

BRB Nos. 09-0855 BLA  
and 09-0855 BLA-A

MARLIN L. GOSSETT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/29/2010
	)	
TN NITRATE TECHNOLOGY, INCORPORATED	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Michael Anderson (Maddox & Anderson PLLC), Chattanooga, Tennessee, for claimant.

J. Al Johnson, Spencer, Tennessee, and Herbert B. Williams (Stokes, Williams, Sharp & Davies), Knoxville, Tennessee, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.  
PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Claim (2008-BLA-05634) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed on February 7, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge noted that employer agreed that claimant worked “at least” eighteen years in coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge initially determined that this claim was timely filed and found that the medical evidence submitted by claimant was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits without addressing employer’s medical evidence.<sup>1</sup>

On appeal, claimant challenges the administrative law judge’s finding that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). In response, employer urges affirmance of the denial of benefits. Employer, in its cross-appeal, contends that the administrative law judge erred in determining that employer is the responsible operator. The Director, Office of Workers’ Compensation Programs (the Director), has not filed a brief in response to claimant’s appeal of the denial of benefits. The Director has filed a letter brief in response to employer’s cross-appeal, asserting that the administrative law judge permissibly found that employer failed to prove that it was incorrectly identified as the responsible operator.

By Orders dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on these cases, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims and became effective on March 23, 2010.<sup>2</sup> *Gossett v. TN Nitrate Technology, Inc.*,

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<sup>1</sup> In the section of his Decision and Order entitled “Conclusion,” the administrative law judge stated:

In summary, [c]laimant has failed to establish that he is totally disabled on a respiratory basis or has pneumoconiosis and is not entitled to a review of the entire record based on proof of a condition of entitlement that had been adjudicated against him.

Decision and Order at 9. We note, however, that the administrative law judge did not address the issue of the existence of pneumoconiosis. Moreover, this is claimant’s initial claim, not a subsequent claim. Director’s Exhibit 1; *see* 20 C.F.R. §725.309.

<sup>2</sup> Relevant to this living miner’s claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for

BRB No. 09-0855 BLA (June 18, 2010)(unpub. Order); *Gossett v. TN Nitrate Technology, Inc.*, BRB No. 09-0855 BLA-A (June 18, 2010)(unpub. Order). Claimant, employer and the Director have responded.

Claimant states that the recent amendments to the Act affect this case, as the present claim was filed after January 1, 2005; claimant established over fifteen years of coal mine employment; and claimant has a totally disabling pulmonary impairment. Thus, claimant asserts that the case must be remanded to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act. *See* 30 U.S.C. §921(c)(4).

Employer responds that, although Section 1556 may affect this case, the retroactive application of the amended version of Section 411(c)(4) to this claim is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property. Alternatively, employer contends that, if the Board remands this case for consideration of claimant's entitlement to the Section 411(c)(4) presumption, due process requires that the administrative law judge allow the parties the opportunity to submit additional, relevant evidence to address the change in law.

The Director states that the recent amendments to the Act may affect this case, as the present claim was filed after January 1, 2005. Thus, the Director maintains that the case must be remanded to the administrative law judge to determine whether claimant is entitled to the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge, on remand, must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414, or to establish good cause for exceeding those limitations under 20 C.F.R. §725.456(b)(1).

Because the administrative law judge found that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2), which is a prerequisite to invocation of the rebuttable presumption set forth in the amended version of 30 U.S.C. §921(c)(4), we must first address the administrative law judge's consideration of this issue to determine whether remand for consideration of the applicability of the amendments is required.

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claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

## **I. Total Disability – 20 C.F.R. §718.204(b)**

### **A. The Administrative Law Judge's Findings**

The administrative law judge initially determined that total disability was not established at 20 C.F.R. §718.204(b)(2)(i), (ii), as the pulmonary function study and arterial blood gas study produced nonqualifying results. Decision and Order at 8; Director's Exhibit 10. The administrative law judge also found that total disability was not established at 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. Decision and Order at 8.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinion of Dr. Toban, who examined claimant at the request of the Department of Labor (DOL) on April 9, 2007. Decision and Order at 8; Director's Exhibits 10, 18. Dr. Toban indicated on Form CM-988 that claimant last worked preparing rock and coal for blasting. Director's Exhibit 10. Dr. Toban diagnosed chronic obstructive pulmonary disease (COPD), but did not render a conclusion as to the extent of claimant's disability. *Id.* In a subsequent letter, Dr. Toban stated that claimant has chronic obstructive lung disease with loss of airway function and a moderate degree of COPD. Director's Exhibit 18. With respect to the issue of total disability, Dr. Toban indicated, "[t]he pulmonary impairment is certainly severe enough that [claimant] is prevented from working again in the coal mines." *Id.*

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

The administrative law judge initially found that claimant was last employed as a truck driver and cited the decision of the United States Court of Appeals for the Sixth Circuit in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), in support of the proposition that he was required to compare the exertional requirements of claimant's usual coal mine employment with a physician's assessment of claimant's respiratory impairment. Decision and Order at 8. The administrative law judge determined, "I am unable to assess whether the chronic obstructive lung disease with the loss of airway function and a moderate degree of COPD would preclude former work as a driver. I accept that Dr. Toban's opinion is conclusory." *Id.* Thus, the administrative law judge concluded that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv).

### **B. Claimant's Arguments**

Claimant argues on appeal that the administrative law judge erred in finding that Dr. Toban's statement, that claimant's pulmonary impairment prevents him from working in the mines, was insufficient to establish total disability. The Director asserts that the administrative law judge's determination at 20 C.F.R. §718.204(b)(2)(iv) cannot be affirmed, as the administrative law judge did not properly identify claimant's usual coal mine employment. According to the Director, in addition to working as a truck driver, claimant was also a material handler and, in this capacity, was required to measure, line and fill blasting holes and to load and unload explosives weighing sixty pounds multiple times per day. Director's Supplemental Letter Brief at 3-4, *citing* Hearing Transcript at 15, 24-25, 47, 86-87; Director's Exhibit 4. The Director contends that the administrative law judge's "failure to consider" claimant's duties as a material handler "affected his consideration of the medical opinion evidence regarding total disability." Director's Supplemental Letter Brief at 4. The Director suggests that, because Dr. Toban was aware that claimant's last coal mine job involved preparation of rock and coal blasting, remand is necessary to permit the administrative law judge to "assess whether the chronic obstructive lung disease with loss of airway function and a moderate degree of COPD would preclude . . . [c]laimant from performing his former work as a 'truck driver and/or material handler'." <sup>4</sup> *Id.*

### **C. Discussion**

We agree with the Director that the record contains evidence, which, if fully credited, could establish that claimant's was last employed as both a truck driver and a

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<sup>4</sup> We affirm the administrative law judge's findings that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

material handler. Because the administrative law judge rendered his assessment of Dr. Toban's opinion without fully addressing this evidence, we must vacate his finding that Dr. Toban's opinion did not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). See *Cornett*, 227 F.3d at 577, 22 BLR at 2-123. On remand, the administrative must consider all of the evidence relevant to the nature of claimant's usual coal mine employment and reconsider whether Dr. Toban's opinion is sufficient to establish that claimant is totally disabled.<sup>5</sup> If the administrative law judge finds that Dr. Toban's opinion satisfies claimant's burden, he must weigh this evidence against the contrary probative evidence of record in order to determine whether claimant has established total disability at 20 C.F.R. §718.204(b)(2). See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*).

In light of our decision to vacate the denial of benefits and remand the case to the administrative law judge to reconsider his findings on the issue of total disability, the administrative law judge must also consider whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4), 30 U.S.C. §921(c)(4).<sup>6</sup> If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).<sup>7</sup>

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<sup>5</sup> The Director, Office of Workers' Compensation Programs (the Director), maintains that "[i]f the administrative law judge still finds that Dr. Toban's opinion failed to address the element of total disability, the correct remedy is to remand the case to the Department to provide a credible medical opinion in accordance with 30 U.S.C. §923(b)." Director's Supplemental Letter Brief at 4 n.5.

<sup>6</sup> The Director notes that the administrative law judge did not make an explicit finding regarding the length of claimant's coal mine employment. Director's Supplemental Letter Brief at 3. The Director asserts that, because such findings are necessary to determine whether claimant has invoked the Section 411(c)(4) presumption, in addition to determining whether claimant has established that he has a totally disabling respiratory or pulmonary impairment, the administrative law judge should specifically address whether claimant established at least fifteen years of underground coal mine employment or employment in a surface mine in substantially similar conditions. *Id.*

<sup>7</sup> Employer is correct in asserting that, pursuant to 20 C.F.R. §§725.494(a) and 725.495(a)(1), it cannot be designated the operator responsible for the payment of benefits if the administrative law judge determines that claimant has not established total disability.

On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, however, we decline to address, as premature, employer’s argument that the retroactive application of the amendment is unconstitutional.

To promote judicial efficiency, we will address the remainder of claimant’s allegations of error and the arguments raised by employer in its cross-appeal.

## **II. Claimant’s Dependent Daughter – 20 C.F.R. §725.209**

### **A. The Administrative Law Judge’s Findings**

The administrative law judge stated at the hearing that he would hold the record open for claimant to submit documentation that his adult child was disabled. Hearing Transcript at 119. Claimant subsequently submitted letters dated August 17, 2006 and September 1, 2006, in which the Social Security Administration (SSA) reported that, as of December 1, 2005, his daughter’s monthly disability benefits payment was \$686. Claimant’s Exhibits 3. The administrative law judge found that, in light of the fact that claimant’s daughter was born in 1975, the information provided by the SSA did not establish that her disability commenced before she became twenty-two. Decision and Order at 7. The administrative law judge concluded, therefore, that claimant failed to meet his burden of establishing that his daughter became disabled before the age of twenty-three. *Id.*

### **B. Claimant’s Arguments**

Claimant asserts that the administrative law judge erred in finding that the evidence was insufficient to establish that his daughter, who was born on August 3, 1975, is disabled, and is therefore a dependent under the Act. Claimant argues that “the December 2005 date in the [SSA letters] merely referred to the date the amount of benefits changed” and urges reversal of the administrative law judge’s finding on this issue.

### **C. Discussion**

An unmarried adult child satisfies the dependency requirement if the child is under a disability, as defined in Section 223(d) of the Social Security Act, 42 U.S.C.

§423(d), that began before the child attained age twenty-two. 30 U.S.C. §902(g); 20 C.F.R. §§725.209(a)(2)(ii), 725.221. Claimant bears the burden of proving that the child that he has identified as a dependent satisfies the requirements of 20 C.F.R. §725.209. *See Hamilton v. Island Creek Coal Co.*, 4 BLR 1-548 (1982). In this case, the administrative law judge rationally determined that claimant did not satisfy his burden, as the documentation that claimant provided did not contain any statement indicating the date on which her disability commenced. Consequently, we affirm the administrative law judge's finding that claimant failed to establish the dependent status of his child pursuant to 20 C.F.R. §725.209. *See Hite v. Eastern Associated Coal Co.*, 21 BLR 1-46 (1997); *Wallen v. Director, OWCP*, 13 BLR 1-64 (1989).

### **III. Responsible Operator**

Employer argues on cross-appeal that the administrative law judge erred in determining that employer is the operator responsible for the payment of claimant's benefits, if awarded.<sup>8</sup> Claimant has not filed a brief in response to employer's cross-appeal. The Director urges the Board to affirm the administrative law judge's finding.

#### **A. Procedural History**

Claimant was employed as a truck driver and/or material handler with employer for approximately two years, in 1994 and 1995, after working for several years as a miner in surface and underground coal mines. Director's Exhibit 1; Hearing Transcript at 17-18. Employer had a blasting contract with Skyline Coal Company (Skyline), which operated an open pit surface coal mine, loading and shooting or blasting holes as part of removing the overburden to facilitate strip mining. Hearing Transcript at 82-87. Employer's workers would load holes with blasting material and then blast the high wall to allow for the harvesting of coal by Skyline. *Id.* Claimant would be driven to the blasting site, where he would load and unload blasting materials from employer's trucks. *Id.* at 13-15. Claimant testified that he was exposed to coal dust from the mine while working during this period. *Id.* at 46-67.

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<sup>8</sup> Employer also alleges that the administrative law judge erred in applying 20 C.F.R. §725.491 in determining that employer is the responsible operator, because this regulation applies to the identification of "operators" as opposed to "responsible operators." Contrary to employer's contention, the administrative law judge properly addressed whether employer is an operator pursuant to 20 C.F.R. §725.491, as the regulations contemplate establishing that the putative responsible operator is actually an "operator" prior to determining whether it meets the criteria for being a "responsible operator" liable for the payment of any benefits awarded. *See* 20 C.F.R. §725.491-495.

Claimant filed a claim for benefits on February 7, 2007. Director's Exhibit 3. At the time that he filed his claim, claimant was no longer working. Director's Exhibits 2. On April 20, 2007, the district director issued a "Notice of Claim," informing employer that it had been identified as a "potentially liable operator." Director's Exhibit 14. Pursuant to 20 C.F.R. §725.408(a)(1), employer was required to file a response within thirty days, indicating its intent to accept or contest its identification as a potentially liable operator. *Id.* If employer elected to contest its status as a potentially liable operator, it was required to accept or deny five assertions, set forth in 20 C.F.R. §725.408(a)(2).<sup>9</sup> Employer was provided with ninety days to submit documentary evidence in support of its position. *See* 20 C.F.R. §725.408(b)(1). Employer submitted a timely response, controverting the claim and denying all five assertions.<sup>10</sup> Employer did not submit, however, any documentary evidence in support of its position within the prescribed ninety-day period. *See* 20 C.F.R. §725.408(b)(1).

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<sup>9</sup> Section 725.408(a)(2) provides that:

If the operator contests its identification, it shall, on a form supplied by the district director, state the precise nature of its disagreement by admitting or denying each of the following assertions. In answering these assertions, the term "operator" shall include any operator for which the identified operator may be considered a successor operator pursuant to §725.492.

(i) That the named operator was an operator for any period after June 30, 1973;

(ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;

(iii) That the miner was exposed to coal mine dust while working for the operator;

(iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and

(v) That the operator is capable of assuming liability for the payment of benefits.

20 C.F.R. §725.408(a)(2).

<sup>10</sup> Employer also stated that claimant "worked as [a] truck driver" and was "never a miner." Director's Exhibit 15.

The district director completed development of the medical evidence under 20 C.F.R. §725.405 and issued an initial “Schedule for the Submission of Additional Evidence” on July 26, 2007, and a subsequent “Schedule for the Submission of Additional Evidence” on November 1, 2007.<sup>11</sup> See 20 C.F.R. §725.410; Director’s Exhibits 16, 19. Based upon a review of the evidence, the district director made an initial finding of entitlement and determined that employer is the responsible operator. Director’s Exhibit 19. The district director further advised employer that it could not submit evidence relating to its own status as responsible operator, other than evidence regarding whether another potentially liable responsible operator should have been identified. *Id.*

Employer, through its corporate secretary, James F. McKinnie, submitted a letter to the district director dated November 20, 2007, in which he stated:

[Claimant] worked less than two (2) years for us. He was a truck driver and materials handler. We are in the explosives business – not coal mining. As a truck driver, he was not exposed to coal dust. As a materials handler, he would at times have been on coal mine property, but he was never exposed to any coal dust. If he was exposed to any dust at all, it would have been rock dust not coal dust. Any such exposure to rock dust would have been very limited and we allege no exposure.

Director’s Exhibit 20 (emphasis in original). In a Proposed Decision and Order dated February 7, 2008, the district director found that claimant was entitled to benefits and designated employer as the responsible operator. *Id.* Employer, through counsel, submitted a response on March 3, 2008, disagreeing with the district director’s findings and requesting that the case be forwarded to the Office of Administrative Law Judges for a formal hearing. Director’s Exhibit 22. The case was forwarded to the Office of Administrative Law Judges on May 7, 2008, and assigned to the administrative law judge for hearing. Director’s Exhibit 25.

After the administrative law judge continued the hearing at the request of the parties, employer filed a brief in which it asked to be dismissed as responsible operator. Employer attached affidavits from persons allegedly familiar with the nature of claimant’s work. On February 19, 2009, the administrative law judge held a telephonic conference and characterized employer’s filing as a motion to remand the case to the district director for further development of evidence on the responsible operator issue.

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<sup>11</sup> The district director revised his findings upon receiving Dr. Toban’s September 20, 2007 letter clarifying his report dated April 9, 2007. Director’s Exhibits 10, 18.

February 19, 2009 Conference Transcript at 4. At the close of the conference, the administrative law judge declined to remand the case and indicated that he would fully address employer's status at the hearing. February 19, 2009 Conference Transcript at 9.

The formal hearing was held on April 23, 2009, at which all the parties were represented. Claimant, employer's president and employer's corporate secretary provided testimony relevant to the nature of claimant's work. Counsel for the Director indicated that she had no objection to the testimony of employer's corporate officers, but opposed the admission of the affidavits attached to employer's brief requesting that it be dismissed as responsible operator. Hearing Transcript at 76. The administrative law judge stated that he would consider only those affidavits submitted by persons who testified at the hearing. *Id.* at 105-06.

## **B. The Administrative Law Judge's Findings**

In his Decision and Order, the administrative law judge considered the hearing testimony and concurred with the Director's position, that claimant was a miner while working for employer in and around Skyline's coal mine operation for two years, based on his presence at a coal mine site, doing work essential to the mining process. Decision and Order at 5-6. The administrative law judge also agreed with the Director's assertion, that the blasting company was an operator covered by the Act, because it was an independent contractor performing services at the mine. 20 C.F.R. §725.491(a). *Id.* The administrative law judge further found that employer failed to meet its burden to establish "[t]hat it is not the potentially liable operator that most recently employed the miner." Decision and Order at 6, *quoting* 20 C.F.R. §725.495(c)(2).

The administrative law judge next noted that there was a rebuttable presumption that, during the course of his employment with the designated responsible operator, claimant was regularly and continuously exposed to coal mine dust, but that the presumption "may be rebutted by a showing that the employee was not exposed to coal mine dust for significant periods during such employment." Decision and Order at 6, *quoting* 20 CFR §725.491(d). The administrative law judge stated:

I note that the [e]mployer bears the burden of proof on this issue. I find that the evidence is at best in equipoise, and that the [e]mployer has failed to carry its burden. The [c]laimant says that he was exposed to blasting and that it exuded rock dust and coal dust. I accept that the [e]mployer has failed to show to a preponderance of the evidence that the [c]laimant was not exposed to any coat [sic] mine dust during significant periods of his employment. Mr. Cook focused his testimony primarily on coal dust. His testimony did confirm the frequent presence of the claimant on the mine site and the presence of coal mine dust there. It is reasonable to accept that

[c]laimant's testimony[,] together with the proximity of the large coal pit operation[,] confirm the exposure. I also accept Director's argument that the operator failed to show medical evidence to the effect that the coal mine dust exposure was so small that it did not contribute to the miner's disability.

*Id.* (internal citations omitted). Accordingly, the administrative law judge found that employer is the responsible operator.

### **C. Employer's Arguments**

Employer contends that it has proffered evidence sufficient to rebut the presumption of coal mine dust exposure set forth in 20 C.F.R. §725.491(d). Employer cites the hearing testimony of its corporate officers, and the affidavits that were attached to the brief in which it requested dismissal as responsible operator. Employer maintains that the administrative law judge erred in omitting the affidavits from consideration.

### **D. Discussion**

#### **1. Exclusion of the Affidavits of Non-testifying Witnesses**

Regarding the administrative law judge's exclusion of the affidavits from non-testifying witnesses, we hold that the administrative law judge's action was within the broad discretion granted to him in resolving procedural issues. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). Pursuant to 20 C.F.R. §725.456(b)(1), "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1).

A review of the record reflects that employer did not make a motion asking the administrative law judge to find that extraordinary circumstances existed to justify the late submission of the affidavits relevant to employer's status as the responsible operator. At the telephonic conference held to discuss employer's request that it be dismissed as the responsible operator, the administrative law judge informed employer of the terms of 20 C.F.R. §725.456(b)(1) and indicated that employer could make a motion at the hearing regarding the existence of extraordinary circumstances. February 19, 2009 Conference Transcript at 10-11. Contrary to employer's assertion, therefore, employer was on notice, prior to the hearing, that the affidavits would be excluded as untimely pursuant to 20 C.F.R. §725.456(b)(1), unless employer demonstrated that extraordinary circumstances prevented it from proffering the affidavits when the case was before the district director.

At the hearing, although she did not explicitly cite 20 C.F.R. §725.456(b)(1), the Director's counsel stated that she objected to the admission of the affidavits, because they constituted evidence relevant to the identification of the responsible operator, which employer was required to submit while the claim was before the district director. Hearing Transcript at 76. When the administrative law judge sustained the Director's objection by indicating that he would not consider the affidavits from non-testifying witnesses, employer raised no objection and did not address this issue in its written post-hearing closing argument. *See* Hearing Transcript at 106; Employer's Closing Argument. Thus, employer's argument, that the administrative law judge did not properly apply 20 C.F.R. §725.456(b)(1), is without merit.

Employer also asserts that the administrative law judge erred in sustaining the Director's objection to the admission of the affidavits, based upon 20 C.F.R. §725.548(b). Employer's Brief at 9, *citing* Hearing Transcript at 76-78. Employer characterizes 20 C.F.R. §725.548(b) as excusing the appearance of a witness who lives over 100 miles from the site of the hearing. *Id.* A review of the regulation cited by employer indicates, however, that it pertains to the taking of testimony by depositions and interrogatories, has no subsection (b), and contains no reference to a proximity requirement. 20 C.F.R. §725.548(b).

It is likely that employer meant to cite 20 C.F.R. §725.457(b), which provides that "no person shall be required to appear as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his or her place of residence, unless the lawful mileage and witness fee for 1 day's attendance is paid in advance of the hearing date." 20 C.F.R. §725.457(b). Upon review of the portion of the Hearing Transcript cited by employer, we fail to discern that the Director objected on this ground. Even assuming that the Director raised such an objection, the administrative law judge did not indicate that he relied upon 20 C.F.R. §725.457(b) to exclude the affidavits of the non-testifying witnesses. Hearing Transcript at 106. Accordingly, we reject employer's argument. Because employer's allegations of error regarding the administrative law judge's evidentiary ruling have no merit, it is affirmed.

## **2. Regular and Continuous Exposure to Coal Mine Dust**

Pursuant to 20 C.F.R. §725.491(a)(2)(i), the definition of an operator includes anyone who "[e]mploys an individual in the transportation of coal or in coal mine construction in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment." 20 C.F.R. §725.491(a)(2)(i) (internal citation omitted). The terms of 20 C.F.R. §725.491(d) provide:

For the purposes of determining whether a person is or was an operator that may be found liable for the payment of benefits under this part, there shall

be a rebuttable presumption that during the course of an individual's employment with such employer, such individual was regularly and continuously exposed to coal mine dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal mine dust for significant periods during such employment.

20 C.F.R. §725.491(d).

In this case, the administrative law judge was presented with conflicting testimony regarding the extent to which claimant was exposed to coal mine dust. Employer's corporate officers stated that the nature of claimant's work as a truck driver, and the distance of his duties from actual mining operations, precluded him from being exposed to coal dust. Hearing Transcript at 86, 90, 102-03, 105, 109-11. Claimant testified that he spent the majority of his time outside his truck and that he was frequently exposed to rock and coal dust while working at Skyline's strip mine site. *Id.* at 15-16, 41-42, 46, 48, 50-51, 58-59. The resolution of the conflict in the hearing testimony was committed to the discretion of the administrative law judge in his role as fact-finder. *See Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Zyskoski v. Director, OWCP*, 12 BLR 1-159 (1989). We hold that the administrative law judge acted within his discretion in determining that the testimony presented on employer's behalf at the hearing focused "primarily on coal dust," as opposed to coal mine dust; established that claimant was frequently at the mine site; and that coal mine dust was present in the area. *See Doss*, 53 F.3d at 659, 19 BLR at 2-183; *Zyskoski*, 12 BLR at 1-161. The administrative law judge also reasonably exercised his discretion in crediting claimant's testimony, that he was regularly exposed to coal mine dust. *Id.* We affirm, therefore, the administrative law judge's finding that employer did not rebut the presumption, set forth in 20 C.F.R. §725.491(d), that claimant was regularly exposed to coal mine dust. Accordingly, we also affirm the administrative law judge's determination that employer is the responsible operator liable for the payment of any award of benefits.

#### **IV. Conclusion**

In summary, with respect to claimant's appeal, we vacated the administrative law judge's finding that claimant failed to establish total disability under 20 C.F.R. §718.204(b) and affirmed his finding that claimant did not establish that his daughter is a dependent. Regarding employer's cross-appeal, we affirmed the administrative law judge's determination that employer is the responsible operator. We also affirmed the administrative law judge's decision to exclude the affidavits prepared by witnesses who did not testify at the hearing.

In light of these dispositions, we remand the case to the administrative law judge for consideration of the applicability of the amendments to the Act set forth in Section 1556 of Public Law 111-148 in accordance with the instructions set forth above.

Accordingly, the administrative law judge's Decision and Order – Denial of Claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge