BRB Nos. 10-0151 BLA
and 10-0151 BLA-S

TOMMY H. WHITED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 12/23/2010
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 Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer, Dominion Coal Corporation (Dominion or employer), appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (2008-BLA-5405) of Administrative Law Judge Linda S. Chapman (the

administrative law judge) rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-one years of coal mine employment[1] and determined that employer is the responsible operator. The administrative law judge found that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the evidence established complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the evidence established that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

Subsequently, the administrative law judge considered claimant's counsel's petition for a fee, and employer's objections, and awarded a fee of $13,968.75.

On appeal, employer challenges only the administrative law judge's finding that it is the responsible operator. Employer contends that it was not the last coal mine operator to employ claimant for a cumulative period of at least one year. Employer argues further that one, or both, of the coal mine operators that subsequently employed claimant are financially capable of assuming liability for the payment of benefits. Employer therefore argues that it should be dismissed, and the Black Lung Disability Trust Fund (the Trust Fund) should be liable for any benefits payable to claimant. Claimant has not filed a response brief in this appeal, but stated in a letter dated July 30, 2010, that he agrees with employer that Dominion is not the proper responsible operator in this claim, and that liability for the payment of benefits should be transferred to the Trust Fund. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, stating that the administrative law judge erred in finding that employer was the responsible operator, without considering all relevant evidence. Employer has filed a reply brief, reiterating its contentions.[2]

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 4, 6.

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant is irrebuttably presumed totally disabled due to

In its appeal of the Supplemental Decision and Order Awarding Attorney's Fees, employer contests the administrative law judge's finding with respect to the number of compensable hours allowed. Employer asserts that the administrative law judge did not provide valid reasons for allowing multiple and duplicative file reviews. Neither claimant nor the Director has filed a brief in response to employer's appeal of the fee award.

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

Responsible Operator

We first address employer's challenge to the administrative law judge's responsible operator finding. To be a properly designated responsible operator, the employer must be the last coal mine operator to have employed the miner for a cumulative period of at least one year. 20 C.F.R. §725.494. The record reflects that claimant worked for Dominion from 1987 to 1990, for Miller Coal Corporation (Miller) from 1990 to 1993, for R&J Coal, Inc. (R&J) in 1993, for Miller again in 1994, and for Hiope Mining, Inc. (Hiope) in 1995 and 1996. Director's Exhibits 4, 6. Claimant ceased coal mine employment after leaving Hiope, and filed his current claim on March 19, 2007. Director's Exhibit 3.

The district director identified Dominion, Miller, and Hiope as potentially responsible operators, and issued each a Notice of Claim.[3] 20 C.F.R. §725.407(b), (c);

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pneumoconiosis rising out of coal mine employment, and therefore, is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In view of our affirmance of the award of benefits, we note that recent amendments to the Act, which became effective on March 23, 2010, do not affect the adjudication of this case.

[3] In order for an operator to qualify as a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator or its successor, the operator or successor must have been in business after June 30, 1973, the operator or successor must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e). Employer does not dispute that it satisfies the potentially liable operator criteria.

Director's Exhibits 27, 29, 31. The district director subsequently determined that, while Hiope was claimant's most recent employer, since claimant worked for Hiope for less than one year, Hiope was not properly designated as the responsible operator. 20 C.F.R. §725.494(c). Director's Exhibit 42. The district director further determined that, while claimant worked for Miller, his next most recent employer, for more than one year, Miller was not insured on the last date of claimant's employment. 20 C.F.R. §725.494(e); Director's Exhibit 42. Therefore, the district director determined that Miller was not properly designated as the responsible operator. Thus, the district director issued a Schedule for the Submission of Additional Evidence identifying Dominion, the most recent operator to meet all of the requirements of 20 C.F.R. §725.494(a)-(e), as the responsible operator. Director's Exhibit 42.

Dominion contested its designation as the responsible operator, and served Hiope, Miller, and the Director with interrogatories and requests for production of documents related to employment and insurance issues. Director's Exhibit 44. The district director informed employer that he would not formally respond to the request for production, but would provide employer with all relevant information available to the Department of Labor (DOL). Director's Exhibit 45. When employer received no replies to its requests for information from Hiope or Miller, employer requested that the district director compel Hiope and Miller to respond, issue subpoenas to certain individuals to appear as deposition witnesses, and grant employer an extension of time for the submission of its evidence. Director's Exhibits 50, 51, 53. The district director denied employer's request to subpoena witnesses, pursuant to 20 C.F.R. §725.423, and further, denied employer's request for an extension of time. Director's Exhibit 55.

On December 19, 2007, the district director issued a Proposed Decision and Order formally identifying employer as the responsible operator. Employer challenged its designation as the responsible operator, and requested a hearing before an administrative law judge. Director's Exhibit 59.

Following the referral of this case to the Office of Administrative Law Judges for a hearing, employer moved to remand this case to the district director. As grounds for its request, employer asserted that the district director refused to respond, or to require responses, to the written discovery requests, refused to provide the requested subpoenas, and proceeded to dismiss Hiope and Miller as potential responsible operators. Employer asserted that, as a consequence of the district director's refusal to grant an extension of time to submit additional evidence, or to assist employer in obtaining evidence from Hiope or Miller, employer was prevented from developing and presenting evidence on the responsible operator issue, evidence that the DOL regulations require to be submitted before the district director. Therefore, employer requested that the scheduled hearing be continued, and that the case be remanded to the district director to facilitate the development of additional evidence on the responsible operator issue.

By Order dated September 29, 2008, Administrative Law Judge Richard T. Stansell-Gamm denied employer's request for a remand to the district director. Judge Stansell-Gamm reasoned that, since Hiope and Miller had already been dismissed, a remand to the district director to permit further development of the evidentiary record regarding the appropriate responsible operator was not warranted. In so finding, Judge Stansell-Gamm also noted that it was the position of the district director that an administrative law judge should resolve the responsible operator issue.[4] September 29, 2008 Denial of Motion for Remand and Continuance Order at 2.

On appeal, employer initially contends that the district director abused his discretion in refusing to assist employer to develop evidence in its defense, when he denied employer's request for an extension of time, and refused to compel Hiope and Miller to respond to employer's requests for information regarding claimant's employment with their companies. Employer asserts that the district director's mishandling of the case requires that employer be dismissed, and that liability be transferred to the Trust Fund. We disagree.

The question of the district director's conduct is not properly before the Board. As set forth above, in its motion to remand, employer did not ask Judge Stansell-Gamm to compel the production of documents from Hiope or Miller, or to subpoena witnesses. Nor did employer assert that extraordinary circumstances existed for the admission of such evidence. *See* 20 C.F.R. §725.456(b)(1). Employer requested only that the case be remanded to the district director, and employer has not challenged Judge Stansell-Gamm's Order denying employer's request. Moreover, employer did not argue, before the current administrative law judge, that the district director's mishandling of this case prevented employer from developing timely evidence establishing that either Hiope or Miller is the proper responsible operator in this case. Therefore, the administrative law judge made no findings regarding the district director's alleged misconduct, for the Board to review. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). Consequently, we decline to further address employer's contentions regarding the district director's handling of this case.

Employer next asserts that the administrative law judge erred in determining that Hiope, claimant's most recent employer, did not employ claimant for a cumulative period of at least one year. Employer's Brief at 18. Employer contends that, because the record

[4] In the same Order, Administrative Law Judge Richard T. Stansell-Gamm granted claimant's request for a continuance, and, therefore, canceled the scheduled hearing. When the case was ultimately rescheduled for a hearing, it was assigned to Administrative Law Judge Linda S. Chapman, the current administrative law judge.

does not establish the exact beginning and ending dates of claimant's employment with Hiope, the administrative law judge was required to use the Bureau of Labor Statistics (BLS) calculation of average daily earning in coal mining to determine the length of claimant's employment with Hiope. Employer' Brief at 20. Employer further contends that, because application of the BLS formula establishes that Hiope most recently employed claimant for at least one calendar year, and for more than 125 working days, Hiope, not employer, is the properly designated responsible operator. Employer's Brief at 20-21.

The Director responds and urges the Board to affirm the administrative law judge's determination that Hiope is not the properly designated responsible operator, because employer has presented no evidence that Hiope employed claimant for at least one year, sfter his work for employer. Director's Brief at 10-11.

We agree with the Director that the administrative law judge rationally found that employer failed to meet its burden to establish that Hiope is the properly designated responsible operator. As set forth above, pursuant to 20 C.F.R. §§725.494(c), 725.495(c)(2), the responsible operator is the party that has most recently employed the miner "for a cumulative period of not less than one year."[5] Dates and length of coal mine employment may be established by any credible evidence including, but not limited to, company records, pension records, earnings statements, coworkers' affidavits and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). Further, employer bears the burden of proving "[t]hat it is not the potentially liable operator that most recently employed the miner." 20 C.F.R. §725.495(c)(2).

[5] The regulations define a year as:

> [A] period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. §725.101(a)(32).

While the record does not indicate the exact beginning or ending dates for claimant's employment at Hiope, the administrative law judge accurately noted that, in his sworn response to employer's interrogatories, claimant stated that he worked for Hiope for "less than one year." Decision and Order at 4; Director's Exhibit 49. The administrative law judge found, as was within her discretion, that "there is no reason to doubt the veracity of [claimant's] response . . . ." Decision and Order at 4; *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Consequently, the administrative law judge rationally determined that this evidence was sufficient to prove that claimant worked for Hiope for less than one year. *See* 20 C.F.R. §§725.495(c)(2), 725.101(a)(32); *Daniels*, 479 F.3d at 333, 24 BLR at 2-21; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

Furthermore, employer's contention, that the administrative law judge was required to use the BLS calculation of average daily earning in coal mining to determine the length of claimant's employment with Hiope, lacks merit. The regulations provide only that an administrative law judge "may" use such figures. 20 C.F.R. §725.101(a)(32)(iii). In addition, the DOL has indicated that the use of BLS figures was intended as a "fallback" option, to be used when the only information available regarding the length of a miner's coal mine employment is his or her total annual income from an employer. *See* 62 Fed. Reg. 2249 (Jan. 22, 1997). However, in this case, the record included claimant's sworn response to employer's interrogatories, which the administrative law judge rationally considered as credible evidence of the length of his employment with Hiope. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); Director's Exhibit 49.

Employer next asserts that the administrative law judge erred in determining that Miller, which employed claimant more recently than Dominion, and for more than one year, is not financially capable of assuming its liability for benefits, and thus, is not the proper responsible operator in this case. Employer's Brief at 22. Specifically, employer asserts that, in determining that Miller was not insured on claimant's last date of employment, the administrative law judge failed to consider the hearing testimony of Mr. Ralph Miller, the owner of Miller, that employer contends establishes that Miller was insured on the last date of claimant's employment with the company. Employer's Brief at 22.

The Director responds, agreeing with employer that a remand is required because the administrative law judge did not consider Mr. Miller's testimony concerning the dates of claimant's employment with Miller. Director's Brief at 12. The Director states that, "[i]f credited, Mr. Miller's testimony could establish that Miller Coal Corporation, which employed [claimant] after he left Dominion, was insured on the miner's last day of employment and thus is capable of providing for benefits." Director's Brief at 1-2.

We agree with employer and the Director that the administrative law judge's responsible operator finding must be vacated and the case must be remanded to the administrative law judge for further consideration, as the administrative law judge did not consider all of the relevant evidence regarding whether Miller met the criteria of a responsible operator. *See* 30 U.S.C. §923(b). On remand, the administrative law judge must consider whether Mr. Miller's testimony is credible and may reject his testimony if she finds it to be inconsistent or unsubstantiated. *See Lafferty v. Cannelton Indus*., 12 BLR 1-190 (1989). If the administrative law judge finds Mr. Miller's testimony to be credible, she must weigh it with the other evidence of record to determine whether employer has rebutted the presumption that it is the properly designated responsible operator. 20 C.F.R. §§725.494; 725.495(c)(2); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Attorney Fees

Employer further appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. Employer correctly notes, however, that if liability for the payment of benefits is ultimately imposed on the Trust fund, any attorney fees will also have to be paid by the Trust Fund, and, to date, the Trust fund has not entered any objections to the fee. Employer's Petition for Review on attorney fees at 2. Thus, in light of our decision to remand this case to the administrative law judge for further proceedings regarding the identity of the responsible operator, we decline to address employer's arguments regarding the award of attorney fees at this time.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge