BRB Nos. 97-1135 BLA
and 97-1135 BLA-A

ESTILL SHEPHERD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BENHAM COAL, INCORPORATED	)	DATE ISSUED:_____
	)	
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Estill Shepherd, Delphia, Kentucky, *pro se*.

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for employer.

Jennifer U. Toth (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals and employer, Benham Coal, Incorporated, cross-appeals the Decision and Order (96-BLA-0764) of Administrative Law Judge Donald W. Mosser 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). After crediting claimant with at least twenty-five years of coal mine employment, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found the evidence sufficient to establish

total disability pursuant to 20 C.F.R. §718.204(c), the administrative law judge also found that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. Employer, however, argues on cross-appeal that the administrative law judge erred in designating it as the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The Director, however, argues that the administrative law judge properly designated employer as the responsible operator.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

We initially address employer's contention that the administrative law judge erred in designating it as the responsible operator. Claimant worked for employer from 1967 until March of 1972. Director's Exhibit 2. Claimant subsequently worked for Blue Diamond Coal Company (Blue Diamond) from March 21, 1972 until he retired on January 1, 1991. Director's Exhibits 1, 2, 4; Transcript at 16. Approximately five months after claimant's retirement, Blue Diamond filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Director's Exhibit 36. The regulations provide that the operator with which the miner had the most recent periods of cumulative employment of not less than one year shall be the responsible operator. 20 C.F.R. §725.493(a)(1). However, an operator may be relieved of liability if it is determined incapable of paying benefits. 20 C.F.R. §725.492(a). In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability. 20 C.F.R. §725.492(b).

In the instant case, the administrative law judge acknowledged that claimant's most recent coal mine employment of not less than one year was with Blue Diamond. Decision and Order at 20. The administrative law judge, however, found that Blue Diamond was not financially capable of assuming liability because the Bankruptcy Court had rendered such a conclusion. *Id.* Consequently, the administrative law judge assessed liability against employer. *Id.* The administrative law judge's determination is not supported by the evidence of record. Contrary to the administrative law judge's statement, the Bankruptcy Court did not conclude that Blue Diamond was financially incapable of assuming liability. Moreover, as evidenced by its filing of several documents contesting its liability in the instant case, Blue Diamond continues to exist.[1] Furthermore, there is nothing in the record to

[1]On October 5, 1992, Blue Diamond filed an operator controversion form and notified the Department of Labor (DOL) that it had filed a petition under Chapter 11 of the Bankruptcy Code. Director's Exhibit 31. On October 9, 1992, Blue Diamond filed a

demonstrate that the reorganized Blue Diamond is currently unable to assume financial responsibility.

Employer contends that it is relieved of any liability by virtue of a Settlement Agreement entered into by Blue Diamond and the Department of Labor (DOL) on December 10, 1992. Under the terms of the Settlement Agreement,[2] the DOL agreed to be the "sole obligor to effect the

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"Special Answer and Controversion." Director's Exhibit 32. By letter dated March 4, 1993, the district director noted that as part of its reorganization plan, Blue Diamond had entered into a settlement agreement with the DOL. Director's Exhibit 37. In accordance with the Settlement Agreement, the district director noted that Blue Diamond would no longer be named as the responsible operator in any case where the miner's last coal mine employment with Blue Diamond ceased prior to June 19, 1991. *Id.* The district director, therefore, relieved Blue Diamond of liability in the instant case. *Id.*

[2]The DOL estimated that the Black Lung Disability Trust Fund (Trust Fund) would ultimately be required to pay between five and seven million dollars for Black Lung Claims filed by Blue Diamond employees in the future. Director's Exhibit 36. Blue Diamond estimated that the amount of the Black Lung Claims was $3,798,600. *Id.* These claims were resolved under the terms of a December 10, 1992 Settlement Agreement. Under the terms of the Settlement Agreement, the DOL agreed to "release from liability all parties including Blue Diamond" from black lung claims upon confirmation of the Plan in exchange for Blue Diamond's agreement: (1) to allow the DOL to receive approximately $442,000 of negotiable securities held by the Federal reserve in a fund identified as the "Reserve Fund"

payment of benefits to any and all employees of Blue Diamond terminated prior to June 19, 1991." *See* Director's Exhibit 36. In return, Blue Diamond agreed to pay the DOL over 3.6 million dollars in cash and other assets. *Id.* The administrative law judge, nevertheless, held that employer could not rely on the terms of the Settlement Agreement to escape liability because it was "intended to apply only to those parties signing the agreement...." Decision and Order at 20. Employer, citing paragraphs 2 and 3 of the Settlement Agreement, contends that the DOL released it from liability in the instant case. We agree with employer. Paragraphs 2 and 3 of the December 10, 1992 Settlement Agreement provide that:

> 2. Upon confirmation of Blue Diamond's plan of reorganization, *the DOL shall release from liability all parties* including Blue Diamond, the reorganized Blue Diamond, First American, First American Trust Company or the officers, directors and agents of those entities, against which DOL may have asserted claims relating to Blue Diamond, and will waive its rights for any payments except as those as specifically set forth in this agreement.
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> 3. Upon confirmation of Blue Diamond's plan of reorganization, *the Fund shall be the sole obligor to effect the payment of benefits to any and all employees of Blue Diamond terminated prior to June 19, 1991, pursuant to the Black Lung Act*; and DOL and the Fund shall be entitled to immediate receipt of the Reserve Funds in the approximate amount of $442,000.00.

Director's Exhibit 36 (emphasis added).

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and to pay the proceeds from this Fund into the Trust Fund; (2) to make twenty-eight quarterly payments of $75,000 each to the Trust Fund; and (3) to pay into the Trust Fund any proceeds from the refund of a bond held by Utica Mutual Insurance Company in the amount of $1,075,000. *Id.*

Paragraph 2 can only be characterized as a general release. Paragraph 3 is similarly clear. It provides that no entity other than the Trust Fund will be liable for black lung benefits after confirmation of Blue Diamond's Plan. Thus, it was error for the administrative law judge to hold employer liable as the responsible operator.[3] We, therefore, vacate the administrative law judge's designation of employer as the responsible operator and hold that, pursuant to the terms of the agreement, the Trust Fund is liable for any benefits awarded in the instant case.

[3]We note that a Bankruptcy Court held, under the terms of the same December 10, 1992 Settlement Agreement at issue in the instant case, that the DOL could not hold a successor operator liable for payment of Blue Diamond's settled black lung claims. *See In re Blue Diamond Coal Co.*, 163 B.R. 798 (Bankr. E.D. Tenn. 1994).

We now turn our attention to the merits of the instant claim. In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that "every x-ray which [had] been interpreted as positive for pneumoconiosis [had] also been reread as negative by at least one physician of equal or superior training." Decision and Order at 16. The administrative law judge further noted that "the more recent x-rays [had] been read on several occasions by highly qualified radiologists as negative [for] pneumoconiosis." *Id.* The administrative law judge, therefore, found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. *Id.* Contrary to the administrative law judge's characterization, not every x-ray of record interpreted as positive for pneumoconiosis was reread as negative by at least one physician of equal or superior training. Claimant's February 11, 1992 and December 22, 1992 x-rays were uniformly interpreted as positive for pneumoconiosis.[4] Director's Exhibits 58, 59. Inasmuch as the administrative law judge's evidentiary analysis is not supported by the evidence of record, the administrative law judge committed error.[5] *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). We also note that the administrative law judge erred to the extent that he discredited positive x-ray evidence solely because later x-rays were interpreted as negative. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) and remand the case to the administrative law judge for further consideration.[6]

Moreover, the administrative law judge's weighing of the evidence to find the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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[4]Drs. Baker and Vaezy interpreted claimant's February 11, 1992 x-ray as positive for pneumoconiosis. Director's Exhibits 58, 59. Dr. Baker is a B reader. Director's Exhibit 58. Dr. Vaezy's qualifications are not found in the record.

Dr. Lane, a B reader, interpreted claimant's December 22, 1992 x-ray as positive for pneumoconiosis. Director's Exhibit 59.

[5]The administrative law judge also failed to consider Dr. Sargent's positive interpretation of claimant's September 25, 1992 x-ray. *See* Director's Exhibit 63.

[6]Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant was precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 16. Furthermore, the administrative law judge properly found that claimant was not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). *Id.* Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. See 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. See 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. See 20 C.F.R. §718.306.

§718.202(a)(4) is not affirmable. The administrative law judge discredited Dr. Sundaram's diagnosis of pneumoconiosis because he found that his report was not well documented. Decision and Order at 17. The administrative law judge found that Dr. Sundaram's report was not well-documented merely because it was only "one-half page in length." *Id.* Although one-half page in length, Dr. Sundaram noted claimant's symptomatology and that claimant had worked in the mines for thirty years. Director's Exhibit 67. Dr. Sundaram further noted that his physical examination revealed a few rhonchi and wheezing. *Id.* Dr. Sundaram also relied upon a chest x-ray interpretation and the results of a pulmonary function study conducted on February 3, 1995. *Id.* Given the documentation underlying Dr. Sundaram's report, the administrative law judge must reconsider whether Dr. Sundaram's report is sufficiently documented. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984) (An opinion based upon symptomatology, patient history and a physical examination is considered minimally documented).

The administrative law judge also discredited Dr. Sundaram's opinion because the doctor relied upon an inaccurate smoking history. The administrative law judge noted that Dr. Sundaram, in his February 14, 1995 report, indicated that claimant had not smoked since well before 1991. Decision and Order at 17. The administrative law judge found that this statement contradicted Dr. Sandlin's 1996 testimony that claimant "continued to smoke." *Id.* Contrary to the administrative law judge's characterization, Dr. Sandlin did not testify that claimant continued to smoke in 1996. During his 1996 deposition, Dr. Sandlin testified that although he had written in one of his notes that claimant continued to smoke, he subsequently discovered that claimant had stopped smoking in 1991.[7] Employer's Exhibit 1.

The administrative law judge also erred to the extent that he discredited the opinions of those physicians diagnosing pneumoconiosis (Drs. Baker, Vaezy, Anderson, Lane, Sandlin and Sundaram) because the overall weight of the x-ray evidence was negative for pneumoconiosis. As discussed *supra*, the administrative law judge erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Moreover, although an administrative law judge may properly consider whether contrary readings of an x-ray that a physician relied upon in rendering his opinion call into question the reliability of his conclusion, he may not reject a physician's diagnosis of pneumoconiosis merely because it is based upon a positive x-ray interpretation that is outweighed by the interpretations of other x-rays. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Winters v. Director, OWCP*, 6 BLR 1-877 (1984).

The Director also argues that the administrative law judge erred in stating that a medical opinion finding lung disease only "partially" related to coal dust exposure is insufficient to establish legal pneumoconiosis as defined at 20 C.F.R. §718.201. *See* Decision and Order at 18. The definition of pneumoconiosis includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment *significantly* related to, or *substantially* aggravated by, dust exposure in coal mine employment." 20 C.F.R.

[7]We note that claimant testified at the hearing that he quit smoking three months prior to heart surgery in 1991. Transcript at 22.

§718.201 (emphasis added); *see Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). The administrative law judge should consider whether an opinion that finds claimant's lung disease "partially" related to coal dust exposure supports a finding that claimant's lung disease was significantly related to or substantially aggravated by coal dust exposure. The administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is vacated, and the case is remanded to the administrative law judge for further consideration.

In light of our decision to vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b). On remand, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) or (a)(4), he must reconsider whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is modified in part, affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge