

BRB Nos. 96-1782 BLA
and 96-1782 BLA-A

JAMES T. CASH)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
BGL MINING COMPANY)	
)	
)	
Employer-Petitioner)	
)	
and)	
)	
TENNESSEE CONSOLIDATED COAL COMPANY)	
)	
)	
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 on Remand of Thomas M. Burke,
Administrative Law Judge, United States Department of Labor.

Douglas L. Payne, Greeneville, Tennessee, for claimant.

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for BGL Mining
Company.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for
Tennessee Consolidated Coal Company.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

BGL Mining Company (BGL) appeals and Tennessee Consolidated Coal Company (TCC) cross-appeals the Decision and Order on Remand (93-BLA-0494) of Administrative Law Judge Thomas M. Burke naming BGL the responsible operator on this claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. Initially, the administrative law judge found that the x-ray evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Regarding the responsible operator issue, the administrative law judge noted that claimant last worked for BGL, from April 6, 1989 through April 4, 1990, after which he went on unannounced sick leave. Although there was evidence in the record which, if credited, could have supported a finding that claimant's employment relationship with BGL continued for at least three additional working days beyond April 4, 1990, the administrative law judge focused only on the date of claimant's last day of work activity at the mine. Thus, the administrative law judge concluded that claimant worked less than one calendar year for BGL. He therefore dismissed BGL and named TCC as the responsible operator pursuant to 20 C.F.R. §725.493. Accordingly, the administrative law judge awarded benefits.

Pursuant to TCC's appeal, the Board affirmed as supported by substantial evidence the administrative law judge's finding pursuant to Section 718.304, but vacated his responsible operator finding. The Board held that the administrative law judge erred in excluding claimant's time on sick leave, and instructed the administrative law judge on remand to consider all of the relevant evidence to determine when claimant's employment relationship with BGL ceased. *Cash v. Tennessee Consolidated Coal Co.*, BRB No. 95-0120 BLA (Nov. 29, 1995)(unpub.).

On remand, the administrative law judge discussed all of the relevant evidence as instructed and found that, "based on the uncontradicted testimony of claimant . . . claimant's foreman, and . . . the owner of BGL, . . . claimant's employment relationship with BGL did not cease until at least . . . three days after he last worked. Thus, claimant's last coal mine employment of not less than a year was with BGL." Decision and Order on Remand at 4. Accordingly, the administrative law judge named BGL the responsible operator.

On appeal, BGL contends that the administrative law judge failed to independently evaluate the responsible operator evidence and erred in concluding that claimant worked for a full calendar year with BGL. BGL also challenges the administrative law judge's finding in his initial Decision and Order regarding the dependency of claimant's ex-spouse. TCC responds, urging affirmance of the administrative law judge's responsible operator finding, and cross-appeals, raising the same arguments regarding the merits of entitlement rejected by the Board in the initial appeal. Claimant responds, requesting that the Board decline to consider any issues not related to the identification of the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), has declined to

participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

BGL argues that the administrative law judge on remand simply accepted the Board's description of the responsible operator evidence without determining whether the evidence was credible. BGL Brief at 5-7. Contrary to BGL's contention, the administrative law judge discussed all of the responsible operator evidence at length. Decision and Order on Remand at 2-4. In so doing, the administrative law judge correctly found that the testimony of claimant, his foreman, and the owner of BGL that claimant's employment relationship continued beyond his last day in the mines was uncontradicted. Employer's Exhibits 1 at 9, 2 at 9-10; Hearing Transcript at 33-34. The administrative law judge acted within his discretion in crediting this uncontradicted testimony to conclude that claimant was employed by BGL for at least one calendar year pursuant to Section 725.493. See *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Therefore, we reject BGL's contention.

BGL further asserts that the administrative law judge erred in finding that claimant worked a full calendar year for BGL. BGL Brief at 7-10. Specifically, BGL contends that claimant's unpaid sick leave cannot be counted as employment. *Id.* Under Section 725.493(b), a claimant should be given credit for days he or she actually worked or was excused from work by the employer. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988)(*en banc*). An unpaid leave of absence may be counted where there is no evidence that the employment was terminated and the record indicates that claimant retained the right to employment. *Elswick v. The New River Co.*, 2 BLR 1-1109, 1113-14 (1980). As the administrative law judge found, the record indicates that claimant's employment was not terminated when he went on unannounced sick leave after his last day at the mine, his job was kept open for at least three additional working days thereafter as a matter of company policy, and claimant retained the right to return to work if his physician had authorized him to do so. Employer's Exhibits 1 at 9-11, 2 at 9-13, 3; Hearing Transcript at 33-34. Therefore, we reject employer's contention.

BGL also contends that the administrative law judge erred in his initial decision awarding benefits by finding claimant's divorced spouse to be a dependent for purposes of benefits augmentation.¹ BGL Brief at 10-13. In the initial Decision and Order, the

¹ We have considered claimant's argument that BGL waived this issue by not raising it in the initial appeal, Claimant's Brief at 2, but we are persuaded that BGL reasonably determined not to cross-appeal on this issue at that time, as the administrative law judge had dismissed BGL as the responsible operator.

administrative law judge found claimant's divorced spouse² to be a dependent based on her receipt of benefits out of claimant's Social Security disability award. [1994] Decision and Order at 3. For a divorced spouse to establish dependency, the record must indicate that the divorced spouse is receiving substantial contributions pursuant to a written agreement or court order, or that the divorced spouse receives at least one-half of his or her support from the miner. 20 C.F.R. §725.207. Claimant testified that there is no court order requiring him to support his ex-spouse.³ Hearing Transcript at 28. Regarding the one-half support issue, claimant testified that he “help[s]” his ex-spouse in that “she receives benefits out of my disability. Social Security.” Hearing Transcript at 29. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that Social Security retirement benefits are not the miner's property and thus, are not contributions from the miner as defined in the regulations, and therefore may not be counted for purposes of the Section 725.207 dependency requirements. *Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987). The court's reasoning would also apply to Social Security disability benefits. Because the Social Security disability benefits received by claimant's divorced spouse are not contributions from claimant under Section 725.207, and the record contains no evidence of any other support from claimant, we reverse the administrative law judge's finding that claimant's divorced spouse met the dependency requirements of Section 725.207.

² BGL does not dispute that claimant's ex-spouse meets the relationship requirements of a divorced spouse pursuant to 20 C.F.R. §725.306.

³ The record does not contain a written support agreement, and claimant did not suggest that one exists. See 20 C.F.R. §725.207(b); Hearing Transcript at 28-30.

Accordingly, the administrative law judge's Decision and Order awarding benefits is reversed in part, and his Decision and Order on Remand naming BGL the responsible operator is affirmed.⁴

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

⁴ In light of our disposition of this case, we need not address the issues raised in TCC's cross-appeal.