

BRB Nos. 00-0989 BLA  
and 00-0989 BLA-A

ANNETTE FRANCISCO )  
(Widow of HOUK B. FRANCISCO) )  
 )  
Claimant-Petitioner )

v. )

DATE ISSUED:

HARBERT CONSTRUCTION )  
CORPORATION )

and )

LIBERTY MUTUAL INSURANCE )  
COMPANY )

Employer/Carrier-Respondents )  
Cross-Petitioners )

and )

CYPRUS CUMBERLAND COAL )  
CORPORATION )

Employer-Respondent )

and )

MOUNTAIN DRIVE COAL COMPANY )

and )

ROYAL INSURANCE OF AMERICA )

Employer/Carrier- )  
Respondent )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )  
Party-in-Interest )

DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole & Anderson P.S.C.), Barbourville, Kentucky, for claimant.

Debra L. Fulton (Franz, McConnell & Seymour, LLP), Knoxville, Tennessee, for employer Harbert Construction Company.

Laura Metcoff Klaus and Tab R. Turano (Greenberg Taurig LLP), Washington, D.C., for employer Cyprus Cumberland Coal Corporation.

Barry H. Joyner (Howard M. Radzely, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> and employer Harbert Construction Corporation (Harbert), appeal the Decision and Order (97-BLA-0044) of Administrative Law Judge Robert L. Hillyard denying 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).<sup>2</sup> The

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<sup>1</sup>Claimant, Annette Francisco, is the widow of the miner, Houk B. Francisco, who died on April 25, 1993. Claimant filed a claim for survivor's benefits on May 14, 1993. Director's Exhibit 87.

<sup>2</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 20 C.F.R. Parts 718, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive

administrative law judge found that the evidence of record established that the transfer provisions of the 1981 amendments to the Act were inapplicable in the present case, and that Harbert was the operator potentially liable for payment of this claim. *See* Black Lung Benefits Act Amendments of 1981, Pub. L. No. 97-119, §205(a), 95 Stat.1645 (1981), codified at 30 U.S.C. §932(c)(2), (j)(3); 20 C.F.R. §§725.496, 725.497(2000). The administrative law judge credited the miner with twenty-five years and three months of coal mine employment, and since the miner's claim was filed on August 15, 1973, adjudicated the claim pursuant to 20 C.F.R. Parts 727 and 718 (2000). Director's Exhibit 1. On the merits, the administrative law judge found the evidence of record insufficient to establish invocation of the interim presumption in the miner's claim pursuant to 20 C.F.R. §727.203(a)(2000), or entitlement pursuant to Part 718 (2000). Regarding the survivor's claim, the administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b)(2000), but insufficient to demonstrate that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2000). Accordingly, both the miner's and survivor's claims were denied.

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relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On appeal, claimant contends that the administrative law judge erred by failing to find that employer, Mountain Drive Coal Company (Mountain Drive), is the operator responsible for payment of this claim, and by failing to make a finding of fact regarding whether good cause existed for Mountain Drive's late controversion of benefits. Harbert responds, urging affirmance of the denial of benefits as supported by substantial evidence. In its cross-appeal, Harbert asserts that liability for payment of this claim should be transferred to the Black Lung Disability Trust Fund (Trust Fund), as Harbert was not given timely notification of the claim. Alternatively, Harbert contends that Mountain Drive should be designated as the operator responsible for payment of this claim. Cyprus Cumberland Coal Corporation, (Cyprus), another named employer, responds urging affirmance of the administrative law judge's Decision and Order, and asserts that liability for this claim properly rests with the Trust Fund. The Director, Office of Workers' Compensation Programs (the Director), agrees with claimant that the administrative law judge erred by failing to make a finding regarding whether Mountain Drive established good cause for its untimely controversion of liability.<sup>3</sup>

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The parties stipulated to the procedural history of the instant claim. Director's Exhibit 141. The miner filed an application for benefits on August 15, 1973, indicating that he had most recently been employed by Mountain Drive. Director's Exhibit 1. The claim was informally denied by the district director on October 24, 1974, and again on February 3, 1976, and June 9, 1977. Director's Exhibits 27, 29. The miner responded to each denial, and on June 20, 1977, requested a formal hearing. Director's Exhibits 19, 27, 29, 30. By letter dated April 10, 1979, on Mountain Drive letterhead, Linda Cupp reported that the miner had been employed by this entity from October 13, 1970 through 1974. Director's Exhibit 15.

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<sup>3</sup>We affirm the findings of the administrative law judge on the length of coal mine employment and his determination that the evidence was insufficient to establish entitlement on the merits in the living miner's claim and the survivor's claim at 20 C.F.R. §§727.203(a), 718.202(a), 718.203(b), 718.204(c), and 718.205(c)(2000), as they are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On June 18, 1979, the district director issued a Notice of Initial Finding awarding benefits to the miner and naming Mountain Drive as the operator responsible for payment of these benefits. Director's Exhibit 33. This notice was sent to Mountain Drive which thereafter submitted a letter from J. William Powers, III, dated July 12, 1979, on Mountain Drive letterhead, indicating that Mountain Drive had received the Notice of Initial Finding and was forwarding this notice to its insurance carrier. The letter further indicated that the carrier "may wish to contest the initial finding." Director's Exhibit 41. On August 24, 1979, the district director sent a letter to Mountain Drive referencing the July 12, 1979 letter of Mr. Powers, and granting Mountain Drive an additional forty-five days to submit a response to the Notice of Initial Finding. Director's Exhibit 42. No further response was submitted by Mountain Drive, and on October 16, 1979, the district director issued a Proposed Decision and Order awarding benefits finding Mountain Drive to be the responsible operator liable for the payment of the miner's claim. Director's Exhibit 34. The district director sent a further letter to Mountain Drive on December 10, 1979, indicating that by failing to timely controvert the claim, it had waived its right to file a controversion or have the miner examined by a physician of its choice. Director's Exhibit 42. Mountain Drive did not respond to this letter, and on February 15, 1985, the district director sent a letter to Mountain Drive requesting that it begin payment of benefits to the miner, and also requesting reimbursement for those benefits previously paid by the Trust Fund. Director's Exhibit 36.

On April 16, 1985, counsel for Mountain Drive submitted a Motion to Dismiss, requesting that it be released as the operator responsible for payment of this claim on the grounds that liability should be transferred to the Trust Fund. Director's Exhibit 38. On May 2, 1985, a response was submitted by the Office of the Solicitor of Labor on behalf of the Trust Fund, stating that the transfer provisions of the Act were inapplicable and that liability rested with Mountain Drive. Director's Exhibit 39. On May 30, 1985, counsel for Mountain Drive submitted a Motion for Remand, contending that there was good cause for the late controversion of benefits, that the claim was controverted by the July 1979 letter of J. William Powers, and again asserting that liability should be transferred to the Trust Fund. Director's Exhibit 41. Counsel for the Director responded on June 15, 1985, stating again that the transfer provisions of the Act were inapplicable, and there was no good cause for a late controversion of the claim by Mountain Drive. Director's Exhibit 42. Mountain Drive filed further Motions to Remand to the district director on June 11, 1987, and July 17, 1990, requesting that liability be transferred to the Trust Fund. Director's Exhibits 44, 46. By letter dated August 7, 1991, the district director informed Mountain Drive that the Trust Fund was not liable for payment of this claim since the miner's Part C claim was not denied by the Department of Labor more than one year prior to March 1, 1978. Director's Exhibit 47. Mountain Drive filed a Controversion of Benefits on September 3, 1991, again requesting a transfer of liability to the Trust Fund, and further requested a formal hearing. Director's Exhibit 48. The claim was forwarded to the Office of Administrative Law Judges (OALJ's), on November 6, 1991, and on August 20, 1992, Mountain Drive filed a Motion to Remand

the case for further consideration of the late controversion. Director's Exhibits 49, 50, 75. This motion was denied on September 2, 1992. Director's Exhibit 75.

A formal hearing was held on September 17, 1992, and on October 14, 1992, the administrative law judge remanded the case to the district director for further consideration of the applicability of the transfer provisions and the untimely controversion of benefits. Director's Exhibits 77, 78. On October 22, 1992, Mountain Drive filed a Motion To Find Good Cause for filing an untimely controversion on the grounds that their insurance carrier had not been notified of the claim until 1985. Director's Exhibit 79. Mountain Drive's Motion was denied by the district director who again determined that liability for this claim should not rest with the Trust Fund and that no good cause had been shown for Mountain Drive's late controversion of benefits, as the record file failed to indicate any correspondence from employer until 1985. Director's Exhibit 79. Mountain Drive subsequently requested a formal hearing and filed a new Controversion of Liability on February 22, 1993. Director's Exhibit 82.

By memorandum dated February 24, 1993, a Supervisory Claims Examiner noted that it was unclear whether Mountain Drive had insurance coverage for the last date of the miner's employment, and a memorandum dated March 4, 1993, noted that Cyprus Coal was a successor operator to Mountain Drive, and therefore potentially liable for payment of benefits. Director's Exhibits 83, 84. Cyprus Coal was notified of its potential liability on April 1, 1993. Director's Exhibit 85.

The miner died on April 25, 1993, and claimant's widow filed an application for survivor's benefits on May 14, 1993. Director's Exhibits 87, 89. Mountain Drive was notified of its potential liability for survivor's benefits on May 24, 1993, and on June 1, 1993 a Controversion of Benefits was filed by Cyprus Coal, indicating that Mountain Drive was a subsidiary of Cyprus Coal. Director's Exhibits 92, 93. Mountain Drive filed a controversion on June 3, 1993. Director's Exhibit 95. On January 11, 1994, the district director issued a Proposed Decision and Order Memorandum of Conference finding Mountain Drive liable for payment of survivor's benefits. Director's Exhibit 98. By letter dated February 1, 1994, Mountain Drive requested a formal hearing, and on February 28, 1994, the district director issued a Proposed Decision and Order dismissing the insurance carrier for Mountain Drive and finding Cyprus Coal liable for benefits as a successor operator. Director's Exhibits 100, 101. Cyprus Coal requested a formal hearing on March 30, 1994. Director's Exhibit 102. The district director filed a Statement of Position with an Adjudicatory History on April 22, 1994, reiterating the prior finding that no good cause existed for Mountain Drive's untimely controversion of benefits, and noting that DOL had not known that Mountain Drive was insured by Royal Insurance Company until April 16, 1985. Director's Exhibit 103.

The claim was forwarded to the OALJ on May 12, 1994, with both Mountain Drive

and Cyprus Coal as potential responsible operators. Director's Exhibit 104. By letter dated February 2, 1995, Cyprus Coal contended that the miner last worked for Harbert instead of Mountain Drive, and on February 10, 1995, the case was again remanded to the district director, for further consideration of the responsible operator issue. Director's Exhibits 105R, 105U. On March 27, 1995, Harbert was notified of its potential liability and its designation as the primary responsible operator, Cyprus Coal was notified of its designation as the secondary responsible operator, and Mountain Drive was notified that it was now designated as the tertiary responsible operator. Director's Exhibit 107. All three entities thereafter submitted controversions of liability. Director's Exhibits 108-110. On October 10, 1996, the claim was again forwarded to the OALJ for a formal hearing. Director's Exhibit 141. The Director raised the issue of whether Mountain Drive established good cause for its late controversion of this claim. Director's Exhibit 141.

A formal hearing was held on June 15, 1999. On the issue of the identity of the responsible operator, the administrative law judge considered the relevant evidence and found that Harbert was the last employer by whom the miner was employed for a cumulative period of at least one year. The administrative law judge based his determination on the miner's Social Security Earnings Statement, which listed Harbert as the miner's employer during the period 1970 to 1973, and on the July 12, 1979 letter from Mr. Powers to Harbert's insurance agencies, which referred to the miner as an employee of Harbert. Decision and Order at 14-19. The administrative law judge further relied on the testimony of Doug Hoskins, a managing official at Mountain Drive, who confirmed the purchase of Mountain Drive by Harbert in 1970, and also stated that the miner was employed by Harbert during the period of 1970 to November 19, 1973, and worked periodically in 1974 on special projects for Mountain Drive. *Id.* The administrative law judge further found that because the miner and the various authors of correspondence in the record identified Mountain Drive as the miner's last employer, it was not until 1995, that Harbert was determined to be the actual employer. The administrative law judge noted that the district director then immediately notified Harbert that it was being designated as the primary responsible operator. Decision and Order at 19. In addition, the administrative law judge found that Harbert's due process rights had not been violated by the delay in notifying it of the existence of the miner's claim, since Harbert received actual notice of the claim in 1979 and Harbert could have defended the claim at that time. Furthermore, the administrative law judge noted that Mountain Drive, Harbert's subsidiary, fully developed the medical evidence regarding the miner's claim. Decision and Order at 19.

Claimant contends that the administrative law judge erred by failing to make a finding regarding the timeliness of Mountain Drive's controversion of the living miner's claim, and whether good cause exists for such late controversion.<sup>4</sup> We agree. Pursuant to 20 C.F.R.

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<sup>4</sup>The living miner's claim is the only claim at issue herein, since claimant did not

§725.413 (2000), within thirty days after receipt of a Notice of Initial Finding, an operator is required to respond to such notice indicating whether it accepts or contests liability for the claim, unless this period is extended by the district director for good cause shown. *See* 20 C.F.R. §725.413(a)(2000). If the operator fails to respond within the specified period, the operator is deemed to have accepted the findings of the district director, and may not raise issues or present evidence contrary to the district director's initial findings. A failure to respond is considered a waiver of the operator's right to contest the claim unless the operator can establish good cause for such failure. *See* 20 C.F.R. §725.413(b)(3)(2000); *Pyro Mining Co. v. Slaton*, [Slaton], 879 F.2d 187, 12 BLR 2-328 (6<sup>th</sup> Cir. 1989);<sup>5</sup> *Caudill Construction Co. v. Abner* [Abner], 878 F.2d 179, 12 BLR 2-335 (6<sup>th</sup> Cir. 1989).

In the instant case, the district director notified Mountain Drive of its initial finding that the miner was entitled to benefits on June 18, 1979. Director's Exhibit 33. The record contains a letter from Mountain Drive dated July 12, 1979, indicating that its carrier "may" wish to contest the claim. Director's Exhibits 41, 42. The record further indicates that Mountain Drive did not challenge the district director's findings until April 16, 1985. Director's Exhibits 38, 42. Thus, claimant correctly contends that unless good cause exists for Mountain Drive's late controversion, it is unable to challenge the miner's entitlement to benefits, and is responsible for the payment of those benefits. 20 C.F.R. §725.413(3) (2000); *see Jonida Trucking Co. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6<sup>th</sup> Cir. 1997); *Slayton*, *supra*; *Abner*, *supra*.

The administrative law judge's Decision and Order reflects no finding on the issue of whether there was good cause for Mountain Drive's failure to controvert. Director's Exhibit 141. As this issue should have been resolved prior to the consideration of any alternative responsible operator, we must vacate the administrative law judge's finding that Harbert is

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challenge the administrative law judge's finding that she did not establish entitlement to survivor's benefits on the merits.

<sup>5</sup>The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the responsible operator and remand the present case to the administrative law judge for further consideration. *See Jonida, supra.* On remand, if the administrative law judge finds that Mountain Drive did not have good cause for failing to timely controvert this claim, then claimant is entitled to benefits based on the living miner's claim as Mountain Drive would be precluded from contesting the miner's eligibility for benefits, or its designation as the responsible operator therein. 20 C.F.R. §725.413(c); *Jonida, supra.* If however, on remand, the administrative law judge finds that Mountain Drive established good cause for its late controversion, Mountain Drive has no liability for payment of this claim, as claimant has not challenged the administrative law judge's finding that the evidence is insufficient to establish entitlement on the merits pursuant to Parts 718 and 727.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge