

BRB No. 88-2101 BLA

ROBERT ASHBY)
)
 Claimant)
)
 v.)
)
 OAKWOOD RED ASH COAL)
 CORPORATION, INCORPORATED)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order, Denial of Motion for Reconsideration, Denial of Director's Second Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney Fees of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Irene B. Wozny (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, 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: SMITH and DOLDER, Administrative Appeals Judges, and FEIRTAG, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the
*Sitting as a temporary Board member by designation
pursuant to the Longshore and Harbor Workers' Compensation Act as amended in
1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Director), appeals the Decision and Order, the Denial of Motion for Reconsideration, the Denial of Director's Second Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (84-BLA-6125) of Administrative Law Judge Frank D. Marden awarding medical benefits and attorney fees 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 credited claimant with thirty years of qualifying coal mine employment, found that claimant had established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(a)(4), and found that the

evidence had failed to establish rebuttal of this presumption pursuant to 20 C.F.R.

§727.203(b). Accordingly, benefits were awarded. The administrative law judge

further found, however, that employer had been improperly designated as the

responsible operator pursuant to 20 C.F.R. §§725.493(a)(1) and 725.701A(f).

Consequently, the administrative law judge transferred liability for payment of

medical benefits to the Black Lung Disability Trust Fund (Trust Fund). The Director

appeals, contending that the administrative law judge erred in determining that

employer was not the responsible operator herein, and erred in holding the Trust

Fund liable for payment of medical benefits and attorney fees. Employer responds,

urging affirmance. Claimant has not participated in this appeal.¹

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. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

¹ The administrative law judge's findings under 20 C.F.R. §727.203 and with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

The Director contends that the administrative law judge failed to address all of the relevant evidence of record in determining that employer is not the responsible operator pursuant to Section 725.493(a)(1) and (a)(2)(i), and thus failed to comply with the requirements of the 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), 30 U.S.C. §932(a). We agree. The administrative law judge found that claimant's Social Security Administration (SSA) records documented only one quarter of employment with employer, rather than the requisite minimum of one year of cumulative employment, and thus concluded that employer did not qualify as the responsible operator. 20 C.F.R. §725.493(a)(1); see Decision and Order at 8. However, Section 725.493(a)(2)(i) provides in pertinent part that if an operator of a mine on or after January 1, 1970, transferred such mine or substantially all of the assets thereof to another operator, such successor operator shall be liable for all benefits which would have been payable by the prior operator. 20 C.F.R. §725.493(a)(2)(i). The Director argues that the administrative law judge did not consider the complete SSA records, which indicate that claimant worked for L. M. Colley Coal Company from 1965 through the first quarter of 1971, the period immediately preceding claimant's employment with employer; an order issued by the Industrial Commission of Virginia, requiring "Jewell Coal & Coke Company (L. M. Colley Coal Company)" to make a settlement payment to claimant; or claimant's

testimony indicating that he last worked for Jewell Smokeless Coal Company, which was also known as Oakwood Red Ash [employer]. See Hearing Transcript at 20; Director's Exhibits 5, 32 at 3. The Director contends that this evidence, if fully credited, establishes that said companies are either the same mining concern under different names, or that employer is the successor operator of those companies. See 20 C.F.R. §725.493(a)(2)(i); Ridings v. C & C Coal Co., Inc., 6 BLR 1-227, 1-231 (1983). As the administrative law judge failed to address all the relevant evidence in identifying the responsible operator herein, we vacate his findings under Section 725.493(a)(1), and remand this case for the administrative law judge to consider the evidence on this issue.² We also vacate the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees as it is premature.

Accordingly, the administrative law judge's Decision and Order, Denial of Motion for Reconsideration and Denial of Director's Second Motion for Reconsideration are affirmed in part, vacated in part, and this case is remanded for

² Contrary to the Director's arguments contained in the first and second motions for reconsideration, the issue of whether claimant had at least one year of cumulative employment with employer was properly before the administrative law judge for consideration, inasmuch as employer generally contested its status as responsible operator. See Director's Exhibits 10, 21, 22, 33; see generally Carpenter v. Eastern Associated Coal Corp., 6 BLR 1-784 (1984). Further, the administrative law judge acted within his discretion in refusing to consider evidence which was not contained in the record and in refusing to admit post-hearing evidence into the record as it was untimely submitted. See Itell v. Ritchey Trucking Co., 8 BLR 1-356, 1-359 (1985).

further consideration consistent with this opinion. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is vacated.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge