

BRB No. 98-1274 BLA

CLYDE BREEDING)	
)	
Claimant-Respondent)	
)	
v.)	
)	
COLLEY & COLLEY COAL COMPANY)	DATE ISSUED:
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Award of Benefits and Denial of Employer's Motion to Remand of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington, Schelin & Herrell), Bristol, Virginia, for claimant.

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

Cathryn Celeste Helm (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 appeals the Decision and Order on Remand - Award of Benefits and Denial of Employer's Motion to Remand (87-BLA-3185) of Administrative Law Judge

Richard T. Stansell-Gamm 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). This case has a lengthy procedural history. In his initial Decision and Order issued on February 26, 1988, Administrative Law Judge John H. Bedford determined that employer was properly designated the responsible operator herein, and credited the miner with over twenty-five years of qualifying coal mine employment. The administrative law judge adjudicated the miner's claim, filed on September 29, 1980, pursuant to the provisions at 20 C.F.R. Part 718, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (3), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded.

On appeal, the Board rejected employer's argument that it was improperly named the responsible operator in this case in light of the miner's thirteen years as a mine inspector for the Commonwealth of Virginia subsequent to his employment with employer. The Board affirmed the administrative law judge's findings regarding the length of coal mine employment, the etiology of the miner's pulmonary condition pursuant to Section 718.203(b), his identification of employer as the responsible operator pursuant to 20 C.F.R. §725.492, and his finding of invocation of the presumption at 20 C.F.R. §718.305. The Board vacated the administrative law judge's award of benefits, however, for further consideration of the rebuttal provisions at Section 718.305 and, if entitlement was established, a determination of the onset date of the miner's disability. *Breeding v. Colley & Colley Coal Co.*, BRB No. 88-1072 BLA (Mar. 30, 1990)(unpublished).

On April 25, 1990, employer filed a motion for reconsideration with the Board. While employer's motion remained pending, the miner died on March 25, 1992, and his widow filed a survivor's claim on April 15, 1992. Following an initial determination of eligibility and employer's controversion of the survivor's claim, the district director issued a memorandum on September 10, 1992, to the "Hearing & Appeals Section." The district director attached the survivor's claim file, indicating that the claim was considered a "conversion of benefits," and was to be associated with the miner's claim still pending before the Board.

On reconsideration, the Board rejected employer's argument that the Board erred in relying upon *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989), to hold that the Commonwealth of Virginia did not qualify as a responsible operator under 20 C.F.R. §725.493(a)(1), and to affirm the administrative law judge's finding that employer was properly designated the responsible operator herein. The Board agreed, however, with employer's argument that a reduction in the length of

coal mine employment credited to the miner was warranted in accordance with the reasoning in *Kopp*. The Board thus instructed the administrative law judge on remand to make a precise finding as to the length of the miner's qualifying coal mine employment as distinct from his work as a state mine inspector, and if he found less than fifteen years of qualifying coal mine employment, to reconsider his findings under 20 C.F.R. §718.202(a)(1) and consider whether pneumoconiosis was at least a contributing cause to the miner's total disability pursuant to 20 C.F.R. §718.204(b). *Breeding v. Colley & Colley Coal Co.*, BRB No. 88-1072 BLA (Oct. 13, 1994)(*recon. en banc*)(Brown, J., concurring)(unpublished).

On remand, this case was assigned to Administrative Law Judge Charles P. Rippey. In a Supplemental Decision and Order on Remand issued on December 12, 1995, the administrative law judge credited the miner with 12.46 years of qualifying coal mine employment, and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), or disability causation pursuant to Section 718.204(b). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's findings regarding the length of coal mine employment and his finding that pneumoconiosis was not established at Section 718.202(a)(1), but vacated his findings at Section 718.204(b) because he provided invalid reasons for discounting the opinions of Drs. Schmidt and Buddington. The Board remanded the case for a determination of whether the evidence established the existence of pneumoconiosis at Section 718.202(a)(4), as defined in 20 C.F.R. §718.201, and for reconsideration of the evidence relevant to disability causation at Section 718.204(b). *Breeding v. Colley & Colley Coal Co.*, BRB No. 96-0487 BLA (Jan. 28, 1997)(unpublished).

On remand, this case was assigned to Administrative Law Judge Richard T. Stansell-Gamm, who issued a Notice of Additional Evidence on March 1, 1998, in which he acknowledged receipt of the survivor's claim file, which was found situated within the miner's claim file. Because the autopsy evidence in the survivor's claim was relevant to the issue of whether the miner had pneumoconiosis, the administrative law judge sent a copy of the entire survivor's claim file to each party, and allowed the parties thirty days within which to address the admissibility of the evidence contained therein. The administrative law judge indicated that he would allow additional time for further medical evaluation of the autopsy results, if requested.

On March 25, 1998, employer filed a motion for remand of the miner's claim to the district director for consolidation with the survivor's claim and the assembly of all relevant evidence. In the alternative, employer requested 120 days to obtain the

autopsy slides for development and submission of rebuttal evidence.

In a Decision and Order on Remand issued on June 4, 1998, the administrative law judge denied employer's motion to remand and its request for additional time to submit evidence. The administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established at Sections 718.202(a)(2), 718.203(b), and total disability due to pneumoconiosis established at Section 718.204. Consequently, the administrative law judge awarded benefits on the miner's claim, and determined that the miner's widow was automatically entitled to benefits pursuant to 20 C.F.R. §725.212.

In the present appeal, employer contends that the administrative law judge erred by considering the evidence contained in the survivor's claim with the evidence of record in the miner's claim. Employer thus challenges the administrative law judge's findings pursuant to Sections 718.202(a)(2), 718.204(b), asserts that its due process rights were violated, and urges its dismissal as responsible operator herein. Claimant¹ responds, agreeing with employer's due process arguments, and urging dismissal of employer as responsible operator, with entry of an award of benefits and imposition of liability upon the Black Lung Disability Trust Fund (Trust Fund). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, opposing the imposition of liability upon the Trust Fund, but urging a remand for the development of responsive evidence.

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, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹The miner's widow, Delta Breeding, is pursuing the miner's claim on his behalf.

Employer initially maintains that the survivor's claim is separate and independent of the miner's claim, and contends that because the survivor's claim was not fully developed and processed in accordance with the regulatory scheme, and the two claims were never formally consolidated before the district director, the administrative law judge could not consider the evidence contained in the survivor's claim when adjudicating the miner's claim. We agree. Employer correctly notes that the evidentiary record in the miner's claim was established at the hearing before Judge Bedford on November 4, 1987, pursuant to the regulations at 20 C.F.R. §§725.464, 725.456. While the miner's widow would be derivatively entitled to benefits upon entry of a final judgment awarding benefits in the miner's claim, at the time of the miner's death, the Board had vacated Judge Bedford's award of benefits. Thus, the district director improperly curtailed development and processing of the survivor's claim on the ground that the widow was automatically entitled to benefits. Moreover, there is no provision in the regulations which authorized the district director to "associate" the evidence submitted in the survivor's claim with the record evidence in the miner's claim pending before the Board.² Rather, the district director was required to fully process the survivor's claim in accordance with the regulatory scheme, and the administrative law judge was obligated to adjudicate the miner's claim based solely on the record made before Judge Bedford, see 20 C.F.R. §725.477, unless he opted to grant employer's motion to remand to the district director for consolidation of the claims. As the award of benefits in the miner's claim was based in part upon the autopsy evidence contained in the incompletely-developed survivor's claim, we vacate the administrative law judge's award of benefits and his findings pursuant to Sections 718.202(a)(2), 718.204(b), and remand this case to the administrative law judge for readjudication of the miner's claim based on the record therein, and for him to remand the survivor's claim to the district director for further development and processing. Inasmuch as the evidence in the survivor's claim is relevant to the contested issues in the miner's claim, the administrative law judge may opt to remand both claims to the district director for consolidation.

²A review of the record does not reveal how or when the survivor's claim file became included within the miner's claim file.

Employer and claimant next contend that the prosecution and defense of the miner's and survivor's claims have been irreparably prejudiced as a result of the procedural due process violations herein, and that the only equitable remedy, consistent with the decision in *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), is dismissal of employer as the responsible operator³ and imposition of liability upon the Trust Fund. The arguments of employer and claimant are without merit. Unlike the factual situation in *Lane Hollow*, where the government's protracted delay in notifying employer of its potential liability was the direct cause of employer's inability to gather medical evidence from the miner, thus depriving employer of a fair opportunity to mount a meaningful defense, *see id.*, all parties to the instant miner's claim fully presented their respective cases and introduced documentary evidence in support thereof at the hearing before Judge Bedford prior to the miner's death, thus there was no core violation of due process. Further, the delay in processing the survivor's claim has not deprived the parties of the opportunity to mount a meaningful case or defense and have their fair day in court, inasmuch as responsive evidence may still be developed based on physician review of the autopsy report and slides. Consequently, the appropriate remedy under the facts of this case is the remand of both claims, as more fully discussed above.

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits and Denial of Employer's Motion to Remand is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

³We decline to address the arguments of claimant and employer that the Department of Labor erred by not naming the Commonwealth of Virginia as a potential operator in the miner's and survivor's claims, as the Board previously affirmed Judge Bedford's finding that employer was properly designated the responsible operator herein, and no exception to the law of the case doctrine has been demonstrated. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge