BRB Nos. 97-1832 BLA
and 97-1832 BLA-A

WILLIAM MACK GOODMAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 8/30/99
Employer	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent Cross-Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order - Dismissing Eastern Associated Coal and Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Philip A. LaCaria, Welch, West Virginia, for claimant.

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

PER CURIAM:

Claimant appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order - Dismissing Eastern Associated Coal and Denying Benefits (96-BLA-1382) of Administrative Law Judge Richard D. Mills 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 administrative law judge credited claimant with at least ten years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718, in light of claimant's May 1995 filing date. In addition, the administrative law judge dismissed Eastern Associated Coal Corporation (EACC) as the putative responsible operator and found that the Black Lung Disability Trust Fund (Trust Fund) would be liable for the payment of benefits, if awarded. Addressing the merits of entitlement, the administrative law judge found the biopsy evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and that the evidence was insufficient to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the medical evidence of record was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3) and 718.304. However, the administrative law judge found the medical evidence of record sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) but that the evidence was insufficient 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 denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish complicated pneumoconiosis pursuant to Section 718.304. In addition, claimant contends that the administrative law judge erred in failing to find that pneumoconiosis was a contributing cause of his total disability. In response, the Director urges affirmance of the administrative law judge's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. However, the Director concurs with claimant that the administrative law judge erred in finding that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). The Director thus requests that the Board vacate the administrative law judge's Section 718.204(b) finding and remand the case for further consideration. Employer has not filed a response brief in this appeal.[1]

[1] The parties do not challenge the administrative law judge's decision to credit claimant with at least ten years of coal mine employment, his finding that the existence of

pneumoconiosis arising out of claimant's coal mine employment was established under 20 C.F.R. §§718.202(a)(2) and 718.203(b), or his finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In his cross-appeal, the Director contends that the administrative law judge erred in dismissing EACC as the responsible operator inasmuch as the Director is under no obligation to investigate whether the sole corporate officer of a putative responsible operator is capable of assuming financial liability for benefits and thus is not required to name the corporate officer as a separate possible responsible operator. Rather, the Director argues that the decision of whether to proceed against a corporate officer is a purely discretionary decision on the part of the Department of Labor. Neither claimant nor EACC has responded to the Director's cross appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the procedural issue raised in the Director's cross-appeal. The administrative law judge, in dismissing EACC as the putative responsible operator, found that the Department of Labor (DOL) failed to carry its burden of establishing that Bailey Energy, Incorporated (Bailey Energy), the company for which claimant was most recently employed for at least one (1) year, was financially incapable of assuming liability.[2] Decision and Order at 4. In particular, the administrative law judge found that DOL failed to adequately prove that Kennie Childers, Bailey Energy's sole corporate officer, was also financially incapable of assuming liability. *Id.* Citing *Donovan v. McKee*, 845 F.2d 70 (4th Cir. 1988) and 30 U.S.C. §933(d)(1), the administrative law judge found that DOL should have conducted a more detailed investigation into Mr. Childers's ability to assume financial liability and that, absent such an investigation, and because the

[2] In order to be named the responsible operator, an operator must be the most recent employer who employed the miner for a period of one year and is capable of assuming financial liability for benefits, by either obtaining insurance, qualifying as a self-insured operator or having assets available for the payment of benefits. 20 C.F.R. §§725.492(a)(4), 725.493; *see also Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995).

regulations do not allow DOL the option of whether or not to pursue a possible responsible operator, the administrative law judge dismissed EACC, the most recent employer financially capable of assuming liability. *Id*. Thus, the administrative law judge found the Trust Fund liable for any benefits which may be payable in this case. Decision and Order at 5.

Subsequent to the issuance of the administrative law judge's Decision and Order, the Board held in *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(Order on recon.)(*en banc*), that 30 U.S.C. §933(d)(1), and its implementing regulation, 20 C.F.R. §725.495(a), cannot be used to modify the definition of a responsible operator to include corporate officers. The Board held that the Director is not required to consider whether officers of a corporation can be held liable as responsible operators pursuant to 20 C.F.R. §725.491(a). Rather, the Director, at his discretion, may institute proceedings to impose a penalty on certain corporate officers of uninsured corporations, whose responsibility it is to maintain the company's insurance policies pursuant to Section 423 of the Act and Section 725.495(a), when they fail to secure the appropriate black lung insurance.[3] *See Lester*, *supra*; *see also Mitchem v. Bailey Energy, Inc., et al*, BLR , BRB Nos. 97-1757 BLA and 97-1757 BLA-A (July 26, 1999)(*en banc*).

The administrative law judge, therefore, relied on the mistaken assumption that the Director is required to determine 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 most recent responsible operator. Decision and Order at 4-5. Inasmuch as the Director's decision to take enforcement action against corporate officers pursuant to Section 725.495 is discretionary, the administrative law judge erred in finding the Trust Fund liable in this case on the theory that the Director was obliged to enforce this provision. *See Lester, supra; see also Mitchem, supra*. Consequently, we vacate the administrative law judge's dismissal of EACC and remand the case for further consideration of the responsible operator issue in accordance with *Lester* and *Mitchem*. 20 C.F.R. §§725.491(a), 725.492(a), 725.493, 725.495(a); *Lester, supra; Mitchem, supra*.

Addressing the administrative law judge's findings on the merits, claimant challenges the administrative law judge's denial of benefits, contending that the

[3] In addition, under 20 C.F.R. §725.495(a), certain corporate officers (presidents, secretaries and/or treasurers) may also be held severally personally liable jointly with the uninsured corporation for the payment of benefits. 20 C.F.R. §725.495(a).

administrative law judge erred in finding the medical evidence of record insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. In particular, claimant contends that the record contains two diagnoses of complicated pneumoconiosis, *i.e.*, the opinion of Dr. Jabour and the pathology report of Dr. Pia, and argues that the administrative law judge erred in failing to consider Dr. Pia's report in weighing the evidence relevant to the issue of complicated pneumoconiosis We disagree.

Contrary to claimant's contention, the medical report of Dr. Pia, the pathologist who examined claimant's lung biopsy evidence, did not conclude that the biopsy evidence showed the existence of complicated pneumoconiosis. Rather, a review of Dr. Pia's report shows that the physician diagnosed findings compatible with coal workers' pneumoconiosis and chronic bronchitis. Claimant's Exhibit 1. Dr. Pia did not mention the existence of complicated pneumoconiosis, massive lesions, progressive massive fibrosis or any other indicia of complicated pneumoconiosis. *Id*. Consequently, we reject claimant's contention that the administrative law judge erred in failing to consider the medical report of Dr. Pia as supportive of a finding of complicated pneumoconiosis pursuant to Section 718.304. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Moreover, we affirm the administrative law judge's finding that the February 24, 1997 report of Dr. Jabour is insufficient to establish the existence of complicated pneumoconiosis. Decision and Order at 9. The administrative law judge, within a reasonable exercise of his discretion, accorded no weight to this report, finding that it was neither reasoned nor documented inasmuch as Dr. Jabour did not explain the basis for his finding of complicated pneumoconiosis. *Id.* In particular, the administrative law judge found that Dr. Jabour failed to adequately explain the inconsistencies between the February 24, 1997 report and the reports issued before and after this report, which do not reference the existence of complicated pneumoconiosis. Decision and Order at 9; Director's Exhibits 14, 15, 41; Claimant's Exhibits 1-3; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). Inasmuch as the administrative law judge reasonably accorded no weight to the February 24, 1997 report of Dr. Jabour, the only evidence supportive of a finding of complicated pneumoconiosis, we affirm his finding that the evidence is insufficient to establish the existence of complicated pneumoconiosis and, thus, that claimant is not entitled to the benefit of the irrebuttable presumption of total disability pursuant to Section 718.304. 20 C.F.R. §§718.202(a)(3), 718.304.

Claimant further challenges the administrative law judge's finding that the

evidence of record was insufficient to establish that claimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability. In particular, claimant contends that Dr. Jabour's opinion is sufficient to establish that pneumoconiosis was a contributing cause of his total respiratory disability pursuant to Section 718.204(b).[4] Claimant also notes that the State of West Virginia awarded a forty (40) percent disability award for occupational pneumoconiosis.[5] Moreover, the Director concurs with claimant's allegation regarding the administrative law judge's treatment of Dr. Jabour's opinion and requests that the Board remand the case to the administrative law judge for further consideration of the medical evidence pursuant to Section 718.204(b). The Director contends that the administrative law judge did not consider all of Dr. Jabour's reports and treatment summaries and, thus, mischaracterized the physician's conclusions. Additionally, the Director contends that the administrative law judge improperly credited the medical opinions of Drs. Fino, Tuteur and Zaldivar on the issue of causation inasmuch as their opinions stated that claimant does not suffer from pneumoconiosis and, therefore, are contradictory to the administrative law judge's finding on that issue. Consequently, the Director argues that the case should be remanded to the administrative law judge for further consideration of the relevant medical evidence, particularly, the entirety of Dr. Jabour's medical reports. We agree.

In finding the evidence insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b), the administrative law judge stated that, as he discussed pursuant to Section 718.202(a)(4), there was no well reasoned and documented medical opinions that state that pneumoconiosis contributes in any way to claimant's pulmonary

[4] As the administrative law judge properly stated, in this case arising in the United States Court of Appeals for the Fourth Circuit, in order to establish entitlement, a claimant's pneumoconiosis must be a contributing cause of a totally disabling respiratory or pulmonary impairment. *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[5] Contrary to claimant's contention, the finding of a state workers' compensation board on the extent of claimant's respiratory impairment is relevant evidence but is not binding on the administrative law judge. 20 C.F.R. §718.206; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985). Inasmuch as the administrative law judge reasonably found that employer, Eastern Associated Coal Corporation, was not a party to the state proceedings and, therefore, the evidence submitted by employer in the instant case was not considered by the state board, *see* Decision and Order at 3 n.1, it was not error for the administrative law judge to exclude the state board's finding from his consideration of the relevant evidence. *Id*.

impairment. Decision and Order 16. Therefore, the administrative law judge found that claimant did not establish that pneumoconiosis was a contributing cause of his total respiratory disability pursuant to Section 718.204(b). *Id.*

However, as claimant and the Director correctly contend, the administrative law judge did not fully consider all of the reports submitted by Dr. Jabour during the pendency of this claim. *See* Director's Exhibits 14, 15, 41; Claimant's Exhibits 1-3. The administrative law judge only considered some of Dr. Jabour's reports in his discussion of the evidence pursuant to Section 718.202(a)(4), but has not considered all of the medical reports and treatment summaries contained in the record.[6] In particular, the administrative law judge did not discuss Dr. Jabour's May 18, 1996 report, in which the physician stated that claimant's pulmonary condition was due to both his emphysema and pneumoconiosis, *see* Claimant's Exhibit 2. Therefore, as the Director correctly contends, the administrative law judge, in failing to consider all of the medical reports of Dr. Jabour, in their entirety, has not accurately characterized Dr. Jabour's opinion that claimant's total respiratory disability was due to both his emphysema and pneumoconiosis. Decision and Order at 14-15; Director's Exhibits 14, 15, 41; Claimant's Exhibits 1-3; *see Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *see also McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). We, therefore, remand the case for the administrative law judge to consider the reports of Dr. Jabour, in conjunction with one another, to determine whether the physician's opinion is sufficient to establish that claimant's pneumoconiosis is a contributing cause of his total respiratory disability. *Id*. Moreover, as the Director correctly contends, the administrative law judge must consider, on remand, whether the opinions of Drs. Fino, Tuteur and Zaldivar, each of which stated that claimant is not suffering from pneumoconiosis, are relevant to the issue of the cause of claimant's total respiratory disability pursuant to Section 718.204(b), in light of their finding on the issue of the existence of pneumoconiosis, which is contrary to the administrative law judge's determination. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Dehue Coal Company v. Ballard*, 65 F.3d 1189, 19 BLR 2-306 (4th Cir. 1995); *Clark, supra*; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-474 (1986).

Accordingly, the administrative law judge's Decision and Order - Dismissing

[6] The administrative law judge, pursuant to Section 718.202(a)(4), considered only Dr. Jabour's June 1995 and May 1997 medical reports. However, the administrative law judge did not discuss the numerous treatment summaries and reports dating from his initial report in June 1995 through the May 1997 report. *See* Claimant's Exhibits 1-3.

Eastern Associated Coal and Denying Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge