BRB Nos. 89-0500 BLA,
89-0500 BLA-A,
89-0500 BLA-B
and 89-2637 BLA,
89-2637 BLA-A

CAROL J. THOMAS (Widow of STANTON THOMAS, JR.)	)
Claimant-Respondent Cross-Petitioner-A	)
v.	)
BETHENERGY MINES, INCORPORATED	)
Employer-Respondent Cross-Petitioner	)
and	)
BIG MOUNTAIN COALS, INCORPORATED	) DATE ISSUED:
Employer-Petitioner Cross-Respondent	)
and	)
WEST VIRGINIA CWP FUND	)
Carrier-Respondent	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)
Respondent Cross-Petitioner-B Petitioner	) DECISION and ORDER on) MOTION for RECONSIDERATION

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for BethEnergy Mines, Incorporated.

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

SMITH, Administrative Appeals Judge:

BethEnergy Mines, Incorporated (BethEnergy), has filed a timely Motion for Reconsideration of the Board's Decision and Order which affirmed in part and vacated in part the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees (86-BLA-4957) of Administrative Law Judge Donald W. Mosser on claims 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). *Thomas v. BethEnergy Mines, Inc.*, BRB Nos. 89-0500 BLA/A/B and 89-2637 BLA/A (Oct. 4, 1993)(unpublished). Claimant, Big Mountain Coals, Incorporated (Big Mountain), and the Director, Office of Workers' Compensation Programs (the Director), have not responded to BethEnergy's Motion for Reconsideration.

In the Board's Decision and Order in the above-captioned case, the Board vacated the administrative law judge's identification of Big Mountain and in the alternative, the Director, as the responsible operator, as claimant did not work 125 days for Big Mountain pursuant to 20 C.F.R. §725.493(b).[1] *Thomas*, *supra*, at 3-4. The Board held that the miner's time on sick leave did not count towards the 125 days required at Section 725.493(b) and thus was insufficient to establish 125 working days for Big Mountain. Consequently, the Board remanded the case to the administrative law judge for further consideration of the responsible operator issue. If BethEnergy was identified as the proper responsible operator on remand, the administrative law judge was instructed to afford

[1]It was uncontested that the miner worked as a car dropper for Big Mountain from August 7 to October 14, 1980, a period of 68 days, when he suffered a work-related back injury. Director's Exhibit 11. The miner never returned to work but continued on Big Mountain's payroll until May 17, 1982, when he was laid off. Decision and Order at 4-5; Director's Exhibits 9, 10.

BethEnergy an opportunity to fully defend the claim on its merits.[2]

The Board also vacated the administrative law judge's award of an attorney's fee which apportioned a fee of $3,791.25 payable by Big Mountain and a fee of $3,277.25 payable by the Director after vacating the administrative law judge's identification of Big Mountain, and, alternatively the Director, as the responsible operator. *Thomas*, *supra*, at 5.

With regard to the survivor's claim, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c) and remanded the case to the administrative law judge to determine whether Dr. Gaziano's opinion was sufficient to establish that the miner's pneumoconiosis actually hastened his death in light of *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993) and *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). The Board affirmed the administrative law judge's award of benefits in the miner's claim pursuant to 20 C.F.R. Part 718 as the Board had no basis to review this award as Big Mountain's counsel had not adequately raised or briefed any issues for review. *Thomas*, *supra*, at 5, n. 6.

In its Motion for Reconsideration, BethEnergy asserts that, contrary to the Board's holding, the Board had a basis to review the administrative law judge's findings regarding the miner's claim as BethEnergy had supplemented Big Mountain's arguments on appeal in its response brief and raised further errors committed by the administrative law judge which the Board should have addressed. Alternatively, BethEnergy asserts that it cannot be held liable for the payment of benefits on the miner's claim as it has not been provided with an opportunity to fully defend that claim on its merits in violation of its due process rights.

Section 725.493(b) provides, in relevant part:

> From the evidence presented, the identity of the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year and, to the extent the evidence permits, the beginning and ending dates of such periods, shall be ascertained. . . . However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be

[2]The Board noted that although BethEnergy attended the hearing, its objection to claimant's late submission of evidence was rendered moot by the administrative law judge and BethEnergy was not provided with post-hearing medical evidence developed by claimant and Big Mountain. *Thomas*, *supra*, at 4, n. 5.

> determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer. . . . A "working day" means any day or part of a day for which a miner received pay for work as a miner. . . .

20 C.F.R. §725.493(b). In the instant case, it was undisputed that the miner was employed with Big Mountain from August 7, 1980 to May 17, 1982, when he was laid off. Director's Exhibit 10. The miner worked a total of 68 days with Big Mountain from August 7 to October 14, 1980, before suffering a work-related back injury. After his back injury, the miner was absent from work due to the accident or illness from October 15, 1980, to May 17, 1982, excluding the months of April and May, 1981, when he was absent from work due to a contract strike.[3] Despite its agreement with BethEnergy that a miner's time off work due to a work-related injury is considered as time spent mining coal for purposes of fulfilling the requirement of one year of cumulative employment, Big Mountain sought to escape liability by maintaining that the miner was not employed by it for one year as the miner's employment terminated on October 14, 1980. *See Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986); *Verdi v. Price River Coal Co.*, 6 BLR 1-1067 (1984); *Soulsby v. Consolidation Coal Co.*, 3 BLR 1-565 (1982); *VanNest v. Consolidation Coal Co.*, 3 BLR 1-526 (1981); Decision and Order at 5. Big Mountain's argument was rejected by the administrative law judge in an Order dated March 25, 1988, after the administrative law judge agreed with both the Director and BethEnergy that this case was analogous to *Verdi*, *supra*, and that Big Mountain could not claim that the miner was not an employee when the company continued to carry him on its payroll records.

Subsequently, Big Mountain filed a motion to be dismissed as a party after contending that the miner was not employed by Big Mountain for at least 125 working days and therefore Big Mountain could not be the responsible operator as the miner was not regularly employed with it for a cumulative year. Big Mountain argued that the administrative law judge was required by Section 725.493(b) to determine that it is not the responsible operator based on the language in Section 725.493(b) that if employer proves that the miner was not employed by it for a period of at least 125 working days, employer shall be determined to have established that the miner was not regularly employed by it for a cumulative year. Big Mountain viewed this regulation as mandatory and not discretionary and distinguished the cases of *Boyd*, *supra*, *Verdi*, *supra*, *Soulsby*, *supra*, and *VanNest*, *supra*, where the miner in each case was employed in excess of 125 working days prior to the time the miner terminated his employment due to illness or an injury.[4] BethEnergy

[3]This time on strike does not count towards the miner's employment with Big Mountain. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The miner was on vacation from July 27 through August 7, 1981. Unlike strike time, vacation time counts towards the miner's employment with Big Mountain. *See Elswick v. The New River Co.*, 2 BLR 1-1109 (1980).

[4]We view Big Mountain's attempt to distinguish the cases of *Boyd*, *supra*, *Verdi*, *supra*, *Soulsby*, *supra*, and *VanNest*, *supra*, from the instant case, as a distinction without a

responded that Big Mountain's analysis was contrary to the holding in *Verdi*, *supra*, and allowed an employer to benefit from "down time" due to an injury suffered by a miner in conscientious dedication to his employment. After initially siding with BethEnergy on this matter, the Director responded in support of Big Mountain's motion.

Upon consideration of Big Mountain's motion, the administrative law judge denied it. Decision and Order at 6-8. The administrative law judge stated that he believed that Section 725.493(b) was included to provide guidance in factually disputed cases on the question of how to calculate a year of employment. He did not believe it was intended to deny liability where it was uncontested that a miner was carried on the payroll as an employee for a period well in excess of one year. He agreed with BethEnergy that the holding in *Verdi*, *supra*, was controlling and that it would be inequitable and inappropriate to allow Big Mountain to benefit from down time due to the injuries suffered by the miner's conscientious dedication to his employment. Consequently, the administrative law judge found Big Mountain to be the responsible operator liable for the payment of benefits in this case as the miner was employed for more than one year with Big Mountain.

Subsequent to the decisions by both the Board and the administrative law judge, the United States Court of Appeals for the Tenth Circuit in *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-336 (10th Cir. 1996) affirmed the administrative law judge's identification of Northern Coal Company (Northern) as the responsible operator liable for benefits in a case that arises out of similar facts to the instant case. In *Pickup*, the court affirmed the administrative law judge's conclusion that the miner was regularly employed in or around a coal mine by Northern. The court emphasized that Northern, like Big Mountain in the instant case, had not terminated the employment relationship with the miner during the sick leave absences and the miner had the right to return to work after his illness until he was laid off. The administrative law judge also found that Northern had paid the miner during his sick leave and the absences were excused. In the instant case, the record did not reflect whether the miner was paid during his sick leave, but presumably the absences were excused as Big Mountain kept the miner on its payroll until May 17, 1982.

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difference.

Upon reconsideration of the administrative law judge's Decision and Order in light of *Pickup*,[5] we now hold that the administrative law judge properly rejected Big Mountain's argument that the language in Section 725.493(b) requiring the miner to have worked for at least 125 working days in order to establish regular employment was mandatory. We affirm the administrative law judge's finding that the provisions in Section 725.493(b) were included to provide guidance in factually disputed cases on the question of how to calculate a year of employment for purposes of Section 725.493, and were not intended to deny liability where it is uncontested that a miner was carried on the payroll as an employee for a period well in excess of one year.

We also agree with the administrative law judge that it would have been inequitable and inappropriate to allow Big Mountain to benefit from down time due to the work-related injuries suffered by the miner. Decision and Order at 7-8. In *Verdi*, the Board held that the miner's time on sick leave counted towards the initial one year of coal mine employment required in Section 725.493(b), and affirmed the administrative law judge's finding that Price River Coal Company was the responsible operator.[6] Because the miner's time on sick leave counts towards his employment with Big Mountain, the miner was employed with Big Mountain for more than 125 working days.[7] If the miner was not being paid for his time from work due to the accident or illness or was not excused during his absences from work, Big Mountain failed to establish this fact despite its burden to do so. *See Tackett v. Cargo*

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[5]In *Pickup*, the court declined to address the Director's argument that as a matter of law sick leave absences cannot be excluded in determining the amount of time that a miner worked for an employer. *See Pickup*, 100 F.3d at 877, n. 9, 20 BLR at 2-347, n. 9. The court also declined to address the Director's further argument that once it is determined that a miner worked for an employer for at least 125 days, employer is the responsible operator as a matter of law and that the administrative law judge has no further discretion to decide that the employment was not regular. In declining to address these arguments, the court indicated that it was providing the administrative law judge with discretion in determining whether a miner's employment with a given employer was "regular."

[6]20 C.F.R. §725.493(b) requires the miner to initially establish one year of employment with an employer in order to hold that employer responsible for the payment of the miner's benefits. Employer may escape liability by proving that the miner is not regularly employed by it because the miner did not work for it for 125 working days. 20 C.F.R. §725.493(b); *Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348 (1985); *Brumley v. Clay Coal Corp.*, 6 BLR 1-956, 1-959, n. 2 (1984).

[7]That the miner was regularly employed with Big Mountain for a cumulative year or more is also supported by the administrative law judge's length of coal mine employment finding which is unchallenged by any party. In finding that the evidence reasonably supported the allegation of 37 years of coal mine employment, the administrative law judge apparently included the miner's total length of coal mine employment with Big Mountain from August 1980 to May 1982. Decision and Order at 4.

Mining Co., 12 BLR 1-11 (1988)(*en banc*); *Green v. A.G.P. Coal Co., Inc.*, 4 BLR 1-109 (1981).

Although our dissenting colleague argues that the holding in *Director, OWCP v. Gardner*, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989) is dispositive of the issue here and leads to a contrary result, *Gardner* can be distinguished from the instant case. In *Gardner*, the court held that the miner's employment with employer for 357 days did not constitute the initial one year or 365 days required at Section 725.493(b) and therefore employer could not be held responsible for the payment of benefits. *Compare Landes v. Director, OWCP*, 997 F.2d 1192, 17 BLR 2-172 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989)(periods of employment totaling 125 working days or more in a calendar year count as one year of coal mine employment under 20 C.F.R. §718.301(b)); *see also Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(a mere showing of 125 days of coal mine employment does not in and of itself constitute one year of coal mine employment under 20 C.F.R. §718.301). In *Dawson*, *supra*, at 1-60, n. 1, the Board described the method an administrative law judge should use in determining a miner's length of coal mine employment under Section 718.301, a provision analogous to Section 725.493(b). *See Croucher v. Director, OWCP*, 20 BLR 1-67 (1996)(McGranery, J., concurring in part and dissenting in part). We think this method is equally applicable when an administrative law judge is determining whether the miner was regularly employed for a cumulative year with employer under Section 725.493(b). First, the administrative law judge must determine the beginning and ending dates of the miner's periods of covered coal mine employment. In the instant case, the administrative law judge determined that the miner worked for Big Mountain from August 7, 1980, to May 17, 1982, thus establishing more than one year of coal mine employment. The administrative law judge then is required to determine whether the miner's employment during a particular period was regular employment. Here, the administrative law judge rejected Big Mountain's argument that the miner was not regularly employed by it. If, as here, the administrative law judge concludes that the employment during this period was regular employment, then the entire period between the beginning and ending dates may be counted. In the instant case, the administrative law judge acted within his discretion in determining that the miner was regularly employed for a cumulative year with Big Mountain under Section 725.493(b). *See Pickup*, *supra*.

Furthermore, our dissenting colleague's concern that the miner has not been sufficiently exposed to coal dust while working for Big Mountain in this case is not warranted. The record reflects that the miner worked for BethEnergy for 13 years prior to his one and three-quarters years with Big Mountain. Director's Exhibit 2. The miner, therefore, was employed for a much longer period of time with BethEnergy than Big Mountain. If claimant was not sufficiently exposed to coal dust while working for Big Mountain, however, Big Mountain should have sought to escape liability by establishing that the miner was not exposed to coal dust for significant periods during his employment with it pursuant to 20 C.F.R. §725.492(c).[8] Moreover, Big Mountain never contested Mr. Thomas'

[8]Under 20 C.F.R. §725.492(c), there is a rebuttable presumption that a miner was

status as a "miner", a word that is associated with exposure to coal dust pursuant to 20 C.F.R. §725.202.[9]

Although our dissenting colleague defers to the opinion of the Director on appeal in this case, we have not done so despite noting that the Director's interpretation of the regulations is entitled to substantial deference in the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies. *See Shuff*, *supra*. In this case, the Director has taken at least two different positions that we count before the administrative law judge alone, *i.e.*, initially in support of BethEnergy's position, subsequently in favor of Big Mountain's stance. Although the Director supported Big Mountain's position on appeal, the Director did not participate on reconsideration. Because the Director did not participate on reconsideration, the Director's position remains unknown especially in light of *Pickup*, *supra*.

We, therefore, vacate our prior reversal of the administrative law judge's identification of Big Mountain as the responsible operator and reinstate the administrative

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regularly and continuously exposed to coal dust during the course of his employment. To escape liability for the payment of benefits, employer may rebut this presumption by showing that the miner was not exposed to coal dust for significant periods during this employment. 20 C.F.R. §725.492(c).

[9]20 C.F.R. §725.202 contains a similar presumption to the one found in Section 725.492(c). Pursuant to Section 725.202, individuals employed in coal transportation or coal mine construction have the benefit of the presumption that they were exposed to coal mine dust during their periods of employment for purposes of determining whether they are or were miners and determining the identity of a coal mine operator liable for the payment of benefits in accordance with Section 725.493. 20 C.F.R. §725.202(a)(1). This presumption can be rebutted by demonstrating that the individuals were not regularly exposed to coal mine dust during their employment in or around a coal mine or preparation facility. 20 C.F.R. §725.202(a)(1)(i).

law judge's finding that, as the miner was employed for more than one year with Big Mountain, Big Mountain is the responsible operator liable for the payment of benefits in this case as it is rational, supported by substantial evidence and not contrary to law.

In light of our reinstatement of Big Mountain as the responsible operator, we must clarify our holding concerning the administrative law judge's award of an attorney's fee. In our Decision and Order, we vacated the administrative law judge's award of an attorney's fee and remanded the case to the administrative law judge to reassess counsel's fee petition and award the attorney's fee payable by the party responsible for the payment of benefits from the time it received notice of its potential liability and declined to pay compensation. *Thomas*, *supra*, at 5. On remand, we now instruct the administrative law judge to award an attorney's fee to be paid by Big Mountain as Big Mountain received notice of its potential liability on July 22, 1982, and controverted the claim on August 5, 1982. Director's Exhibits 7, 8. *See generally Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50 (CRT)(4th Cir. 1986); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Capelli v. Bethlehem Mines Corp.*, 11 BLR 1-129 (1988); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987), *aff'd*, *BethEnergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988). Although there was much controversy in this case over which employer was the responsible operator liable for the payment of benefits, the fact remains that Big Mountain is the party responsible for the payment of benefits, received notice of the claim and declined to pay compensation. Therefore, Big Mountain is responsible for the payment of an attorney's fee and expenses before the administrative law judge on the miner’s claim, and in the event of an award, on the survivor’s claim, also. On remand, if the administrative law judge enters an award on the survivor’s claim, he should award the entire fee payable by Big Mountain. If he awards benefits on the miner’s claim only, he must award fees for services only on the successful miner’s claim payable by Big Mountain.

We reaffirm the finding in our previous Decision and Order that this case must be remanded to the administrative law judge for further consideration of the survivor's claim pursuant to Section 718.205(c) in light of *Grizzle* and *Shuff*. The award on the miner's claim pursuant to Part 718 is reaffirmed since Big Mountain's counsel failed to adequately raise or brief any issues arising from the administrative law judge's findings.

Accordingly, BethEnergy's Motion for Reconsideration is granted. The case is remanded to the administrative law judge for further consideration of the survivor's claim. The administrative law judge's finding that Big Mountain is the responsible operator is now affirmed. Thus, Big Mountain is responsible for the payment of benefits on the miner's claim and benefits, if awarded, on the survivor's claim. Big Mountain is also liable to claimant's counsel for an attorney's fee and expenses on the miner’s claim, and in the event of an award, on the survivor’s claim, also.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I must respectfully dissent from the majority's affirmance of Big Mountain as the responsible operator, but I concur in its decision to affirm the award of benefits on the miner's claim and to remand the survivor's claim for further consideration.

I would reaffirm the Board's prior holding which vacated the administrative law judge's identification of Big Mountain as the responsible operator. Although the miner was employed by Big Mountain for more than a year, he actually worked for Big Mountain only sixty-eight days. I believe that the miner's time on sick leave does not count towards the 125 working days required by Section 725.493(b) to hold an employer liable as a responsible operator. That regulation sets forth the criteria in identifying the responsible operator. In *Director, OWCP v. Gardner*, 882 F.2d 67, 69, 13 BLR 2-1, 2-5 (3d Cir. 1989), the Third Circuit explained the two requirements pertaining to time of employment contained in Section 725.493(b):

> One is that the miner must have been employed by the operator for "not less than 1 year." *Id.* The other is that during that employment period the miner must have been "employed . . . for . . . at least 125 working days" or the miner will not be deemed to have been "regularly employed by such operator or employer." *Id.* As a practical matter, the one-year employment requirement sets a floor for the operator's connection with the miner, below which the operator cannot be held responsible for the payment of benefits. The 125-day limit relates to the minimum amount of time the miner may have been exposed to coal dust while in employment by that operator.

The Board correctly vacated the administrative law judge's finding that Big Mountain was the responsible operator as the miner did not actually perform work for Big Mountain for 125 days and thus was not sufficiently exposed to coal dust during that period of employment for Big Mountain to be held responsible for the miner's totally disabling pneumoconiosis.

The requirement of a sufficient amount of exposure to coal dust in assessing operator liability is consistent with both the mandate of the statute and the regulations. Section 932(c) of the Act, 30 U.S.C. §932(c), states that,

> [N]o benefit 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. . . .

30 U.S.C. §932(c). Likewise, the regulation found at Section 725.492(a)(1) requires that the miner's disability or death arise at least in part out of his coal mine employment with employer in order to hold employer liable for the payment of benefits. 20 C.F.R. §725.492(a)(1). Section 725.492(c) makes plain that the liability of the responsible operator is premised on the presumption that the miner was "regularly and continuously exposed to coal dust during the course of employment." The regulation states that this presumption is rebuttable and can be rebutted "by a showing that the employee was not exposed to coal dust for significant periods during such employment." That regulation accords some discretion to the administrative law judge in determining the sufficiency of the evidence to support rebuttal. But Section 725.493(b) provides that an operator which demonstrates that it did not employ the miner for at least 125 days *cannot* be held liable for benefits:

> [I]f an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for the purposes of paragraph (a) of this section. A "working day" means any day or part of a day for which a miner received pay for work as a miner (see

§725.202(a)).[10]

Although the majority applies a broad interpretation to the definition of working day, I would apply a stricter interpretation to "working day" in accordance with the court's statement in *Gardner* that,

> It is one thing, . . . , for courts to allow liberal construction of the term "year" of employment in order to effectuate the congressional purpose that the Black Lung laws be construed in favor of finding entitlement to benefits, and another thing to allow such flexibility where it is allocation between payers rather than the claimant's entitlement that is at issue.

[10]The majority asserts that Big Mountain should have relied upon Section 725.492(c) and argued that the miner had not been employed for "significant periods." Big Mountain did not rely upon the vague term "significant periods," which affords the administrative law judge discretion in determining the evidence necessary to establish rebuttal, because Big Mountain had evidence which Section 725.493(b) specifically provides is sufficient to establish rebuttal. Thus, Section 725.492(c) permits an administrative law judge to find that employment for various periods may rebut the presumption of regular employment for one year. But Section 725.493(b) specifically provides that evidence of fewer than 125 working days does rebut the presumption. As the Third Circuit explained in *Gardner*, 125 working days is the "floor . . . below which the operator cannot be held responsible for the payment of benefits." *Id.* In relying upon Section 725.493(b), Big Mountain contends that its liability is precluded.

Gardner, 882 F.2d at 71, 13 BLR 2-8. This reasoning is equally applicable to construction of "working day".[11] As the relevant issue here is the allocation between payers, a stricter interpretation of the definition of a "working day" is in order. Consequently, a day when a miner is on sick leave cannot constitute a working day as defined in Section 725.493(b) as the miner is not "receiv[ing] pay for work as a miner." (emphasis added).

The majority attempts to distinguish *Gardner* from the instant case by summarizing the specific holding: the employer in *Gardner* could not be held to be the responsible operator because it had employed the miner for periods totaling fewer than 365 days which does not satisfy the requirement of "periods of cumulative employment of not less than 1 year." 20 C.F.R. §725.493(a)(1). The majority ignores the rationale of *Gardner* which compels a strict construction of the regulations when determining the employer which must bear the burden of liability for payment of an award of benefits. I believe that *Gardner* is persuasive authority. The Third Circuit explained in *Gardner* that an employer cannot be held liable as a responsible operator unless it has both employed the miner for a period of at least 365 days and exposed the miner to coal dust for at least 125 working days. As claimant actually worked for Big Mountain for a period of only 68 days, he was not exposed to coal dust by Big Mountain for 125 days of employment, hence, Big Mountain cannot be held responsible for the payment of benefits in this case.

The majority's reliance on *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-336 (10th Cir. 1996) is misplaced. It is true that the Tenth Circuit approved the inclusion of sick leave in determining the one year requirement of Section 725.493(a). That is also consistent with the Third Circuit's approach in *Gardner*. In *Pickup*, it was undisputed that the miner had worked for at least 125 days. In fact, he had worked approximately 222 days during his total employment period of one year and twenty days. *Pickup*, 100 F.3d at 877, n. 7, 20 BLR at 2-346, n. 7. *Pickup* does not address the issue presented here, specifically whether sick leave should be included when calculating 125 working days at Section 725.493(b) to determine employer's liability.

The majority's determination to extend the holding of *Verdi v. Price River Coal Co.*, 6 BLR 1-1067 (1984) renders meaningless one of the two regulatory requirements in determining a responsible operator. *Verdi* authorizes the inclusion of sick leave in determining whether employer has satisfied the minimum requirement of employing the miner for one year; it does not address the rebuttal part of the regulation which authorizes

[11]Reference to *Gardner* is instructive on the way to approach the issue presented in the instant case. Contrary to the majority's representation, I do not consider *Gardner* dispositive. It cannot be dispositive because it addresses a different issue and it was authored by a court without controlling authority over the case at bar.

an employer to demonstrate that it cannot be held liable if it has not employed the miner for 125 working days. If sick leave is included in both the one year requirement and the 125 working days requirement, the latter is redundant and does not satisfy Congress' concern that the responsible operator actually exposed the miner to coal dust. Accordingly, I would hold that Big Mountain cannot be liable for the payment of benefits in the case at bar.

I would hold that the Trust Fund is responsible for the award on the miner's claim and that it would be responsible in the event of an award on the survivor's claim. Since entitlement to benefits was established in the miner's claim, although the wrong party was held to be the responsible operator, claimant cannot be required to relitigate the miner's claim against another operator. *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). Similarly, principles of fairness preclude holding an operator liable for payment when it has not had an opportunity to fully litigate the claim. *Id.* In the case at bar, BethEnergy was represented below, but its evidence was excluded at the formal hearing. Hence, the Trust Fund must pay for the award on the miner's claim.

The same principles apply to preclude relitigation of those elements to entitlement which claimant established in the survivor's claim.[12] As a result, the Trust Fund must also be held liable for any award in the survivor's claim.

The Director's contention that the Trust Fund should not be held liable when the administrative law judge bears responsibility for denying the responsible operator full participation is without merit. But where principles of fairness preclude both requiring claimant to relitigate an element he has proved and requiring an employer to assume liability without fully litigating all issues, there is no alternative but to place any liability on the Trust Fund.

I believe that the Board in its previous Decision and Order correctly vacated the administrative law judge's finding that Big Mountain was the responsible operator and this view is further supported by the Director. On appeal, the Director argues that Big Mountain was not the responsible operator because the miner actually worked for it fewer than 125 days. The Director's argument is based on the statutory scheme, the regulatory history of the responsible operator provisions, and case law. Director's Consolidated Brief in Support of Petition for Review and Response Brief in BRB Nos. 89-0500 BLA-A-B at 11-23. The Director's interpretation of the regulations, here Section 725.493(b), is entitled to substantial deference as the courts have recognized, in particular, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *Shuff v. Cedar Coal Co.*,

[12]Because claimant had established in the miner's claim both the existence of pneumoconiosis at Section 718.202(a)(4) and that it arose out of coal mine employment at Section 718.203(b), those elements were established in the survivor's claim.

967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). The Director's interpretation of Section 725.493(b) is also compatible with the Act's purpose of allocating to the mine operator an actual, measurable cost of its business. *See generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976).

I agree with BethEnergy that the Board should have addressed the arguments raised by BethEnergy in its response brief concerning the administrative law judge's findings with respect to the miner's claim. *See generally Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(*en banc*)(Smith, J., dissenting); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994)(*en banc*). Although I agree with the majority that Big Mountain did not adequately raise any issues with regard to the miner's claim in its Petition for Review and Brief, BethEnergy supplemented Big Mountain's arguments in its Response Brief and these arguments should have been addressed by the Board. Big Mountain's Brief at 7-9; BethEnergy's Brief at 8-13. I will address these arguments now.

BethEnergy argues that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4) because he credited the opinions of Drs. Rasmussen, MacCallum and Smith, which were based in part on positive x-rays, and the administrative law judge had determined that the weight of the x-ray evidence was negative for pneumoconiosis. Contrary to BethEnergy's contention, this weighing of the evidence was not irrational because the positive x-ray was just one of several factors which were considered. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 12; Director's Exhibits 7-A, 22-25; Claimant's Exhibits 3, 6, 8; Big Mountain's Exhibits 2, 18. Also, the administrative law judge acted within his discretion in concluding that Dr. Rasmussen's opinion, that the miner suffered from pneumoconiosis, established the existence of pneumoconiosis, since Dr. Rasmussen's opinion was well-reasoned and based upon a comprehensive examination; also his opinion was corroborated by the opinion of Drs. MacCallum and Smith, who diagnosed pneumoconiosis. *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

With respect to 20 C.F.R. §718.202(a)(1), BethEnergy challenges the administrative law judge's weighing of readings of x-rays dated February 12, 1986; July 16, 1986; and March 3, 1987. Because I believe that the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4) is supported by substantial evidence, any error committed by the administrative law judge at Section 718.202(a)(1) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With regard to Section 718.204(c), BethEnergy contends that the administrative law judge erred in rejecting the joint opinion of Drs. MacCallum and Smith solely because these physicians did not administer a blood gas study. I disagree. In determining that total disability was established pursuant to Section 718.204(c), the administrative law judge relied on Dr. Rasmussen's opinion as well as his qualifying blood gas study of February 12, 1986, which was validated by Dr. McQuillan, a Department of Labor medical consultant. Decision and Order at 14. The administrative law judge considered that the opinion of Drs. MacCallum and Smith, diagnosing occupational pneumoconiosis with a very mild

pulmonary impairment, provided little "contrary probative evidence" because it did not take into account the results of a blood gas study, which provided the crucial factor in Dr. Rasmussen's diagnosis of total disability. Decision and Order at 14-15. The administrative law judge was not imposing a requirement of a blood gas study to support a medical opinion at Section 718.204(c)(4), he was merely analyzing the evidence and reasonably concluded that employer's evidence did not effectively rebut claimant's evidence.

With regard to 20 C.F.R. §718.204(b), BethEnergy argues that the administrative law judge failed to determine the credibility of Dr. Rasmussen's opinion which, BethEnergy asserts, does not set forth the physician's reasoning for eliminating cigarette smoking as the cause of the miner's respiratory impairment. Also, BethEnergy contends that the administrative law judge erred in failing to discuss the opinion of Drs. MacCallum and Smith on the disability causation issue. Both arguments are without merit.

In determining that the miner's total disability was due to pneumoconiosis, the administrative law judge found that the only opinion relevant to this issue was Dr. Rasmussen's opinion. Decision and Order at 15. The administrative law judge, therefore, found that the miner was totally disabled due to pneumoconiosis based on Dr. Rasmussen's opinion that the miner was totally disabled as a result of his lung disease and that pneumoconiosis was the only disease diagnosed relating to the miner's cardiopulmonary system. Decision and Order at 15.

Dr. Rasmussen testified that the effect of cigarettes on ventilatory function is reversible and that the miner had not smoked cigarettes for fourteen years. Big Mountain's Exhibit 18 at 9. He stated that even though it would be reasonable to assume, given claimant's twenty-five year smoking history, that some part of his impairment would be attributable to smoking, the doctor could state within a reasonable degree of medical certainty, that all of claimant's impairment was attributable to coal dust exposure. This diagnosis was based upon claimant's marked impairment in gas exchange and absence of significant ventilatory impairment, reflecting interstitial type lung disease, which is different from that caused by smoking. *Id.* at 10-11, 18-19. Thus the doctor explained his attribution of claimant's pulmonary impairment to claimant's coal dust exposure, instead of cigarette smoking, and the administrative law judge's reliance on this opinion was entirely reasonable.

The administrative law judge was also correct in determining the cause of the miner's total disability without considering the opinion of Drs. MacCallum and Smith that the miner's occupational pneumoconiosis caused a very mild pulmonary impairment because, as in the analysis at Section 718.204(c)(4), that opinion did not rebut claimant's evidence. Blood gas study evidence was the linchpin in Dr. Rasmussen's diagnosis of the cause of total disability and that evidence was lacking in the report of Drs. MacCallum and Smith. Consequently, I would affirm the administrative law judge's findings at Section 718.204(b).

Accordingly, I would reinstate the Board's prior holding that Big Mountain is not the

responsible operator liable for the payment of benefits and I would hold the Trust Fund liable for the payment of benefits and the attorney's fee on the miner's claim. I would likewise hold the Trust Fund liable in the event of an award on the survivor's claim, but I concur in the majority's decision to remand this case to the administrative law judge for further consideration of the survivor's claim.

REGINA C. McGRANERY
Administrative Appeals Judge