

BRB No. 00-0760 BLA

JOHN WILDER )

Claimant )

v. )

DATE ISSUED:

LANGLEY & MORGAN )  
CORPORATION )

Employer- )

Respondent )

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

DECISION AND ORDER

Petitioner

Appeal of the Decision and Order Denying Director's Motion for Reconsideration of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Director's Motion for Reconsideration (89-BLA-0373) of Administrative Law Judge Clement J. Kichuk 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).<sup>1</sup> This case is before the Board for the fifth time.<sup>2</sup> In its fourth Decision and Order issued on February 23, 1999, the Board affirmed the administrative law judge's finding of entitlement under 20 C.F.R. Part 718 (2000). However, pursuant to employer's and the Director's requests, the Board remanded the case to the administrative law judge for further proceedings regarding the viability of claimant's 1973 Part B claim and its impact on the issue of transfer of liability.<sup>3</sup> *Wilder v. Langley & Morgan Corp.*, BRB No. 98-0717 BLA (Feb. 23, 1999)(unpub.).

On remand, the administrative law judge reopened the record and provided the parties the opportunity to submit additional evidence relevant to the sole remaining issue, transfer of liability. Following the submission of evidence, the administrative law judge found that the evidence was insufficient to establish that an election card was sent to or received by claimant and, thus, found that transfer of liability was appropriate. Consequently, the administrative law judge dismissed employer and found the Black Lung Disability Trust Fund (Trust Fund) liable for the payment of benefits pursuant to the transfer provisions in Section 205 of the 1981 amendments to the Act. Decision and Order on Fourth Remand ([2000] Decision and Order).

The Director submitted a Motion for Reconsideration seeking reconsideration of the administrative law judge's decision transferring liability for payment of

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<sup>1</sup> 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.

<sup>2</sup> This case has a long and detailed procedural history as outlined in the Board's prior Decision and Order, *see Wilder v. Langley & Morgan Corp.*, BRB No. 98-0717 BLA, slip op. at 2-3 (Feb. 23, 1999)(unpub.).

<sup>3</sup> Claimant filed his initial claim, a Part B claim with the Social Security Administration on June 21, 1973, which was denied on November 6, 1973. Director's Exhibit 39.

benefits to the Trust Fund. In conjunction with this motion, the Director submitted additional documents “as Director’s Exhibits to be included in the record.” Director’s Motion for Reconsideration at 2. The administrative law judge denied the Director’s Motion for Reconsideration, in a Decision and Order dated March 31, 2000. See Decision and Order Denying Director’s Motion for Reconsideration ([2000] Decision and Order on Recon.).

On appeal, the Director contends that the administrative law judge erred in transferring liability for payment of claimant’s benefits to the Trust Fund, arguing that the administrative law judge incorrectly concluded that the Director did not present sufficient evidence that an election card had been mailed to claimant. The Director contends that the record contains uncontradicted evidence establishing that an election card was mailed to claimant and not returned and, therefore, the transfer of liability provisions are not applicable. In response, employer urges affirmance of the administrative law judge’s finding that transfer of liability was appropriate. Employer also requests that the Board strike the new evidence included in the Director’s Petition for Review and brief and the arguments based upon this evidence. Claimant has not responded in this appeal.

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, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the amended 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 March 2, 2001, to which both employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to this Order.<sup>4</sup> Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board’s scope of review is defined by statute. The administrative law

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<sup>4</sup> Pursuant to the Board’s instructions, the failure of a party to submit a brief within 20 days following receipt of the Board’s Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Following the Board's 1999 Decision and Order remanding the case to the administrative law judge, and pursuant to the Board's instructions, the administrative law judge reopened the record to accord the parties the opportunity to submit additional evidence on the sole remaining issue, the applicability of the transfer of liability regulations. Employer filed a Request for Production of Documents on March 13, 1999, requesting that the Director submit documents concerning claimant's 1973 Social Security Administration (SSA) claim and also any information regarding the filing of an election card. The Director did not respond to the request.

On May 19, 1999, employer filed a Motion to Compel Production of Documents, requesting that the Director be compelled to respond to the request for documents regarding claimant's 1973 Part B claim. ALJ Exhibit 1. The administrative law judge granted the motion on June 17, 1999 and required the Director to respond within 30 days and produce the requested documents. ALJ Exhibit 2. The administrative law judge received the Director's response on June 21, 1999, in the form of a copy of a cover letter to employer, which referenced enclosures submitted to employer. ALJ Exhibit 4. However, as the administrative law judge stated in his Decision and Order, the Director did not forward the referenced enclosures with the cover letter. [2000] Decision and Order at 3.

On October 19, 1999, employer submitted a motion requesting that the administrative law judge issue a subpoena *duces tecum* to the SSA commissioner requesting information and documents concerning claimant's 1973 Part B claim. In an Order dated October 29, 1999 (ALJ Order No. 2), the administrative law judge denied employer's request for the subpoena, noting that it is the Director's burden to produce this evidence and not the responsibility of the SSA. However, the administrative law judge renewed his June 1999 Order that the Director provide review of the case per 20 C.F.R. §725.497(b) [providing an initial review in all cases involving a denied Part B claim to determine the propriety of transfer]. See ALJ Order No. 2. In addition, the administrative law judge ordered the Director to submit any additional evidence necessary to "an informed consideration" of the issue, including all relevant facts emanating from SSA regarding transferability.<sup>5</sup> ALJ

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<sup>5</sup> In particular, the administrative law judge stated that the Director was to obtain a response from the Social Security Administration (SSA) regarding the meaning of the handwritten notation "7/16/86" on claimant's 1973 SSA denial. ALJ Exhibit 5; Director's Exhibit 39 at 2. This notation was specifically discussed by the Board in its 1999 Decision and Order as possible evidence that SSA was

Exhibit 5. The Order further provided that the Director had until December 1, 1999 to respond and that the record would close on December 1, 1999, with the parties then having until December 20, 1999 to file briefs. *Id.*

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reviewing the denied 1973 claim. See *Wilder v. Langley & Morgan Corp.*, BRB No. 98-0717 BLA, slip op. at 6 (Feb. 23, 1999) (unpub.).

The Director responded to Order No. 2 on December 7, 1999, stating that a review of the file in June 1999 revealed no election card had been filed. In addition, the Director stated that a computer printout “concerning all data on claimant’s election card status” had been submitted. ALJ Exhibit 6. Accompanying the Director’s response were two letters regarding the SSA determinations in this case,<sup>6</sup> *see* ALJ Exhibits 7, 9, and a “Memorandum to File” from the district director dated November 24, 1999, which stated that “the computer records reveal an election card was forwarded to the miner on March 24, 1978. However, the miner did not return the election card or any other document requesting review.” ALJ Exhibit 8. This memorandum further stated that SSA advised that they did not have any records on file relevant to the issue of transfer in this case. *Id.* The memorandum therefore concluded that the transfer provisions of Section 205 of the 1981 amendments to the Act do not apply. *Id.*

Based on the record then before him, the administrative law judge found that the Director, as guardian of the Trust Fund, bears the burden of establishing that the miner did not elect review of his denied claim and, thus, that liability for the claim should not transfer to the Trust Fund. However, the administrative law judge found that:

despite this Court’s leaving the record open for six months following remand in order to develop such evidence, [the Director] failed to proffer any documentation establishing that Mr. Wilder was sent an election card in this case. Moreover, the documents that were submitted show that there is *no* record of an election card having been sent to the miner.

[2000] Decision and Order at 5. Moreover, the administrative law judge found that the record does not contain the computer printout referenced by the Director as establishing that

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<sup>6</sup> The Director stated that SSA offices in Pikeville, Kentucky and Baltimore, Maryland had been contacted regarding transfer. Following a review of the records, SSA stated that no information regarding the SSA Black Lung claim had been located. As for the “7/16/86” notation, SSA stated that such notations are often merely used for “local case control” and have no bearing on determinations. ALJ Exhibits 7, 8, 9.

an election card was sent. *Id.* Consequently, the administrative law judge found that the record contains no direct evidence that an election card was mailed to claimant and, based on the case law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, found that the transfer provisions set forth in Section 205 of the 1981 amendments to the Act apply to this case. [2000] Decision and Order at 6; *see Director, OWCP v. Quarto Mining Co. [Bellomy]*, 901 F.2d 532, 13 BLR 2-435 (6th Cir. 1990).

In a Motion for Reconsideration dated February 28, 2000, the Director requested reconsideration of the administrative law judge's [2000] Decision and Order dismissing employer and transferring liability to the Trust Fund. Accompanying the Director's Motion for Reconsideration were documents which were sent to employer as the Director's June 1999 response to the Order for production of documents, including a letter from the regional Solicitor of Labor (SOL) attorney to the Office of Workers' Compensation Programs (OWCP) requesting information on the transfer issue, Director's Motion for Reconsideration Attachment A; the response from the OWCP, with a copy of a computer printout, Director's Motion for Reconsideration Attachment B; and, a copy of the Director's response to the administrative law judge's June 1999 Order, Director's Motion for Reconsideration Attachment C. Employer objected to the Director's submission of this new evidence, arguing that "since this evidence was in existence at the time the Director responded to [the administrative law judge's] Order No. 2, it is not properly proffered in connection with a request for reconsideration." Employer's Response to the Director's Motion for Reconsideration at 2.

In denying the Director's Motion for Reconsideration, the administrative law judge noted the Director's submission of this additional evidence in conjunction with the reconsideration request and employer's objection to the additional evidence. However, the administrative law judge did not explicitly rule on employer's objection. Rather, the administrative law judge considered the newly submitted evidence but found that it failed to remedy the inadequacies of the record as noted by the administrative law judge in his 2000 Decision and Order. [2000] Decision and Order on Recon at 2.

Initially, we address the administrative law judge's failure to rule on employer's objection to the Director's submission of new evidence in conjunction with her Motion for Reconsideration of the administrative law judge's [2000] Decision and Order. The regulations provide that the procedures to be followed in the reconsideration of a Decision and Order shall be determined by the administrative law judge. 20 C.F.R. §725.479(b) (2000). Thus, the Board has held that, "provided that proper procedural safeguards are maintained, an administrative

law judge is neither bound to accept new evidence nor precluded from considering such evidence in disposing of a motion for reconsideration.” *Covert v. Westmoreland Coal Co.*, 6 BLR 1-1111, 1-1113 (1984); *see also Hensley v. Grays Knob Coal Company*, 10 BLR 1-88 (1987). However, in order to receive the new evidence into the record, the administrative law judge must make a determination whether there was “good cause” for the failure to obtain and exchange the evidence in compliance with Section 725.456(b)(2) (2000). 20 C.F.R. §725.456(b)(2) (2000); *Hensley, supra*; *Thomas v. Freeman United Coal Mining Co.*, 6 BLR 1-739 (1984).

Inasmuch as the administrative law judge did not address employer’s objection to the submission of new evidence by the Director with her Motion for Reconsideration nor render a determination whether there was “good cause” for the Director’s failure to submit this evidence in response to the two Orders for production of evidence, we vacate the administrative law judge’s findings and remand the case to the administrative law judge for further consideration. *Id.* Therefore, on remand, the administrative law judge must address employer’s objection to the submission of the new evidence and determine the appropriateness of the Director’s inclusion of new evidence with a request to reconsider the administrative law judge’s Decision and Order on Fourth Remand.

Accordingly, the administrative law judge’s Decision and Order Denying Director’s Motion for Reconsideration is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge