

BRB No. 89-1644 BLA

MERRITT LEWIS)
)
 Claimant-Respondent)
)
 v.)
)
 AMHERST INDUSTRIES,)
 INCORPORATED,)
)
 ARCH OF WEST VIRGINIA,)
)
 CLAY COAL CORPORATION,)
)
 Employers-Respondents) DATE ISSUED:
)
 and)
)
 TRAVELERS INSURANCE COMPANY)
 (for CLAY COAL CORPORATION))
)
 Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Order Granting Motions to Dismiss of Bernard J. Gilday, Jr.,
Administrative Law Judge, United States Department of Labor.

Elizabeth J. Shapiro (Judith E. Kramer, Acting 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.

John V. Porter (Wells, Porter, Schmitt & Walker), Paintsville, Kentucky, for
employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the

Director), appeals the Order Granting Motions to Dismiss (89-BLA-0152) of Administrative Law Judge Bernard J. Gilday, Jr. 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). Claimant filed a claim for benefits on December 9, 1982. After an initial denial of the claim, claimant sought to submit additional evidence. The deputy commissioner then named Amherst Industries, Incorporated (Amherst) as the putative responsible operator. Amherst controverted the claim on the grounds that it was sold to a subsidiary of Diamond Shamrock Corporation (Diamond). Diamond also controverted the claim, and the matter was referred to the Office of Administrative Law Judges. Amherst and Diamond then moved to remand the case to the deputy commissioner for designation of another responsible operator. The administrative law judge granted the motion and the deputy commissioner named Arch of West Virginia (Arch) as a responsible operator and Clay Coal Corporation (Clay) as a secondary responsible operator.¹ Both Arch and Clay controverted the claim, and the case was referred to the Office of Administrative Law Judges for a formal hearing. Prior to the hearing, both Arch and Clay filed motions to dismiss. On March 29, 1989, the administrative law judge considered the motions and dismissed Amherst, Diamond and Arch because claimant did not work a full year for any of these operators. The administrative law judge further dismissed Clay because the deputy commissioner violated the Board's holding in Goddard v. Oglebay Norton Corp., 12 BLR 1-130 (1988), that prohibited the naming of a second operator after having previously named a putative responsible operator in an earlier proceeding. On appeal, the Director contends that the administrative law judge's dismissal of Clay must be vacated because the United States Court of Appeals for the Sixth Circuit reversed the Board's holding in Goddard.² Clay responds urging that the Board dismiss the Director's appeal as it is untimely filed and because the Board lacks jurisdiction to hear the appeal as the order appealed from is interlocutory in nature.

¹Arch of West Virginia, part of Arch Minerals Corporation, acquired Diamond Shamrock Coal Company in 1987.

²As the administrative law judge's dismissals of Arch, Amherst and Diamond are not challenged on appeal, they are affirmed. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

The Director relies on the Sixth Circuit's holding in Director, OWCP v. Oglebay Norton Co. [Goddard], 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989) in contending the administrative law judge erred in dismissing employer as responsible operator. The Sixth Circuit concluded in Goddard that the employer's designation as responsible operator should not be disregarded merely because it was inefficiently reached. The court therefore reversed the Board's decision affirming the administrative law judge's dismissal of the employer in that case as responsible operator and noted that none of the parties would be substantially prejudiced by further remand of the case with that employer properly identified as the responsible operator. See Goddard, 877 F.2d 1304-1305, 12 BLR 2-363-364.

We hold that, consistent with our decisions in Lewis v. Consolidation Coal Co., 15 BLR 1-37 (1991) and Beckett v. Raven Smokeless Coal Co., 14 BLR 1-43 (1990), inasmuch as the Department of Labor had named Clay as the responsible operator prior to any formal hearing on the merits of the claim, and, as Clay is not prejudiced in its defense of the claim, that the administrative law judge improperly dismissed Clay from the case. See Lewis, supra; Beckett, supra; see also Goddard, supra. As a result, the administrative law judge's dismissal of Clay is vacated, Clay is reinstated as the properly named responsible operator, and the case is remanded to the administrative law judge for consideration of the merits of the claim.³

³On January 2, 1991, the Board granted the Director's motion for Extension of Time to file its Petition for Review and Brief in this case. The Petition for Review and Brief was filed with the Board on February 6, 1991 and was accepted as timely. 20 C.F.R. §802.217. Also, we reject employer's contention that the Board lacks jurisdiction to hear this appeal as the Department of Labor is required to resolve the responsible operator issue prior to the consideration of the merits of the claim. See 20 C.F.R. §725.412(d); Crabtree v. Bethlehem Steel Corp., 7 BLR 1-354 (1984).

Accordingly, the administrative law judge's Order Granting Motions to Dismiss is vacated in part and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge