BRB Nos. 98-0986 BLA
and 98-0986 BLA-A

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| DELPHIA PRATT<br>(Widow of PEARL PRATT)<br><br>Claimant-Petitioner<br>Cross-Respondent<br><br>v.<br><br>DIAMOND MAY COAL COMPANY<br><br>and<br><br>KENTUCKY COAL PRODUCERS<br><br>Employer/Carrier-<br>Respondents<br><br>RAY COAL COMPANY<br><br>and<br><br>SUN COAL COMPANY<br><br>Employer/Carrier-<br>Respondents<br>Cross-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 8/18/99<br><br>DECISION and ORDER |

Appeals of the Decision and Order Denying Benefits on Miner's Claim and Denying Benefits on Widow's Claim of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Delphia Pratt, Viper, Kentucky, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard,

Kentucky, for Diamond May Coal Company.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen Chartered), Washington, D.C., for Ray Coal Company and Sun Coal Company.

Rodger Pitcairn (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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] representing herself, appeals, and Ray Coal Company cross-appeals, the Decision and Order Denying Benefits on Miner's Claim and Denying Benefits on Widow's Claim (97-BLA-1337) of Administrative Law Judge Thomas F. Phalen, Jr., on claims 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). This case involves a duplicate miner's claim filed on November 5, 1992, and a survivor's claim filed on November 3, 1994.[2] The district director denied the miner's claim on April 13, 1993 on grounds that the miner failed to establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 22. The miner requested modification of the denial of benefits in the miner's claim on June 30, 1993. Director's Exhibit 23. The district director again denied the claim on August 17, 1993 for the same reasons that the claim was previously denied. *Id*. On October 15, 1993, the miner indicated that he intended to file additional evidence in support of modification, having filed with the district director a request for an extension of time to do so. Director's Exhibit 31. Before any further action was taken, however, the miner died on October 30, 1994. Director's Exhibits 3, 14. Claimant filed a survivor's claim soon thereafter, on November 3, 1994. Director's Exhibit 31. The district director denied

[1]Claimant is the surviving spouse of the miner, who died on October 30, 1994. Director's Exhibits 3, 14. The miner's death certificate, signed by Dr. Chaney, indicated that the immediate cause of the miner's death was respiratory failure due to, or as a consequence of, metastatic renal carcinoma. Director's Exhibit 14.

[2]The miner filed an initial living miner's claim on July 18, 1980, which the district director finally denied on January 16, 1981 for the miner's failure to establish pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 114. The miner took no further action in pursuit of benefits until filing a duplicate claim on November 5, 1992. Director's Exhibit 1.

the survivor's claim on March 22, 1995 for claimant's failure to establish that the miner had pneumoconiosis or that the disease caused the miner's death. Director's Exhibit 25. Also on March 22, 1995, the district director denied modification of the denial of benefits in the miner's claim. Director's Exhibit 24. The consolidated claims were transferred to the Office of Administrative Law Judges on June 2, 1997, Director's Exhibit 115, and assigned to the administrative law judge, who held a hearing on December 3, 1997.

In his Decision and Order, the administrative law judge credited the miner with nineteen years of coal mine employment based upon the stipulation of the parties at the hearing. The administrative law judge found that Diamond May Coal Company (Diamond May) was properly designated as the responsible operator in this case, and that Ray Coal Company (Ray Coal) must be retained as a potentially liable secondary operator. Regarding the request for modification in the duplicate miner's claim, the administrative law judge found that the evidence submitted since April 13, 1993, *i.e.,* when the district director denied the miner's initial request for modification of the denial of the 1992 duplicate miner's claim, was insufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and was totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge determined that, therefore, claimant did not establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge stated that he considered also the previously submitted evidence, and that this evidence was likewise insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) and total disability under Section 718.204(c)(1)-(4). The administrative law judge found that, therefore, claimant failed to establish a mistake in a determination of fact under Section 725.310. Finding that claimant failed to establish grounds for modification, the administrative law judge consequently denied benefits in the miner's duplicate claim. With regard to the survivor's claim, the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a). The administrative law judge also found that there was no evidence in the record supporting a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge found that benefits were precluded in the survivor's claim. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Diamond May responds in support of the administrative law judge's decision denying benefits. Ray Coal has filed a cross-appeal contending that the administrative law judge erred in retaining it as a named party in this case potentially secondarily liable for benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter contending that Ray Coal and its carrier, Sun Coal Company (Sun Coal), should be dismissed from the instant case. The Director indicates that he does not otherwise intend to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In addressing the issue of pneumoconiosis when considering the miner's claim, the administrative law judge first weighed all of the newly submitted x-ray evidence pursuant to Section 718.202(a)(1), and found that it was insufficient to establish that the miner suffered from the disease. Decision and Order at 14-15. The administrative law judge stated that the new x-rays were all read negative for pneumoconiosis except for Dr. De Ponte's positive reading of the October 12, 1993 film. Decision and Order at 14; Director's Exhibit 108. The administrative law judge permissibly found that the numerous readings of no pneumoconiosis by several B readers and Board-certified radiologists substantially outweighed the one positive reading by Dr. De Ponte. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 321, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 15. The administrative law judge also properly found that the x-rays submitted prior to the most recent denial were almost consistently read as negative. *Id*. Inasmuch as substantial evidence supports the administrative law judge's finding,[3] we affirm the administrative law judge's finding that

[3]The record includes four positive x-ray readings, and twenty-one negative interpretations. Two of the positive readings were submitted by Drs. Chaney and Williams, physicians with no special radiological qualifications. Director's Exhibits 97, 114. Dr. De Ponte, a B reader, submitted the other two positive readings of record, interpreting the December 7, 1992 and October 12, 1993 films as positive. Director's Exhibits 107, 108. The December 7, 1992 film was read as negative by Dr. Barrett, who, unlike Dr. De Ponte, is a Board-certified radiologist as well as a B reader. Director's Exhibit 105. Dr. Barrett also read the October 12, 1993 film as negative, as did Drs. Sargent and Halbert, who

claimant failed to establish that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton, supra; Woodward, supra*.

In addressing whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2), the administrative law judge correctly stated that the record contains the results of two biopsies, but that an autopsy was not performed. Decision and Order at 15. The administrative law judge correctly found that Dr. McManis's report of the November 19, 1993 biopsy could not support a finding of pneumoconiosis because Dr. McManis simply diagnosed clear cell adenocarcinoma. 20 C.F.R. §§718.201, 718.202(a)(2); Decision and Order at 15; Director's Exhibit 95. The administrative law judge further properly determined that Dr. Boswell's finding that the biopsy he conducted on October 28, 1993 showed a "marked increase in...peri vascular anthracotic pigment with slight fibrosis" could not support a finding of pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202(a)(2); Decision and Order at 15; Director's Exhibit 82. We, therefore, affirm the administrative law judge's finding that the biopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2).

Additionally, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(3). The administrative law judge properly determined that the presumption at 20 C.F.R. §718.304 does not apply because the record does not contain evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 16. The administrative law judge further properly determined that the presumptions at 20 C.F.R. §§718.305 and 718.306 are inapplicable in this case since the instant miner's and survivor's claims were filed after January 1, 1982, and since the miner died after March 1, 1978. *See* 20 C.F.R. §§718.305, 718.306; Decision and Order at 16.

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likewise are dually-qualified B reader/Board-certified radiologists. Director's Exhibits 84, 90, 106.

Finally, the administrative law judge considered the new medical opinions submitted after the district director's April 13, 1993 denial of the 1992 miner's claim under Section 718.202(a)(4). The administrative law judge correctly stated that Dr. Sundaram's opinion was the only new opinion which supported a finding that the miner had the disease. Decision and Order at 17; Director's Exhibits 83, 89. The administrative law judge also correctly stated that Dr. Broudy diagnosed mild chronic obstructive airways disease resulting from cigarette smoking.[4] Decision and Order at 16-17; Director's Exhibit 92. Finally, the administrative law judge properly stated that Drs. Rogers, Kremp and Tannir diagnosed chronic obstructive pulmonary disease, but did not link their diagnoses of chronic obstructive pulmonary disease to coal dust exposure or any specific cause. Decision and Order at 16-17; Director's Exhibits 94, 95, 97. The administrative law judge concluded that the preponderance of the evidence did not prove that the miner "suffered from legal pneumoconiosis," finding that the opinions of Drs. Rogers, Kremp and Tannir were not well-reasoned. Decision and Order at 16; Director's Exhibits 94, 95, 97.

[4]Dr. Broudy further specifically stated that the miner did not have pneumoconiosis or any disease arising out of his work in coal mine employment. Director's Exhibit 92.

The administrative law judge erred, however, by failing to determine, in violation of the Administrative Procedure Act (the APA), whether the newly submitted opinions of Drs. Sundaram and Broudy were documented and reasoned opinions, *i.e.*, to make credibility determinations with respect to each of these opinions in order to attempt to resolve the conflict presented by the evidence. *See* 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983); Decision and Order at 17. It is evident that the administrative law judge only summarily concluded that a preponderance of the medical opinion evidence submitted after April 1993 was insufficient to establish the existence of pneumoconiosis. Decision and Order at 17. We, therefore, vacate the administrative law judge's finding that the medical opinion evidence submitted after the district director's April 1993 denial of benefits was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). On remand, the administrative law judge must provide a weighing of all of the relevant medical opinion evidence under Section 718.202(a)(4) which comports with the APA.[5] *See* 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a).

In addressing the issue of total disability under Section 718.204(c), the administrative law judge initially considered the newly submitted pulmonary function study and arterial blood gas study evidence, and properly found that two of the three new pulmonary function studies and all three new arterial blood gas studies produced non-qualifying results for total disability.[6] Decision and Order at 17; Director's Exhibits 82, 96-98. The administrative law judge further correctly stated that the previously submitted pulmonary function studies, administered on August 20, 1980, October 7, 1980, August 2, 1988 and December 7, 1992, all produced non-qualifying values, as did all of the prior arterial blood gas studies, which were administered on August 26, 1980, October 7, 1980 and December 7, 1992. Decision and Order at 18; Director's Exhibits 17, 18, 110, 111, 114. We thus affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish that the miner was totally disabled pursuant to Section 718.204(c)(1) or (c)(2). *See* 20 C.F.R. §718.204(c)(1), (2). Additionally, the record does not contain evidence of cor pulmonale with right sided congestive heart failure, and

[5]On remand, the administrative law judge should consider whether the opinions are well-reasoned and documented. A medical opinion is documented if it sets forth the clinical findings, observations, facts and other data upon which the physician based his opinion, and a medical opinion is considered reasoned if the physician explains how the opinion's documentation supports his conclusions. *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[6]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values.

claimant is thus precluded from establishing total disability under Section 718.204(c)(3). *See* 20 C.F.R. §718.204(c)(3).

The administrative law judge next considered the newly submitted medical opinion evidence with regard to total disability. The administrative law judge correctly stated that Dr. Sundaram was the only physician who found that the miner was totally disabled due to pneumoconiosis. Decision and Order at 17; Director's Exhibits 83, 89. The administrative law judge then found that the reports of Drs. Rogers, Chaney, Kremp and Tannir, as well as the miner's hospital records, were entitled to little weight. In this regard, the administrative law judge found that these reports were not well-reasoned or well-documented because they did not indicate a finding regarding total disability. Decision and Order at 17; Director's Exhibits 95, 97. The administrative law judge further stated that the newly submitted opinion of Dr. Broudy, in contrast, indicated that the miner was not totally disabled from a respiratory standpoint. Decision and Order at 17; Director's Exhibit 92. The administrative law judge then concluded that the preponderance of the new evidence did not show that the miner was totally disabled due to pneumoconiosis. Decision and Order at 17. The administrative law judge also stated that he considered the previous evidence, and found that Drs. Williams and Cornish did not make a finding on total disability, while Dr. Wicker opined that the miner retained the respiratory capacity to perform his usual coal mine employment. Decision and Order at 18; Director's Exhibits 18, 114. The administrative law judge concluded that this evidence also supports a finding of no total disability. *Id*.

We hold that the administrative law judge erred in summarily concluding, without weighing the relative merits of the medical opinions, that the preponderance of the medical opinion evidence was insufficient to establish total disability under Section 718.204(c)(4), in contravention of the APA. *See Wojtowicz, supra; Seese, supra*; Decision and Order at 17-18. The administrative law judge merely engaged in a quantitative analysis, noting that there was one medical opinion supporting a finding of total disability, and that there were two opinions which supported a contrary finding. *Id*. We, therefore, vacate the administrative law judge's conclusion that claimant failed to establish total disability by a preponderance of the evidence under Section 718.204(c)(4), and remand the case for the administrative law judge to provide, if reached, a weighing of all of the relevant evidence thereunder which comports with the APA. *See* 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a).

Claimant's duplicate claim is subject to automatic denial unless she establishes pursuant to 20 C.F.R. §725.309 that a material change in conditions has occurred since the prior denial of the miner's original, 1980 claim. *See* 20 C.F.R. §725.309. The United States Court of Appeals for the Sixth Circuit, under whose jurisdiction the instant case arises, has held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that in order to determine whether a material change in conditions is established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement

previously adjudicated against him. The miner's prior claim, filed on July 18, 1980, was finally denied on January 16, 1981 by the district director, who found that the miner failed to establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 114. On remand, the administrative law judge should consider all of the relevant new evidence, including Dr. Wicker's December 7, 1992 report, Director's Exhibit 18, in determining whether claimant has established a material change in conditions by establishing either the existence of pneumoconiosis under Section 718.202(a)(4) or total disability under Section 718.204(c)(4).[7] *See Ross*, *supra*.

We next affirm, however, the administrative law judge's denial of benefits in the survivor's claim. Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit has held that, for purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death "where pneumoconiosis actually hastens death." *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

[7]As discussed *supra*, the administrative law judge considered all of the evidence of record in rendering his findings that the existence of pneumoconiosis was not established under 20 C.F.R. §718.202(a)(1)-(3) and that total disability was not established under 20 C.F.R. §718.204(c)(1)-(3). Inasmuch as the administrative law judge's findings in this regard are supported by substantial evidence, as discussed *supra,* the fact that the administrative law judge did not analyze the evidence under Sections 718.202(a)(1)-(3) and 718.204(c)(1)-(3) in terms of whether the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309 did not constitute prejudicial error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In concluding that claimant was precluded from establishing that the miner's death was due to pneumoconiosis, the administrative law judge correctly noted that there is no evidence of record indicating that pneumoconiosis was a cause of the miner's death or that pneumoconiosis hastened the miner's death in any way. *See* 20 C.F.R. §718.205(c)(1), (c)(2); *Brown, supra*; Decision and Order at 22-23. The administrative law judge properly found that the miner's hospital records from March 1994 through October 1994 indicated that the miner was diagnosed with, and was receiving treatment for, renal cell carcinoma, which spread to his lungs. Decision and Order at 23; Director's Exhibit 97. When the miner died in the hospital on October 30, 1994, Dr. Chaney recorded the following final diagnoses in his discharge summary: terminal metastatic renal cell carcinoma, klebsiella pneumonia, lung metastasis, dehydration, cachexia, chronic anemia, and prerenal azotemia. Director's Exhibit 97. Dr. Chaney further indicated on the miner's death certificate that the miner died of respiratory failure as a consequence of metastatic renal carcinoma. Director's Exhibit 14. The administrative law judge correctly stated that the hospital records did not indicate that pneumoconiosis played a role in the miner's death, or even that the miner had pneumoconiosis,[8] and that none of the other reports of record indicated that the miner's death was caused or hastened by pneumoconiosis. 20 C.F.R. §718.205(c)(1), (c)(2); Decision and Order at 23; Director's Exhibits 14, 97.

Moreover, the record contains no evidence of complicated pneumoconiosis and, therefore, claimant cannot establish that the miner's death was due to pneumoconiosis under Section 718.205(c)(3). Since the administrative law judge properly found that the record is devoid of evidence that supports claimant's burden under Section 718.205(c)(1)-(3), the administrative law judge properly denied benefits in the survivor's claim. 20 C.F.R. §718.205(c); *Brown, supra*; Decision and Order at 22-23.

[8]In records of the miner's several hospitalizations between March 1994 and October 30, 1994, Drs. Chaney and Tannir noted a history of chronic obstructive pulmonary disease, but did not note an etiology for the disease or indicate to what extent it was affecting the miner's physical condition. Director's Exhibit 97.

Finally, we agree with Ray Coal and the Director that Ray Coal and its carrier, Sun Coal, were improperly retained by the administrative law judge as potentially secondarily liable for benefits, and should be dismissed as parties to this case. As Ray Coal concedes, the district director acted properly and, moreover, met his responsibility in naming Ray Coal as a putative responsible operator in addition to designating Diamond May and its carrier, Kentucky Coal Producers, as the primary responsible operator.[9] *See* 20 C.F.R. §725.412(a); *Director, OWCP v. Tracefork Coal Co. [Matney]*, 67 F.3d 503 (4th Cir. 1995); *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993). Once the administrative law judge determined in his Decision and Order that Diamond May was the company with whom the miner spent his last year of cumulative coal mine employment, and that Diamond May was, therefore, properly designated the responsible operator pursuant to Section 725.493(a)(1), however, the administrative law judge should have dismissed Ray Coal.

Neither the Act nor the regulations contain provisions that support an administrative law judge's decision to hold a coal mine operator secondarily liable for the payment of benefits.[10] *See* 30 U.S.C. §901 *et seq.*; 20 C.F.R. §725.490 *et seq.* We hold that the

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[9]Section 725.412(a), which governs the designation of a responsible operator, provides that:

> At any time during the processing of a claim under this part, after sufficient evidence has been made available to the deputy commissioner, the deputy commissioner may identify a coal mine operator...*which may be liable* for the payment of the claim....Such identification shall be made as soon after the filing of the claim as the evidence obtained permits. (emphasis added).

20 C.F.R. §725.412(a). "Responsible operator" is defined as "the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than one year." 20 C.F.R. §725.493(a)(1).

On November 27, 1995, the district director denied a request from Ray Coal that it be dismissed as a secondary, putative responsible operator. Director's Exhibit 61. The district director based his denial on the grounds that the primary operator's carrier, Kentucky Coal Producers Self-Insurance Fund (Kentucky Coal Producers), was involved in a pending bankruptcy proceeding. *Id*. The district director informed Ray Coal that a back-up operator must be retained until the district director receives documentation showing the capability of Kentucky Coal Producers to assume liability. *Id*.

[10]The regulations require that the Black Lung Disability Trust Fund (Trust Fund) pay benefits when a responsible operator which has been found liable for benefits, such as Diamond May Coal Company and its carrier Kentucky Coal Producers have undisputedly been in the instant case, subsequently defaults on the payment of benefits. *See* 20 C.F.R. §725.490, 725.605(a). If and when such a default occurs, the regulations outline the procedures for the Trust Fund to file an action in federal court against the designated responsible operator to recover the payments made by the Trust Fund. *See* 20 C.F.R.

administrative law judge erred when he made Ray Coal and its carrier, Sun Coal, secondarily liable for the payment of benefits. The parties do not argue to the contrary. We, therefore, vacate the administrative law judge's finding and dismiss Ray Coal and Sun Coal as parties in this case.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Miner's Claim and Denying Benefits on Survivor's Claim is affirmed in part, and vacated in part, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

§725.605(b).