

BRB No. 97-1653 BLA

EMMETTE D. POWELL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
A&D COAL COMPANY/ WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND)	DATE ISSUED:
)	
Employer/Carrier)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR))
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

George E. Freeman, Charleston, West Virginia, for employer.

Edward Waldman (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (96-BLA-0159) of Administrative Law Judge Samuel

J. Smith awarding 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). The administrative law judge, applying the regulations at 20 C.F.R. Part 718, found the evidence sufficient to establish entitlement to benefits. Decision and Order at 7-18. The administrative law judge also found the Black Lung Disability Trust Fund liable for payment of benefits pursuant to 20 C.F.R. §§725.490, 725.493(a)(4). Decision and Order at 3-6.

On appeal, the Director does not challenge claimant's entitlement to benefits, but asserts that the administrative law judge erred in making the Trust Fund liable for payment of benefits by finding that the evidence regarding the responsible operator in this case was inadequately developed. Director's Brief at 4-8. Claimant¹ has declined to participate in this appeal inasmuch as his entitlement to benefits has not been contested, and A&D Coal Company has not responded.²

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

Claimant's last coal mine employment was with Jo-Bet Mining Company. Director's Exhibit 2. Claimant testified that he also worked for M&M Trucking Company for less than a year in 1987-88 and that M&M and Jo-Bet were the same entity. Hearing Transcript at 21-23. Prior to working at Jo-Bet, claimant was employed with A&D Coal Company during 1971-77, Director's Exhibits 2, 27. Hearing Transcript at 36.

¹ Claimant is Emmette D. Powell, the miner, who filed his claim for benefits on May 25, 1994. Director's Exhibit 1.

² Inasmuch as the administrative law judge's finding that claimant is entitled to benefits is unchallenged on appeal, we affirm it. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge considered all the evidence in the record and found the Trust Fund liable for black lung benefits. Decision and Order at 3-6. Specifically, the administrative law judge found credible claimant's testimony that "he worked for Jo-Bet for more than one year," that the work was not constant, and that at times he was paid as an employee of the company and, at other times, as a self-employed operator. Decision and Order at 4. The administrative law judge stated that under certain circumstances claimant's periods of employment as a self-employed operator may be merged with time spent as an employee of the entity, but the record must support a finding of sufficient supervision and control. *Id.* In considering whether hearing testimony or documentary evidence supports such a relationship, the administrative law judge found that the record "constitutes a wholly inadequate basis upon which to determine whether an employer-employee relationship with Jo-Bet existed during periods of claimant's self-employment." Decision and Order at 5. The administrative law judge further noted that the record has been insufficiently developed regarding the relationship between Jo-Bet and M&M such that it cannot be determined whether claimant's employment at each of these companies would total one year. *Id.*

Citing *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993), the administrative law judge stated that these "deficiencies in the record do not, however, lead to the conclusion that the named operator, A&D Coal, is responsible for the payment of benefits." Decision and Order at 5. Rather, the administrative law judge stated that it is the Director's burden, not A&D's, "to resolve the unanswered questions regarding Claimant's work history and the terms of his employment with Jo-Bet" and to "determine whether Jo-Bet and M&M Trucking are related entities." Decision and Order at 6. Therefore, because the Director failed to effectively proceed against all potential operators, the administrative law judge concluded that the Trust Fund is liable for payment of benefits. *Id.*

The Director noted that pursuant to Section 725.493(a)(1) the responsible operator is the last employer with which claimant had his most recent periods of cumulative employment of not less than one year. Director's Brief at 4. However, the Director asserts that Jo-Bet, as claimant's most recent employer, cannot be named the responsible operator in this case because claimant was not employed by this company for a period of at least 125 working days pursuant to Section 725.493(b). Director's Brief at 4-5. Therefore, the Director contends that he has fulfilled his duty in effectively proceeding against all potential operators by proving that claimant was employed fewer than 125 days with Jo-Bet. Director's Brief at 5.

Additionally, the Director asserts that, contrary to the administrative law

judge's finding, it is irrelevant whether the record contains information regarding claimant's self-employed work for Jo-Bet and the relationship between Jo-Bet and M&M Trucking because, even when viewing these facts most favorably towards A&D, it is impossible to conclude that claimant has more than 125 working days of coal mine employment with Jo-Bet and M&M Trucking. Director's Brief at 5-8. Relying solely on the Social Security records, the Director asserts that these records firmly establish that claimant has less than 125 working days of coal mine employment with Jo-Bet and M&M Trucking. In doing so, the Director dismisses claimant's contrary testimony, which the administrative law judge has deemed credible, and engages in speculative reasoning to determine that claimant had, at most, 111 working days with Jo-Bet and M&M Trucking.

We reject the Director's assertions.³ As the administrative law judge stated in his Decision and Order, there is evidence in the record which raises questions regarding claimant's work history with Jo-Bet and M&M Trucking, and the lack of evidence clarifying these questions makes it difficult, if not impossible, to accurately determine claimant's length of employment with these companies. Hearing Transcript at 21-25, 35-36; Director's Exhibits 7, 27. Had these entities been named as potential responsible operators by the district director, the questions regarding claimant's employment with Jo-Bet and M&M Trucking may have been answered. Therefore, we hold that it was reasonable, see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), for the administrative law judge to find that the record is insufficient to determine the actual number of days that claimant was employed at Jo-Bet and M&M Trucking.

Given the deficiencies in this record, we affirm the administrative law judge's finding that the Director has failed to effectively proceed against all potential responsible operators, as required by Section 725.412, and his finding that the Director has failed to establish a proper basis for relieving Jo-Bet and/or M&M Trucking of liability pursuant to Section 725.493. See *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995); *England, supra*. Inasmuch as the Director failed to name Jo-Bet and M&M Trucking, and to do so at this stage in the proceedings would not enhance the efficient administration of the Act, we also affirm the administrative law judge's dismissal of A&D as the

³ When this case was before the district director, A&D urged the United States Department of Labor to name Jo-Bet and M&M Trucking as putative responsible operators, but the district director declined to do so. Director's Exhibits 25, 30, 31.

responsible operator and affirm his determination that liability for payment in this case rests with the Trust Fund. See *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits and dismissing A&D Coal Company as the responsible operator is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge