

## PART III

### PROCEDURAL ISSUES

#### C. PAYMENT OF BENEFITS

##### 2. UNDER THE 1981 AMENDMENTS TO THE ACT

###### d. Procedural Issues Involving Transfer of Liability

Under 20 C.F.R. §725.497(b), the Office of Workers' Compensation Programs (OWCP) is required to review each claim to determine whether it is affected by the transfer provisions. Once the district director has performed this duty, it is reasonable to assume that all relevant facts have been examined and employer must present clear evidence to the contrary in order to overcome a finding that the claim does not transfer. ***Krecota v. Rochester & Pittsburgh Coal Co.***, 8 BLR 1-234 (1985), *aff'd on this issue*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); ***Vance v. Peter Fork Mining Co.***, 6 BLR 1-1226 (1984). Where one of the parties has submitted "new evidence" to the Board with regard to the issue of transfer, *i.e.*, evidence that has not been made a part of the record in the proceeding below, the Board will remand the case to the district director only if the new evidence needs to be interpreted by a fact-finder. ***Jarvis v. Barnes and Tucker Coal Co.***, 8 BLR 1-299 (1985); ***Stallings v. Mulga Coal Co.***, 7 BLR 1-807 (1985).

#### CASE LISTINGS

[Notice of Review document prepared by OWCP does not constitute evidence but merely is inter-office memorandum] ***Krysik v. Harmar Coal Co.***, 6 BLR 1-1167 (1984).

[while 1981 Amendments place no burden on Director to establish non-existence of denial, Director must determine whether "denial" has taken place; transfer precluded if Director finds no indication of "denial" unless employer establishes otherwise - not reasonable to assume from silent record that claim was denied by DOL] ***Bartley v. L & M Coal Co.***, 7 BLR 1-243 (1984).

[Seventh Circuit held that Director could contest fact-finder's award and benefit from evidence developed by dismissed employer notwithstanding prior support of award and objection to admission of the evidence; Court stated "there is nothing like the prospect of financial loss to concentrate the mind"] ***Hardisty v. Director, OWCP***, 776 F.2d 129 (7th Cir. 1985); *cf.* ***Patellos v. Director, OWCP***, 7 BLR 1-661 (1985).

[claimant's affidavit that he does not recall receiving election card from SSA must be weighed against contrary record evidence, *i.e.*, Notice of Review, that election card was sent to claimant but there is no record of its return] ***Kinder v. Kaiser Steel Corp.***, 8 BLR 1-253 (1985).

[Third Circuit agreed with Director that since claim was in approval status at time of passage of 1981 Amendments, liability transferred as Director had not opposed entitlement] ***Theakston v. Director, OWCP***, No. 85-3412 (3d Cir. Dec 2, 1985)(unpub. order).

### DIGESTS

The Board found that even if claimant had made a valid election for Section 435 review of his denied Part B claim, the operation of Department of Labor's regulations pertaining to the payment of duplicate claims would preclude transfer because the Part B claim, following election of Section 435 review, would merge *into* a pre-Reform Act Part C claim which claimant had filed. This Part C claim, which "survived" the merger, was not denied prior to March 1, 1977, and thus did not have a procedural history which would support transfer. ***Chadwick v. Island Creek Coal Co.***, 7 BLR 1-883 (1985), *aff'd*, 8 BLR 1-447 (1986)(en banc recon.); see also ***Bolling v. Old Ben Coal Co.***, 8 BLR 1-133 (1985).

Board vacates administrative law judge's finding of an election by claimant. The Office of Workers' Compensation Programs issued a Notice of Review which indicated that an election card had been mailed to claimant but not returned; employer did not present evidence establishing an election. ***Krecota v. Rochester & Pittsburgh Coal Co.***, 8 BLR 1-234 (1985), *aff'd on this issue*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989).

Although no letter denying the miner's claim was in the record, a computer printout from the Black Lung Information System indicated that a denial letter has been issued. Since this information was in the Director's control, the Board held that the Director had the burden to disprove the existence of the denial or to show that the computer printout was inaccurate. As the Director presented no evidence to meet his burden, the Board affirmed the administrative law judge's findings that a denial existed and that it supported transfer of liability to the Trust Fund pursuant to the 1981 Amendments. ***Persinger v. North American Coal Co.***, 9 BLR 1-18 (1986).

The Sixth Circuit dismissed the case for lack of jurisdiction and held that the Board's order which decided the transfer issue only, and left the question of entitlement on the merits as an unresolved issue, was not a final appealable order. ***The Youghiogeny & Ohio Coal Co. v. Baker***, 815 F.2d 422, 10 BLR 2-8 (6th Cir. 1987).

Claimant's vague statements regarding his mailing of the election card and the dates of the mailing are insufficient evidence to establish that claimant did in fact return the election card by mail within the prescribed time period as required for transfer of liability to the Trust Fund. The Board remanded the case to the administrative law judge for the development of additional evidence concerning the election card issue, which was relevant to whether a later claim could be merged with an earlier claim and thus whether the transfer of liability provisions applied regarding liability for attorney fees. The Board indicated that, on remand, the administrative law judge may seek submission of the original SSA file, for information pertinent to the election card issue. **Messick v. Alfred Coal Co., Inc.**, 10 BLR 1-112 (1987)(en banc), *aff'g on recon.*, 8 BLR 1-226 and 13 BLR 1-41 (1985).

The Board held that because claimant's Part C survivor's claim was approved prior to the miner's claim and because claimant's survivor's claim is not subject to transfer under the 1981 Amendments, Section 725.497(f) precludes relieving employer of liability for payment of claimant's Part C claim, even if the miner's claim is ultimately approved. Department of Labor's failure to comply with Section 727.106, which requires the Department of Labor to review an adjudication of claims transferred from the Social Security Administration, does not relieve employer of liability for payment of claimant's Part C claim. Section 725.497(f) does not state any exceptions, not even for good cause. Board therefore refused to remand the Part C survivor's claim for consolidation with the miner's Part B claim. **Patton v. Earl Patton Coal Co.**, 9 BLR 1-164 (en banc recon.), *aff'd*, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988).

The Board held that the administrative law judge erred in dismissing employer as the responsible operator under the transfer provisions of the Black Lung Benefits Amendments of 1981 where claimant's Part B and initial Part C claims had been finally denied and administratively closed after one year when claimant took no further action, and the only claim still "alive" and pending adjudication before the administrative law judge is claimant's duplicate Part C claim, which was filed on August 12, 1981. **Hagerman v. Island Creek Coal Co.**, 11 BLR 1-116 (1988).

Administrative law judge may find "good cause" under Section 410.704(d) for *failure* to file an election card for Section 435 review of denied Part B claim; Board rejects Director's view that only a late filing may be excused thereunder. The Board noted that the court in **Old Ben Coal Co. v. Luker**, 826 F.2d 688, 10 BLR 2-249 (7th Cir. 1987) rejected the theory of merger of claims stated by the Board in **Chadwick v. Island Creek Coal Co.**, 7 BLR 1-883 (1985), under which Part B claims merge into Part C claims, thus losing their status as denied claims. The Board nevertheless affirmed transfer of liability in this Seventh Circuit case where Part B claim was denied before March 1, 1978, "good cause" was found for failure to elect review, and entitlement ultimately was found to be established by the Department of Labor district director. **Robertson v. Peabody Coal Co.**, 11 BLR 1-120 (1988).

The Sixth Circuit held that employer was entitled to transfer liability to the Trust Fund for the claimant's reopened claim where claimant did not receive an election card. The court held that where claimant has failed to receive an election card, that claimant's presentation of the issue or the operator's raising of the transfer of liability issue at a formal hearing suffices as a legitimate filing of a Part B claim. **Director, OWCP v. Quarto Mining Co. [Bellomy]**, 901 F.2d 532, 13 BLR 2-435 (6th Cir. 1990).

5/95