BRB No. 99-0263 BLA

TERRY K. HODGES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
W-P COAL COMPANY	)	DATE ISSUED:
STIRRAT COAL COMPANY	)	
	)	
Employers-Petitioners	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer, W-P Coal Company.

Stephen E. Crist (Employment Programs Litigation Unit), Charleston, West Virginia, for carrier, the West Virginia Coal Workers' Pneumoconiosis Fund.

Helen H. Cox (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, BROWN,

Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0472) of Administrative Law Judge Edward Terhune Miller awarding benefits in 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 credited claimant with approximately seventeen and one-quarter years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(4). Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. In addition, the administrative law judge found that W-P Coal Company (W-P) was properly designated as the responsible operator.

On appeal, W-P challenges the administrative law judge's weighing of the conflicting medical evidence at 20 C.F.R. §§718.202(a)(4), 718.203 and 718.204(b). W-P also challenges the administrative law judge's finding that it was properly designated as the responsible operator. Claimant has not filed a brief in this appeal. The West Virginia Coal Workers' Pneumoconiosis Fund (WV CWP Fund) responds, urging affirmance of the administrative law judge's finding that it is not liable as the insurer of W-P. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that W-P was properly designated as the responsible operator. The Director also urges affirmance of the administrative law judge's finding that the WV CWP Fund is not liable as an insurer of W-P, if the Board holds that the WV CWP Fund did not waive its right to contest its liability on this issue.[1]

[1]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(4) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal*

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are 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).

Co., 6 BLR 1-710 (1983).

Initially, we will address W-P's contentions with respect to the administrative law judge's findings on the merits. W-P contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Dr. Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibits 17, 25, Dr. Zaldivar opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 71. The administrative law judge properly accorded greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar because he found Dr. Rasmussen's opinion to be better reasoned.[2] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject W-P's assertions that the

[2]We hold that W-P's assertion that Dr. Rasmussen's opinion is not well reasoned lacks merit. The administrative law judge found "Dr. Rasmussen's assessment to be the more credible, because it is better reasoned than Dr. Zaldivar's." Decision and Order at 14. The administrative law judge stated that "Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis was based explicitly and credibly on the nearly eighteen years of coal mine dust exposure, and Dr. Speiden's positive x-ray reading in the implicit context of a comprehensive black lung physical examination." *Id*. at 17. Further, the administrative law judge stated that Dr. Rasmussen "later reevaluated and reaffirmed his diagnosis upon review of negative x-ray readings subsequently adduced." *Id*. In contrast, the administrative law judge observed that "[a]lthough Dr. Zaldivar opines categorically that the Claimant's asthma is not related to coal dust, he provides no explicit rationale nor any reference to particular evidence which convincingly rules out a causal connection between the asthma and potentially irritating particles of coal dust in this case." *Id*. at 14 n.6.

administrative law judge did not explain why he affords deference to the opinion of Dr. Rasmussen, and that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), by failing to provide an adequate explanation for his weighing of the conflicting evidence.

Further, we reject W-P's assertion that the administrative law judge erred in failing to explain why he accorded greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar, in view of the superior qualifications of Dr. Zaldivar. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Based on his finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge found that claimant established the existence of pneumoconiosis. However, subsequent to the issuance of the administrative law judge's decision, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a) to determine whether claimant has established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 221 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In the instant case, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), but found it sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). However, the administrative law judge did not weigh all of the relevant evidence together to determine whether claimant established the existence of pneumoconiosis in accordance with *Compton*. Thus, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis, and remand the case to the administrative law judge to weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant has established the existence of pneumoconiosis. *See Compton, supra*.

W-P also contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Whereas Dr. Rasmussen opined that

claimant suffers from coal workers' pneumoconiosis arising out of coal dust exposure, Director's Exhibit 17, Dr. Zaldivar opined that claimant does not suffer from coal workers' pneumoconiosis, Director's Exhibit 71. As previously noted, the administrative law judge properly accorded greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar because he found Dr. Rasmussen's opinion to be better reasoned. *See Clark, supra*; *Fields, supra*; *Fuller, supra*. Thus, we reject W-P's assertion that the administrative law judge erred in weighing the conflicting medical opinions of record. However, inasmuch as we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis, we also vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. If, on remand, the administrative law judge finds that the evidence is sufficient to establish the existence of pneumoconiosis, he may reinstate his finding that the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

W-P further contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Whereas Dr. Rasmussen opined that claimant suffers from a disabling respiratory impairment caused by cigarette smoking and coal mine dust exposure, Director's Exhibit 17, Dr. Zaldivar opined that claimant is unable to work above the light work level because of his asthma, Director's Exhibit 71. The administrative law judge properly accorded greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar because he found Dr. Rasmussen's opinion to be better reasoned and documented.[3] *See Clark, supra*; *Fields, supra*; *Lucostic v.*

[3]The administrative law judge stated that "Dr. Rasmussen's opinion is better documented, more comprehensive, and better reasoned than the contrary opinion of Dr. Zaldivar." Decision and Order at 17. With respect to Dr. Rasmussen's opinion, the administrative law judge observed that "Dr. Rasmussen...noted Claimant's wheezing, considered blood gas study data disclosing marked hypoxia, and severe, partially reversible obstructive ventilatory impairment." *Id*. at 16. The administrative law judge also observed that Dr. Rasmussen "attributed the severe partially reversible obstructive ventilatory impairment to the effects of cigarette smoking and coal mine dust exposure, which he declared could not be separately assessed, although he could opine that coal mine dust exposure was a major contributing factor in Claimant's impaired respiratory function." *Id*. at 17. With respect to Dr. Zaldivar's opinion, the administrative law judge observed that a "portion of Claimant's impairment reversible by bronchodilators may, as Dr. Zaldivar contends, be attributable to asthma." *Id*. at 17. However, the administrative law judge

United States Steel Corp., 8 BLR 1-46 (1985); *Fuller, supra*. Thus, we reject W-P's assertion that the administrative law judge erred in weighing the conflicting medical opinions of record. Moreover, we reject W-P's assertion that the administrative law judge substituted his opinion for that of the physician.[4]

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observed that "a disabling irreversible component remains after the administration of bronchodilators which Dr. Zaldivar does not adequately explain." *Id*.

[4]W-P asserts that the administrative law judge went beyond the scope of his authority in relying on *Webster's Ninth New Collegiate Dictionary* and *Dorland's Pocket Medical Dictionary* (23d ed.) to assess Dr. Zaldivar's opinion. The

administrative law judge stated that "Dr. Zaldivar did not discuss the attributes of asthma or explain why Claimant's asthma could not be attributed in any degree to the potentially irritating effects of coal dust." Decision and Order at 16. The administrative law judge observed that "asthma is defined in *Webster's Ninth New Collegiate Dictionary* as 'a condition often of allergic origin that is marked by continuous or paroxysmal labored breathing accompanied by wheezing, by a sense of construction (sic) in the chest, and often by attacks of coughing or gasping.'" *Id*. The administrative law judge also observed that *Dorland's Pocket Medical Dictionary* (23d ed.) defines asthma as "'a condition marked by recurrent attacks of paroxysmal dyspnea, with wheezing due to spasmodic contraction of bronchi.'" *Id*. Further, the administrative law judge observed that according to *Dorland's Pocket Medical Dictionary* (23d ed.), "[i]n some cases, [asthma] is an allergic manifestation in sensitized persons; in others it may be induced by vigorous exercise, irritant particles, or physiologic stress." *Id*. W-P does not contest the accuracy of the definitions of asthma provided in *Webster's Ninth New Collegiate Dictionary* and *Dorland's Pocket Medical Dictionary* (23d ed.). Inasmuch as the administrative law judge permissibly considered the definition of asthma, as provided in *Webster's Ninth New Collegiate Dictionary* and *Dorland's Pocket Medical Dictionary* (23d ed.), *see* Decision and Order at 16; *see generally Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-138-9 (1990), and rationally found that Dr. Rasmussen's opinion is "consistent with the general definition of asthma discussed *infra* which can be provoked by irritants," Decision and Order at 14, 16, we reject W-P's assertion that the administrative law judge went beyond the scope of his authority in weighing the conflicting medical opinion evidence.

In addition, we reject W-P's assertion that the administrative law judge erred in relying on the West Virginia Occupational Pneumoconiosis Board's award of benefits. An administrative law judge, within his discretion, may give weight to the decision of a state workers' compensation board. *See Clark, supra*. Here, the administrative law judge rationally found that "the fact that the West Virginia Pneumoconiosis Board has granted Claimant permanent partial disability awards in two increments, six years apart, totaling 40% permanent partial disability, attributable to his coal mine dust exposure provides a measure of corroboration to Dr. Rasmussen's assessment, as opposed to Dr. Zaldivar's." Decision and Order at 17; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Nonetheless, inasmuch as we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis, we also vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). If reached on remand, the administrative law judge may reinstate his finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b).

In light of the foregoing, we vacate the administrative law judge's award of benefits, and remand the case for further consideration.

Next, we address W-P's contentions with regard to its designation as the responsible operator. Specifically, W-P asserts that it should be dismissed as the responsible operator since the Director failed to act promptly against Top Kat Mining (Top Kat), an operator which waived its right to challenge the award of benefits. The pertinent 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).

In his consideration of the identity of the responsible operator, the administrative law judge stated that "W-P's office manger (sic) declared that Claimant was employed by W-P from January 12, 1976, through February 1988 as a beltman and certified electrician;[5] that he worked for W-P's #21 contract mine, Deer

[5]The administrative law judge stated that "W-P concedes that it is capable of

Run Mining, from February 1988 through November 1989; and worked for [Top Kat], #21 Mine, from December 1989 to the date of the declaration, July 25, 1991."[6] Decision and Order at 4. Although claimant's most recent coal mine employment of at least one year was with Top Kat, the administrative law judge stated that "[t]he inability of Top Kat to meet such obligations [of a responsible operator] is established in this case."[7] *Id*. at 18. The administrative law judge, therefore, concluded that "W-P is the properly designated [responsible operator] in respect of this claim pursuant to [20 C.F.R.] §725.491(b)(1), because W-P exercised sufficient interest and control over Top Kat under its lease contract with Top Kat to qualify as [the responsible operator] in respect of this black lung claim."[8] *Id*. at 20; *see Buck v. Elliot Coal*

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paying for any benefits awarded, because it is solvent, and because it contends that it is insured by the WV CWP Fund." Decision and Order at 22.

[6]The administrative law judge stated that "[t]he mine where Claimant worked for W-P, #21, was initially owned and operated by W-P, which leased its mining operations to Deer Run [Mining] from February 1988 to November 1989, and, subsequently, to Top Kat from December 1989 to October 1991." Decision and Order at 7-8.

[7]The administrative law judge stated that Top Kat "was dissolved by decree of court for nonpayment of taxes on April 14, 1994." Decision and Order at 11. The administrative law judge observed that "[t]he company is out of business and apparently without assets." *Id*. at 18. The administrative law judge also observed that "[t]here is evidence that it has outstanding debts to suppliers of $22,500, which allows the inference that it has no capacity to pay other obligations." *Id*. Further, the administrative law judge stated, "[f]or all that appears of record, Top Kat, now out of business, did not obtain black lung insurance as required, and is not capable of assuming the liability." *Id*. at 20.

[8]The administrative law judge stated, "[a]ccording to Claimant, there came a time when Vernon Cornette, the general local superintendent of W-P announced to the work force that Mine #21 would no longer be run by W-P." Decision and Order at 8. The administrative law judge also stated that "Claimant testified credibly that W-P gave directions on how much coal to mine, and provided parts for equipment." *Id*. The administrative law judge further stated that "Claimant understood that W-P was in control of Top Kat." *Id*. The administrative law judge observed that "[w]hen Top Kat ran...into financial difficulties because of equipment breakdowns and other factors, [Mr.] Cornette raised the royalty price per ton, gave [Mr.] Adkins payroll advances, arranged for favorable purchases of supplies, and waived the fee for equipment rental." *Id*. Further, the administrative law judge observed that "[t]he contract specified that W-P retained title to the coal both in place and mined, that

Mining Co., Inc., 12 BLR 1-187 (1989); *Demchak v. Elliot Coal Mining Co., Inc.*, 12 BLR 1-178 (1989). Inasmuch as the administrative law judge rationally found that Top Kat could not be designated as the responsible operator because it was not financially capable of assuming liability for the payment of benefits, we reject W-P's assertion that it should be dismissed as the responsible operator since the Director failed to act promptly against Top Kat, an operator which waived its right to challenge the award of benefits. *See Gilbert v. Williamson Coal Co., Inc.*, 7 BLR 1-289 (1984).

Top Kat had no right to dispose of the coal to anyone other than W-P or its designee, and that Top Kat had no economic interest in any coal owned or held under lease by W-P." *Id*. at 9. In addition, the administrative law judge observed that "W-P retained the right of entry without notice to examine the...operations and all books and records, maps and plans." *Id*. Hence, the administrative law judge found that "actual control by W-P over Top Kat was comprehensive, varied, and effective, notwithstanding the disclaimers in the lease." *Id*. at 10.

We also reject W-P's assertion that it should be dismissed as the responsible operator since the Director failed to carry his burden to prove that the corporate officer of Top Kat is not able to pay benefits.[9] The Board has held that corporate

[9]W-P asserts that the record does not contain evidence of Mr. Adkins' financial capacity to assume liability for the payment of benefits. The administrative law judge observed that "[t]he Controller of Top Kat was identified as William Mitchell Adkins." Decision and Order at 8. The administrative law judge also observed that Mr. Adkins "testified that he had retired in May 1992 and was in what he characterized as very poor health." *Id*. at 11. The administrative law judge further observed that Mr. Adkins "has an eighth grade education." *Id*. In addition, the administrative law judge observed that "[b]ecause of deteriorating equipment, the company got into financial difficulties before long." *Id*. The administrative law judge stated that "[t]hese included problems with operating capital." *Id*. The administrative law judge therefore inferred "from this evidence that [Mr.] Adkins as the sole officer of the uninsured operator does not have substantial financial resources with which to pay any black lung benefits for which Top Kat might be liable." *Id*. However, as W-P asserts, the record does not contain evidence of Mr. Adkins' financial capacity to assume liability for the payment of benefits. Nonetheless, inasmuch as the Director is not required to consider whether officers of

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 grounds); *see also Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999)(*en banc*)(Nelson and Hall, J.J., dissenting), *aff'd on other grounds on recon*. *en banc*, BRB Nos. 97-1757 BLA and 97-1757 BLA-A, BLR (Dec. 22, 1999)(to be published). Here, W-P does not assert that Mr. Adkins falls within the definition of a responsible operator. Furthermore, the record does not indicate that Mr. Adkins falls within the definition of a responsible operator. 20 C.F.R. §725.491.

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a corporation, as individuals, can be held liable as responsible operators, *see Lester v. Mack Coal Co.*, 21 BLR 1-126, 1-132 (1999)(*en banc*)(McGranery, J., dissenting on other grounds), we hold that any error by the administrative law judge in finding that Mr. Adkins is not able to assume liability for the payment of benefits is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In addition, W-P contends that the administrative law judge erred in failing to consider whether the WV CWP Fund waived its right to contest its designation as the insurer of W-P. Specifically, W-P asserts that the WV CWP Fund should be held liable as its insurer because the WV CWP Fund did not notify the Director of the change in W-P's insurance coverage from underground mining to surface mining. The administrative law judge stated that "W-P and the WV CWP Fund advisedly and explicitly reduced the scope of W-P's insurance coverage."[10] Decision and Order at 22. Hence, the administrative law judge concluded that "W-P's underground coverage had terminated, and, as a consequence, W-P is primarily liable, as it would be in any event, for Claimant's black lung benefits as an underground coal miner, since Claimant worked as an underground coal miner before and after the termination of such coverage, albeit after such termination for Top Kat, which was uninsured, but controlled by or ultimately 'taken over' by W-P." *Id*. at 23.

[10]In a letter dated February 19, 1991, W-P confirmed its verbal request made in a meeting held on February 14, 1991 to change its insurance coverage with the WV CWP Fund from underground mining to surface mining effective January 1, 1991. Director's Exhibit 74. In a subsequent letter dated February 26, 1991, the WV CWP Fund advised W-P that it granted W-P's request to change W-P's Quarterly Reporting Classification from underground mining to surface mining effective January 1, 1991. *Id*.

The pertinent regulations provide that "[e]ach carrier shall report to the Office each policy and endorsement issued, cancelled, or renewed by it to an operator." 20 C.F.R. §726.208. The regulations also provide that "[c]ancellation of a contract or policy of insurance issued under authority of the Act shall not become effective otherwise than as provided by 33 U.S.C. 936(b); and notice of a proposed cancellation shall be given to the Office and to the operator in accordance with the provisions of 33 U.S.C. 912(c), 30 days before such cancellation is intended to be effective." 20 C.F.R. §726.212. Here, the record does not indicate that the WV CWP Fund notified the Director of the change in W-P's insurance coverage from underground mining to surface mining. However, as the Director asserts, it is the responsibility of the operator to obtain adequate insurance coverage. 20 C.F.R. §726.4(b). The change in W-P's insurance coverage occurred as a result of W-P's own initiative. Consequently, the administrative law judge rationally found that "the lack of such notice should not override the contract limitation initiated by W-P, and granted by the WV CWP Fund, apparently in good faith, or redound to the advantage of W-P in the instant case, whatever its effect might be vis-a-vis an innocent third party, or, if the Director confronted potential liability because of a responsible operator's inability to pay black lung benefits."[11] Decision and Order at 23. We, therefore, reject W-P's assertion that the WV CWP Fund should be held liable for the payment of benefits as W-P's insurer because it did not notify the Director of the change in W-P's insurance coverage from underground mining to surface mining.[12]

Finally, we are not persuaded by W-P's assertion that the WV CWP Fund's failure to contest its liability as insurer of W-P in the initial proceedings of the case binds it to its outward appearance of acting as the insurer of W-P for this claim. As previously noted, claimant's most recent coal mine employment was as an underground miner. Further, as previously noted, W-P initiated the change in its insurance coverage with the WV CWP Fund from underground mining to surface mining. Although the WV CWP Fund initially controverted its liability for the payment of benefits as the insurer of W-P,[13] the record clearly indicates that the WV CWP

[11]The administrative law judge stated that "[t]he Director does not appear to qualify as such an innocent third party in this case, because W-P admits that it is capable of assuming liability for the black lung benefits in issue." Decision and Order at 23.

[12]The administrative law judge stated that "[t]he consequences of a failure to notify is not explicitly identified as an extension of the preexisting coverage contrary to contractual arrangements such as existed under the circumstances of this case." Decision and Order at 23.

[13]A Notice of Claim dated July 29, 1991 was sent to W-P and the WV CWP

Fund did not provide underground mining insurance coverage to W-P during claimant's most recent coal mine employment. Hence, the WV CWP Fund is not a party to the claim. 20 C.F.R. §725.360(a)(4).

Fund. Director's Exhibit 26. On August 13, 1991 and September 10, 1991, the WV CWP Fund filed controversions of liability on behalf of W-P. Director's Exhibits 27, 28. The WV CWP Fund did not contest its designation as the insurer of W-P in either of the controversions. To the contrary, the WV CWP Fund stated that "the named Responsible Operator secured insurance coverage with the WV CWP Fund for the period of the miner's last coal mine employment with the Responsible Operator." *Id*. Similarly, in a Controversion of Liability dated January 15, 1992, in response to a December 31, 1991 Notice of Initial Finding, the WV CWP Fund stated that "the named Responsible Operator secured insurance coverage with the WV CWP Fund for the period of the miner's last coal mine employment with the Responsible Operator." Director's Exhibit 34. On September 16, 1992, the WV CWP Fund filed a Motion to Dismiss with the Office of Administrative Law Judges, requesting that its insureds, W-P and Deer Run Mining, be dismissed as potential responsible operators in this claim. Director's Exhibit 49. In addition, on June 14, 1994, the WV CWP Fund requested a hearing on behalf of W-P and Deer Running. Director's Exhibit 68. The WV CWP Fund, however, did not contest its designation as the insurer of W-P.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge