

BRB Nos. 89-2390 BLA
and 89-2390 BLA-A

KENNETH R. GEARY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LAUREL RIDGE COAL, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
PENNSYLVANIA STATE WORKERS')	
INSURANCE FUND)	
)	
Employer/Carrier-)	
Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order; Order Denying Reconsideration; Order Denying Motion to Re-Open Record; and Order Denying Carrier's Second Motion to Reopen the Record of George P. Morin, Administrative Law Judge, United States Department of Labor.

J. Scott Leckie (Yablonski, Costello, Leckie & Chaban), Washington, Pennsylvania, for claimant.

Donna M. Lowman (Grigsby, Gaca & Davies, P.C.), Pittsburgh, Pennsylvania, for carrier.

Kathleen M. Bole (Thomas S. Williamson, Jr., 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: BROWN and McGRANERY, Administrative Appeals Judges,
and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant and carrier appeal the Decision and Order, Order Denying Reconsideration, Order Denying Motion to Re-Open Record, and Order Denying Carrier's Second Motion to Reopen the Record (87-BLA-1794) of Administrative Law Judge George P. Morin denying 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 credited claimant with more than ten years of qualifying coal mine employment, and determined that Laurel Ridge Coal, Incorporated and the Pennsylvania State Workers' Insurance Fund (SWIF) were properly designated the responsible operator and carrier, respectively, pursuant to 20 C.F.R. §§725.492, 725.493 and 726.203. The administrative law judge then found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but further found that the evidence was sufficient to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(2) and (3), and that claimant also failed to establish entitlement pursuant to 20 C.F.R. Part 718.¹ Accordingly, benefits were denied. On appeal, claimant and carrier challenge the administrative law judge's designation of SWIF as the responsible carrier herein, as well as his denial of the two motions to admit

¹ The administrative law judge additionally adjudicated this claim pursuant to the provisions at 20 C.F.R. §410.490. Subsequent to the issuance of the administrative law judge's Decision and Order, however, in light of *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991), the Board held that Section 410.490 does not apply to a case, such as this, which has been properly adjudicated pursuant to Part 727. *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991) (*en banc*).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

post-hearing evidence into the record. Carrier additionally maintains that the administrative law judge improperly curtailed cross-examination of claimant at the hearing. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's findings.

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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant and carrier initially contend that the administrative law judge erred in designating SWIF as the responsible carrier herein, and maintain that the administrative law judge failed to adequately consider the evidence of record which corroborates claimant's testimony that he ceased working for employer prior to May 20, 1980, the date SWIF's coverage of employer commenced.² The administrative law judge, however, acted within his discretion as trier-of-fact in finding that claimant's testimony was unreliable inasmuch as claimant admitted at the hearing that his memory had deteriorated. See Order Denying Motion to Re-Open Record at 2, 3; Order Denying Carrier's Second Motion to Reopen the Record at 1; Hearing Transcript at 22, 26; see generally *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Consequently, the administrative law judge permissibly credited, as the most probative evidence, the Social Security Administration records which reported earnings of \$4,466 in 1980, combined with employer's pay stubs showing that claimant received \$4,466 in wages between April 20, 1980 and July 26, 1980, in finding that claimant was engaged in coal mine employment for employer after SWIF commenced coverage. Decision and Order at 4; Order Denying Motion to Re-Open Record at 2, 3; Director's Exhibits 13, 61; see generally *Brumley v. Clay Coal Corp.*, 6 BLR 1-956 (1984); *Yendall v. Director, OWCP*, 4 BLR 1-467 (1982).

Claimant and carrier also contend that the administrative law judge erred in refusing to reopen the record to admit claimant's

² We agree with the Director that claimant lacks standing to challenge SWIF's designation as the responsible carrier herein, inasmuch as claimant is not adversely affected by the outcome of this issue. 20 C.F.R. §802.201(a); see generally *Seewald v. Imperial Coal Co.*, 8 BLR 1-469 (1986). Contrary to claimant's assertions, SWIF's dismissal would not automatically shift liability to the Black Lung Disability Trust Fund, and even if it did, the Director would not be bound by the district director's initial finding of eligibility. See *Pavesi v. Director, OWCP*, 759 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

post-hearing deposition and/or affidavit regarding claimant's inclusive dates of coal mine employment with employer. We disagree. An administrative law judge has broad discretion in procedural matters, and absent compelling circumstances or a showing of good cause, is not required to reopen the record for post-hearing evidence. 20 C.F.R. §725.456(b)(1), (2); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985). The administrative law judge reasonably found that the parties had ample opportunity to present evidence and elicit testimony at the hearing regarding claimant's dates of employment,³ and that there was no reason to believe that claimant's memory concerning this issue had improved after the hearing. Order Denying Motion to Re-Open Record at 2, 3.

Contrary to claimant's and carrier's arguments, the administrative law judge did not abuse his discretion by refusing to admit into the record evidence based on claimant's post-hearing recollections of his dates of employment, since the administrative law judge permissibly found that claimant was an unreliable witness, and thus such evidence was equally unreliable despite the presence in the record of any corroborative evidence. Order Denying Motion to Re-Open Record at 2, 3; Order Denying Carrier's Second Motion to Reopen the Record at 1; *see generally Miller v. Director, OWCP*, 7 BLR 1-693 (1985). Consequently, we affirm the administrative law judge's finding that SWIF was properly designated the responsible carrier herein, as supported by substantial evidence, and we affirm his denial of benefits pursuant to 20 C.F.R. Parts 727 and 718, as the merits of this claim were unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order denying benefits, Order Denying Reconsideration, Order Denying Motion to Re-Open Record, and Order Denying Carrier's Second Motion to Reopen the Record are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY

³ We reject carrier's argument that the administrative law judge improperly curtailed its cross-examination of claimant at the hearing, as unsupported by the record. A review of the Hearing Transcript reveals that the administrative law judge merely requested that counsel change the form of his questions. See Hearing Transcript at 28.

Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge