BRB No. 98-0309 BLA

JARRELL DEAN COCHRAN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion to Reconsider of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Jennifer U. Toth (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 BROWN, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and the Order Denying Motion to Reconsider (96-BLA-1140) of Administrative Law Judge Stuart A. Levin (the administrative law judge) dismissing Westmoreland Coal Company (Westmoreland) as a putative

responsible operator in 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).[1] In a Decision and Order dated August 11, 1997, the administrative law judge granted Westmoreland's motion to be dismissed as the responsible operator in this case, and remanded the case to the district director for further evaluation of claimant by Dr. Daniel with regard to the existence of pneumoconiosis and the etiology of claimant's impairment. In an Order dated October 20, 1997, in response to the Director's motion for reconsideration, the administrative law judge found that Westmoreland provided evidence at the hearing which is sufficient to justify its dismissal as the responsible operator. On appeal, the Director contends that the administrative law judge erred by dismissing Westmoreland as a potentially responsible operator. Westmoreland responds, urging affirmance of the administrative law judge's dismissal of it as a putative responsible operator. Claimant has not participated in this appeal.

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).

[1]The Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's August 11, 1997 and October 20, 1997 dismissals of Westmoreland Coal Company (Westmoreland) as a potentially responsible operator. On December 5, 1997, Westmoreland filed a Motion to Dismiss Interlocutory Appeal. The Board denied Westmoreland's request since the Director's appeal falls within the collateral order exception to the final judgment rule. *Cochran v. Westmoreland Coal Co.*, 21 BLR 1-89 (1998).

The Director contends that the administrative law judge erred by dismissing Westmoreland as a potentially responsible operator in this case. Specifically, the Director asserts that the administrative law judge's decision to dismiss Westmoreland and transfer liability to the Black Lung Disability Trust Fund (the Trust Fund) is unreasonable because the Director is blameless in failing to designate ICI Explosives as a potentially responsible operator and because the claim has not been fully litigated on the merits. The pertinent history regarding the identification of the putative responsible operator in this case is as follows: Claimant filed his claim on February 23, 1995.[2] On August 23, 1995, Westmoreland and Harden Trucking Company, Incorporated (Harden Trucking) were designated as potentially responsible operators. Director's Exhibits 36, 38. On September 14, 1995, Westmoreland requested an informal conference to address the responsible operator issue. Director's Exhibit 40. Claimant also requested an informal conference to resolve the responsible operator issue on September 15, 1995. Director's Exhibit 41. The district director issued a Memorandum of Informal Conference dated March 8, 1996, which determined that Westmoreland is the proper responsible operator.[3] Director's Exhibit 52. Claimant requested a hearing on March 11, 1996. Director's Exhibit 53. On September 26, 1996, the Director informed the administrative law judge that he did not plan to attend the hearing because the evidence supports a determination that Westmoreland is the proper responsible operator. However, the Director requested an opportunity to file a post-hearing written brief in response to the issue of liability of the named responsible operator or the Trust Fund if the issue was raised at the hearing. The hearing was

[2]In claimant's application for benefits, claimant indicated that Harden Trucking Company, Incorporated (Harden Trucking) was the employer against whom his West Virginia Workers' Compensation Claim was filed. Director's Exhibit 1. Although claimant listed ICI Explosives as his most recent employer on the Employment History form, claimant indicated that the type of work that he performed involved "Explosives." Director's Exhibit 2. However, claimant indicated on the same form that the type of work that he performed for his prior employer, Harden Trucking, involved "Coal Transporting." *Id*. Similarly, claimant listed the work that he performed for Westmoreland as "Coal Mines." *Id*. In a Description of Coal Mine Work and Other Employment form, claimant listed ICI Explosives under the current or last non-coal mine employment section of the form. Director's Exhibit 17.

[3]The district director determined that although Harden Trucking was claimant's most recent coal employer, it does not qualify as a responsible operator pursuant to 20 C.F.R. §725.492 because it is no longer in operation and because it was not required to obtain insurance for federal black lung disability benefits as a transportation operator. Director's Exhibit 52.

held by the administrative law judge on October 9, 1996.[4]

In his decision, the administrative law judge referred to claimant's testimony at the hearing and stated that "[t]he record shows that Claimant's work for ICI Explosives...constituted the work of a miner, and since he spent a significant portion of each workday at a mine site, ICI Explosives would be a proper responsible operator in this case." Decision and Order at 2. The administrative law judge also stated that "[a]lthough the evidence shows that Harden Trucking is not able to serve as a responsible operator, the Director has failed to demonstrate that ICI is similarly unavailable." *Id*.

The pertinent regulations provide that "the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year...shall be the responsible operator." 20 C.F.R. §725.493(a)(1). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant's employment must satisfy both a function test and a situs test. *See Amigo Smokeless Coal Co. v.* Director*, OWCP [Bower]*, 642 F.2d 68, 2 BLR 2-68 (4th Cir. 1981); *see also Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986). The situs test is satisfied when the miner's work is performed in or around a coal mine. The function test is satisfied when the miner's work performed a function necessary to the extraction or preparation of coal.

[4]Claimant did not indicate that his work with ICI Explosives involved possible coal mine employment until the hearing, and there is no other explicit evidence of record that ICI Explosives is possibly the proper responsible operator. Hearing Transcript at 17, 18, 22-24, 26-30. On November 7, 1996, upon learning that the record was left open for thirty days after the hearing for the submission of closing briefs, the Director requested an extension of time from the administrative law judge to file a closing brief because the Director had not received a copy of the hearing transcript and needed time to review it. There is no indication in the record that the administrative law judge responded to the Director's request.

In the instant case, the administrative law judge stated that "[t]he evidence indicates that the Claimant's work at coal mine sites while employed by ICI satisfied the situs and status tests, and that he and ICI Explosives performed mine services while maintaining a significant presence at mine sites." Decision and Order at 2.[5] The administrative law judge's reference to the "mine services" that claimant performed while employed by ICI Explosives lacks detail sufficient to permit the Board to determine whether the administrative law judge found that claimant's work for ICI Explosives met the function test and, necessarily, whether such a finding is rational and supported by substantial evidence.[6] Therefore, we vacate the administrative law judge's finding that claimant had more than one year of coal mine

[5]The administrative law judge found that claimant's employment with ICI Explosives satisfied the status test. The Board has held that a claimant's employment must satisfy the status (of the coal) test for determining whether the duties performed by a claimant constitute coal mine employment. *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985). The status test is satisfied when the coal with which claimant worked was still in the course of being processed, and not yet a finished product in the stream of commerce. However, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not require that claimant's employment satisfy the status test. *See Amigo Smokeless Coal Co. v.* Director*, OWCP [Bower]*, 642 F.2d 68, 2 BLR 2-68 (4th Cir. 1981); *see also Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986). Rather, the Fourth Circuit has held that claimant's employment must satisfy the two-prong test of situs and function. *See Bower, supra*; *see also Collins, supra*. We note that in *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987), which was cited by the administrative law judge, the United States Court of Appeals for the Third Circuit held that an inquiry into the status of the coal is best understood as subsumed within the function test.

[6]In *Pinkham v. Director, OWCP*, 7 BLR 1-55 (1984), the Board affirmed, as supported by substantial evidence, the administrative law judge's findings that claimant's job occurred on coal mine premises and was integral to the process of extracting coal, as claimant participated in the delivery of supplies and the maintenance of essential equipment. The Board held, therefore, that claimant's work collecting, recharging, and delivering CO2 cylinders, which are used in the extraction of coal, was qualifying coal mine employment, inasmuch as claimant's duties satisfied the "situs-function" test. *Id*. at 1-57. If the administrative law judge is called upon to resolve the responsible operator issue prior to considering the merits of the present claim, he should consider whether claimant's work with ICI Explosives constituted coal mine employment in light of the Board's decision in *Pinkham*.

employment with ICI Explosives after his employment with Westmoreland as well as the administrative law judge's dismissal of Westmoreland as a potentially responsible operator. This case is remanded to the district director to develop evidence regarding claimant's possible coal mine employment with ICI Explosives and medical evidence on the entitlement issues identified by the administrative law judge. *See Collins, supra*; *Bower, supra*.

Furthermore, since this case has not been fully litigated on the merits, we remand the case to the district director to render a determination regarding the appropriate responsible operator. *See Beckett v. Raven Smokeless Coal Co.*, 14 BLR 1-43 (1990); *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1990); *cf. Director, OWCP v. Trace Fork Coal Co.*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), *rev'g in part sub nom.*, *Matney v. Trace Fork Coal Co.*, 17 BLR 1-145 (1993); *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). Contrary to Westmoreland's contentions, since the administrative law judge has not made a determination with regard to whether claimant is entitled to benefits, the concerns of due process violations and piecemeal litigation addressed in *Crabtree* are not present in this case.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion to Reconsider are vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge