BRB Nos. 98-1645 BLA
and 98-1645 BLA-A

RUSSELL J. LAMBERT	)	
	)	
Claimant-Respondent	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONESVILLE COAL PREPARATION COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
SOLAR FUEL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner/Cross-Respondent	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Dismissing Named Operator and the Decision on Motion for Reconsideration of George P. Morin, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer Solar Fuel Company and carrier Old Republic Insurance Company.

David L. Yaussy (Robinson & McElwee), Charleston, West Virginia, for employer Conesville Coal Preparation Company.

Edward Waldman (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Dismissing Named Operator and the Decision on Motion for Reconsideration (97-BLA-1124) of Administrative Law Judge George P. Morin 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). At the hearing conducted on December 5, 1997, the administrative law judge granted claimant's request to defer adjudication of the merits of this claim and the admission of post-hearing medical evidence until issuance of a preliminary order determining which of the two named employers was the responsible operator herein. On June 29, 1998, the administrative law judge issued an Order dismissing Conesville Coal Preparation Company (Conesville) as a party to this case. In his Decision on Motion for Reconsideration issued on August 26, 1998, the administrative law judge denied the relief requested by Solar Fuel Company (Solar) and found that Solar was properly designated the responsible operator herein.[1]

[1]Conesville is located within the jurisdiction of the United States Court of Appeals for the Sixth Circuit; Solar is located within the jurisdiction of the United States Court of Appeals for the Third Circuit.

The Director appeals, challenging the administrative law judge's dismissal of Conesville and urging that both employers be retained as parties through completion of the proceedings on the merits before the administrative law judge. Claimant and Conesville respond, urging the Board to reject the Director's request to reinstate Conesville as a party, to which the Director replies in support of his position. Solar has filed a "cross-appeal," challenging its designation as the responsible operator herein. The Director responds, urging dismissal of Solar's appeal as interlocutory and untimely filed.[2] Conesville responds in opposition to Solar's appeal and the Director's response.[3]

The Board's scope of review is defined by statute. The administrative law judge's findings 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).

Turning first to the Director's motion to dismiss Solar's appeal for lack of jurisdiction, the Director argues that the appeal is interlocutory and does not meet

---

[2]The Director filed a motion with the Board to dismiss Solar's appeal for lack of jurisdiction, which was denied "at this time" by Order issued on December 22, 1998. The Director renewed the motion to dismiss in his response brief.

[3]On November 2, 1998, the administrative law judge issued an Order Granting Solar Fuel Company's Motion to Hold Record in Abeyance pending appellate review by the Board. The administrative law judge indicated that, if it chose to do so, Solar was free to develop medical evidence in the interim, and that the parties could request additional time for development of medical evidence after a decision was rendered by the Board. Claimant died on June 26, 1999, and his widow, Marlene Lambert, has requested that the Board proceed with his appeal.

the collateral order exception to the final order rule. The Director additionally maintains that Solar's appeal was not timely filed pursuant to 20 C.F.R. §802.205(c), and does not constitute a cross-appeal pursuant to 20 C.F.R. §802.201(a)(2), despite its designation as such by Solar. The Director's arguments have merit. An aggrieved party has thirty days in which to appeal an administrative law judge's decision, 33 U.S.C. §921(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §802.205(a), and this time limit is jurisdictional. 20 C.F.R. §802.205(c); *see Blevins v. Director, OWCP*, 683 F.2d 139, 4 BLR 2-104 (6th Cir. 1982). In the present case, the administrative law judge denied Solar's motion for reconsideration on August 26, 1998, thus any direct appeal would be timely only if it was filed prior to September 26, 1998. Solar did not file its "cross-appeal" until October 8, 1998. While a prevailing party may challenge any adverse findings of fact or conclusions of law in the same proceeding by filing a cross-appeal within fourteen days of the date on which the first direct appeal of the case was filed, the administrative law judge's Order and the Decision on Motion for Reconsideration were not favorable to Solar. *See* 20 C.F.R. §§802.201(a)(2), 802.205(b). Inasmuch as Solar did not file a timely direct appeal, we dismiss Solar's "cross-appeal" for lack of jurisdiction. *Blevins, supra*.

Moreover, an order that leaves the question of entitlement on the merits unresolved does not constitute a final appealable order. *Youghiogheny and Ohio Coal Co. v. Baker*, 815 F.2d 422, 10 BLR 2-8 (6th Cir. 1987); *Cochran v. Westmoreland Coal Co.*, 21 BLR 1-89 (1998). The Board follows the well-established rule of federal practice forbidding piecemeal appeals on interlocutory matters. *Cochran, supra; Crabtree v. Bethlehem Mines Corp.*, 7 BLR 1-354 (1984). The collateral order exception to the final judgment rule is narrowly construed and is only applicable when the order appealed satisfies three conditions. The order must: (1) conclusively determine the disputed issue; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Baker, supra; Redden v. Director, OWCP*, 825 F.2d 337, 10 BLR 2-201 (11th Cir. 1987); *Cochran, supra*. In the instant case, Solar seeks substantive review of the administrative law judge's findings on the issue of the responsible operator herein, while the Director merely seeks reinstatement of Conesville as a party to this action until the completion of the proceedings on the merits before the administrative law judge. Although the administrative law judge's Order Dismissing Named Operator and his Decision on Motion for Reconsideration satisfy the first two conditions, the responsible operator issue is reviewable on appeal from a final judgment determining the merits of this case, thus the third condition is not satisfied with respect to Solar's appeal. *See Baker, supra*. With respect to the Director's appeal, however, the third condition is met because the dismissal of Conesville at the present time will be effectively

unreviewable on appeal from a final decision and order on the merits of the claim. The Director correctly maintains that, should benefits be awarded, *Crabtree*, 7 BLR at 1-357, would preclude the Director from proceeding against any putative responsible operator which had not been a participant in every stage of the prior adjudication. *Cochran, supra; see Collins v. J & L Steel*, 21 BLR 1-181 (1999). As the Director's interest in implementing Congress's mandate, that liability be imposed to the maximum extent feasible on the coal industry rather than the Black Lung Disability Trust Fund, can only be insured by retaining both Conesville and Solar as parties through completion of the proceedings on the merits before the administrative law judge,[4] *see Cochran, supra; see generally Old Ben Coal Co. v.*

---

[4]We reject Conesville's argument that the regulation at 20 C.F.R. §725.412(d) mandates its dismissal once the appropriate adjudication officer has determined the issue of which operator is liable. The regulation merely provides that "[i]f, in any case, there is a dispute between two or more operators as to which may be liable for the payment of benefits to the claimant, all such operators shall be notified under this section and the issue of which operator is liable shall be determined by the appropriate adjudication officer." 20 C.F.R. §725.412(d). While the administrative law judge has determined the issue of liability, the Director accurately notes that Section 725.412(d) does not obligate the administrative law judge to dismiss a

Luker, 826 F.2d 688, 10 BLR 2-249 (7th Cir. 1987), we vacate the administrative law judge's dismissal of Conesville and remand this case for the administrative law judge to reinstate Conesville as a party to this action and to adjudicate the merits of this claim.

---

putative responsible operator before the completion of the proceedings on the merits. Although claimant argues that, given the divergent economic status of the parties, it is unfair to subject claimant to further medical development by two operators when the administrative law judge has provided a factual and legal basis for the dismissal of one operator, the Director correctly maintains that there is no provision in the Act or regulations which grants claimant the right to proceed against only one putative responsible operator. Rather, Section 725.412(d) and *Crabtree v. Bethlehem Steel Corp.,* 7 BLR 1-354 (1984), contemplate an administrative law judge proceeding involving multiple operators, and the Director's reasonable interpretation of the regulation is entitled to deference. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

Accordingly, the Order Dismissing Named Operator and the Decision on Motion for Reconsideration of the administrative law judge are vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge