BRB No. 97-0899 BLA

IRA E. HUNTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:_____
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for Westmoreland Coal Company.

J. Matthew McCracken (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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Westmoreland Coal Company (Westmoreland) appeals the Decision and Order (95-BLA-0719) of Administrative Law Judge Thomas M. Burke 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). The instant case involves a 1994 duplicate claim.[1] Because the administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis, he found that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1994 claim on the merits. The administrative law judge found that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits. On appeal, Westmoreland challenges its designation as the responsible operator. Westmoreland also contends that the administrative law judge erred in finding claimant entitled to the irrebuttable presumption set out at 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, arguing, *inter alia*, that the administrative law judge erred in excluding evidence from the record. The Director also argues that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of complicated pneumoconiosis. In a reply brief, Westmoreland argues that the administrative law judge acted within his discretion in excluding evidence from the record.[2]

---

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on March 1, 1973. Director's Exhibit 38. The SSA denied the claim on June 18, 1973. *Id.* After claimant elected SSA review of his claim, the SSA denied the claim on June 28, 1979. *Id.* The Department of Labor also denied the claim on July 20, 1981. *Id.* There is no indication that claimant took any further action with regard to his 1973 claim.

Claimant filed a second claim on February 23, 1994. Director's Exhibit 1.

[2]By Order dated June 15, 1998, the Board notified the parties that the case would be held in abeyance pending decisions in *Mitchem* and *Lester*. *Hunter v. Westmoreland Coal Co.*, BRB No. 97-0899 (June 15, 1998) (Order). The Board indicated that the parties would be informed after decisions in *Mitchem* and *Lester* were issued.

After issuing decisions in *Mitchem* and *Lester*, *see Lester v. Mack Coal Co.*, 21

BLR 1-126 (1999) (*en banc*) (McGranery, J., dissenting); *Mitchem v. Bailey Energy, Inc.*, BLR , BRB No. 97-1757 BLA/A (July 26, 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 in abeyance. *Hunter v. Westmoreland Coal Co.*, BRB No. 97-0899 (Aug. 4, 1999) (Order). The Board notified the parties that they could file supplemental briefs addressing the issues in *Mitchem* and *Lester* within ten days from receipt of the Order. *Id.*

The Director, Office of Workers' Compensation Programs (the Director), filed a supplemental brief, noting, *inter alia*, his agreement with the Board that the Director is not required to proceed against the officers and directors of a miner's most recent employer before proceeding against a prior employer. Westmoreland Coal Company filed a supplemental brief, reiterating its contention that the administrative law judge erred in failing to dismiss it as the putative responsible operator. Claimant has not filed a supplemental brief.

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).

Westmoreland 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).

In his consideration of the identity of the responsible operator, the administrative law judge noted that claimant's most recent employment of at least one year was with Har-Mat Coal Company (Har-Mat).[3] Decision and Order at 3. The administrative law judge further noted that the Director had submitted a letter from the Secretary of State from the State of West Virginia indicating Har-Mat was involuntarily dissolved/withdrawn by decree of the Kanawha County Circuit Court on December 16, 1987 for failure to pay corporate license taxes and/or file an annual corporate report.[4] *Id.* The administrative law judge further noted that the Director had submitted a 1996 report from Dun & Bradstreet indicating that Har-Mat had filed for bankruptcy and was no longer conducting operations. *Id.* at 3-4.

Westmoreland argued that the evidence was insufficient to establish that Har-Mat was out of business. Westmoreland also asserted that there was no evidence that the directors and officers of Har-Mat were incapable financially of paying

[3]In the instant case, claimant's most recent coal mine employment of at least one year's duration was with Har-Mat Coal Company (Har-Mat) (1986-1988). Director's Exhibit 4. Claimant's next most recent coal mine employment was with Westmoreland Coal Company (Westmoreland) from 1981 to 1986. *Id.*

[4]By letter dated August 8, 1991, Ken Hechler, the Secretary of State for the State of West Virginia, informed the Department of Labor that Har-Mat, a West Virginia corporation, was chartered on May 31, 1985. Director's Exhibit 21. The Secretary of State further indicated that Har-Mat was not in good standing and was "involuntarily dissolved/withdrawn by decree of the Kanawha County Circuit Court on December 16, 1987 for failure to pay corporate license taxes and/or file the annual corporate report." *Id.*

benefits. The administrative law judge rejected these arguments. The administrative law judge found that the reports from the Secretary of State and Dun & Bradstreet were sufficient to establish that Har-Mat was dissolved as a business entity. Decision and Order at 4. The administrative law judge further found that the Director was not required to proceed against Har-Mat's corporate officers before proceeding against Westmoreland. *Id.* The administrative law judge, therefore, held that Westmoreland was the proper responsible operator inasmuch as it was the coal mine operator that most recently employed the claimant for one year or more and was financially capable of paying benefits. *Id.*

Westmoreland initially argues that the administrative law judge erred in relying upon a 1996 report from Dun & Bradstreet inasmuch as this report was not admitted into the record. At the hearing, the administrative law judge noted that the Director had submitted additional evidence to be marked as Director's Exhibit 40 and offered into evidence. Transcript at 4-5, 7. Westmoreland objected to the admission of this evidence, arguing that the source of the information contained in the report was not clear. *Id.* at 7. The administrative law judge, without discussion, denied the Director's request to admit this evidence into the record. *Id.*

Because the administrative law judge excluded the Dun and Bradstreet report from the record (excluded Director's Exhibit 40), the administrative law judge erred in relying upon it in resolving the responsible operator issue. *See generally Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Inasmuch as the administrative law judge's finding that Har-Mat was incapable of assuming liability for the payment of benefits was based in part upon this excluded evidence, we vacate the administrative law judge's designation of Westmoreland as the responsible operator and remand the case for further consideration.[5]

[5]Westmoreland also argues that it cannot be designated the responsible operator because the Department of Labor failed to proceed against the officers and directors of Har-Mat as potential responsible operators. We disagree. 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 grounds); *see also Mitchem v. Bailey Energy, Inc.*, BLR , BRB No. 97-1757 BLA/A (July 26, 1999) (*en banc*) (Nelson and Hall, J. J., dissenting).

The Director contends that the administrative law judge erred in not admitting this report into the record. The regulations provide that any evidence not submitted to the district director may be received in evidence subject to the objection of any party if it is sent to all other parties at least twenty days before the hearing. 20 C.F.R. §725.456(b)(1). The excluded report was submitted on March 27, 1996, more than twenty days before the April 23, 1996 hearing.

The Board has construed Section 725.456 to favor admission of all evidence that is relevant and to allow the adjudicator to determine the weight to be assigned to the evidence. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). The administrative law judge did not explain his basis for excluding the report submitted as Director's Exhibit 40. Inasmuch as the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), the administrative law judge, on remand, is instructed to reconsider whether to admit the evidence contained in proposed Director's Exhibit 40 into the record.

Westmoreland next contends that the administrative law judge committed numerous errors in finding the claimant entitled to the irrebuttable presumption at 20 C.F.R. §718.304. Westmoreland initially contends that the administrative law judge erred in not considering all the relevant evidence of record. We agree. Westmoreland accurately notes that although Dr. Scott interpreted two separate x-rays taken on February 14, 1983 as negative for complicated pneumoconiosis,[6] the administrative law judge only considered one of these interpretations. *See* Decision and Order at 6.

The administrative law judge also erred in not considering relevant medical opinion evidence. The administrative law judge erred in not considering the medical

[6]Dr. Scott indicates that one x-ray taken on February 14, 1983 was provided by "Kanawha Valley Radiologists" and the other x-ray taken on February 14, 1983 was provided by "Associated Radiologists." Employer's Exhibit 3. In his summary of the x-ray evidence, the administrative law judge noted that Dr. Wheeler rendered interpretations of two x-rays taken on February 14, 1983. Decision and Order at 6. The administrative law judge, however, only referenced one of Dr. Scott's interpretations of the x-rays taken on February 14, 1983. *Id.*

opinions of Drs. Jarboe,[7] Chillag,[8] Dahhan[9] and Crisalli.[10] Employer's Exhibits 3, 13,

[7]Dr. Jarboe reviewed the medical evidence. In a report dated February 28, 1996, Dr. Jarboe noted there was sufficient radiographic evidence to make a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 13. Dr. Jarboe further noted that although a few x-ray readings mentioned the possibility of complicated pneumoconiosis, the great majority of x-ray interpretations did not describe a pattern compatible with a finding of complicated pneumoconiosis. *Id.* Dr. Jarboe, therefore, concluded that claimant did not suffer from progressive massive fibrosis. *Id.* In a supplemental report dated March 27, 1996, Dr. Jarboe reiterated his opinion that there was adequate evidence to make a diagnosis of simple coal

workers' pneumoconiosis. Employer's Exhibit 15.

[8]Dr. Chillag reviewed the medical evidence. In a report dated May 11, 1995, Dr. Chillag opined that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 3. Dr. Chillag also noted that the findings of the radiologists at John Hopkins University School of Medicine that the x-ray changes could indicate the possibility of tuberculosis "may be confused by less experienced readers." *Id.* In a supplemental report dated March 27, 1996, Dr. Chillag opined that there was "probably" sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 15.

[9]Dr. Dahhan reviewed the medical evidence. In a report dated May 11, 1995, Dr. Dahhan noted that there were "equivocal radiological findings regarding the presence of simple pneumoconiosis." Employer's Exhibit 3.

[10]Dr. Crisalli reviewed the medical evidence. [Dr. Crisalli previously examined claimant on October 26, 1994. *See* Employer's Exhibit 2.] In a report dated April 1, 1996, Dr. Crisalli opined that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 15. Dr. Crisalli

15.

The administrative law judge also erred in not considering the comments found on Dr. Gaziano's x-ray report. Although Dr. Gaziano interpreted claimant's April 11, 1994 x-ray as revealing size A large opacities, Dr. Gaziano commented that in regard to the upper lobe lesion, he could not "exclude coexisting TB." Director's Exhibit 13. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom*. *Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Westmoreland also contends that the administrative law judge, in finding the existence of complicated pneumoconiosis, erred in not according any weight to the x-ray interpretations rendered by Drs. Binns, Morgan, Dahhan and Patel. Although the administrative law judge noted that Dr. Wheeler's finding that claimant did not suffer from complicated pneumoconiosis was supported by the opinions of Drs. Kim, Scott, Fino and Castle, *see* Decision and Order at 10, the administrative law judge failed to consider that Dr. Wheeler's opinion was also supported by the opinions of Drs. Binns, Morgan, Dahhan and Patel. Inasmuch as Drs. Binns, Morgan, Dahhan and Patel found no large opacities that could be classified as size A, B or C, their interpretations support a finding that claimant does not suffer from complicated pneumoconiosis. Director's Exhibit 14; Employer's Exhibits 6, 10, 11.

Moreover, in finding the x-ray evidence sufficient to establish the existence of complicated pneumoconiosis, the administrative law judge improperly focused on the number of physicians rendering interpretations of complicated pneumoconiosis. In evaluating x-ray evidence, an administrative law judge should focus on the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344

---

noted that although the x-ray findings may be related to an old infection such as tuberculosis, he could not "state for sure that coal workers' pneumoconiosis is not present." *Id.*

(1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988).

The administrative law judge also apparently considered the interpretations of "ten physicians" who opined that claimant's focal densities were from a coalescence of opacities to be supportive of a finding of complicated pneumoconiosis. Decision and Order at 10. On remand, should the administrative law judge find these opinions supportive of a finding of complicated pneumoconiosis, he is instructed to explain his conclusion with reference to evidence in the record.[11]

Westmoreland also contends that the administrative law judge mischaracterized the qualifications of Dr. Aycoth. While the administrative law judge accurately noted that Dr. Aycoth is a B reader, the administrative law judge's finding that Dr. Aycoth is a Board-certified radiologist is not supported by the record. *See* Claimant's Exhibit 1. Inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the administrative law judge committed error. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Westmoreland also contends that the administrative law judge's analysis violates the APA.[12] We agree. Inasmuch as the administrative law judge did not explain his basis for finding that the evidence supportive of a finding of complicated pneumoconiosis was more credible than the evidence supportive of a finding that claimant does not suffer from complicated pneumoconiosis, his analysis does not comply with the APA. 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz*, *supra*.

In light of these errors,[13] we vacate the administrative law judge's finding

---

[11]The administrative law judge should also identify these "ten physicians."

[12]The Director agrees with Westmoreland that the administrative law judge failed to adequately explain his decision to credit x-ray readings that were positive for complicated pneumoconiosis over the contrary evidence. Director's Motion to Remand at 6.

[13]Westmoreland also contends that the administrative law judge erred in not according greater weight to the interpretations of Drs. Wheeler, Scott and Kim based upon their status as professors of radiology at The Johns Hopkins Medical Institutions. *See* Employer's Exhibits 3, 4. An administrative law judge, in evaluating the relative weight of the x-ray readings, is not limited to considering the B reader and Board-certified reader status of the various physicians. However, while an administrative law judge is not barred from considering further factors relevant to

pursuant to 20 C.F.R. §718.304 and remand the case for further consideration.

---

the level of radiological competence, such as a professorship in the field of radiology, he is not obligated to do so. *See generally Worach v. Director, OWCP*, 17 BLR 1-105 (1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge