BRB No. 97-1223 BLA

JOHN N. HODGES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Petitioner

Appeal of the Decision and Orders of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order dismissing employer from the present claim and the Decision and Order denying the Director's request for reconsideration (95-BLA-1876) of Administrative Law Judge Edward J. Murty, Jr., with respect to 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). This is the second time that this case has been before the Board. In its prior Decision and Order, the Board considered claimant's *pro se* appeal of the Decision and Order in which Administrative Law Judge Reno E. Bonfanti denied benefits. The Director submitted a Motion to Remand in response to claimant's appeal and urged the Board to remand the case to the district director on the ground that the Director had failed to fulfill his statutory duty to provide claimant with a complete and credible pulmonary evaluation under 30 U.S.C. §923(b). The Director specifically referred to the report of Dr. Scattaregia, who examined claimant at the request of the Department of Labor (DOL), in which the doctor did not offer an opinion as to the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 14. Employer objected to the Director's motion and asked for oral argument concerning the Director's standing to raise this issue on claimant's behalf and whether the Director raised the issue in a timely fashion. The Board granted employer's request for oral argument which was held in Pittsburgh, Pennsylvania on June 7, 1994.

In a published Decision and Order issued on September 29, 1994, the Board held that the Director has standing, as a party-in-interest, to raise the issue of a complete and credible pulmonary examination in cases in which a responsible operator is a party. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-87-88 (1994). In addition, the Board rejected employer's assertion that the Director's failure to raise the issue at the earliest opportunity precluded the Board from considering the issue for the first time on appeal. *Hodges*, *supra*, 18 BLR at 1-89-90. With respect to Dr. Scattaregia's medical report, the Board held that because the doctor did not answer the question concerning the existence of a disabling impairment on DOL Form CM-988, his opinion was incomplete and did not fulfill the Director's statutory obligation regarding the provision of a complete and credible pulmonary examination. 18 BLR at 1-93; *see* 30 U.S.C. §923(b). Accordingly, the Board vacated Judge Bonfanti's Decision and Order and remanded the case to the district director "in order to provide claimant with a complete and credible pulmonary evaluation." *Id.*. The Board also noted that the Director indicated that he "intends to seek, initially, a response from Dr. Scattaregia to the DOL physical examination report form question concerning the

extent of claimant's respiratory impairment."[1] 18 BLR at 1-93, n.7, citing the Director's [Supplemental] Brief at 2, n.2; Oral Argument Transcript at 34.

After the issuance of the Board's Decision and Order, but before the case file was received by the district director, employer informed the Director's appellate counsel that employer wished to take Dr. Scattaregia's deposition. Director's Brief at 7; Employer's Brief in Response at 4. Appellate counsel advised employer that the Director had no objection. *Id.*. After providing notice to the district director, the Associate Regional Solicitor in Arlington, Virginia, the Director's appellate counsel, and claimant, employer took Dr. Scattaregia's deposition on December 15, 1994. Director's Exhibit 58. Counsel for the Director did not attend the deposition. *Id.*.

On January 17, 1995, the district director received the case file from the Board and on January 26, 1995, a letter was issued in which the district director informed claimant that in accordance with the Decision and Order of the Benefits Review Board, his claim was remanded to the district director for authorization of a complete medical evaluation. Director's Exhibit 54. The district director subsequently issued an authorization letter, dated January 30, 1995, in which claimant was instructed to contact Stonewall Jackson Memorial Hospital, the facility at which Dr. Scattaregia performed his examination of claimant. Director's Exhibit 55. A second authorization letter was issued on February 2, 1995, in which claimant was instructed to make an appointment with Dr. Rasmussen at the Southern West Virginia Clinic. Director's

[1]In our prior Decision and Order, we also reversed Judge Bonfanti's determination that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), based upon our holding in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992), and instructed the administrative law judge to reconsider his finding under 20 C.F.R. §718.204(c) in light of a weighing of the evidence supportive of a finding of total disability against the contrary probative evidence of record. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-93-94 (1994). Subsequent to the issuance of our Decision and Order, the Fourth Circuit adopted a standard which requires a claimant to establish at least one of the elements previously adjudicated against him, based upon a weighing of the newly submitted evidence, in order to demonstrate a material change in conditions. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Judge Bonfanti's finding that claimant's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b) - the element which claimant failed to prove in his earlier claim - is sufficient, as a matter of law, to establish a material change in conditions under *Rutter*.

Exhibit 56. Claimant notified the district director on February 6, 1995, that he had scheduled an examination with Dr. Rasmussen on February 10, 1995. Director's Exhibit 57. Dr. Rasmussen conducted a pulmonary evaluation of claimant on that date. Director's Exhibits 60, 61.

In a letter dated March 28, 1995, the district director notified the parties that the case was to be returned to the Office of the Administrative Law Judges (OALJ) for a formal decision. Director's Exhibit 68. Employer subsequently obtained and submitted additional medical evidence, including x-ray readings and a report of Dr. Renn's examination of claimant on May 16, 1995. By letter dated May 25, 1995, the district director informed the parties that the case was being referred to the OALJ for a hearing. Director's Exhibit 71. On the enclosed Form CM-1025, boxes were checked indicating that the Director contested the issues of total disability and partial disability. *Id.*.

Due to Judge Bonfanti's unavailability, the case was assigned to Judge Murty (the administrative law judge) who conducted a hearing on February 7, 1996. Claimant appeared and employer and the Director were represented by counsel. Employer objected to the admission of Dr. Rasmussen's examination into the record on the ground that the Board's remand order restricted the district director to seeking Dr. Scattaregia's opinion regarding the existence of a totally disabling respiratory or pulmonary impairment. Hearing Transcript at 8. Employer also alleged that the district director erred in failing to make a determination as to claimant's entitlement to benefits based upon the additional medical evidence submitted on remand. *Id.* at 10. Employer argued that the administrative law judge should dismiss it from the case in order to remedy the harm caused by the Director's actions. *Id.* at 10-11. The Director responded that inasmuch as employer had the opportunity to respond to Dr. Rasmussen's report, inclusion of this report in the record would not violate employer's rights. *Id.* at 14. At the close of the hearing, the administrative law judge accepted employer's evidence in response to Dr. Rasmussen's report as part of the record, conditioned upon his decision as to whether Dr. Rasmussen's report would be admitted. *Id.* at 35-36.

In a Decision and Order issued on May 31, 1996, the administrative law judge found that the Director's actions on remand violated his obligation to treat the parties in a fair manner. Decision and Order at 3. The administrative law judge determined that in order to provide a remedy, he could either exclude Dr. Rasmussen's evaluation or dismiss employer as a party to the claim. *Id.*. Noting that excluding the evidence would penalize claimant only, the administrative law judge dismissed employer as the responsible operator and remanded the case to the district director "so that it may be considered as required" under 20 C.F.R. §725.418. *Id.*. In a second Decision and

Order, issued on May 5, 1997, the administrative law judge denied the Director's request for reconsideration. The Director's appeal followed.

In his Brief In Support of Petition for Review, the Director argues that the Board should consider the propriety of the administrative law judge's nonfinal order, inasmuch as pursuant to 20 C.F.R. §725.411, employer's dismissal would be effectively unreviewable on appeal from a final judgment. The Director also contends that the administrative law judge acted beyond the scope of his authority in dismissing employer from this case, citing portions of the Act and the regulations which prohibit the Trust Fund from assuming liability in cases in which there is a responsible operator. In addition, the Director asserts that the administrative law judge premised his decision with respect to this issue upon several erroneous factual findings. Employer has responded and contends that the administrative law judge's dismissal of employer fell within the broad authority granted to the administrative law judge under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and the regulations governing the conduct of hearings.[2] The Director filed a reply brief in which he reiterated his previous contentions. Claimant has not responded to the Director's appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

As an initial matter, we hold that it is appropriate for the Board to consider the Director's interlocutory appeal of the administrative law judge's dismissal of employer as a party to this case. The administrative law judge's determination with respect to this issue meets the "collateral order" exception to the "final order" rule which typically prohibits a party from appealing any order which does not result in the final disposition of a case. *See generally Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1983). The administrative law judge's dismissal of employer constitutes a reviewable collateral order, as the administrative law judge's action conclusively determined a disputed question which is completely separate from the merits of the claim for benefits. *See Carolina Power and Light Co. v. U.S. Dept. of*

[2]In its response brief, employer also "invited" the Board to hold oral argument in this case. Employer's request for oral argument is hereby denied. 20 C.F.R. §802.306.

Labor, 43 F.3d 912 (4th Cir. 1995).[3] In addition, the administrative law judge's action would be effectively unreviewable, as the Director would be foreclosed from appealing an award of benefits by the district director on remand. Pursuant to 20 C.F.R. §725.411, only a claimant is permitted to appeal a district director's determination in cases in which there is no operator responsible for payment. *See* 20 C.F.R. §725.411; *see also Carolina Power and Light Co.*, *supra*. We will, therefore, consider the Director's appeal of the administrative law judge's dismissal of employer from the present case.

The Director maintains that the administrative law judge's action was beyond the authority granted him under the Act, the regulations implementing the Act, and the regulations concerning the powers and duties of administrative law judges. The administrative law judge apparently determined that it was within the broad discretion granted him in resolving procedural issues to dismiss employer as the responsible operator and therefore impose liability upon the Trust Fund. 1996 Decision and Order at 3; 1997 Decision and Order at 1. Employer concurs in the administrative law judge's determination and cites in support of its position the general powers an administrative law judge is permitted to exercise in order to insure that a claim is adjudicated in a manner consistent with due process. *See* 20 C.F.R. §725.351; 29 C.F.R. §§18.29 *et seq*.. Employer also refers to cases in which an administrative law judge was found to have acted properly in dismissing an employer as a responsible operator and ordering the Trust Fund to pay any benefits owed to a claimant.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's qualifying coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

We agree with the Director's position. Although an administrative law judge is afforded broad latitude in settling procedural disputes, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan*, *supra*, his or her authority is not unlimited and must be construed in the context of the relevant provisions of the Act. *See* 29 C.F.R. §18.1(a). Under the Act, the Black Lung Disability Trust Fund (Trust Fund) is generally held liable for benefits only if there is no operator who is responsible for the payment of such benefits. 26 U.S.C. §§4121(a), 9501(d)(1)(B). In the present case, employer does not argue, nor has there been any finding, that it does not meet the responsible operator criteria set forth in 20 C.F.R. §§725.491-725.493. While the Board and the United States Courts of Appeals have recognized circumstances in which dismissal of the responsible operator and imposition of liability upon the Trust Fund are appropriate, these involved cases in which the Director failed to identify and notify the proper responsible operator before the case was fully adjudicated. This omission on the part of the Director was held to have resulted in insurmountable damage to the operator's ability to defend the claim at issue, thereby violating the operator's right to due process. *See England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993); *Williams v. Humphreys Enterprises*, 17 BLR 1-126 (1993); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984); *see also Lane Hollow Coal Co. v. Director, OWCP, [Lockhart],* 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998). The facts of the present case do not accord with those of the cited cases, as employer was apprised of its status as the named responsible operator before each of claimant's applications for benefits was referred to the OALJ for a hearing. Director's Exhibits 19, 27. In addition, employer has been permitted to respond to the evidence that the Director allegedly obtained and submitted in violation of the Board's remand instructions.[4] We hold, therefore, that the administrative law judge acted beyond the scope of his authority in dismissing employer from the present case.[5] Accordingly, we vacate the administrative law judge's action in this regard.

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[4]The administrative law judge suggested that the Director, Office of Workers' Compensation Programs (the Director), breached employer's right to due process by failing to raise the issue of whether Dr. Scattaregia's report constituted a complete and credible pulmonary evaluation at the earliest opportunity. 1997 Decision and Order at 1. The Board, however, held explicitly that the Director could raise the issue for the first time on appeal. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-89-90. (1994).

[5]Inasmuch as we have determined that the administrative law judge's decision to dismiss employer and impose liability upon the Black Lung Disability Trust Fund exceeded the power granted him under the Act and the relevant regulations, we

We must also vacate the administrative law judge's decision to remand the case to the district director for consideration under 20 C.F.R. §725.418. 1996 Decision and Order at 3. As the Director asserts, contrary to the administrative law judge's finding, the district director is not required to issue a proposed Decision and Order or hold an informal conference. *See* 20 C.F.R. §§725.416, 725.418. In addition, the administrative law judge's concern regarding the district director's failure to set forth the position of the Director with respect to claimant's entitlement to benefits on remand was addressed by the district director, as he enclosed Form CM-1025 when transferring the case to the OALJ for hearing and he checked the boxes indicating that the Director contested the issues of total disability and partial disability.[6] Director's Exhibit 71.

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decline to address the Director's contention that the administrative law judge based his decision upon inaccurate factual premises.

[6]The Director acknowledges in his Brief in Support of Petition for Review that the issue of partial disability was checked in error, as this issue is relevant only in cases arising under Section 411(c)(5) of the Act, 30 U.S.C. §921(c), which concerns certain survivor's claims.

We, therefore, remand this case to the administrative law judge for consideration of the merits of entitlement based upon a weighing of all of the evidence of record,[7] including the deposition of Dr. Scattaregia, the report of Dr. Rasmussen, and the evidence submitted by employer in response. Based upon the holdings in our prior Decision and Order, when considering the merits, if the administrative law judge determines that the evidence of record supports a finding of total disability under Section 718.204(c)(1), (c)(2), (c)(3) or (c)(4), he must determine whether the evidence supportive of a finding of total disability outweighs the contrary probative evidence of record. *Hodges*, 18 BLR at 1-93-1-94. In addition, if the administrative law judge reaches the issue of whether claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b), he must determine whether claimant has established that pneumoconiosis is a contributing cause of his total disability in accordance with the standard adopted by the United States Court of Appeals for the Fourth Circuit in *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). *Hodges*, *supra*, at 1-94.

Accordingly, the Decision and Orders of the administrative law judge are vacated and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

[7]Neither Dr. Rasmussen's report nor the evidence submitted by employer in response was formally admitted by the administrative law judge. The administrative law judge must initially do so on remand.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge