BRB No. 98-1336 BLA
and 98-1336 BLA-A

HAROLD J. STEELE Claimant-Respondent v. FOSSIL FUELS, INCORPORATED, Successor to APPLE-JACK MINING CORPORATION and their individual officers JERRY MITCHELL LYALL, JACQUELINE LYALL BOBBERA, ANNETTE WALLS, and DENNY MILLER Employers and Officers-Respondents and TUG HUFF COAL CORPORATION, and its individual officers STEVE HORN and H. L. SHIRLEY Employer and Officers-Respondents and VIRGINIA CREWS COAL COMPANY Employer-Respondent Cross-Petitioner	)	DATE ISSUED:_____
DIRECTOR, OFFICE OF WORKERS'	)	

COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Decision on Motion for Reconsideration of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

John P. Scherer (File, Payne, Scherer & File), Beckley, West Virginia, for Virginia Crews Coal Company.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals and Virginia Crews Coal Company (Virginia Crews) cross-appeals the April 9, 1998 Decision and Order on Remand and the June 11, 1998 Decision on Motion for Reconsideration (94-BLA-0085) of Administrative Law Judge Samuel J. Smith 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). In the initial Decision and Order, the administrative law judge, after crediting claimant with sixteen and one-half years of coal mine employment, found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability pursuant to 20 C.F.R. §718.204(c)(4). The administrative law judge, however, found that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. By Decision and Order dated February 25, 1997, the Board affirmed the administrative law judge's finding of

sixteen and one-half years of coal mine employment and his findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(c)(4) as unchallenged on appeal. *Steele v. Fossil Fuels, Inc.*, BRB No. 96-1326 BLA (Feb. 25, 1997) (unpublished). The Board, however, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) and remanded the case for further consideration. *Id.* The Board further instructed the administrative law judge to render appropriate findings with regard to the responsible operator issue if he found claimant entitled to benefits. *Id.*

On remand, the administrative law judge found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. The administrative law judge further found that Tug Huff Coal Corporation (Tug Huff) and Steven Horn (Mr. Horn), President and Chief Executive Officer of Tug Huff, were jointly and severally liable for the payment of claimant's benefits. In the event that neither Tug Huff nor Mr. Horn was able to assume financial liability for the payment of claimant's benefits, the administrative law judge found that claimant's benefits would be paid by Virginia Crews.

Virginia Crews subsequently filed a motion for reconsideration. The administrative law judge reaffirmed his finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge, however, reconsidered his findings regarding the responsible operator. The administrative law judge found that Tugg Huff was not financially capable of assuming liability for the payment of claimant's benefits. Consequently, the administrative law judge found that Mr. Horn, as President and Chief Executive Officer of Tug Huff, was liable for the payment of claimant's benefits. In the event that Mr. Horn was unable to pay claimant's benefits, the administrative law judge found that the Black Lung Disability Trust Fund (Trust Fund) would be liable for the payment of benefits. The administrative law judge, therefore, dismissed Virginia Crews as a potential responsible operator.

On appeal, the Director contends that the administrative law judge erred in designating Mr. Horn as the responsible operator.[1] The Director argues that Virginia Crews should be

[1]By Order dated August 17, 1998, the Board granted the Director's motion to hold the instant case in abeyance pending decisions in *Mitchem* and *Lester*. *Steele v. Fossil Fuels, Inc.*, BRB Nos. 98-1336 BLA and 98-1336 BLA-A (Aug. 17, 1998) (Order).

After issuing decisions in *Mitchem* and *Lester*, *see Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999) (*en banc*) (McGranery, J., dissenting on other grounds); *Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999) (*en banc*) (Nelson and Hall, J.J., dissenting), the Board, by Order dated August 4, 1999, informed the parties that the instant case was no longer held

designated as the responsible operator. In its cross-appeal, Virginia Crews contends that the administrative law judge properly dismissed it as a putative responsible operator and properly held that the Trust Fund was liable for benefits in the event that Mr. Horn was incapable of paying claimant's benefits. Virginia Crews also contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). In a response brief, claimant responds in support of the award of benefits. In a reply brief, the Director reasserts his contention that Virginia Crews is the proper responsible operator. In a reply brief, Virginia Crews reiterates its previous contentions.

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).

The Director argues that the administrative law judge erred in his resolution of the responsible operator issue. The regulations provide that the operator with which the miner had the most recent periods of cumulative employment of not less than one year shall be the responsible operator. 20 C.F.R. §725.493(a)(1). However, an operator may be relieved of liability if it is determined incapable of paying benefits. 20 C.F.R. §725.492(a). In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability. 20 C.F.R. §725.492(b).

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in abeyance and reestablished a briefing schedule. *Steele v. Fossil Fuels, Inc.*, BRB Nos. 98-1336 BLA and 98-1336 BLA-A (Aug. 4, 1999) (Order).

In his consideration of the identity of the responsible operator, the administrative law judge found that claimant's most recent coal mine employment of at least one year was with Tug Huff.[2] Decision on Motion for Reconsideration at 11. The administrative law judge,

[2]The administrative law judge noted that claimant was most recently employed as a miner by Fossil Fuels, Incorporated (Fossil Fuels) and its predecessor, Apple-Jack Mining Corporation (Apple-Jack), for an indeterminate amount of time in 1989 and 1990. The administrative law judge found that:

> The end result, despite several diligent efforts to ascertain Claimant's employment dates, is that the evidence is simply unclear and insufficient to determine whether or not Claimant worked for Fossil Fuels, successor to Apple-Jack, for more than one cumulative year. It is determined that the record does not support a finding that Fossil Fuels or Apple-Jack employed Claimant for more than one cumulative year as required by §725.492(a)(1), and thus it is not the proper responsible operator in this matter.

however, found that Tug Huff could not be designated as the responsible operator because it was not financially capable of assuming liability for the payment of benefits.[3] *Id.* at 11-12. Inasmuch as no party challenges that administrative law judge's finding that Tug Huff is not the responsible operator, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge found that Mr. Horn, based upon his status as the President and CEO of Tug Huff, is the proper responsible operator liable for the payment of claimant's benefits. Decision on Motion for Reconsideration at 12-13. The Director contends that the administrative law judge erred in designating Mr. Horn as the responsible operator. We agree. The Director is not required to consider whether the corporate officers of a potentially responsible operator are financially incapable of assuming liability for black lung payments, in addition to establishing that the potential operator itself is incapable of assuming liability, before designating the next responsible operator. The Board has held that corporate officers, as individuals, cannot be considered to be responsible operators unless they fall within the definition of a responsible operator at 20 C.F.R. §725.491. *See Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999) (*en banc*) (McGranery, J., dissenting on other

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Decision and Order on Remand at 25.

The administrative law judge also dismissed Denny Miller and Jacqueline Lyall Bobbera, officers of Fossil Fuels, as potential responsible operators. *Id.* Inasmuch as no party challenges the administrative law judge's dismissals of Apple Jack, Fossil Fuels, Denny Miller and Jacqueline Lyall Bobbera as potential responsible operators, these dismissals are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]The administrative law judge noted that the record reveals that Tug Huff was uninsured as of claimant's last day of employment with the company and was dissolved on December 16, 1987. Decision and Order on Remand at 26; Director's Exhibits 18-20, 36.

grounds); *see also Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999) (*en banc*) (Nelson and Hall, J.J., dissenting).

However, because the administrative law judge has not yet done so, we remand the case to the administrative law judge to determine whether Mr. Horn meets the definition of an operator as outlined in 20 C.F.R. §725.491 and is financially capable of paying claimant's benefits. We note that it is within the administrative law judge's discretion to reopen the record for the submission of further evidence regarding Mr. Horn's status or to remand the case to the district director for further evidentiary development. *See Lester, supra*.

In the event that Mr. Horn is unable to pay claimant's benefits, the administrative law judge found that claimant's benefits should be paid by the Trust Fund rather than by Virginia Crews, the next most recent operator for which claimant worked for at least one year. Decision and Order on Reconsideration at 13-14. The Director argues that the administrative law judge erred in failing to designate Virginia Crews as the responsible operator.

When the most recent operator to employ a miner for more than one cumulative year does not satisfy the other criteria for identification as the responsible operator, the next most recent operator that does satisfy all of the criteria is the responsible operator. To the extent that Mr. Horn is not designated the responsible operator, Virginia Crews is the next employer who satisfies the criteria for identification as the responsible operator.[4]

[4]Virginia Crews has not contested the fact that it satisfies the criteria for identification as the responsible operator.

However, Virginia Crews, citing *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995),[5] contends that the Trust Fund should assume liability "due to the delay in [the] handling [of] this case by the Department of Labor and due to the failure of the Department of Labor to adequately develop the issue concerning the responsible operator." Virginia Crews's Brief at 13. Virginia Crews contends that the Department of Labor failed to develop information concerning the financial situation of Tugg Huff and Mr. Horn. *Id.* We disagree. Virginia Crews has not demonstrated any prejudice to its defense of the instant claim on account of any delay in identifying the responsible operator. Virginia Crews was identified as a putative responsible operator, was notified of its designation, and has been given an opportunity to defend the claim. *See* Director's Exhibit 17. Consequently, should the administrative law judge, on remand, find that Mr. Horn cannot be designated the responsible operator, we reverse the administrative law judge's finding that the Trust Fund is liable for the payment of claimant's benefits and hold that Virginia Crews should be designated the responsible operator.

Turning to the merits of the instant case, Virginia Crews contends that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).[6] After finding that the opinions of Drs. Vasudevan and Zaldivar were not sufficiently reasoned, the administrative law judge found that Dr. Rasmussen's opinion was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order on Remand at 15-19; Decision on Motion for Reconsideration at 3-6.

We initially reject Virginia Crews's contention that the administrative law judge erred

[5]In *Matney*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, recognized that the regulations require the Director to identify, notify and develop evidence regarding potential responsible operators. In *Matney*, the Fourth Circuit court refused to remand the case for the naming of another responsible operator because the Director had failed to develop evidence regarding a potentially responsible operator's ability to pay. The Fourth Circuit noted that if another responsible operator was named, that operator would be entitled to challenge the miner's entitlement to benefits. The Fourth Circuit noted that it was unwilling to potentially upset the finding that the miner was entitled to benefits, a matter that had already been fully litigated on the merits.

[6]The Fourth Circuit has held that a claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

in not addressing the results of claimant's pulmonary function and arterial blood gas studies in his consideration of whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Pulmonary function studies and arterial blood gas studies, while relevant to the presence or absence of a respiratory impairment, are not determinative of causation. *See generally Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984).

Virginia Crews next contends that the administrative law judge erred in discrediting Dr. Vasudevan's opinion. Dr. Vasudevan attributed claimant's pulmonary disability to his cigarette smoking-induced chronic obstructive pulmonary disease. Director's Exhibit 9. The administrative law judge, however, acted within his discretion in according less weight to Dr. Vasudevan's opinion because the doctor failed to explain the basis for his conclusion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 15-16; Director's Exhibit 9.

Virginia Crews also contends that the administrative law judge erred in discrediting Dr. Zaldivar's opinion. The administrative law judge discredited Dr. Zaldivar's opinion regarding the etiology of claimant's pulmonary disability because the doctor relied upon an inaccurate smoking history. Decision and Order on Remand at 5. An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. *See generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984).

The administrative law judge found that the evidence (including claimant's testimony) revealed that claimant had smoked a half a pack of cigarettes a day for forty years. Decision and Order on Remand at 12-15. Although Virginia Crews challenges the administrative law judge's finding regarding the length of claimant's smoking history, the administrative law judge's finding is based upon substantial evidence[7] and is, therefore, affirmed.

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[7]The administrative law judge noted that claimant testified that he had smoked a half a pack of cigarettes a day since he was a teenager. Decision and Order on Remand at 12-14; Transcript at 91-92, 104-105. The administrative law judge further found that:

> Dr. Vasudevan noted that Claimant smoked 5-6 cigarettes per day (DX-9); Dr. Rasmussen noted in two reports that Claimant smoked less than half a pack a day (CX-1); and Stevens Clinic Hospital noted a pack a day (EX 14). Dr. Zaldivar recorded a history of Claimant having smoked a pack a day until 1983, and then cutting back to ½ pack. (EX-1).
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> Most notably, Dr. Zaldivar stated that he found Claimant's smoking history was "...obviously inaccurate. He told me he hadn't smoked any from

the previous day, which represented 12 hours before the blood gases were drawn. Yet the blood gases showed he is smoking close to one pack of cigarettes per day."

While Dr. Zaldivar's blood gas studies may indicate that Claimant had, contrary to his statement to the physician, smoked 12 hours before the blood gas studies, Dr. Zaldivar provided no explanation for his conclusion that arterial blood gas studies are dispositive to quantify a patient's cigarette usage. Thus, it is determined that Dr. Zaldivar's opinion that Claimant smoked a pack of cigarettes per day is unsupported and undocumented, and has no probative value in quantifying Claimant's cigarette usage.

The preponderance of the medical reports indicate that Claimant smoked ½ pack of cigarettes or less per day. Furthermore, the undersigned relies on Claimant's hearing testimony, where Claimant testified during direct examination and cross-examination that he had smoked about ½ pack a day for forty years. Therefore, it is determined that Claimant smoked about a ½ pack of cigarettes for forty years. This is also consistent with the smoking histories recorded by Drs. Rasmussen and Vasudevan.

In discrediting Dr. Zaldivar's opinion, the administrative law judge found that the discrepancy between a forty year half a pack a day history and Dr. Zaldivar's forty year pack a day history was significant. Decision and Order on Remand at 16-17; Decision on Motion for Reconsideration at 4-5. The administrative law judge, therefore, permissibly discredited Dr. Zaldivar's opinion regarding the etiology of claimant's pulmonary disability because the doctor relied upon an inaccurate smoking history. *See generally Bobick*, *supra*; *Rickey*, *supra*.

Virginia Crews finally argues that the administrative law judge erred in relying upon Dr. Rasmussen's opinion to support a finding that claimant's total disability was due to his pneumoconiosis because Dr. Rasmussen relied upon inaccurate smoking and employment histories. The administrative law judge found that the evidence demonstrated that claimant had a smoking history of about a half a pack of cigarettes a day for forty years. Decision and Order on Remand at 15. Dr. Rasmussen relied upon a similar history, noting that claimant had smoked less than a half of a pack of cigarettes a day for forty years. Claimant's Exhibit 1.

Decision and Order on Remand at 14-15.

In regard to claimant's coal mine employment history, the Board previously held that:

> The disparity of approximately four or five years between the administrative law judge's calculation of total years of coal mine employment and Dr. Rasmussen's detailed notation of claimant's coal mine employment is not so significant a difference as to warrant rejecting the doctor's opinion in its entirety.

Steele v. Fossil Fuels, Inc., BRB No. 96-1326 BLA (Feb. 25, 1997) (unpublished).

On remand, the administrative law judge determined that the discrepancy between Dr. Rasmussen's assumption of claimant's coal mine employment history (21-22 years) and his own determination (16½ years) was not so significant as to affect the weight given to Dr. Rasmussen's report. Decision and Order on Remand at 17. We affirm the administrative law judge's finding. Consequently, inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

Accordingly, the administrative law judge's Decision and Order on Remand and Decision and Order on Reconsideration are reversed in part, affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

JAMES F. BROWN
Administrative Appeals Judge