

BRB No. 99-1193 BLA

MELVIN D. WEIR )  
 )  
 Claimant )  
 )  
 v. )  
 )  
 LESCO CORPORATION )  
 )  
 and )  
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 ROCKWOOD CASUALTY )  
 INSURANCE COMPANY )  
 )  
 Employer/Carrier )  
 )  
 and )  
 )  
 GAELIC COAL CORPORATION )  
 )  
 and )  
 )  
 INSERVCO INSURANCE SERVICE, )  
 INC. )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED) STATES DEPARTMENT )  
 OF LABOR )  
 )  
 Respondent )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Paul K. Paterson (Mascelli & Paterson), Scranton, Pennsylvania, for Gaelic Coal Corporation.

Jeffrey S. Goldberg (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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer, Gaelic Coal Corporation (Gaelic), appeals the Decision and Order (98-BLA-0939) of Administrative Law Judge Lawrence P. Donnelly holding employer responsible for the payment of 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, after considering all of the contradictory evidence of record, determined that claimant established ten years of qualifying coal mine employment.<sup>1</sup> Decision and Order at 3-6. In addressing the responsible operator issue, the administrative law judge found that claimant worked for less than a cumulative year with Olenick Brothers Coal Company, P & C (Pavlick and Chiccini) Coal Company and Pine Hill Coal Company/Lensco Corporation and that Weir Coal Company was not capable of assuming liability. Decision and Order at 6. Consequently, the administrative law judge found that these companies could not be responsible for the payment of benefits in this claim and subsequently dismissed Lensco Corporation from the case. Decision and Order at 6-7. The administrative law judge then concluded that the evidence of record indicated that claimant last worked for Gaelic (hereinafter employer) in early 1985 and that claimant's last day of employment was covered by an insurance policy. Decision and Order at 7. Accordingly, employer was held to be the responsible operator in this claim. On appeal, employer contends that the administrative law judge erred in failing to consider all of claimant's testimony and in failing to make a definite determination as to the date of claimant's last coal mine employment with employer. Claimant has not responded in the

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<sup>1</sup>Claimant, Melvin D. Weir, filed this claim for benefits on May 30, 1997. Director's Exhibit 1. The named responsible operators sought to have the case bifurcated and the administrative law judge granted this motion on September 3, 1998. Decision and Order at 2. At the formal hearing held on January 14, 1999, the sole issues were the length of claimant's coal mine employment and whether any of the named employers were responsible for the payment of benefits in this case. Director's Exhibits 38, 39; Decision and Order at 2. The issues of entitlement were reserved for adjudication at a later date. Director's Exhibit 39; Decision and Order at 2.

instant appeal. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that a remand is required.<sup>2</sup>

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 the 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).

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<sup>2</sup>The administrative law judge's length of coal mine employment determination as well as his findings that Olenick Brothers Coal Company, P & C (Pavlick and Chiccini) Coal Company, Pine Hill Coal Company/Lensco Corporation and Weir Coal Company could not be responsible for the payment of benefits in this claim, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends, on appeal, that the administrative law judge erred in finding that Gaelic and P & C (Powers and Culpit) Coal Company (P & C) “became one” as the administrative law judge failed to consider claimant’s testimony and as this finding is not supported by any evidence in the record. We agree. The administrative law judge, in the instant case, determined that Gaelic became affiliated with P & C and that the insurance records indicate that the companies became one as the form indicates that the insurance coverage is for P & C/Gaelic Coal’s policy of June 14, 1985 to October 6, 1985.<sup>3</sup> Decision and Order at 4. However, the record does not contain the actual insurance policy but only a statement by the Pennsylvania Insurance Department indicating that the named insured was P & C/Gaelic Coal and that the policy was in effect from June 14, 1985 to October 6, 1985. Director’s Exhibit 34. Further, claimant, one of Gaelic’s owners, testified that P & C and Gaelic did not merge. Rather, P & C was considering purchasing Gaelic but this purchase never occurred and there was no other relationship between the two companies. Director’s Exhibit 40; Hearing Transcript at 23, 33-35. Under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. Although the administrative law judge is empowered to weigh the evidence, in the instant case, other than reviewing a statement by the Pennsylvania Insurance Department, he has provided no specific indication that he also considered the testimony of claimant on this issue. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). We therefore vacate the administrative law judge’s finding that P & C and Gaelic became one and that Gaelic was insured from the period of June 14, 1985 to October 6, 1985 and remand this case to the administrative law judge to specifically address claimant’s testimony on this issue.

Employer further contends that the administrative law judge erred in failing to find that claimant was employed by Gaelic until December 1985. Employer argues that because Gaelic’s insurance policy expired in May 1985, it cannot be held liable for payment of benefits. The administrative law judge, in the instant case, credited claimant with five years of coal mine employment with Gaelic from 1979 through early 1985. Decision and Order at 4. He considered claimant’s testimony that he could have done reclamation work through the summer and fall of 1986 and that he was paid in cash. The administrative law judge considered the 1986 and 1987 tax returns for Gaelic which showed that the corporation was

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<sup>3</sup>Employer does not challenge on appeal the administrative law judge’s finding that Gaelic Coal Corporation was insured by Rockwood Casualty Insurance Company, herein represented by Inservco Insurance Services due to the insolvency of Rockwood, for the period of May 7, 1984 to May 1, 1985. Employer’s Brief at 2-3; *Skrack, supra*.

still in existence with assets and liabilities but also indicated that there were no expenses for employees, subcontractors, fuel, oil, or other operating supplies. The administrative law judge properly concluded that this documentary evidence did not support the speculation that claimant performed reclamation work for Gaelic in 1986 and 1987. Decision and Order at 4; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Thus, the administrative law judge concluded that claimant was employed by Gaelic through early 1985. However, as employer correctly asserts, claimant also testified that he did reclamation work for Gaelic in December 1985. Director's Exhibit 40. Additionally, the administrative law judge noted that the tax returns for Gaelic for 1984 and 1985 showed expenses for employee wages, subcontractors, fuel, oil and operating supplies which can be inferred to be related to reclamation work. Decision and Order at 4. Consequently, we vacate the administrative law judge's determination that claimant was employed by Gaelic through early 1985 and remand the case for the administrative law judge to specifically consider claimant's testimony and to make a specific determination as to the date that claimant last worked for Gaelic and if Gaelic had black lung insurance coverage at that time. *Fetterman, supra; McCune, supra.*

Accordingly, the administrative law judge's Decision and Order holding employer liable for the payment of benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge