

BRB Nos. 94-3686 BLA
and 94-3686 BLA-A

BONNIE C. PORTER-DONAHUE)
(Widow of HARRISON B. PORTER))

Claimant-Respondent)

v.)

COEBURN TRUCKING COMPANY)

and)

OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:

Employer/Carrier-)

Respondents)

Cross-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Petitioner)

DECISION and ORDER

Appeal of the Decision and Order of Sheldon R. Lipson, Administrative
Law Judge, United States Department of Labor.

Michael J. Pollack (Arter & Hadden), Washington, D.C., for employer.

Barry H. Joyner (Thomas S. Williamson, Jr., 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:

The Director, Office of Workers' Compensation Programs (the Director) appeals, and employer cross-appeals, the Decision and Order (92-BLA-1613) of Administrative Law Judge Sheldon R. Lipson, transferring liability for the payment of benefits to the Black

Lung Disability Trust Fund (Trust Fund) 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 determined that the miner's¹ claim was subject to transfer to the Trust Fund pursuant to 20 C.F.R. §725.496. Accordingly, he dismissed as parties all named employers and carriers.²

On appeal, the Director contends that the administrative law judge erred in excluding relevant evidence on the transfer issue and in finding that liability on the miner's claim transferred to the Trust Fund. Employer, on cross-appeal, urges affirmance of the administrative law judge's Decision and Order, and seeks to preserve for future proceedings those issues controverted in this case and not decided by the administrative law judge. Claimant has not responded to 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director contends that the administrative law judge erred in finding the evidence of record sufficient to establish that the miner's claim had been denied prior to March 1, 1977. Director's Brief at 4. The administrative law judge found that the only evidence addressing whether the miner's claim was denied prior to March 1,

¹The miner is Harrison B. Porter who filed a claim for benefits on September 16, 1974. Director's Exhibit 1. The miner died on April 21, 1986, and claimant, Bonnie C. Porter-Donahue, the miner's widow, filed a survivor's claim on August 31, 1987. Director's Exhibits 19, 21.

²The named employers are Top Notch Coal Company, Bull Run Coal Company, and Coeburn Trucking Company. The named carriers are Rockwood Insurance Company, Nationwide Insurance Company, and Old Republic Insurance Company.

1977 was a letter written by the miner's daughter, Kathy (Porter) Buchanan, to the Department of Labor (DOL) on May 5, 1992. Decision and Order at 3; Director's Exhibit 166. In this letter, the miner's daughter states: "My Dad tried to get his Black Lung in 1974 and 1975, but he was denied even though he had complicated pneumoconiosis at that time. . . . So when he was turned down for black lung benefits in 1975, he didn't fight it." Director's Exhibit 166. Regarding the letter, the administrative law judge stated: "To be sure, this would not be as probative as the Department's dated denial letter, itself. Regrettably, that does not appear to be among the documents of record." Decision and Order at 3.

The Director argues that the administrative law judge erred in relying on the letter because he failed to (1) assess the letter's credibility, (2) consider that the letter provides no basis for the daughter's knowledge of the fact which she asserts, and (3) address the letter's self-serving nature. Director's Brief at 8-9. As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Further, the weight to be accorded to the evidence and determinations concerning credibility are within the purview of the administrative law judge. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). As the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated: "The administrative law judge is in a better position to assess the weight and sufficiency of the evidence than either the Board or this Court." *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1190, 7 BLR 2-202, 2-208 (4th Cir. 1985).

In this case, the administrative law judge admitted the letter into the record without objection and permissibly found it to be credible and sufficient to support a finding that the miner's claim was finally denied in 1975. Hearing Transcript at 60; Decision and Order at 3-4; see *Mabe, supra*; *Kuchwara, supra*. The administrative law judge stated that the letter would not be as probative as a dated denial letter, but he did not find that the letter was not probative as to the issue in question. Decision and Order at 4. Thus, we reject the Director's contentions regarding the administrative law judge's treatment of this letter and affirm his credibility determination. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

The Director next contends that the administrative law judge erred in relying on DOL's Form CM-1088 in determining that the miner's claim had been denied. Director's Brief at 7. The Director states that the administrative law judge's finding was "based primarily, if not exclusively," on this form letter, which notified the miner that the DOL was reconsidering his claim under the 1977 Amendments. Director's Brief at 7; Director's Exhibit 18.

Contrary to the Director's contention, the administrative law judge stated that the only evidence on the issue of whether the claim was denied prior to March 1, 1977 is the letter written by the miner's daughter. Decision and Order at 3. Therefore, the administrative law judge did not rely on the form letter in finding that the miner's claim was denied prior to March 1, 1977.

While the administrative law judge stated that the letter dated July 2, 1980 indicated that the claim had already been

considered and denied, and the Board has held that Form CM-1088³ does not constitute a denial, see *Etzweiller v. Cleveland Brothers Equipment Co.*, 8 BLR 1-172 (1985), such error is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the administrative law judge provided a valid alternative rationale in relying on the 1992 letter from the miner's daughter, see *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), to find that the claim was denied prior to March 1, 1977 and the language of the CM-1088 letter does not contradict that of the daughter's letter. Decision and Order at 3-4; Director's Exhibits 18, 166. Thus, we reject the Director's contentions regarding the administrative law judge's treatment of the form letter.

The Director next contends that the administrative law judge erred in stating that counsel for the Director conceded at the hearing that the miner's claim was in denial status as of March 1, 1978. Director's Brief at 7, n. 6. The Director argues that counsel's statement was based on her erroneous belief that the miner had filed a Part B claim with the Social Security Administration instead of a Part C claim, and that this explanation was pointed out to the administrative law judge in the post-hearing briefs. *Id.* The administrative law judge considered counsel's statements at the hearing and counsel's explanation in the post-hearing brief and permissibly found that counsel conceded that the miner's claim was in denial status as of March 1, 1978. Decision and Order at 2, 4; Hearing Transcript at 42-43; Director's Post-Hearing Brief at 2; see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1980); *Mabe, supra*; *Kuchwara, supra*. Thus, we reject the Director's contention.

³The form letter states that the Department of Labor is "reconsidering" the claim under the 1977 Reform Act and that claimant has the right to submit additional medical evidence. Under the 1977 Amendments, all pending and denied claims were to be reconsidered; the form letter does not indicate whether the claim to be reconsidered was either pending or denied and thus is not relevant to the issue. See *Etzweiller, supra*.

Finally, the Director contends that the administrative law judge abused his discretion in refusing to re-open the record to admit evidence which was proffered with the Director's post-hearing brief to respond to the transfer issue. Director's Brief at 10. Specifically, the Director argues that the issue was raised for the first time at the hearing, that the administrative law judge allowed the Director the opportunity to respond post-hearing, and that part of his response is evidence, especially the Notice of Review, demonstrating that the miner's claim was not denied prior to March 1, 1977. Director's Brief at 10-12.

Contrary to the Director's contention, the administrative law judge noted that he had made it "abundantly clear" at the hearing that he intended to close the evidentiary record at that time and "bring clo[s]ure to a claim that dates back to 1974 which, in the course of its tortuous history, was remanded on three separate occasions by administrative law judges because of a failure to fully develop evidence." Decision and Order at 2, n. 1.

Further, at the hearing, the administrative law judge engaged in a discussion of the transfer issue with the Director's counsel and the other counsel of record. Hearing Transcript at 41-51. During this discussion, the Director's counsel stated that "there is no evidence that we have not produced. I want to make that clear." Hearing Transcript at 48. At the end of this discussion, the administrative law judge stated:

Any decision made in this matter will be based solely on the record made at this hearing. Any papers, documents or exhibits previously submitted to or filed with the Deputy Commissioner are not a part of this record at this time. Any such paper, document or exhibit must be introduced into evidence at this hearing if anyone wishes it to be a part of the record.

Hearing Transcript at 51-52.

The Board has held that the administrative law judge is afforded broad discretion in dealing with procedural matters and may refuse to admit post-hearing evidence. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985); *Conn v. White Deer Coal Co.*, 6 BLR 1-979 (1974). While Section 725.497(b) provides that where the issue of the transferability of the claim cannot be resolved by agreement of the parties and the evidence of record is not sufficient for a resolution of the issue, the hearing record may be re-opened or the case remanded, in this case the administrative law judge

permissibly found the only probative evidence of record sufficient to resolve the transfer issue. See discussion, *supra*.

Inasmuch as the administrative law judge made it clear that he would close the record after the hearing, and Director's counsel failed to proffer any relevant evidence⁴ at that time, we hold that the administrative law judge acted within his discretion in refusing to re-open the record post-hearing. See *Hensley v. Grays Knob Coal Co.*, 10 BLR 1-88 (1987); *Thomas v. Freeman United Coal Mining Co.*, 6 BLR 1-739 (1984). Thus, we reject the Director's contentions and affirm the administrative law judge's finding that liability for the payment of benefits transfers to the Trust Fund pursuant to 20 C.F.R. §725.496.

Accordingly, the administrative law judge's Decision and Order transferring liability for the payment of benefits to the Trust Fund is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁴We note that the excluded Notice of Review and accompanying transfer analysis are dated June 9, 1987. Director's Exhibit 168-170. We also note that Director's counsel offered no explanation for why the Notice of Review and transfer analysis were not submitted for admission into the record prior to the hearing. 20 C.F.R. §725.456.