BRB No. 98-1627 BLA

CLYDE J. BELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NOBLE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/30/99
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

K. Keian Weld (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Jill M. Otte (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Carrier appeals the Decision and Order (98-BLA-0312) of Administrative Law Judge John C. Holmes awarding 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 found that claimant[1] established the existence of complicated pneumoconiosis and entitlement to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to benefits as of April 1, 1997, the month in which complicated pneumoconiosis was diagnosed, and that Noble Coal Company (employer) is liable for the payment of benefits. Accordingly, benefits were awarded. On appeal, carrier does not contest the administrative law judge's finding on the merits of entitlement, but contends that the administrative law judge erred in finding it liable for the payment of benefits because the administrative law judge relied upon evidence which was not a part of the record in making his finding. The Director, Office of Workers' Compensation Programs (the Director), responds, stating that he requested that the evidence in question be admitted into evidence and that the administrative law judge considered the evidence to be a part of the record even though he did not specifically admit it into the record. The Director also states that, contrary to carrier's assertions, the record contains evidence, other than the documents in question, which addresses the financial status of Maben Energy, a subsequent carrier. Claimant has not responded on appeal.[2]

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,

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[1]Claimant is Clyde Bell, the miner, whose initial claim for benefits was filed on May 28, 1992 and dismissed without prejudice on December 10, 1993. Director's Exhibit 28. Claimant filed the instant claim on March 11, 1997. Director's Exhibit 1.

[2]We affirm the administrative law judge's determination that claimant established entitlement to benefits by invoking the irrebuttable presumption of total disability under 20 C.F.R. §718.304, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Carrier's sole argument on appeal is that the administrative law judge erred in relying upon evidence submitted by the Director regarding the financial status of Maben Energy, a subsidiary of Adventure Resources, which is claimant's most recent carrier of at least one year. Prior to the hearing, counsel for the Director submitted a letter to the administrative law judge, dated June 10, 1998, in which he stated that the Director would not be represented by counsel at the hearing. He further indicated that because the West Virginia Coal Workers' Pneumoconiosis Fund (carrier) had not received an answer to its query to the district director regarding the status of the responsible operator issue, the Director was providing a response in this correspondence. Attached to the letter were documents, marked Director's Exhibits 30-32, pertaining to Maben Energy's bankruptcy proceedings and loss of certification as a self-insurer. Counsel requested in a footnote that these exhibits "be included in the record of this case." Letter at 2 n.3. Counsel further suggested that if the documents could not be admitted into the record, the administrative law judge could take judicial notice of them pursuant to 29 C.F.R. §18.45. *Id.*

At the hearing, which was held on June 18, 1998, Mr. Ronald Gurka appeared on the Director's behalf, stating that inasmuch as his presence was required at a prior hearing that day, it was convenient for him to appear at the hearing in this case. Hearing Transcript at 5-6. The administrative law judge indicated that the documents forwarded to him by the Director were labeled Director's Exhibits 1-29 and that it was his duty to admit this evidence. *Id*. at 6. Because there was no objection from any of the parties, the administrative law judge made Director's Exhibits 1-29 part of the record. *Id.* at 7. At the administrative law judge's request, counsel for the Director proceeded to discuss the Director's position that Maben Energy could not be designated the responsible operator due to its insolvency. Counsel for carrier replied that "I'm not sure there's any bankruptcy documents *in the record presently* to substantiate that claim." *Id*. at 9 (emphasis supplied). Counsel for the Director responded that "attached to my letter there are some documents that, as I think of it now, it may be a good idea to make them part of the record." *Id*. Without any comment from the administrative law judge indicating that he recognized counsel's "idea" as a motion for admission of the documents, counsel then described the documents and how they supported a determination that Maben Energy could not be found liable for the payment of benefits. Hearing Transcript at 9-11. Carrier's attorney stated that "based upon the 29 Director's Exhibits as they

are admitted presently," that Maben Energy is the properly designated responsible operator. Hearing Transcript at 11.

The two opposing attorneys then engaged in a discussion of whether it was carrier's or the Director's burden to prove that Maben Energy is insolvent. Counsel for the Director cited the documents at issue in support of his argument that the Director fulfilled his obligation to inquire into the status of any potential responsible operators and correctly named employer as the responsible operator in this case. The administrative law judge interjected that employer would have to obtain evidence disproving Maben Energy's inability to assume liability for the payment of benefits. *Id*. at 14-18; *see also id*. at 38. Carrier's counsel then rejected the administrative law judge's attempt to obtain a stipulation on the responsible operator issue. *Id*. at 21-22. The hearing closed without the administrative law judge formally admitting Director's Exhibits 30-32 into the record. The administrative law judge left the record open for thirty days to permit the submission of additional medical evidence and further suggested that employer submit evidence pertaining to Maben Energy's solvency. *Id*. at 38.

In his Decision and Order, the administrative law judge noted that Adventure Resources and its affiliated and subsidiary companies filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in December of 1992. The administrative law judge did not identify where in the record this information was contained, but this appears to be information included in Director's Exhibit 14. The administrative law judge then stated that:

> According to its well documented pre-hearing brief, filed June 10, 1998, the Director contends that neither Adventure Resources, Maben Energy, nor any of its affiliates or subsidiary companies is capable of assuming liability for the payment of benefits by any means set forth in 20 C.F.R. 725.492(a)(4)...

Decision and Order at 4. The administrative law judge also stated that the Director complied fully, if not exhaustively, in its obligation to name and pursue those parties that might be liable for payment under the Act. Decision and Order at 5. The administrative law judge then concluded that the Director properly named employer as the responsible operator. *Id.*

Carrier contends on appeal that the administrative law judge's reliance upon the Director's June 10, 1998 submission constitutes reversible error because the documents were not made a part of the formal record. In support of this argument, carrier also notes that the remaining evidence of record, Director's Exhibits 1-29,

does not contain any reference to Maben Energy's financial status. This statement is incorrect. Director's Exhibit 14 consists of a computer print-out dated June 20, 1997, in which it is noted that "Adventure Resources has filed under Chapter 11 of the Bankruptcy Code[.] Maben Energy is included under that filing." Director's Exhibit 14. As carrier contends, however, the administrative law judge erred in relying on Director's Exhibits 30-32 to find that employer is the properly designated responsible operator without formally making these exhibits part of the record.[3]

Pursuant to 20 C.F.R. §725.456(b)(1), in order to be admitted into the record, documentary evidence must be exchanged at least twenty days prior to the date of the hearing. 20 C.F.R. §725.456(b)(1). Evidence which is not submitted in accordance with Section 725.456(b)(1) cannot be made part of the record unless the parties consent, in writing, to its admission or the administrative law judge finds that good cause existed for failure to comply with the twenty-day rule. 20 C.F.R. §725.456(b)(2). In the present case, inasmuch as the administrative law judge did not make a good cause determination, Director's Exhibits 30-32 were not admitted on this ground. Regarding the issue of consent, the Director maintains that in light of the fact that carrier did not raise the timeliness issue at the hearing, it waived any objection to the admission of the documents at issue. This contention is without merit. Section 725.456(b)(2) provides that waiver of the twenty-day rule must be provided in writing. *Id*. Because written consent was not forthcoming from carrier, carrier did not waive any objection to the admission of Director's Exhibits 30-32 on the ground that they were exchanged less than twenty days before the date of the hearing.

[3]In his Decision and Order, the administrative law judge stated that it is unlikely that Maben Energy would have sufficient assets to assume liability for the $8,000,000 in black lung benefits estimated by the Director, Office of Workers' Compensation Programs, as being owed. Decision and Order at 4. While Director's Exhibits 30-32 indicate that there is an unsecured priority claim in that amount against Maben Energy, there is nothing is Director's Exhibit 14 concerning the existence of such a claim. The document in Director's Exhibit 14 merely indicates that Maben Energy's parent company filed for Chapter 11 reorganization and that Maben Energy was included in the filing. Director's Exhibit 14.

We must, therefore, vacate the administrative law judge's finding that employer is the properly designated responsible operator and remand the case for the administrative law judge to determine, pursuant to Section 725.456(b)(2), whether good cause existed for the Director's failure to comply with the twenty-day rule. If the administrative law judge finds that the Director has not demonstrated good cause, he must exclude Director's Exhibits 30-32 and either remand the claim to the district director for consideration of such evidence or reconsider the responsible operator issue in light of the evidence contained in Director's Exhibits 1-29. *See* 20 C.F.R. §725.456(b)(2). In the alternative, the administrative law judge may consider whether he can take judicial notice of these documents under 29 C.F.R. §18.45.

Accordingly, the Decision and Order of the administrative law judge is affirmed in part and vacated in part and the case is remanded to the administrative law judge for
further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge