BRB Nos. 00-1065 BLA
and 00-1065 BLA-A

DALE A. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISON COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
RISH EQUIPMENT COMPANY	)	
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Robert Austin Vinyard), Abingdon, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer Ison Coal Company and its carrier.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer Rish Equipment Company.

Edward Waldman (Howard M. Radzely, 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.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0135) of Administrative Law Judge Daniel J. Roketenetz 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).[1] The administrative law judge credited claimant with twenty-three years of qualifying coal mine employment, determined that Rish Equipment Company (Rish) was properly designated as the responsible operator herein, and adjudicated this claim, filed on November 25, 1997, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) (2000), but insufficient to establish invocation of the irrebuttable presumption of totally disabling pneumoconiosis at 20 C.F.R. §718.304 (2000) or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, benefits were denied.

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.304 and 718.204(c)(4) (2000). Employers Rish and Ison Coal Company (Ison) respond, urging affirmance of the denial of benefits, and Rish cross-appeals, challenging its designation as the responsible operator herein. The Director, Office of Workers' Compensation Programs (the Director), responds to Rish's cross-appeal and concedes that, in light of the intervening decision in *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000), by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, the Black Lung Disability Trust Fund (Trust Fund) is liable for payment of any benefits that might ultimately be awarded herein.[2] The Director also responds to claimant's appeal, opposing claimant's entitlement to benefits but requesting a remand for the administrative law judge to reevaluate the evidence pursuant to Sections 718.304 and 718.204(c)(4) (2000). Claimant replies to the Director's response, arguing that the Director waived any arguments against claimant's entitlement by failing to contest the merits of the claim below.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 16, 2001, to which employer Ison and the Director have responded, asserting that the amended regulations at issue in the lawsuit do not affect the outcome of this case. Claimant and employer Rish have not responded to the Board's order.[4] Based on the briefs submitted by Ison and the Director, and

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[2]The Director asserts that the evidence of record is overwhelming that Matt Mining had authoritative direction and control over claimant, thus the district director should have named Matt Mining as a potentially liable responsible operator under the "borrowed servant" doctrine. Director's Brief at 4-5. In view of the Director's concession of Trust Fund liability, we need not reach Rish's arguments on cross-appeal.

[3]We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) (2000), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's order issued on May 16, 2001, would be construed as a

our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially argues that, because the district director determined that claimant was entitled to benefits and the Director did not contest entitlement before the administrative law judge, the Director has waived any arguments against claimant's entitlement following the Director's concession on appeal that, if benefits are ultimately awarded herein, the Trust Fund rather than any named employer is liable for payment thereof. Claimant's arguments are without merit. The Trust Fund's liability for payment of benefits to claimant requires a determination of eligibility which has become final under the procedure established by the statute and regulations. After Ison and Rish contested claimant's entitlement to benefits and requested a full evidentiary hearing before an administrative law judge, the intervening determination of ineligibility for benefits issued by the administrative law judge served to nullify the preliminary decision reached by the district director. *See Shortt v. Director, OWCP*, 766 F.2d 172, 8 BLR 2-9 (4th Cir. 1985). The Director notes that some of the evidence which the administrative law judge relied upon to support his denial of benefits was not available to the deputy commissioner when the claim was before him for consideration, and the Director, acting as the representative of the Trust Fund with the obligation to protest unjustified claims against it, correctly asserts that he is not bound to the position initially taken by the deputy commissioner. *See generally Shortt, supra*; *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Hardisty v. Director, OWCP*, 775 F.2d 129, 8 BLR 2- 72 (7th Cir. 1985). Consequently, the Director now permissibly opposes this claim, although he agrees with claimant's arguments that the administrative law judge's findings pursuant to Sections 718.304 and 718.204(c)(4) (2000) cannot be affirmed.

Turning to the merits, claimant and the Director first challenge the administrative law judge's evaluation of the evidence at Section 718.304 (2000). Specifically, claimant and the Director contend that the administrative law judge failed to address all relevant evidence and explain why he found the opinions of the physicians who diagnosed tuberculosis more persuasive than those of the physicians who diagnosed complicated pneumoconiosis. Claimant and the Director further maintain that the administrative law judge mischaracterized

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position that the challenged regulations will not affect the outcome of this case.

Dr. Robinette's deposition testimony. The arguments of claimant and the Director have merit.

In finding the weight of the evidence insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge credited the negative opinions of Drs. Scott, Wheeler, Fino, Dahhan, Cooper, Fairman and Henry[5] over the positive opinions of Drs. Robinette, Aycoth, Mullens, Humphreys, Paranthaman and Navani on the grounds that: (1) the majority of the more highly qualified physicians found complicated pneumoconiosis to be absent; (2) the opinions of the physicians who did not find complicated pneumoconiosis were more persuasive based on their conclusion that the large opacities were consistent with tuberculosis, as well as Dr. Dahhan's explanation that claimant's negative tuberculin skin tests did not rule out tuberculosis because claimant's diabetes is an autoimmune condition which suppresses his ability to react to skin tests; and (3) Dr. Robinette agreed, in his deposition testimony, that diabetes can be considered an autoimmune condition. Decision and Order at 12-13.

Contrary to the administrative law judge's findings, however, out of the physicians who did not diagnose complicated pneumoconiosis, only Drs. Scott, Wheeler and Dahhan, who interpreted multiple films, opined that claimant's x-ray opacities were consistent with tuberculosis. A review of the record reveals that Dr. Fino interpreted a single film, dated December 12, 1997, as showing coalescence of small pneumoconiotic opacities in the right upper zone, Employer's Exhibit 11; and Dr. Cooper interpreted the same film as showing a right upper zone opacity which "could be cancer - need to [rule out] malignancy," Employer's Exhibit 12. Further, claimant correctly maintains that the administrative law judge failed to acknowledge Dr. Robinette's status as claimant's treating pulmonologist and as the regional tuberculosis control officer for the Commonwealth of Virginia since 1986. *See* Claimant's Exhibit 5 at 6, 20. Although Dr. Robinette agreed that it was possible that diabetes could suppress the immune system under the theory advanced in some of the literature that diabetes is an autoimmune condition, as opposed to a disease process of pancreatic insufficiency, *see* Claimant's Exhibit 5 at 28-29, Dr. Robinette testified that claimant did not have tuberculosis. Claimant's Exhibit 5 at 21. Moreover, claimant accurately notes that Dr. Dahhan's explanation for claimant's negative tuberculin skin tests does not account for the sputum smears and cultures which Dr. Robinette obtained that were negative for tuberculosis. Claimant's Exhibit 5 at 1-12. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.304 and remand this case for the

[5]The record reflects that only one classification form, completed and initialed by Dr. Cooper, was submitted by the Committee on Occupational Lung Disease of the Medical College of Virginia, which consists of B-readers Drs. Cooper, Fairman and Henry. *See* Employer's Exhibit 12.

administrative law judge to reevaluate all relevant evidence thereunder consistent with *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999).

Claimant and the Director also challenge the administrative law judge's weighing of the evidence at Section 718.204(c)(4) (2000). In finding the medical opinions insufficient to establish total respiratory disability, the administrative law judge discounted the opinions of Drs. Paranthaman and Robinette on the ground that these physicians based their conclusion of total disability upon a diagnosis of complicated pneumoconiosis, which the administrative law judge found was not present in this case. Decision and Order at 19. The administrative law judge further determined that although Dr. Robinette additionally based his finding of total disability upon pulmonary function testing, those tests failed to produce values indicative of total disability, a discrepancy which Dr. Robinette failed to adequately address. *Id.*

The Director accurately maintains, however, that Dr. Robinette testified in detail at his deposition that, while the June 8, 1998 and November 8, 1999 pulmonary function study results were non-qualifying, the subnormal FEV1 and FVC values and low diffusing capacity showed that claimant had a mild to moderate restrictive lung defect that would preclude performance of mining duties. Claimant's Exhibit 5 at 14-19. The Director also notes that the administrative law judge overlooked Dr. Paranthaman's statement, based on the December 12, 1997 pulmonary function study results, that claimant had a moderate respiratory impairment, Director's Exhibit 17, and argues that this assessment, when compared with the exertional requirements of claimant's usual coal mine employment, could support a finding of total respiratory disability. *See generally Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

As the administrative law judge did not determine whether the assessments of moderate respiratory impairment by Drs. Robinette and Paranthaman were well reasoned and sufficient to prevent claimant from performing his usual coal mine employment duties, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(4) (2000). If, on remand, the administrative law judge again finds that complicated pneumoconiosis is not established, he must reevaluate the medical opinions of record and determine whether the weight of the evidence, both like and unlike, is sufficient to establish total respiratory disability pursuant to Section 718.204(b).[6] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-

[6]The regulation applied by the administrative law judge has been restructured. The methods for establishing total disability which were formerly set forth at Section 718.204(c)(1)-(4) (2000) are now set forth at Section 718.204(b)(2)(i)-(iv). *See* 65 Fed. Reg.

19 (1987). If so, the administrative law judge must determine whether claimant has established disability causation at Section 718.204(c).

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

80,049-80,050 (2000).