BRB No. 98-0309 BLA

JARRELL DEAN COCHRAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED: 06/11/1998
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	ORDER

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order of Administrative Law Judge Stuart A. Levin dismissing Westmoreland Coal Company (Westmoreland) as a party to 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).[1] While this case was pending with the district director, two potentially responsible operators, Hardin Trucking Company (Hardin) and Westmoreland, were identified and notified of their potential liability. Both operators controverted. Director's Exhibits 30-39.

At the hearing, claimant testified that after his work for Hardin and Westmoreland, he worked for ICI Explosives (ICI) from 1980 to May 1983, delivering explosives and assisting in their use at the mine sites serviced by ICI. Hearing Transcript at 17, 23. As a result of this testimony, Westmoreland, for whom claimant had worked from 1965-66 and 1973-79, moved for dismissal as a potentially responsible operator, arguing that ICI, the last coal mine

[1] Claimant filed his application for benefits on February 23, 1995 and requested a hearing following a denial of his claim by the Department of Labor (DOL). Director's Exhibits 1, 28, 52, 53.

employer for over one full year, should be held responsible for any liability in this case. Hearing Transcript at 31.

The Director objected to this motion, arguing that Westmoreland should be retained as a potentially responsible operator as Harden, for whom claimant had worked from 1980-83, had been involuntarily dissolved and therefore could not qualify as a responsible operator under 20 C.F.R. §725.492. The Director then requested remand to the district director for further investigation of the responsible operator issue. Contending that even though claimant had noted his employment with ICI at the time of his application, the Director argued that claimant's testimony at the hearing as to his duties at ICI was the first indication that the employment was qualifying under the Act and therefore necessitated remand for further investigation.

On August 11, 1997, the administrative law judge found that ICI "appears to be the last company to employ Claimant as a miner for over one year." Decision and Order at 2. Further, the administrative law judge found that even if Hardin or its owners were responsible, ICI as the last employer would be the responsible operator herein. Therefore, as the Director had failed to demonstrate that ICI was unavailable, the administrative law judge granted Westmoreland's Motion to Dismiss and remanded the case for a complete medical examination as he found the record void of a complete assessment based on a correct employment history. Decision and Order at 3. The Director timely requested reconsideration, contending that remand was also necessary to further investigate the responsible operator issue and arguing that Westmoreland should not be dismissed prior to that investigation. The administrative law judge denied this request on October 20, 1997. The Director then timely appealed the two interlocutory orders of the administrative law judge issued on August 11 and October 20, 1997. Westmoreland filed a Motion to Dismiss Interlocutory Appeal, contending that this matter is not reviewable by the Board at this time as it is premature and should be dismissed.[2] Westmoreland Dismissal at 4. In its response, the Director urges the Board to recognize and apply the collateral order exception to the final judgment rule.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence and consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] Westmoreland also requested that any briefing schedule be held in abeyance pending the resolution of its motion. We grant Westmoreland's request to hold the briefing schedule in abeyance pending our decision herein.

An order that leaves the question of entitlement on the merits unresolved does not constitute a final appealable order. *Youghiogheny and Ohio Coal Co. v. Baker*, 815 F.2d 422, 10 BLR 2-8 (6th Cir. 1987). The Board follows the well-established rule of federal practice forbidding piecemeal appeals on interlocutory matters. *Christian v. Holmes & Narver, Inc.*, 1 BRBS 85 (1974); *see also Crabtree v. Bethlehem Mines Corp.*, 7 BLR 1-354 (1984). The Director urges the Board, however, to consider review under the collateral order exception to the final judgment rule. This "narrow exception" to the final judgment rule favoring appellate review of final judgments, *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Redden v. Director, OWCP*, 825 F.2d 337,338, 10 BLR 2-201, 2-202 (11th Cir. 1987), has been recognized by the Board for the purpose of avoiding undue hardship and inconvenience in the processing of claims. *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986)(further delay would create irreparable harm by retarding the disposition of the merits).

The collateral order exception is only applicable when the order appealed satisfies three conditions. The order must: 1) conclusively determine the disputed issue; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. *Redden*, *supra*; *Baker*, 815 F.2d at 425, 10 BLR at 2-12.

In this case, we agree with the Director that the three conditions of the collateral order rule are satisfied and therefore hold that this appeal constitutes an exception to the final judgment rule. Initially, the administrative law judge's two orders have conclusively determined that Westmoreland is not a potentially responsible operator in this case and have undermined any further investigation concerning the potential liability of ICI. Moreover, the dismissal of Westmoreland as a potentially responsible operator resolves an important issue completely separate from the merits of the claim. Finally, the dismissal of Westmoreland will be effectively unreviewable on appeal from a final decision and order on the merits of this claim. As the Director contends, should benefits be awarded, *Crabtree*, 7 BLR at 1-357, would preclude the Director from proceeding against any putative responsible operator which had not been a participant in every stage of the prior adjudication.

We therefore deny Westmoreland's Motion to Dismiss Interlocutory Appeal. As the Director's petition for review and supporting brief were filed on January 5, 1998, any response brief on the merits of this appeal shall be submitted to the Board within thirty (30) days from the receipt of this order.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge