BRB Nos. 98-1371 BLA
and 98-1371 BLA-A

OKEY JACK STEELE	)	
	)	
Claimant-Respondent	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ROBINSON-PHILLIPS COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order Denying Director's Motion for Reconsideration of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

John P. Scherer (File, Payne, Scherer & File), Beckley, West Virginia, for employer.

Sarah M. Hurley (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and employer cross-appeals, the Decision and Order and Decision and Order Denying Director's Motion for Reconsideration (97-BLA-00733) of Administrative Law Judge Lawrence P. Donnelly 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 administrative law judge determined that the instant case was a modification request, and noting the proper standard, considered entitlement pursuant to the provisions of 20 C.F.R. Part 727.[1] The administrative law judge found, and the parties stipulated to, invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Decision and Order at 5-6; Hearing Transcript at 5. The administrative law judge further found that rebuttal of the interim presumption was not established pursuant to any provision of 20 C.F.R. §727.203(b), and thus found that there had been a mistake of fact in the prior determination. Decision and Order at 6-9. The administrative law judge further considered the newly submitted evidence of record and determined that it was sufficient to establish the existence of complicated pneumoconiosis, which also established a change in conditions pursuant to 20 C.F.R. §725.310. Decision and Order at 9-14. Accordingly, benefits were awarded. The administrative law judge then considered the issue of responsible operator and concluded that, in accordance with *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), and *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993), the Black Lung Disability Trust Fund (Trust Fund) was liable for the payment of benefits, commencing as of January 1979. Decision and Order at 17-19.

[1] Claimant filed his claim for benefits on January 9, 1979. Director's Exhibit 1. The claim was denied by Administrative Law Judge Robert Glennon on March 15, 1989. Claimant filed an appeal with the Benefits Review Board but subsequently requested modification and submitted additional evidence. Director's Exhibits 65, 70, 72. The Board dismissed claimant's appeal on February 22, 1991, and remanded the case to the district director for processing of the modification request. Director's Exhibit 75.

On appeal, the Director does not challenge the award of benefits, but asserts that employer was properly designated the responsible operator herein, and contends that the administrative law judge erred in finding the Trust Fund liable for payment of benefits. Employer responds that the administrative law judge properly held the Trust Fund liable for payment of benefits, and cross-appeals, contending that the administrative law judge erred in finding the evidence sufficient to establish complicated pneumoconiosis and in failing to find rebuttal established at Section 727.203(b)(3). Claimant responds, urging affirmance of the award of benefits and declining to take a position on the responsible operator issue.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

[2] The administrative law judge's findings with respect to 20 C.F.R. §§727.203(a)(1), 727.203(b)(1), (2), (4) and 725.310 as well as his date of onset determination are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-616 (1983).

Initially, the Director contends that the administrative law judge erred in holding the Trust Fund liable for payment of benefits. In considering the responsible operator issue, the administrative law judge determined that claimant was employed for at least one cumulative year by both Logrind Coal Company (Logrind) and Bock Coal Company (Bock) subsequent to his employment with Robinson-Phillips Coal Company, employer herein. Decision and Order at 14-15. The administrative law judge found that both Logrind and Bock were no longer in existence, had no business assets remaining after their respective closures, and neither obtained insurance coverage nor were self-insured. The administrative law judge concluded that the provisions of 20 C.F.R. §725.495(a) required that the corporate officers of Logrind and Bock be considered as potential payors, and found that because the Director failed to determine whether the corporate officers had the ability to pay, the Trust Fund was liable for payment of benefits.[3] Decision and Order at 14-19. The Director maintains that corporate officers cannot be held personally liable for Black Lung benefits unless the corporation itself also meets the criteria of a responsible operator. The Director's arguments have merit.

Section 725.495(a) provides for the enforcement of penalties and cannot be used to modify the definition of a responsible operator to include corporate officers, but rather allows the Director, within his discretion, to hold certain officers personally liable for debts of a corporation which has failed to secure the appropriate black lung insurance. In the present case, the administrative law judge relied on the assumption that the Director is required to determine whether the corporate officers of a potential 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 17-19. On this issue, we again reiterate the position we recently stated in *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(order on recon.)(*en banc*) and *Mitchem v. Bailey Energy Inc.*, 21 BLR 1-161 (1999)(*en banc*)(Nelson,

[3] Section 725.495(a) states in pertinent part:

> Any employer required to secure payment of benefits under the act and §725.494 which fails to secure such benefits shall be subject to a civil penalty...; and in any case where such employer is a corporation, the president, secretary and treasurer thereof shall be also severally liable for such civil penalty...; and... shall be severally personally liable, jointly with such corporation, for any payments or other benefit which may accrue under the act in respect to any injury which may occur to any employee of such corporation....

20 C.F.R. §725.495(a).

J., concurring in part, dissenting in part), 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 presidents, secretaries and/or treasurers of uninsured corporations, whose responsibility it is to maintain the companies' insurance policies pursuant to Section 423 of the Act and Section 725.495(a), when they fail to secure the appropriate black lung insurance. *See Lester*, *supra*; *Mitchem*, *supra*. This section also provides that such officers may also be held severally personally liable jointly with the corporation for the payment of benefits. However, because the Director's decision to take enforcement action against corporate officers pursuant to Section 725.495(a) is discretionary, the administrative law judge erred in finding the Trust Fund liable in this case on the theory that the Director was obligated to enforce this provision. Decision and Order at 17; *Lester*, *supra*; *Mitchem*, *supra*. We therefore vacate the administrative law judge's determination that the Trust Fund is liable for the payment of benefits.

We note employer's concerns that if corporate officers are not held liable as responsible operators then officers who are financially capable of paying benefits will be encouraged not to obtain liability insurance. Employer's Brief at 20-21. However, we have addressed this specific concern in *Lester*, *supra* and *Mitchem*, *supra*, and employer has not asserted any persuasive rationale to support its contention that our holding regarding Section 725.495(a) is unreasonable or inconsistent with the regulations. Further, we reject employer's contention that as claimant is a corporate officer and stockholder in Bock, he cannot obtain benefits from another employer. Claimant's status as a stockholder and corporate officer in Bock does not affect his eligibility for benefits as a miner under the Act or prevent the properly named responsible operator from paying benefits. *See* 30 U.S.C. §§931(a), (b), 933(a); 20 C.F.R. §§725.491, 725.493; *Lester*, *supra*; *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995). Additionally, employer's assertion that the record contains no evidence that Bock is not financially responsible, lacks merit.[4] The record in this case clearly supports the administrative law judge's determination that Bock is not in existence and has no business assets remaining. Decision and Order at 17. The record contains uncontroverted evidence from the West Virginia Secretary of State which verifies that Bock has been inactive since May 3, 1989, and a statement by Burl Rose, president of Bock, that the company filed bankruptcy on April 2, 1987 and that when they ceased operations, the equipment went back to Robinson-Phillips Coal Company. *See* Director's Exhibits 89, 162. This evidence supports the finding that

[4] Employer does not challenge the administrative law judge's determination that Logrind Coal Company was not in existence, did not have insurance coverage and was not self-insured, and did not have any business assets remaining after the company closed. This determination is therefore affirmed. *See Skrack*, *supra*.

Bock is incapable of assuming liability for benefits.[5]

[5] The holdings in *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(order on recon.)(*en banc*) and *Mitchem v. Bailey Energy Inc.*, 21 BLR 1-161 (1999)(*en banc*)(Nelson, J., concurring in part, dissenting in part), supersede any prior Board decision regarding whether corporate officers can be held liable as responsible operators pursuant to 20 C.F.R. §725.491(a). Further, employer's reliance upon the Board's holding in *Carroll v. Sugar Leaf Processor, Inc.*, BRB No. 97-0589 BLA (January 8, 1998)(unpublished) is misplaced as the Director is not seeking to have employer held secondarily liable for the payment of benefits but rather is naming employer as the designated responsible operator under the regulations. *See* 20 C.F.R. §725.490 *et seq*.

Finally, we address employer's concern that it would be unjust to name employer the responsible operator given the delay in the instant case. Contrary to employer's contention, the mere passage of time in processing a case does not relieve employer of the liability of payment. The United States Court of Appeals for the Fourth Circuit has held that employer's due process rights would be violated if the delay deprived employer of a fair opportunity to mount a meaningful defense to the proposed deprivation of its property.[6] *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). In the instant case, employer was notified of its potential liability for this claim on January 20, 1987, eight years after the claim was filed but prior to any formal hearing on the merits. Employer not only had the opportunity to, but did mount a defense to the claim prior to the first administrative hearing on June 7, 1988. Director's Exhibit 63. The record reflects that employer has participated at every stage of the litigation of this case, and obtained a complete pulmonary evaluation of claimant, including a x-ray and a review of the record evidence. Director's Exhibits 58, 59, 96, 125. We therefore hold, based on the facts of this case, that employer was provided with a fair opportunity to mount a meaningful defense. *Lockhart*, *supra*; *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991). Consequently, as Logrind and Bock do not have the ability to assume payment of benefits pursuant to 20 C.F.R. §725.492(a)(4), then liability for payment of benefits in this case rests with employer and we therefore modify the administrative law judge's responsible operator determination to reflect that employer is liable for the payment of benefits. *See* 20 C.F.R. §§725.492, 725.493; *England*, *supra*; *Matney*, *supra*.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

With respect to the merits, the administrative law judge rationally found that the evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Employer contends that the administrative law judge erred in failing to find subsection (b)(3) rebuttal as no physician has testified or stated that claimant was disabled due to a pulmonary impairment from working in the coal mine industry.[7] We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp Coal Company*, 12 BLR 1-111 (1988). Further, employer misconstrues the relevant burdens of proof under Part 727. Claimant bears the initial burden to establish invocation of the interim presumption pursuant to any one of the Section 727.203(a) subsections by a preponderance of the evidence. *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Burt v. Director, OWCP*, 7 BLR 1-197 (1984). Once invocation is established, claimant is presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment and the burden shifts to the party opposing entitlement to establish rebuttal by a preponderance of the evidence, pursuant to one of the four methods provided in 20 C.F.R. §727.203(b). *See Mullins, supra*; *Lattimer v. Peabody Coal Co.*, 8 BLR 1-509 (1986); *Burt, supra*. Claimant does not have to prove at subsection (b)(3) rebuttal that the cause of his disability is due to his coal mine employment, but rather employer must rule out any relationship between the miner's disability and his coal

[7] The relevant evidence of record consists of three medical opinions and the records of the Veterans Administration Hospital. The hospital records indicate that claimant was transferred to the hospital on January 8, 1979 after a craniotomy due to a self-inflicted gunshot wound to the head and that the injury left him permanently and totally disabled from work. Director's Exhibit 8. The records also indicate that claimant was admitted from June 6 to 9, 1997 and August 27 to 30, 1997 due to recurrent deep vein thrombosis most likely secondary to stasis and hemiparesis. Employer's Exhibit 1. Dr. Burke examined the miner and diagnosed left hemiparesis secondary to gunshot wound to brain and phlebitis of lower extremities, and did not comment upon claimant's pulmonary impairment. Director's Exhibit 7. Dr. Sobieski reviewed the evidence of record and opined that claimant suffered from simple coal workers' pneumoconiosis and did not have a significant respiratory impairment and that from a respiratory standpoint, claimant could perform his usual coal mine employment. The physician concluded that the miner was disabled from any type of occupation because of hemiplegia which is a residual of a gunshot wound to the head which is unrelated to coal dust exposure. Director's Exhibit 53. Dr. Daniel examined claimant and opined that the miner had coal workers' pneumoconiosis and that there was no evidence of significant pulmonary dysfunction and that he should be able to carry out the usual and customary physical requirements required of a coal miner in the performance of his duties. Director's Exhibit 59.

mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). As employer only recites the evidence of record and makes no specific challenge to the administrative law judge's findings at Section 727.203(b)(3), we affirm the administrative law judge's finding that the evidence of record is insufficient to establish rebuttal of the interim presumption pursuant to subsection (b)(3). *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer also challenges the administrative law judge's determination that the x-ray evidence is sufficient to establish complicated pneumoconiosis. The administrative law judge considered all the relevant evidence and concluded that while some physicians read the recent x-rays as showing only simple pneumoconiosis, equally qualified physicians interpreted the recent x-rays as also showing complicated pneumoconiosis. Decision and Order at 14; Director's Exhibits 8, 9, 59, 70, 91, 92, 96, 101-105, 121, 125. The administrative law judge rationally found that the x-ray interpretations by the physicians diagnosing complicated pneumoconiosis were more persuasive and consistent with the progression of claimant's pneumoconiosis. *Mullins*, *supra*; *Piccin*, *supra*. Contrary to employer's contention, the administrative law judge did not ignore the opinions of the physicians diagnosing simple pneumoconiosis, but rather found that these opinions lent support to the opinions of the physicians diagnosing complicated pneumoconiosis, as they showed a progression in the profusion of the pneumoconiosis.[8] Decision and Order at 14. Thus, the administrative law judge, within his discretion as fact-finder, carefully analyzed the evidence and properly concluded that claimant established complicated pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *Piccin*, *supra*. The administrative law judge is empowered to weigh the medical evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's award of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order and Decision and Order Denying Director's Motion for Reconsideration are vacated insofar as they hold the Trust Fund responsible for payment of benefits, are modified to reflect that employer is liable for payment of benefits, and are affirmed as to the award of benefits.

[8] The administrative law judge also noted that Dr. Wiot, who consistently read x-rays as showing a profusion of 1/2, nevertheless found a coalescence of pneumoconiotic nodules on the September 22, 1992 x-ray. Decision and Order at 14; Director's Exhibit 125.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge