BRB Nos. 01-0111 BLA
and 01-0111 BLA-A

ROBERT PRICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COAL POWER CORPORATION	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Michelle S. Gerdano (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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order on Remand (97-BLA-0862) of Administrative Law Judge Donald W. Mosser, 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] This case

[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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On

is before the Board for the second time. In a Decision and Order Denying Benefits issued on May 27, 1998, the administrative law judge accepted the stipulation of the parties to twenty-one years of coal mine employment and determined that Coal Power Corporation (Coal Power) is the responsible operator in this case. Turning to the merits, the administrative law judge found that claimant is totally disabled from a pulmonary standpoint. However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis or that claimant was totally disabled due to pneumoconiosis. Accordingly, benefits were denied.

Claimant appealed and employer cross-appealed the administrative law judge's 1998 Decision and Order. The Board affirmed the administrative law judge's length of coal mine employment finding, and his findings of no pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), and his finding that claimant is totally disabled. The Board, however, vacated the administrative law judge's responsible operator determination and his finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis, as well as his finding concerning disability causation. *Price v. Coal Power Corp.*, BRB Nos. 98-1305 BLA and 98-1305 BLA-A (Oct. 29, 1999)(unpub.).

On remand, the administrative law judge weighed the medical opinion evidence and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000), and therefore, declined to address the issue of disability causation. In addition, the administrative law judge dismissed Coal Power as the responsible operator. Decision and Order on Remand.

On appeal, claimant asserts that the administrative law judge erred in weighing the medical opinions when he found that claimant failed to establish the existence of pneumoconiosis. The Director responds, urging the Board to affirm portions of the administrative law judge's weighing of the medical evidence but vacate portions of his

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August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

findings on the merits of entitlement. In its cross-appeal, the Director asserts that the administrative law judge erred by ignoring evidence in making his responsible operator determination.

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

Initially, we consider the assertions raised by claimant regarding the merits. Claimant asserts that in considering the medical opinions regarding the existence of pneumoconiosis it was inconsistent for the administrative law judge to criticize Dr. Baker's opinion because of the smoking history relied upon by the physician when, claimant alleges, every other physician relied upon similar smoking histories. Claimant also asserts that Drs. Jarboe, Powell, Myers and Broudy all opined that claimant's conditions were partly due to coal dust exposure, and that the administrative law judge mischaracterized Dr. Jarboe's opinion. Claimant maintains that bronchitis, emphysema and anthracosis were all diagnosed and all qualify as legal pneumoconiosis. Claimant also asserts that the administrative law judge's analysis does not comport with *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), and contends that because Dr. Broudy did not explain his opinion that all of claimant's deficit is due to smoking, his opinion must be given less weight under *Cornett*.

The record contains medical opinions of several physicians. In 1992, Dr. Baker examined claimant and diagnosed coal workers' pneumoconiosis, chronic obstructive airway disease with mild obstructive defect and bronchitis. Dr. Baker opined that claimant's impairment is due to his combined twenty-four years of coal dust exposure and thirty pack year history of smoking. Director's Exhibit 36. Dr. Baker examined claimant in 1993, and diagnosed coal workers' pneumoconiosis due to coal dust exposure, and chronic obstructive pulmonary disease, hypoxemia and bronchitis, all due to coal dust exposure and cigarette smoking. Director's Exhibit 12.

Dr. Myers examined claimant in 1992 and diagnosed coal workers' pneumoconiosis. Director's Exhibit 36. In Dr. Myers' deposition, he indicated that there is no way to tell how much of claimant's bronchitis was due to smoking and how much was due to coal dust exposure, but opined that it is probable that the majority of claimant's obstructive airways disease was caused by his heavy cigarette smoking. Dr. Myers diagnosed coal workers' pneumoconiosis and stated that claimant has a significant pulmonary deficit due to his history of pneumonia, his heavy cigarette usage and his dust exposure over a lifetime. Director's Exhibit 53.

Dr. Broudy examined claimant in 1994 and diagnosed chronic obstructive airways disease due to chronic asthmatic bronchitis, which he opined was due to cigarette smoking and some predisposition to asthma or bronchospasm. Dr. Broudy further opined that claimant does not have coal workers' pneumoconiosis, and that he does not have any significant pulmonary disease which has arisen from his coal mine employment. Director's Exhibit 40.

Dr. Powell, who examined claimant in 1994, opined that claimant has severe obstructive ventilatory defect with hyperinflation diagnostic of pulmonary emphysema due to his tobacco smoking, and old granulomatous disease. Director's Exhibit 51. Dr. Powell opined that claimant does not suffer from coal workers' pneumoconiosis, but diagnosed a severe obstructive ventilatory defect with hyperinflation diagnostic of pulmonary emphysema due to claimant's tobacco smoking. Director's Exhibit 59. Dr. Powell was deposed in 1996 and opined that claimant does not have coal workers' pneumoconiosis, but that claimant suffers from chronic obstructive pulmonary disease and emphysema. Dr. Powell stated "I suppose he has some deposition of coal dust" and therefore some anthracosis from his four years of underground coal mine employment. *Id*. at 24. Dr. Powell stated that claimant's chronic obstructive pulmonary disease is not due to, nor contributed to by, claimant's coal dust exposure. *Id.*

Dr. Jarboe examined claimant in 1993 and diagnosed chronic bronchitis due to claimant's history of heavy cigarette smoking, and probable pulmonary emphysema due to his history of cigarette smoking. Dr. Jarboe opined that claimant has a moderate degree of airways obstruction due to his long history of heavy smoking, and that he has significant chronic bronchitis and heavy mucous production which is contributing to his airways obstruction. Dr. Jarboe stated that claimant does not have any occupational lung disease caused by his coal mine employment. Director's Exhibit 51. Dr. Jarboe was deposed in 1995 and stated that claimant's impairment is not due to coal dust. Dr. Jarboe opined that the vast majority of claimant's FEV1 deficit is due to smoking and that a small portion of it is due to claimant's coal dust exposure, but stated that the amount of this reduction is not even clinically important. Dr. Jarboe further opined that claimant has no permanent diagnosable pulmonary condition due to his coal mine employment. Director's Exhibit 54.

In weighing the medical opinion evidence, the administrative law judge stated that the opinions of Drs. Baker, Jarboe, Broudy and Powell "merit greater deference" because of their superior qualifications. Decision and Order on Remand at 6. However, the administrative law judge discounted Dr. Baker's opinion:

because the smoking histories on which he relied not only varied, but were

> exaggeratedly low. He relied on a history of smoking one pack of cigarettes per day for 30 years in 1992, and a history of smoking one pack of cigarettes a day for 21 years in 1993. In fact, every other examining physician relied upon a smoking history of about two packs of cigarettes a day. Accordingly, I find the smoking history on which Dr. Baker relied to be much less extensive than it actually was, and this detracts from the probity of his opinion.

Decision and Order on Remand at 6. The administrative law judge accorded greatest weight to the opinions of Drs. Jarboe, Broudy and Powell, finding them reasoned and documented. In addition, the administrative law judge stated:

> I further find their opinions to be sensible given [claimant's] extensive and lengthy smoking history, his medical history which was remarkable for childhood pneumonia, and the fact that most of his coal mine employment was spent above ground, with some of it not even at the mining site.

Decision and Order on Remand at 7.

In *Cornett*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, provided direction for determining whether a medical opinion is sufficient to meet claimant's burden of establishing the existence of pneumoconiosis. The court held that when determining the credibility of medical opinions regarding the presence or absence of pneumoconiosis, the administrative law judge must consider not only whether the opinions address the medical definition of pneumoconiosis, but also the broader statutory definition of pneumoconiosis provided by the Act. When making findings on the existence of pneumoconiosis, the court advised that the administrative law judge must determine whether a physician has provided an explanation for excluding coal dust as an aggravating factor in a claimant's respiratory problems. Moreover, the court noted that under the statutory definition of pneumoconiosis, a claimant is not required to demonstrate that coal dust is the only cause of his respiratory problem, rather, he must show that he has a chronic respiratory or pulmonary impairment significantly related to or substantially aggravated by dust exposure in coal mine employment. *Cornett*, *supra*.

Claimant asserts that the administrative law judge did not consider the shortcomings of the evidence supportive of employer's position, specifically arguing that Dr. Broudy did not provide a basis for his opinion that claimant's coal dust exposure does not contribute to claimant's respiratory condition. Dr. Broudy stated "I do not believe that there has been any significant pulmonary disease or respiratory impairment which has arisen form this man's occupation as a coal worker." Director's Exhibit 40. Because the administrative law judge did not consider that Dr. Broudy did not explain the basis for

his opinion that claimant's coal dust exposure does not contribute to claimant's respiratory problems, *see Cornett, supra*, we vacate the administrative law judge's reliance upon this opinion. On remand, the administrative law judge must reconsider this opinion in light of *Cornett*.

Claimant also asserts that the administrative law judge misconstrued the opinions of Drs. Jarboe and Powell. Claimant alleges that these opinions, *see* Director's Exhibits 54, 59, support a finding of statutory pneumoconiosis.[2] On remand, the administrative law judge should consider the testimony of the physicians and determine whether it constitutes the physicians' medical opinions relevant to claimant's condition, and if so, whether it satisfies the statutory definition of pneumoconiosis. *See* 20 C.F.R. §718.201. Moreover, Dr. Powell's opinion appears to be problematic, as the physician, in his deposition, distinguished claimant's exposure to coal dust from his exposure to other dusts, particularly rock dust, in his coal mine employment.[3] The Board has recognized that "coal mine dust" includes any airborne particles generated in the extraction and preparation of coal. *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56, 1-59 (1992). On remand, the administrative law judge must consider this aspect of Dr. Powell's opinion in evaluating the evidence, in addition to determining whether this opinion is adequately explained, pursuant to the requirements of *Cornett*.

Claimant also asserts that it was inconsistent for the administrative law judge to criticize Dr. Baker's opinion because of the smoking history he relied upon when all of the other physicians relied upon a smoking history of about two packs per day. As the administrative law judge noted, in his 1992 opinion, Dr. Baker noted a smoking history of one pack per day for thirty years, and in his 1993 opinion, Dr. Baker noted a smoking history of one pack per day for twenty-one years. *See* Decision and Order on Remand at 6; Director's Exhibits 12, 36. Dr. Myers, in his 1992 opinion, noted a smoking history of two to three packs of cigarettes per day for thirty years, and indicated that claimant had

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[2] Specifically, claimant refers to Dr. Powell statement that "I cannot say with certainty that some very small percentage of the reduction of his FEV1 is not due to [claimant's coal dust] exposure," Director's Exhibit 59 at 30, and his comment that if coal dust exposure contributes to obstructive airway disease and emphysema, it is minimal. Director's Exhibit 54 at 32. Claimant also relies upon Dr. Jarboe's testimony that coal dust exposure can cause a deficit on FEV1 and that it is likely that claimant has coal dust in his lungs. Director's Exhibit 54 at 36, 41.

[3] In addressing the cause of claimant's lung disease, Dr. Powell was asked about claimant's exposure when he worked as a driller. Dr. Powell responded that "that is not coal dust....That is silica for the most part." Director's Exhibit 59 at 29. Dr. Powell did not directly address whether this exposure contributed to claimant's lung condition.

cut down to one-half pack per day. Director's Exhibit 36. Dr. Broudy examined claimant in 1994 and described a smoking history of one and one-half to two packs per day for twenty-five years, until he cut down recently. Director's Exhibit 40. In a 1994 report, Dr. Powell noted that claimant, who was forty-nine years old, started smoking at age twenty-two, smoking two to three packs per day until "five or six years ago," when he cut down to one and one-half packs per day. Dr. Powell also noted that claimant once stopped smoking for four or five months. Director's Exhibit 51. Dr. Jarboe examined claimant, whom he noted was forty-nine years old in 1993 and indicated that, at that time, claimant smoked one pack of cigarettes per day, but that claimant had previously smoked two packs of cigarettes per day. Dr. Jarboe noted that claimant started smoking at age twenty-two and summarized claimant's smoking history as a "greater than thirty pack year history of smoking." Director's Exhibit 51.

While an administrative law judge may properly discredit a medical opinion based on an erroneous smoking history, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1984), since Dr. Jarboe noted a "greater than thirty pack year smoking history" and Dr. Baker described claimant as smoking one pack of cigarettes per day for thirty years, *see* Director's Exhibits 12, 51, it is unclear whether there is a material difference in the smoking histories considered by these physicians. We, therefore, vacate the administrative law judge's discrediting of Dr. Baker's opinion on the basis of the smoking histories.

Consequently, on remand, the administrative law judge must reconsider the existence of pneumoconiosis pursuant to Section 718.202(a)(4). If the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis, he must also determine whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[4]

Inasmuch as we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we must consider the Director's assertions raised in his cross-appeal.

The Director asserts that the administrative law judge erred by ignoring evidence in making his responsible operator determination and in dismissing Coal Power as the

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

responsible operator. Specifically, the Director maintains that the administrative law judge erred by failing to consider evidence which proves that Britestar Mining Company (Britestar) is "defunct and has no assets," Director's Brief at 7, and therefore cannot provide for benefits. The Director refers to testimony in claimant's 1993 deposition regarding Britestar, which, he asserts, could, if credited, prove that Britestar's assets were dissolved, and that it cannot, therefore, provide benefits.

In considering the responsible operator issue, the administrative law judge found that claimant's most recent coal mine employment of at least one year was with Britestar, where he worked for ten months from July 30, 1988 through May 26, 1989, and for six months from May 29, 1989 until December 2, 1989. The administrative law judge found that claimant worked for Coal Power from 1974 through "late 1988 or early 1989." Decision and Order on Remand at 10. The administrative law judge then states:

> While Britestar's insurance ended July 8, 1989, just days before [claimant's] employment with it had reached one year, I note that there has been no determination that Britestar does not possess assets available for the payment of benefits. 20 C.F.R. §725.492(a)(4)(iii). Therefore, I find that Coal Power Corporation is not the properly designated responsible operator and that it and its carrier should be dismissed as parties.

Decision and Order on Remand at 11.

The Director designated Coal Power as the responsible operator. *See* Director's Exhibit 60. The regulations provide that the employer with which claimant had the most recent period of cumulative employment of not less than one year shall be the responsible operator. 20 C.F.R. §725.493(a)(1) (2000).[5] The regulations further state that:

> If there is no operator which meets the conditions of paragraphs (a)(1) or(2) of this section, the responsible operator shall be considered to be the operator with which the miner had the latest periods of cumulative employment of not less than 1 year, subject to the provisions of paragraph (a)(2) of this section and provided that the conditions of §725.492(a)(2)-(a)(4) are met.

20 C.F.R. §725.493(a)(4) (2000). In defining "responsible operator," the regulations require that the operator/employer be capable of assuming its liability for the payment of

[5] While the regulations pertaining to the designation of responsible operators have been revised, they only apply to cases filed after January 19, 2001. *See* 20 C.F.R. §725.2.

continuing benefits under this part" through purchasing insurance, self-insuring, or possessing assets "that may be available for the payment of benefits...." 20 C.F.R. §725.492(a)(4)(iii) (2000). The regulations also state that "In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part." 20 C.F.R. §725.492(b) (2000).

The administrative law judge dismissed Coal Power from liability because he found that Britestar was the employer with which claimant had the most recent period of cumulative employment of not less than one year, *see* Decision and Order on Remand at 10-11; 20 C.F.R. §725.493(a)(1) (2000), and he found that "there has been no determination that Britestar does not possess assets available for the payment of benefits." Decision and Order on Remand at 11.

In rendering his responsible operator finding, the administrative law judge considered claimant's coal mine employment history form, Director's Exhibit 2, the Social Security Earnings Administration Report, Director's Exhibit 3, a letter from Britestar's book-keeper, Director's Exhibit 5, claimant's letter of April 12, 1993 regarding Britestar, Director's Exhibit 28, claimant's answers to questions posed by the Department of Labor, Director's Exhibit 8, claimant's testimony at the August 29, 1996 hearing, Director's Exhibit 59, and claimant's November 12, 1996 deposition testimony, Director's Exhibit 59.

However, as the Director asserts, the administrative law judge failed to consider claimant's 1993 deposition testimony. Employer's Exhibit 1. In his 1993 deposition, claimant answered questions concerning the ownership and operation of Britestar. *Id.* at 15-37. Claimant explained that Britestar was owned by his father, *Id*. at 15, and that it went out of business "around December" 1989, *Id*. at 19. Claimant stated that the mine operated on leased land, *Id*. at 20-21, and that the equipment was sold to settle his father's estate, *Id.* at 20.

Claimant's 1993 deposition testimony contains evidence which, if credited by the administrative law judge, may be relevant to the issue of whether Britestar possesses assets available for the payment of benefits. Inasmuch as the administrative law judge's must consider all relevant evidence in rendering his findings, *see* Administrative Procedure Act (APA), 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); *Tucker v. Director, OWCP,* 10 BLR 1-35, 1-42 (1987), and since this evidence was not considered by the administrative law judge in rendering his responsible operator determination, we vacate the administrative law judge's responsible operator finding, including his dismissal of Coal Power. On remand, the administrative law judge must consider all of the relevant

evidence in making his responsible operator finding.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge