently employed claimant. 20 C.F.R. §§725.410(b), 725.414(b)(1).

In sum, the Schedule for the Submission of Additional Evidence was developed pursuant to the revised regulations. When the schedule is understood in light of the revised regulations as explained by the Department, it becomes clear that the schedule provides employer with an opportunity to submit additional "documentary evidence relevant to liability" which concerns exclusively the most recent potentially liable employer to have employed claimant. There is nothing in the schedule to suggest that the reference to "documentary evidence relevant to liability…" encompasses x-ray interpretations showing that an employer more remote in time should be held liable. Accordingly, the record does not support the administrative law judge's finding that the Schedule for the Submission of Additional Evidence provided employer with an opportunity to offer the x-ray interpretations. Decision and Order at 9.

Similarly unsound is the administrative law judge's determination that employer waived the issue of liability by completion of its Operator Response to Schedule for Submission of Additional Evidence, Director's Exhibit 18. By responding honestly to the form mandated by the district director, employer did not waive its right to contest liability when it checked the box next to the statement: "Agrees it is the responsible operator within the meaning of the Black Lung Benefits Act, liable for any benefits to which the claimant is finally to be entitled." Director's Exhibit 18. The alternative is to check the box indicating disagreement with its designation. In that connection, the form advises that the schedule for submission of additional evidence is subject to the limitations imposed by 20 C.F.R. §725.408(b)(2), which requires observance of the time limits of that section for submission of evidence relevant to liability.

The form further advises, "[A]bsent extraordinary circumstances, no documentary evidence pertaining to liability shall be admitted in any further proceeding conducted

with respect to this claim unless it is submitted to the district director in compliance with a schedule for the submission of additional evidence." Director's Exhibit 18. This form thereby indicates that a determination of liability is based on documentary evidence relevant to the five factors set forth at Section 725.408(a)(2)(i)-(v) and evidence that another operator more recently employed the claimant and, therefore, should be the responsible operator (see discussion *supra*). The form does not provide an opportunity to contest identification on any other basis. Since employer did not dispute the district director's findings with respect to those factors, employer had no choice but to check the box indicating it accepted liability; however, in its cover letter employer reserved the right to contest the responsible operator issue based on additional evidence. Director's Exhibit 18. Hence, the administrative law judge erred in finding employer waived its right to contest liability by completing a form which narrowly circumscribes the criteria relevant to liability and omits the criterion crucial to employer in the case at bar, *i.e.*, medical evidence that claimant had complicated pneumoconiosis prior to being hired by employer.

When the schedule and operator response forms are considered together with the revised regulations, and the Department's statements in the preamble accompanying those final regulations, it becomes apparent that employer was never advised that medical evidence bearing on liability must be developed at the district director level and that employer was provided with no opportunity to submit such evidence. This record provides no support for the administrative law judge's conclusion that employer waived its right to contest liability based upon x-ray interpretations showing entitlement predated claimant's work for employer. But there is a conclusion which this record supports: that the Department completely overlooked the circumstances presented here when the regulations were revised.

Application of 20 C.F.R. §725.456(b)(1): Documentary Evidence

The majority upholds the administrative law judge's decision, based upon the second reason he provided for holding employer liable: that 20 C.F.R. §725.456(b)(1) applies to employer's request to admit x-ray interpretations and that employer had not established that "extraordinary circumstances" existed to justify admission of this evidence. I believe the administrative law judge erred in holding that the reference to "[d]ocumentary evidence" pertaining to liability in Section 725.456(b)(1) includes medical evidence. I also think that employer's alternative argument has merit: even if the administrative law judge had been correct in holding that the documentary evidence pertaining to liability referenced in the regulation encompasses medical evidence, he erred in finding employer failed to establish the existence of extraordinary circumstances to justify admission of the x-ray interpretations.

The regulation at issue provides in relevant part: "Documentary evidence pertaining to the liability of a potentially liable operator…which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). It was error for the administrative law judge to apply that regulation to exclude the x-ray interpretations from consideration of liability because x-ray interpretations are not documentary evidence pertaining to liability. Moreover, the Department alerted employer in the Schedule for the Submission of Additional Evidence, Director's Exhibit 17 discussed *supra*, that it is the "documentary evidence relevant to the grounds set forth in the Operator Assertions- 20 C.F.R. §725.408(a)(2)…" and documentary evidence of more recent employment of claimant by another potentially liable employer, *see* 20 C.F.R. §725.414(b), which cannot be admitted in any further proceeding (absent a showing of extraordinary circumstances). The foregoing statement, quoted from the schedule, regarding documentary evidence which cannot be admitted later without a showing of extraordinary circumstances, obviously refers to Section 725.456(b)(1), showing that the documentary evidence referenced in that regulation is coextensive with the documentary evidence referenced in Sections 725.408 and 725.414(b). The proffered x-ray interpretations are irrelevant to the criteria for liability set forth in 20 C.F.R. 725.408(a)(2)(i)-(v), and they are not evidence that another potentially liable operator *more recently* employed the claimant. The x-ray interpretations are medical evidence which addresses two explicit concerns of Congress in the Act: that a claimant who establishes entitlement "be paid benefits during the period of disability," 30 U.S.C. §922(a)(1); and that an employer not be held liable if it bears no responsibility for a miner's death or total disability due to pneumoconiosis. 30 U.S.C. §932(c).

In holding that the documentary evidence pertaining to liability referenced in Section 725.456(b)(1) encompasses the proffered x-ray interpretations, the administrative law judge relied upon the Director's argument that employer was on notice that all evidence regarding liability had to be presented to the district director. The Director had cited the comments to the revised regulations which explain that the district director must be able to review all evidence relevant to liability before referring a case to the Office of Administrative Law Judges, because the revised regulations do not permit the case to be remanded thereafter for further development of evidence of liability. Hence, the Black Lung Disability Trust Fund (Trust Fund) is at risk of being held liable if the correct employer is not identified prior to the claim being referred to the Office of Administrative Law Judges. Decision and Order at 11, citing 65 Fed. Reg. 79,990 (Dec. 20, 2000). From this, the administrative law judge concluded that the regulations require an employer to submit to the district director all evidence bearing on liability. Decision and Order at 11.

On appeal, employer points to statements in the comments that evidence "relevant to the employment of the miner…" and the operator's "financial capability to pay

benefits…" are the kinds of "documentary evidence" pertaining to liability which employer must submit to the district director or demonstrate extraordinary circumstances for their later submission pursuant to 20 C.F.R. 725.456(b)(1). Employer's Brief at 9-10, citing 65 Fed. Reg. 79,999-80,000 (Dec. 20, 2000). Employer asserts that neither the comments nor the regulations address submission of medical records relevant to liability. Employer's Brief at 10. Furthermore, employer argues that it would be unreasonable to require that medical evidence relevant to liability be submitted to the district director when the regulations contemplate that development of medical evidence may not be completed until the case is before the administrative law judge; moreover, medical evidence may be submitted for the first time to the administrative law judge. Employer's Brief at 11, citing 65 Fed. Reg. 79,999 (Dec. 20, 2000).

It was reasonable for employer to rely upon the Department's clear statement in the comments to the revised regulations: "[section] 725.456, as reproposed, will allow both the claimant and the designated responsible operator in a claim to delay their development of documentary *medical evidence* until shortly before the formal hearing." 65 Fed. Reg. 79999 (Dec. 20, 2000). (emphasis supplied). It is obvious that the Department revised the regulations without considering the possibility that medical evidence could bear on liability. When the Department acknowledged that the revised regulations might require some designated responsible operators to incur additional costs to prove to the district director that another potentially liable operator more recently employed claimant, the Department was eager to point out: "In comparison to the costs of developing medical evidence, however, the Department believes that the additional costs imposed by the regulations will not be significant," 65 Fed. Reg. 79984 (Dec. 20, 2000). The Department provided in the regulations for the parties to defer development of medical evidence until shortly before the hearing because the Department forgot, when revising the regulations, that medical evidence could be relevant to establish liability.

Because the interplay of the regulations, as explained by the Department, creates confusion, employer argues that the regulations should be strictly construed against the drafter. The Director responds that there is no confusion:

> While the first and second notice of proposed rulemaking did refer only to employment records and evidence of financial ability to pay benefits, the final regulations require "submission of *any evidence* relevant to the liability of another party [at the district director level]." 65 Fed. Reg. 79999 (Dec. 20, 2000)(emphasis supplied).

Director's Brief at 6. The Director does not acknowledge that the sentence immediately following the quoted sentence reveals that the evidence referenced in that statement is evidence that another operator is the most recent, potentially liable employer of claimant (discussed *supra*). 65 Fed. Reg. 80000 (Dec. 20, 2000). The Director cites nothing in the

comments or the regulations to indicate that the issue presented in the instant case was anticipated. Nor does the Director offer new interpretations of the regulations, replacing the interpretations provided in the comments to the final rule. As a result, the final regulations, as well as the Department forms issued pursuant to those regulations, must be understood as focusing exclusively on documentary evidence relating to the criteria for liability set forth in 20 C.F.R. §725.408(a)(2) and, where applicable, on documentary evidence relating to claimant's most recent potentially liable employer, set forth in 20 C.F.R. §725.414(b)(1). Director's Exhibits 17, 18, discussed *supra*.

The construction of the provision in Section 725.456(b)(1), "[d]ocumentary evidence pertaining to…liability," as excluding medical evidence is further supported by reference in 20 C.F.R. §725.456 to three categories of evidence which, under specified conditions, may be admitted into the hearing record by the administrative law judge: (1) "[d]ocumentary evidence pertaining to the liability of a potentially liable operator…," 20 C.F.R. §725.456(b)(1); (2) "[m]edical evidence in excess of the limitations contained in §725.414…," *Id.*; and (3) "any other documentary material, including medical reports…" 20 C.F.R §725.456(b)(2). Review of this regulation reveals that the Department distinguished between documentary and medical evidence and that when the Department wanted a reference to documentary evidence to include medical evidence the Department clearly stated its intent. Thus, applying the rule of statutory construction, *expressio unius est exclusio alterius*, the omission of a reference to medical evidence in the provision of Section 725.456(b)(1) regarding documentary evidence is properly understood as exclusion. *See* N. Singer, *Sutherland on Statutory Construction* §47.25 at 327 (6th ed. 2000); *Russello v. United States*, 464 U.S. 16, 23 (1983). The plain language of Section 725.456(b)(1) does not support the interpretation urged by the Director and accepted by the administrative law judge. Hence, it was error for the administrative law judge to hold that the x-ray interpretations were documentary evidence pertaining to liability, the admission of which must be justified by a showing of "extraordinary circumstances" pursuant to Section 725.456(b)(1).

Furthermore, the proffered x-ray interpretations do not fall into the second category of evidence addressed in Section 725.456(b)(1), the admission of which must be justified by a showing of good cause: "[m]edical evidence in excess of the limitations contained in §725.414." That medical evidence is offered to determine entitlement. *See* 65 Fed. Reg. 79989 (Dec. 20, 2000). Employer offered the evidence at issue to determine liability. Because these x-ray interpretations are not documentary evidence pertaining to liability or medical evidence pertaining to entitlement, they are encompassed by Section 725.456(b)(2), providing for the admission of "other documentary material, including medical reports…," if no party objects and if the

evidence was exchanged at least twenty days prior to the hearing.[21] In the instant case, both conditions were met, and the evidence was properly before the administrative law judge on the issues of both liability and onset of total disability. Moreover, the Director conceded the credibility of this evidence when he waived his right to challenge it. Director's Post-hearing Brief at 2 n.1.

The majority's decision to uphold the administrative law judge's application of "documentary evidence" pertaining to liability in Section 725.456(b)(1) to employer's x-ray interpretations hinges on the words in the comments stating that the revised regulations require "submission of *any evidence* relevant to the liability of another party [at the district director level]." 65 Fed. Reg. 79999 (Dec. 20, 2000)(emphasis supplied). The majority reasons that since "any evidence" necessarily includes medical evidence, the "documentary evidence" pertaining to liability referenced in Section 725.456(a)(1) necessarily includes x-ray interpretations. As discussed *supra*, when the statement regarding "any evidence" of liability is considered in context, it becomes apparent that the Department was referring in Section 725.456(b)(1) to the documentary evidence relevant to the criteria set forth in Section 725.408(a)(2) and to the documentary evidence of a more recent, potentially liable operator pursuant to Section 725.414(b). Moreover, documentary evidence of liability does not include medical evidence of liability simply because the Director says that it is so. As I have shown, the Department demonstrated in the revised regulations that it distinguished between the terms documentary evidence and medical evidence.

The revised regulations reveal that the Department failed to provide for the category of medical evidence of liability. Although the majority, like the administrative law judge, declares that employer was aware of its obligation to provide any evidence of liability to the district director, the majority, like the administrative law judge, overlooks the fact that the Department forms provided to employer limited employer's response to issues of documentary evidence relevant to Sections 725.408(a)(2) and 725.414(b), and to testimony pursuant to Section 725.414(c).

---

[21]Section 725.456(b)(2) provides:

> Subject to the limitations in paragraph (b)(1) of this section, any other documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing in connection with the claim.

20 C.F.R §725.456(b)(2).

Nevertheless, the majority insists that when employer received the Notice of Claim, it was aware that claimant's entitlement was based on a finding of complicated pneumoconiosis, and for that reason it was incumbent upon employer to develop at the district director level any evidence which could bear on liability. The majority believes that the revised regulations impose this duty on employer despite the absence of any clear directive in the regulations or notice provided by the district director.

I believe it is more reasonable to construe the revised regulations as imposing this duty on the district director. When he sent employer the Notice of Claim, he was aware: that medical evidence could bear on liability; that the Act prohibits holding liable any employer whose employment of claimant did not give rise to his disability; and that if the potentially liable operator were not correctly identified before the case was transferred to the Office of Administrative Law Judges, the Trust Fund would be held liable. See 20 C.F.R. §725.407(a), (d). It is not necessary to decide in the case at bar, however, whether the Department can shift to employer the burden of identifying correctly the potentially responsible operator at the risk of assuming liability for payment of benefits when it has no responsibility for claimant's total disability.[22] It is sufficient to find in this case that the administrative law judge erred in applying Section 725.456(b)(1) to reject employer's medical evidence pertaining to liability, and thereafter, to hold employer liable.

Application of 20 C.F.R. §725.456(b)(1): Extraordinary Circumstances

Review of the record supports not only employer's argument that the administrative law judge erred in applying the reference to documentary evidence in Section 725.456(b)(1) to include medical evidence, but also employer's alternative argument, *i.e.,* if the x-ray interpretations are deemed documentary evidence pertaining to liability within the meaning of Section 725.456(b)(1), the administrative law judge erred in failing to find "extraordinary circumstances" existed to justify their admission. The extraordinary circumstances in the instant case include the confusion created by the revised regulations and the Department's interpretations of these regulations indicating that evidence of liability must be submitted at the district director level, but development of medical evidence may be deferred until the case is forwarded to the administrative law judge level.

---

[22]20 C.F.R. §725.494(a) provides a rebuttable presumption that the miner's disability or death arose in whole or in part out of his employment with the potentially liable operator.

Although the regulations indicate that the issue of liability is to be resolved by the district director, the regulations do not explicitly address the possible relationship between liability and medical evidence and they permit the parties to continue developing and offering medical evidence when the case is before the administrative law judge. (*See* 20 C.F.R. §725.456(b)(c)). Hence, employer complied with the regulations regarding medical evidence when it sent copies of the x-ray interpretations to the parties more than twenty days prior to the hearing and they were admitted without objection pursuant to 20 C.F.R. §725.456(b)(2). The Director maintains, however, that employer did not comply with the regulations because the medical evidence which employer submitted to the administrative law judge related to liability. The Director seeks to justify the absence of reference to medical evidence in the regulations regarding operator liability by pointing out that medical evidence is irrelevant to liability "in cases of simple pneumoconiosis - the vast majority of claims under the Act. Moreover, even in complicated pneumoconiosis cases, the liability issue arises…in only a very limited number of cases." Director's Brief at 7. The Director's argument proves too much: If medical evidence affects the issue of liability so rarely that it is unnecessary to state explicitly in the regulations that such evidence must be submitted to the district director, the circumstances presented by this case are so rare that they must be deemed extraordinary and, therefore, in the absence of notice to employers, justify employer's submission of the x-ray evidence to the administrative law judge.

Furthermore, the administrative law judge should have considered the circumstances presented in light of Congress's directive in 30 U.S.C. §932(c), so as to avoid holding liable an employer who was not responsible for the miner's presumed disability.[23] The record in the case at bar clearly demonstrates extraordinary

---

[23] 30 U.S.C. §932(c) provides in relevant part:

> Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefits shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator ….

See Truitt v. North American Coal Co., 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP North American Coal Corp.,* 626 F.2d 1137 (3d Cir. 1980).

circumstances: the undeniable lack of clarity in the revised regulations regarding the responsibility of an operator in employer's position to develop medical evidence relating to liability and to proffer it to the district director; the Director's reliance on the rarity of this situation to excuse the confusion in the regulations; and the Congressional mandate to execute the statute in such a way as to avoid injustice to employers.

This last consideration is of overriding importance. When the Director urged the administrative law judge to apply the revised regulations so as to avoid Congress's mandate in 30 U.S.C. §932(c) to hold liable only those operators whose employment gave rise to the disability compensated by the Act, the administrative law judge should have realized that this was an extraordinary circumstance justifying admission of the proffered x-ray interpretations. It appears that the administrative law judge believed that by excluding evidence pertaining to disability as provided in Section 932(c) he was not violating the Act. Yet by refusing to consider uncontradicted, credible evidence which establishes employer has no responsibility for claimant's presumed disability, and then relying on the absence of this evidence to hold employer liable, the administrative law judge violated Section 932(c). The administrative law judge's decision must be vacated consistent with the Fourth Circuit's teaching in *Sidwell v. Director, OWCP*, 71 F.3d 1134, 1138 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996): "[W]e have repeatedly pledged to Congress that if it would speak clearly in its enacted legislation, we in turn would give effect to that clearly stated intent."

Instructive on this issue is the Supreme Court's decision in *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438 (2002). The High Court held in *Barnhart* that the Coal Industry Retiree Health Benefit Act of 1992 is explicit as to who may be assigned liability for beneficiaries, and that the Commissioner of Social Security could not promulgate a regulation to impose liability upon a party who did not come within one of the designated categories. The Commissioner argued that his regulation holding liable successors in interest to signatory operators, is reasonable and necessary to effectuate the purpose of the Act. The Supreme Court rejected the Commissioner's argument because the statutory language is "clear and unambiguous…" 534 U.S. at 460. Furthermore, the Court declared: "Congress…did not delegate authority to the Commissioner to develop new guidelines or to assign liability in a manner inconsistent with the statute." 534 U.S. at 462.

Congress certainly did not authorize the administrative law judge to assign liability in a manner contravening the statute. The regulations as written do not require holding employer liable and, given the circumstances presented, the administrative law judge should have found them extraordinary, and therefore, justified admission of the proffered evidence. The administrative law judge's application of Section 725.456(b)(1) to preclude admission of employer's evidence was a clear abuse of discretion because his decision resulted in a conflict with the plain, unambiguous words of the statute. The

result of his application of the regulations was not to uphold the purposes of the statute but to trap the unwary.[24] Employer had fully complied with the regulations requiring that documentary evidence relating to liability be submitted to the district director, as the Department had explained those regulations, and employer was in compliance with the regulations when it continued to develop medical evidence after transfer of the case to the Office of Administrative Law Judges. Employer also complied with 20 C.F.R. §725.456(b)(2), when it offered in evidence the x-ray interpretations which had been sent to the parties more than twenty days prior to the hearing. The administrative law judge abused his discretion in determining that extraordinary circumstances did not exist to warrant admission of x-ray interpretations which prove that employer should not be held liable under the Act. I note that in upholding the administrative law judge's exercise of discretion to find extraordinary circumstances were not established, the majority did not discuss the specific circumstances presented by this case.

---

[24] In the comments to the revised regulations, the Department took umbrage with criticism of its proposed regulations applicable to potentially liable operators; but the record in the case at bar vindicates that criticism:

> [T]he Department does not accept the criticism that the regulation sets traps for unwary litigants. The nature of the evidence required by the Department, and the time limits for submitting that evidence, are clearly set forth in the regulations, and will be communicated to potentially liable operators who are notified of a claim by the district director.

65 Fed. Reg. 79985 (Dec. 20, 2000).

Date of Entitlement to Benefits

The administrative law judge's third holding is also erroneous: that April 1, 1996 is the date of onset of total disability for commencement of benefits. The administrative law judge reasoned: after he rejected the proffered x-ray interpretations, the evidence of record established that employer should be held liable; because claimant commenced work for employer in November 1994, the first diagnosis of complicated pneumoconiosis thereafter, in April 1996, must determine the date for commencement of benefits; even though the proffered x-ray interpretations showed claimant had complicated pneumoconiosis in May 1992 and the statute mandates that a claimant entitled to benefits "shall be paid benefits during the disability . . . ." 30 U.S.C. §922(a)(1). The administrative law judge believed that because he had already determined that employer was liable for payment of claimant's benefits, an onset date which preceded claimant's employment with employer would conflict with the express statutory provision that no employer should be held liable for payment of benefits to a miner whose disability did not arise out of his employment by that operator. Decision and Order at 11.[25] The administrative law judge had felt constrained by the revised regulations to reject the proffered x-ray interpretations pertaining to liability, and as a result, to hold liable an employer which credible, uncontradicted evidence showed should not be held liable under the Act. Having determined to hold employer liable, the administrative law judge felt constrained by the Act to reject again that credible, uncontradicted evidence, and as a result, to deny claimant four years of benefits to which he was entitled under the Act.[26] Surely, a decision which, on its face, denies both claimant and employer the benefits of specific statutory provisions, cannot be correct. I believe that according to a proper interpretation of the regulations, the proffered x-ray interpretations were admitted into the record pursuant to 20 C.F.R. §725.456(b)(2) and in accordance with this uncontradicted evidence, the administrative law judge should have determined that claimant's entitlement to benefits commenced as of May, 1992.

---

[25]Although in his brief the Director urged the Board to affirm the administrative law judge's onset determination, Director's Brief at 8, at oral argument the Director expressed disagreement with the rationale of that decision, stating that employer could be held liable to pay benefits for a period preceding claimant's employment by employer. O.A. Tr. at 51.

[26]Claimant is entitled to benefits from May, 1992, when uncontradicted evidence established he had complicated pneumoconiosis. A credible diagnosis of complicated pneumoconiosis is sufficient to establish the irrebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(3). Hence, claimant is irrebuttably presumed to be totally disabled since May, 1992 and the Act directs that he "shall be paid benefits during the disability. . . . " 30 U.S.C. §922(a)(1).

Conclusion

In sum, review of the record reveals that the administrative law judge erred in holding employer liable for payment of claimant's benefits and in determining the date for commencement of those benefits. His determination that employer waived the issue of liability is not supported by the evidence. The documents upon which the administrative law judge relied to find waiver are concerned with documentary evidence relating to the criteria of 20 C.F.R. §725.408(a)(2), which are not in dispute, and evidence of a more recent, potentially liable employer, which was never at issue. Neither document addresses the possibility that medical evidence may relate to liability or the possibility that an employer more remote in time may be liable.

The administrative law judge's decision to apply 20 C.F.R. §725.456(b)(1) to exclude employer's proffered x-ray interpretations is likewise unsound. The administrative law judge misconstrued the plain words of the regulation in determining that x-ray interpretations are documentary evidence pertaining to liability. When considered together with Department forms, *see* Director's Exhibits 17, 18, it is clear that the documentary evidence pertaining to liability referenced in Section 725.456(b)(1) is the documentary evidence relating to the criteria for liability in Section 725.408(a)(2) and, where applicable, evidence relating to claimant's most recent, potentially liable employer in Section 725.414(b)(1). That the documentary evidence referenced in Section 725.456(b)(1) excludes medical evidence is confirmed by review of Section 725.456(b)(2), in which the Department demonstrated that it knows how to express the intent to include medical evidence with documentary evidence.

But even if the administrative law judge did not err in applying Section 725.456(b)(1) to include x-ray interpretations in the category of documentary evidence pertaining to liability, he clearly abused his discretion in holding that extraordinary circumstances did not exist to justify their admission in the record. Given the newness of the revised regulations, the lack of specificity of any regulation addressing the situation presented here, the Department's explanation of the regulations, and employer's record of cooperation and compliance with the regulations, the administrative law judge should have resisted the Director's advice to reject employer's evidence, especially when he realized it put him on a collision course with the statute. As the Supreme Court declared in *Barnhart*, a statute does not authorize imposition of liability inconsistent with its express terms. The administrative law judge obviously believed he had not violated the Act when he held employer liable after rejecting evidence which proves employer is not responsible for claimant's presumed total disability. He compounded his error in determining the date for commencement of claimant's benefits. Given the unambiguous words of Section 932(c), together with his imposition of liability on employer, the administrative law judge concluded he must exclude the proffered x-ray interpretations

from consideration of the onset determination, and thereby deny claimant four years of benefits to which he is entitled.

According to a proper application of the regulations to the facts of this case, the proffered x-ray interpretations are medical evidence and they were admitted into the record by operation of 20 C.F.R. §725.456(b)(2). They constitute uncontradicted, credible evidence that claimant is entitled to benefits as of May, 1992 and that employer is not liable to pay those benefits. Accordingly, I would modify the administrative law judge's decision awarding benefits to provide that May 1, 1992 is the date for commencement of benefits. And I would vacate the administrative law judge's decision holding employer liable. Instead, I would hold the Trust Fund liable for payment of claimant's benefits.

____
REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

____
JUDITH S. BOGGS
Administrative Appeals Judge