

BRB No. 00-0417 BLA

HAZEL B. HARLESS)
(Widow of EDEKER HARLESS))

Claimant-Respondent)

v.)

J. O. LIVELY CONSTRUCTION COMPANY)

Employer-Petitioner)

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

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Order Denying Modification and Affirming Designation of Responsible Operator, the Order on Reconsideration and the Order on Third Request for Reconsideration of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

Stephen E. Arey, Tazewell, Virginia, for claimant.

Mary Lou Smith and William H. Howe (Howe, Anderson & Steyer), Washington, D.C., for employer.

Jennifer U. Toth (Judith E. Kramer, Acting 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: McGRANERY and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Order Denying Modification and Affirming Designation of Responsible Operator, the Order on Reconsideration and the Order on Third Request for Reconsideration (97-BLA-0498) of Associate Chief Administrative Law Judge Thomas M. Burke finding employer liable 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).¹ This case is before the Board for the fourth time.² In his

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed all claims pending on appeal before the Board under the Act for the duration of the lawsuit, except for those where the Board, after briefing by the parties to the pending claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which the parties in interest have responded. Based on the briefs submitted by the parties in interest, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.

Claimant is the surviving widow of the miner, Edeker Harless, who died on December 1, 1992, Director's Exhibits 86-87. Claimant is pursuing the miner's claim on behalf of the miner's estate and herself, *see* Director's Exhibits 94, 97. Inasmuch as the deceased miner was awarded benefits as a result of the miner's claim filed prior to January 1, 1982, Director's Exhibits 1, 71, 95, claimant is derivatively entitled to survivor's benefits under Section 401(a), 30 U.S.C. §901(a), *see* 20 C.F.R. §725.212.

² The miner filed a claim on September 24, 1978, Director's Exhibit 1, and in a Decision and Order issued on December 28, 1983, Administrative Law Judge Peter McC. Giesey found employer was the responsible operator liable for the payment of benefits, without discussing whether liability in this case should transfer from employer as the responsible operator to the Black Lung Disability Trust Fund (the Trust Fund) pursuant to the Black Lung Benefits Amendments of 1981 (the 1981 Amendments), and found that the miner established entitlement to benefits on the merits, Director's Exhibit 36. Accordingly, benefits were awarded.

Employer appealed and subsequently, while employer's appeal was pending before

the Board, employer filed a motion requesting that it be dismissed as the responsible operator in this case pursuant to the 1981 Amendments. The Board issued an Order holding that liability for the payment of benefits in this case does not transfer to the Trust Fund pursuant to the 1981 Amendments because the evidence of record was “insufficient as a matter of law” to establish the requisite existence of a Part B claim filed by the miner and/or that such a claim had been denied, Director’s Exhibit 64. *Harless v. J.O. Lively Construction Co.*, BRB No. 84-0242 BLA (Dec. 5, 1985)(unpub. order). Nevertheless, the Board subsequently vacated Judge Giesey’s findings naming employer as the responsible operator, as well as Judge Giesey’s findings on the merits of entitlement, and remanded the case for reconsideration, Director’s Exhibit 66. *Harless v. J.O. Lively Construction Co.*, BRB No. 84-0242 BLA (Apr. 29, 1988) (unpub.).

In a Decision and Order On Remand issued on December 23, 1988, Judge Giesey again found employer was the responsible operator liable for the payment of benefits and found that the miner established entitlement to benefits on the merits, Director’s Exhibit 71. Accordingly, benefits were awarded. Employer appealed and the Board affirmed Judge Giesey’s finding that entitlement to benefits on the merits was established, but again vacated his finding that employer is the responsible operator and remanded the case for reconsideration, Director’s Exhibit 95. *Harless v. J.O. Lively Construction Co.*, BRB No. 89-0364 BLA (Mar. 30, 1993)(unpub.). Inasmuch as Judge Giesey was no longer with the Office of Administrative Law Judges, the case was reassigned to Administrative Law Judge Thomas M. Burke (hereinafter, the administrative law judge) on remand and in a Decision and Order On Remand issued on October 19, 1993, the administrative law judge found that employer is the responsible operator liable for the payment of benefits, Director’s Exhibit 101.

Subsequently, employer filed a timely petition for modification, at issue herein, on July 1, 1996, Director’s Exhibit 115, based on a mistake in fact as to whether the record established that the miner had filed a Part B claim with the Social Security Administration (SSA) and, therefore, as to whether liability should transfer to the Trust Fund pursuant to the 1981 Amendments. In an Order Granting Summary Judgement and Denying Petition for Modification issued on June 25, 1997, the administrative law judge granted a motion for summary judgement by the Director, Office of Workers’ Compensation Programs (the Director), holding that employer’s petition for modification constituted an impermissible collateral attack on a legal conclusion that the evidence of record was insufficient as a matter of law to establish that liability for the payment of benefits should transfer to the Trust Fund pursuant to the 1981 Amendments and was not a request for modification of a determination of fact.

Employer appealed and the Board vacated the administrative law judge’s Order

initial Order Denying Modification and Affirming Designation of Responsible Operator, the administrative law judge found that the evidence of record did not establish that the miner had previously filed a Part B claim with the Social Security Administration (SSA) and, therefore, found that liability in this case does not transfer from employer as the responsible operator to the Black Lung Disability Trust Fund (the Trust Fund) pursuant to the Black Lung Benefits Amendments of 1981 (the 1981 Amendments). Accordingly, the administrative law judge found employer liable, as the responsible operator, for the payment of benefits in this case. The administrative law judge reiterated his findings in his subsequent Order on Reconsideration and Order on Third Request for Reconsideration. On appeal, employer contends that the administrative law judge erred in failing to find that a mistake in fact had been established as to whether the record established that claimant had filed a Part B claim with the SSA and, therefore, as to whether liability should transfer to the Trust Fund pursuant to the 1981 Amendments. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, responds, urging that the administrative law judge's Orders finding employer liable, as the responsible operator, for the payment of benefits in this case be affirmed. Claimant also responds, urging the Board to settle the issue of liability for benefits in this case.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 205(a)(1) of the Black Lung Benefits Amendments of 1981 (the 1981 Amendments), which amended Section 422(c) and (j) of the Black Lung Benefits Reform Act of 1977 (the Reform Act), liability transfers from the responsible operator to the

Granting Summary Judgement and Denying Petition for Modification and remanded the case for the administrative law judge to consider whether employer's petition for modification established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, because there had been a factual determination that liability for the payment of benefits does not transfer to the Trust Fund pursuant to the 1981 Amendments. *Harless v. J.O. Lively Construction Co.*, BRB No. 97-1481 BLA (July 14, 1998)(unpub.).

Trust Fund for the payment of claims in which there was a final denial prior to March 1, 1978, *i.e.*, the effective date of the Reform Act, and which are or have been approved under Section 435 of the Reform Act, 30 U.S.C. §945, *see* 30 U.S.C. §932(j)(3); 26 U.S.C. §9501(d)(1)(B), as implemented by 20 C.F.R. §725.496.

The miner indicated on his 1978 Department of Labor application for black lung benefits that he had previously filed a claim for federal black lung benefits with the SSA, which was pending, *see* Director's Exhibit 1. However, at the September, 1982, hearing before Judge Giesey, both the miner and claimant, the miner's widow, indicated that the miner was receiving Social Security disability insurance benefits, *see* Director's Exhibit 31, September, 1982 Hearing Transcript at 34-35, 74, 104, 133.

Subsequently, while employer's original appeal to the Board in this case was pending, employer filed a motion for the Director to produce documents relating to the black lung claim the miner alleged that he had filed with the SSA, Director's Exhibit 60. In response, the Director produced a black lung case tracking printout, a photocopy of relevant SSA records of Part B claimants who had filed election cards for review and a Notice of Review by the district director which found and/or indicated that no Part B claim for black lung benefits or election for review of such a claim had been filed by the miner with the SSA and, therefore, concluded that this was not a transfer case under the 1981 Amendments.

In conjunction with employer's subsequent motion to the Board to be dismissed as the responsible operator in this case pursuant to the 1981 Amendments, employer submitted an affidavit from the miner, who stated that he had initially filed for black lung benefits with the SSA in 1973, but had never heard from the SSA as to the disposition of his claim and had not received an election card to have his claim reviewed, which the miner contended he would have requested, Director's Exhibit 61. In addition, the miner stated that he had made an inquiry in 1975 as to the status of his 1973 black lung claim with Congressman William C. Wampler and had included a 1975 letter from Congressman Wampler stating that the congressman had contacted the Department of Labor (DOL) to get a report concerning the miner's application for black lung compensation through the DOL.

The Board issued an Order holding that because the evidence of record was "insufficient as a matter of law" to establish either the existence of a Part B claim filed by the miner or the fact that such a claim had been denied, liability for the payment of benefits does not transfer to the Trust Fund in this case pursuant to the 1981 Amendments, *see* Director's Exhibit 64; *Harless*, BRB No. 84-0242 BLA (Dec. 5, 1985)(unpub. order) at 2. While Judge Giesey did not address or rule on the transfer of liability issue, which was not raised by employer, in his subsequent Decision and Order On Remand, Judge Giesey did state his opinion, in dicta, that the fact that there was no evidence of a Part B claim was "unremarkable" in light of his experience that many Part B claims, through no fault of the

SSA, were “lost, destroyed or misplaced without ever being recorded,” *see* Director’s Exhibit 71, 1988 Decision and Order On Remand at 3-4 n. 2.

Subsequently, in a March, 1999, response to interrogatories submitted by employer in conjunction with employer’s petition for modification, the Director indicated that a DOL claims examiner had contacted the SSA in July, 1979, to verify whether the miner had filed a Part B claim and was advised that there was no record of a black lung claim filed by the miner with the SSA. The Director also submitted responses to inquiries made by Congressman Wampler in November, 1981, and August, 1982, regarding the status of the miner’s claim which indicated that the only black lung claim the miner had filed was his September, 1978, claim with the DOL.

Finally, in a July, 1999, response to a subpoena submitted by employer in conjunction with employer’s petition for modification, the SSA indicated that it had no documents of communication with any legislative official or the DOL regarding a black lung claim filed by the miner and no record of any black lung claim filed by the miner. The SSA did submit a copy of a September, 1973, SSA “Application for Disability Insurance Benefits” filed by the miner. The SSA further indicated that the miner began receiving social security disability benefits in January, 1976, with his initial eligibility beginning in January, 1974. The SSA indicated that the miner continued to receive social security disability benefits until April, 1988, when the miner’s benefits were converted to retirement benefits when he reached age 65, which then continued until the miner’s death in December, 1992, at which time claimant, as the miner’s widow, began to receive widow’s social security disability benefits. The miner’s September, 1973, application for social security disability benefits indicates that the miner’s disability was due to “tuberculosis.” In response to a question on the application as to whether the miner had filed or intended to file a claim for disability under any other workmen’s compensation law or plan, the miner indicated “no.” Finally, in response to a question on the application as to whether the miner had received or expected to receive benefits from any other federal agency, the miner only indicated that he had (or expected he would) receive disability benefits from the Veteran’s Administration.

In the administrative law judge’s April, 1999, Order Denying Modification, the administrative law judge initially noted that Judge Giesey’s opinion that many Part B claims filed with the SSA were lost or destroyed does not constitute evidence, but was merely a general observation that does not specifically relate to the facts of this case. The administrative law judge found that the record contains no Part B claim filed with SSA and found that the miner’s statements on his September, 1978, DOL application for black lung benefits and his subsequent affidavit indicating that the miner had filed a claim with the SSA in 1973 were too vague to be reliable and failed to state with specificity any details regarding the claim the miner alleged to have filed. In addition, the administrative law judge found no indication that a Part B claim had been denied and, therefore, determined that it would be

speculation and conjecture to find that the miner had a Part B claim denied prior to the requisite date for liability to transfer from the responsible operator to the Trust Fund under the 1981 Amendments. Finally, the administrative law judge found that the Director presented sufficient evidence to support a finding that the miner had never filed a Part B claim and, therefore, found that employer was responsible for the payment of benefits.

In his July, 1999, Order on Reconsideration, the administrative law judge again found that none of the evidence of record was sufficiently probative or reliable to support a finding that the miner filed a Part B claim, but found that the weight of the evidence, including evidence from the SSA and DOL, established that no Part B claim was filed by the miner. Specifically, the administrative law judge found that the miner's affidavit, Congressman Wampler's 1975 letter and the Director's responses to employer's interrogatories did not establish the filing of a Part B claim. Finally, in his December, 1999, Order on Third Request for Reconsideration, the administrative law judge found that the DOL's and SSA's records were devoid of any record of a Part B claim having been filed by the miner and/or denied and found that employer offered no evidence of a Part B claim having been filed by the miner. The administrative law judge further found that the miner's application with the SSA for social security disability benefits was not an application for black lung benefits and made no mention of black lung or any other compensable disease under the Act.

Employer contends that the miner's statements in his September, 1978, DOL application for black lung benefits and subsequent affidavit, as well as Congressman Wampler's 1975 letter, are unrefuted, probative evidence that the miner previously filed a Part B claim with the SSA. Employer contends that the SSA's records, which show no evidence of a Part B filing by the miner, "may not be" reliable and do not rule out the "possibility" that the SSA records are incomplete, but merely confirm SSA's failure to locate the miner's Part B claim, especially in light of Judge Giesey's stated opinion that many Part B claims were lost. Employer also contends that the miner's 1973 SSA claim for social security disability benefits could be construed to constitute a Part B claim for black lung benefits pursuant to 20 C.F.R. §410.429.³ Finally, employer contends that the DOL's failure

³ Although there is also no evidence that the alleged Part B claim filed by the miner was denied prior to March 1, 1978, *see* 20 C.F.R. §725.496, and such evidence is required under the 1981 Amendments, employer contends that a denial could be inferred from the fact that claimant never received federal black lung benefits as of the time that he filed his September, 1978, claim with the DOL and the fact that the time limit for the appeal of a denial would have expired. Similarly, employer contends that any failure by the miner to have filed an election card seeking review of the miner's alleged Part B claim, as required under the 1981 Amendments, could be excused for good cause because the miner never received an election card to file. Alternatively, employer contends that the miner's alleged 1973 claim for black lung benefits could have been a Pre-Reform Act Part C claim that did

and/or refusal to produce evidence of the miner's alleged Part B claim violated the DOL's duty to produce evidence regarding the transfer of liability under the 1981 Amendments and should result in a finding that the miner's alleged claim was denied.

Contrary to employer's contentions, the administrative law judge found that the Director presented sufficient evidence to support a finding that no Part B claim was filed by the miner and the administrative law judge's finding is supported by substantial evidence, *see* Director's Exhibit 60; Director's March, 1999, response to interrogatories. The only evidence of record that claimant filed a claim with the SSA is the miner's September, 1973, SSA claim "Application for Disability Insurance Benefits" and a statement from the SSA that the miner received social security disability benefits. The fact that the miner filed a social security disability claim is corroborated by the testimony of both the miner and claimant, *see* Director's Exhibit 31, September, 1982 Hearing Transcript at 34-35, 74, 104, 133.

Moreover, contrary to employer's contention that the miner's 1973 claim for social security disability benefits could be construed as a claim for federal black lung benefits, the miner's September, 1973, application for social security disability benefits specifically indicated that the miner's disability was due to "tuberculosis" and that the miner had not filed or intended to file a claim for disability under any other workmen's compensation law. Moreover, in response to a question as to whether the miner expected to receive benefits from any other federal agency, the miner only indicated that he had, or expected to, receive disability benefits from the Veteran's Administration. Thus, the administrative law judge's finding that the miner's September, 1973, claim for social security disability benefits was not an application for federal black lung benefits and made no mention of black lung or any other compensable disease under the Act is affirmed as supported by substantial evidence.

Finally, the administrative law judge, within his discretion, found that the miner's statements in his September, 1978, DOL application for black lung benefits and subsequent affidavit, as well as Congressman Wampler's 1975 letter, were not reliable indicators that the miner previously filed a Part B claim with the SSA. It is within the administrative law judge's discretion, as the trier-of-fact, to assess the evidence of record and to draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, the administrative law judge's findings that the evidence of record does not establish

not require an election card.

that the miner filed a Part B claim and, therefore, that liability does not transfer from employer, as the responsible operator, to the Trust Fund for the payment of benefits awarded in this claim pursuant to the 1981 Amendments are affirmed as supported by substantial evidence. Consequently, we affirm the administrative law judge's findings that employer is responsible for the payment of benefits and, therefore, the denial of employer's petition for modification based on a mistake in fact pursuant to Section 725.310.

Accordingly, the Order Denying Modification and Affirming Designation of Responsible Operator, the Order on Reconsideration and the Order on Third Request for Reconsideration of the administrative law judge's finding employer liable for the payment of benefits and denying employer's petition for modification in his case are affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge