

BRB No. 99-0399 BLA

WILLIAM E. WALTERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
POWER OPERATING COMPANY, INC.	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Motion for Summary Judgment and the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James R. Schmitt (Keisling, Schmitt, Coletta & Deitrick), Carnegie, Pennsylvania, for claimant.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

Michelle S. Gerdano (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Order Denying Motion for Summary Judgment and the Decision and Order - Awarding Benefits (98-BLA-0345) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed his initial application for benefits on June 13, 1973. Director's Exhibit 39. This claim was denied and on June 20, 1978, claimant elected to have his denied claim reviewed by the Social Security Administration (SSA), pursuant to the 1977 Amendments to the Act. SSA denied the claim on June 6, 1979, and sent it to the Department of Labor (DOL) for further review. DOL denied the claim on June 2, 1980. Director's Exhibit 39. No further action was taken on this claim, and claimant filed the present duplicate claim on July 26, 1996. Director's Exhibit 1. The district director found that claimant was eligible for benefits on November 14, 1996. Director's Exhibits 27, 31. Employer contested the award of benefits, and the case was forwarded to the Office of Administrative Law Judges (OALJ).

By letter dated September 18, 1997, employer contended that liability for the present case should be transferred to the Black Lung Disability Trust Fund (Trust Fund) because there was no clear indication in the record that claimant's 1973 claim had been finally denied. Director's Exhibit 45. The case was remanded to the district director, who found that the present claim was not subject to the transfer provisions and referred the case back to the OALJ's for a formal hearing which was held on May 11, 1998, before Administrative Law Judge Michael P. Lesniak (the administrative law judge). Director's Exhibit 51. Subsequently, employer filed a Motion for Summary Judgment again requesting that liability be transferred to the Trust Fund and that it be dismissed as the operator responsible for payment of benefits on this claim. On August 26, 1998, the administrative law judge issued an Order Denying Motion for Summary Judgment, finding that the instant claim was not subject to the transfer provisions of the Act and that employer was responsible for the payment of any benefits awarded.

On December 9, 1998, the administrative law judge issued a Decision and Order - Awarding Benefits on the merits, finding that claimant established twenty-nine years of coal mine employment and that the newly submitted medical reports of record were sufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and a material change in conditions pursuant to 20 C.F.R. §725.309(d), in accordance with the holding in *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).<sup>1</sup> The administrative law judge further

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<sup>1</sup>The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's coal mine employment

found that based on the record as a whole, claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and the objective evidence and medical reports of record established that claimant has a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1), (2), and (4). Accordingly, benefits were awarded.

On appeal, employer contends that liability for payment of this claim should be transferred to the Trust Fund and that the administrative law judge erred by finding that the evidence established the existence of pneumoconiosis and that claimant is totally disabled due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge properly found that the transfer provisions do not apply herein, but has not addressed the merits of the claim. Claimant did not timely file a response brief in this appeal.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

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occurred in the Commonwealth of Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

<sup>2</sup>Claimant's response brief in the instant case was due on April 1, 1999, but was not received until March 14, 2000. In response, employer has submitted a motion to strike claimant's brief from the record. As claimant has provided no justification for the lengthy delay in submitting his brief, we deny claimant's motion to accept his untimely response brief and grant employer's motion to strike claimant's brief from the record.

Under the Black Lung Benefits Amendments of 1981, liability for payment of benefits transfers from coal mine operators to the Trust Fund for any claim denied before March 1, 1978, and which is or has been approved under Section 435 of the Black Lung Benefits Reform Act of 1977 (Reform Act). 30 U.S.C. §932(j)(3); 26 U.S.C. §9501(d)(1)(b). The term “denied claim” includes claims denied by SSA; those in which the claimant was informed by DOL of an administrative or informal denial prior to March 1, 1977, but failed to take certain prescribed actions; and those denied under the law in effect prior to the enactment of the Reform Act following a formal hearing or administrative or judicial review proceeding. 30 U.S.C. §902(l); see also 20 C.F.R. §725.496(b). In the present case, claimant’s 1973 claim would be subject to the transfer provisions if it was not finally denied by DOL. If the 1973 claim were still viable when claimant filed his 1996 application for benefits, the two claims would have merged and the resulting claim would meet the criteria for transfer of liability to the Trust Fund, *i.e.*, the 1973 claim was denied by SSA; claimant elected review of the denial; and the merged claim is subject to review under 20 C.F.R. Part 727 based upon the filing date of the 1973 claim.

With respect to DOL’s treatment of claimant’s 1973 claim, the record indicates that after SSA sent the claim to DOL for review, DOL notified claimant on February 28, 1980, that the evidence currently on file was not sufficient to establish entitlement to benefits. Director’s Exhibit 39. Employer was notified of the action on February 29, 1980. *Id.* On March 24, 1980, claimant returned the form to the district director having checked the box indicating that he was sending additional information regarding his claim. *Id.* DOL denied the claim on June 2, 1980. *Id.* The record also contains an undated operator notification form on which the district director stated that claimant contested the denial. *Id.* Employer submitted an operator controversion form, dated December 24, 1980. *Id.* Subsequently, under a cover letter from counsel dated December 29, 1980, in which claimant’s contest of the denial was cited, employer proffered additional medical evidence. *Id.* The record does not reflect any further action on this claim. Claimant testified at the hearing that although he may have done so, he could not specifically remember if he did in fact, appeal the June 1980 denial of benefits. Hearing Transcript at 30, 31.

Based upon these facts, employer contends that liability for payment of this claim should transfer to the Trust Fund as a matter of law. Employer asserts that claimant’s first claim was not finally denied, and argues that DOL’s correspondence subsequent to its June 1980 denial, which notes that claimant contested the denial of benefits, and employer’s subsequent controversion of the claim and submission of additional evidence in December 1980, supports its position. Employer also contends that the administrative law judge misapplied the holding in *Vance v. Peter Fork Mining Co.*, 6 BLR 1-1226 (1984), asserting that it is solely the duty of the

district director to establish the facts regarding whether transfer of liability is appropriate and whether the correct responsible operator has been named.

Employer's contentions have merit. Pursuant to 20 C.F.R. §725.497(b), the district director is required to review each claim to determine whether it is affected by the transfer provisions and to present all relevant facts regarding transferability. Case law has further clarified this obligation as a requirement to review each claim to determine whether it is affected by the transfer provisions. *Krecota v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-234 (1985), *aff'd* 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Vance, supra*. When the Director has fulfilled this obligation, the burden shifts to employer to present clear evidence to the contrary in order to overturn the Director's finding that a claim is not subject to the transfer provisions.

In the instant case, the operator notification form accompanied by the admission that it is "typically sent in response to a timely hearing request," constitutes a strong indication that claimant appealed DOL's denial of his 1973 claim. See *Bartley v. L&M Coal Co.*, 7 BLR 1-243, 1-246 (1984). Inasmuch as there is no evidence refuting the indication that this form was sent in response to a timely hearing request, we hold, as a matter of law, that the evidence establishes that claimant timely requested a hearing and thus, that claimant's 1973 claim remained viable and is subject to the transfer provisions. Therefore, the administrative law judge improperly placed the burden on employer to present evidence establishing an appeal of the denial. See *Vance, supra*. More importantly, in light of the fact that the 1973 claim is subject to the transfer provision, employer must be dismissed as the party responsible for the payment of benefits and liability transfers to the Trust Fund. *Krecota, supra; Vance, supra; Chadwick v. Island Creek Coal Co.*, 7 BLR 1-883 (1985), *aff'd*, 8 BLR 1-447 (1986)(*en banc recon.*); *Comer v. Consolidation Coal Co.*, 7 BLR 1-764 (1985).

Turning to the merits of the present case, the Director has not alleged any error in the administrative law judge's finding that claimant established entitlement to benefits under 20 C.F.R. Part 718. Therefore, we affirm this finding as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the Order Denying Motion for Summary Judgment is reversed, employer is dismissed as the operator responsible for payment of this claim, liability for payment of benefits herein is transferred to the Trust Fund, and the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge