BRB No. 08-0316 BLA

R.G. Claimant- Respondent v. CHARLES CLEARING CONTRACTOR, INCORPORATED and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/27/2009 DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2006-BLA-5718) of Administrative Law Judge Larry S. Merck 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). Claimant filed his claim for benefits on February 28, 2005. Director's Exhibit 2. The administrative law judge initially determined that the claim was timely filed pursuant to 20 C.F.R. §725.308(c) and that employer was the responsible operator. The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed and that employer is the responsible operator. Employer further contends that the administrative law judge erred in relying on Dr. Hussain's opinion to find that claimant is totally disabled by pneumoconiosis pursuant to Section 718.204(b), (c). Claimant responds, urging affirmance of the award of benefits.[1] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal, asserting that the administrative law judge properly found that the claim was timely filed and that employer is the responsible operator. The Director, however, has declined to address the propriety of the administrative law judge's findings on the merits unless specifically requested to do so by the Board.

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.[2] 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).

[1] Claimant asserts that employer did not timely file its petition for review and brief, and requests that the Board issue an order directing employer to show cause why the appeal should not be dismissed. Claimant's Brief at 4-6. The Board, as a matter of discretion, has accepted employer's filing, and declines to issue a show cause order. 20 C.F.R. §802.217(a).

[2] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Timeliness of the Claim

Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [claimant]" more than three years prior to the filing of his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

In this case, the administrative law judge found that the evidence failed to satisfy employer's burden of proof to rebut the presumption that the claim was timely filed. The administrative law judge explained:

> Besides [c]laimant's hearing testimony that he did not learn he had a lung disease until his cardiac surgery of 2005, the only other evidence that bears on this issue comes from [c]laimant's deposition. He [testified] that no physician has ever told him that he has black lung [Employer's Exhibit 4 at 27]. He has never been asked whether any physician has ever informed him that he is totally disabled due to black lung disease. There is clearly no evidence to support [e]mployer's argument that this claim is not timely. Because [e]mployer has not offered any evidence that a well-reasoned and well-documented diagnosis of total disability due to pneumoconiosis was communicated to [c]laimant, I find that [e]mployer has not rebutted the presumption that this claim was timely filed.

Decision and Order at 12.

Employer's sole assertion with respect to Section 725.308 is that it is "neither just nor logical" to give claimant a rebuttable presumption that his claim was timely filed.[3]

[3] Employer asserts that it is "problematic" to apply a presumption that claimant timely filed his claim since claimant continued to smoke after he stopped working in the mines, and there is no evidence that "disability" from coal dust exposure is progressive. Employer's Brief at 3. Employer notes that it is incumbent upon the claimant to establish by a preponderance of the evidence that he is totally disabled by pneumoconiosis. *Id*. Employer, however, appears to confuse the presumption of timeliness with a presumption that claimant is totally disabled due to pneumoconiosis. Contrary to employer's

Employer's Brief at 3. Although employer challenges the validity of Section 725.308, employer concedes that its argument is "contrary to the present state of the law." *Id.* Moreover, employer does not raise any specific error with respect to the administrative law judge's factual findings. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because employer presents no evidence or argument from which to conclude that the administrative law judge erred in finding that employer failed to establish that this claim was untimely filed, we affirm the administrative law judge's findings pursuant to Section 725.308. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-296; Decision and Order at 12.

Responsible Operator

Employer challenges the administrative law judge's determination that it is the responsible operator liable for payment of benefits. The regulations state that the responsible operator is the party that has most recently employed the miner "for a cumulative period of not less than one year." 20 C.F.R. §§725.494(c), 725.495(c)(2). Pursuant to 20 C.F.R. §725.101(a)(32), a year is defined as: "[A] period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32).

On appeal, employer concedes that the Social Security Administration (SSA) earnings record "may provide some support" for the administrative law judge's finding that it is the responsible operator, but also alleges that "there is no analysis by the administrative law judge to [establish] that these dollar amounts would demonstrate that claimant worked for [employer] for twelve calendar months or for a combination of such a time as to qualify [employer] as the responsible operator." Employer's Brief at 4. We disagree.

In February 2005, claimant prepared an employment history form indicating that he worked for employer in 1989, 1996 and 1997. Director's Exhibit 3. By letter dated March 16, 2005, employer verified that claimant had worked for employer in 1989 and 1996. Director's Exhibit 10. Employer noted that claimant's job classification was as a drill operator. *Id.* The SSA earnings records indicate that the miner earned wages from employer in 1989, 1996 and 1997. Director's Exhibits 8, 9. Claimant testified at the

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contention, claimant does not receive any type of presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.308. While claimant bears the burden of proving the requisite elements of his claim, it is employer's burden to rebut the presumption that claimant timely filed his claim. *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001).

formal hearing that he worked for employer from the summer or fall of 1996 until the fall of 1997. Hearing Transcript (HT) at 18-22. Claimant also stated that he had previously worked for employer in 1989 for five or sixth months. HT at 32-33.

The administrative law judge acknowledged that claimant was "not a good historian of his coal mine employment." Decision and Order at 9. The administrative law judge, therefore, weighed claimant's hearing and deposition testimony in conjunction with employer's March 16, 2005 letter, and the SSA records. *Id.* Based on this evidence, the administrative law judge determined that claimant worked for employer for approximately eighteen months, by totaling the period "from roughly January of 1989 through about August of 1989, during which time claimant earned $11,694.71[,]" *see* Decision and Order at 10, Director's Exhibits 8-10; Employer's Exhibit 4 at 6-7; HT at 32-33, and the period from June 1996 through April 1997, during which time claimant earned $13,875.77, *see* Decision and Order at 10; Director's Exhibit 9.[4]

The Board has held that the administrative law judge may use any reasonable method of calculation to determine the length of coal mine employment. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988). Because the administrative law judge discussed all of the evidence relevant to claimant's employment history, and he explained the basis for his findings, we reject employer's assertion of error and affirm his determination that claimant worked for employer for at least one cumulative year of coal mine employment. *See* 20 C.F.R. §§725.494(c), 725.495(c)(2); *Croucher v. Director, OWCP*, 20 BLR 1-68, 1-72 (1996) (en banc); *Dawson*, 11 BLR at 1-60; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer is the responsible operator.

Merits of Entitlement

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to

[4] The record indicates that claimant worked for P&P Incorporated of Kentucky (P&P) and Lee Sartin Trucking Company (Lee Sartin) subsequent to his coal mine employment with employer. Director's Exhibit 9; Employer's Exhibit 4. However, the administrative law judge determined that neither of these companies had employed claimant for at least one cumulative year. Decision and Order at 10. Because employer does not challenge the administrative law judge's findings with regard to P&P and Lee Sartin, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer argues that the administrative law judge erred in finding that claimant is totally disabled.[5] We disagree. The record includes three pulmonary function studies dated April 13, 2005, June 16, 2006 and June 22, 2006, all of which produced qualifying values for total disability before the use of a bronchodilator.[6] Director's Exhibit 16; Employer's Exhibits 1, 2. After bronchodilation, the April 13, 2005 study was non-qualifying, but the June 16 and June 22, 2006 studies remained qualifying for total disability. Decision and Order at 26. There are also three arterial blood gas studies of record, all of which were non-qualifying for total disability, and three medical opinions. Director's Exhibit 16; Employer's Exhibits 1, 2. Dr. Hussain examined claimant at the request of the Department of Labor on April 13, 2005 and diagnosed heart disease and chronic obstructive pulmonary disease (COPD) due to coal dust exposure and smoking. Director's Exhibit 16. Dr. Hussain opined that claimant's pulmonary function testing demonstrated a moderate respiratory impairment, and that claimant was totally disabled. *Id*. On May 6, 2005, the district director asked Dr. Hussain to clarify whether claimant had legal pneumoconiosis and whether he was totally disabled.[7] Director's Exhibit 27. Dr. Hussain completed a questionnaire on September 13, 2005, indicating that claimant suffered from COPD, which he opined was significantly related to coal dust exposure. Director's Exhibit 28. Dr. Hussain also opined that claimant was totally disabled by his respiratory condition because claimant was "unable to lift weight, [or] do significant

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination of seventeen years of coal mine employment and his findings that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), (4), 718.203. *Skrack*, 6 BLR at 1-711; Decision and Order at 10, 15, 25.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

[7] The regulation at 20 C.F.R. §718.201(a)(2) defines legal pneumoconiosis as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" and includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). For the purposes of the regulation, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

exertion." *Id*. Dr. Hussain attributed claimant's disability to a combination of smoking and coal dust exposure. *Id*.

Employer deposed Dr. Hussain on September 28, 2005. Director's Exhibit 36. When asked whether he agreed that the significant improvement on claimant's pulmonary function test after the use of a bronchodilator was consistent with a smoking-related respiratory impairment, Dr. Hussain answered, "Right." Director's Exhibit 36 at 9. Additionally, after being told by employer's counsel that claimant last worked as a coal truck driver, Dr. Hussain opined that claimant had the respiratory capacity to perform that work. *Id*. at 9-10. By letter dated December 2, 2005, the district director asked Dr. Hussain to clarify whether claimant was totally disabled and suffered from a respiratory condition that was significantly contributed to, or caused by, coal mine employment. Director's Exhibit 43. Dr. Hussain replied, "I still hold the opinion that I gave in the original report." *Id*. Dr. Hussain stated that claimant suffered from legal pneumoconiosis, which was substantially aggravated by coal dust exposure. *Id.* On December 30, 2005, the district director again asked Dr. Hussain to clarify whether he was of the opinion that claimant was totally disabled due to a respiratory impairment. Director's Exhibit 44. Dr. Hussain responded on February 2, 2006 and stated, "I feel that [the] miner is totally disabled and cannot perform the work of a coal miner based on [pulmonary function test] results." *Id.*

The record also includes the opinions of Drs. Broudy and Dahhan, both of whom opined that claimant was totally disabled from a respiratory or pulmonary standpoint. Employer's Exhibits 1, 2. Dr. Broudy opined that claimant's pulmonary function studies confirmed a moderate to severe obstructive impairment from cigarette smoking. Employer's Exhibit 1. Similarly, Dr. Dahhan found that claimant had a moderately severe, and partially reversible, obstructive respiratory defect with no sign of a restrictive abnormality. Employer's Exhibit 2. Dr. Dahhan opined that this pattern of impairment was inconsistent with coal dust exposure and, therefore, he attributed claimant's disability to smoking. *Id*.

The administrative law judge found that claimant established total disability based on the qualifying pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i).[8] With respect to Section 718.204(b)(2)(iv), the administrative law judge noted that "Drs. Hussain, Broudy, and Dahhan are in agreement that claimant does

[8] The administrative law judge found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), as none of the arterial blood gas study evidence was qualifying, and that claimant was ineligible for any of the presumptions available to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 26-27.

not have the respiratory capacity to perform the work of a coal miner." Decision and Order at 27.

Employer asserts that claimant is not totally disabled since Dr. Hussain testified by deposition, "contrary to [his] statements on 'clarification'[,]" that claimant retained the respiratory capacity to work as a truck driver. Employer's Brief at 5. Contrary to employer's contention, the administrative law judge correctly noted that "although Dr. Hussain testified [during his deposition] that [c]laimant could perform the work of a truck driver, [c]laimant's last coal mine job of at least one year was as a drill operator that entailed sometimes lifting drill bits weighing up to 120 pounds." Decision and Order at 27 n.10. Because employer's counsel incorrectly advised Dr. Hussain during the deposition that claimant worked as a truck driver, and since the administrative law judge properly found that Dr. Hussain clarified in his February 2, 2006 statement, made after the deposition, that he was still of the opinion that claimant could not perform the work of a coal miner, we conclude that the administrative law judge permissibly relied upon Dr. Hussain's opinion in finding that claimant is totally disabled from his work as a drill operator. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 27; Director's Exhibit 28.

Furthermore, the administrative law judge's finding that claimant is totally disabled is supported by substantial evidence, including the opinions of Drs. Broudy and Dahhan, along with the qualifying pulmonary function studies. Because the administrative law judge properly weighed all of the contrary probative evidence in finding that claimant is totally disabled, we affirm his determination pursuant to Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

With respect to Section 718.204(c), employer argues that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Dahhan, that claimant's respiratory disability is due to smoking and not coal dust exposure. We disagree. Contrary to employer's contention, the administrative law judge permissibly assigned less weight to the disability causation opinions of Drs. Broudy and Dahhan because the physicians did not diagnose clinical or legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Furthermore, we reject employer's argument that Dr. Hussain's opinion, attributing claimant's respiratory impairment to both smoking and coal dust exposure, is insufficient to satisfy claimant's burden of proof. Employer's Brief at 5. Employer asserts that Dr. Hussain's opinion is not reasoned because he did not have an accurate

understanding of claimant's last coal mine employment or his smoking history. *Id*. The administrative law judge, however, recognized that Dr. Hussain relied upon a history of twenty-three years of coal mine employment, while the administrative law judge found seventeen years established. Decision and Order at 8. The administrative law judge specifically stated that he did not find the six year difference to be "significant enough to undermine Dr. Hussain's conclusions." *Id*. Additionally, contrary to employer's assertion, the administrative law judge gave consideration to the fact that, in forming his disability causation opinion, Dr. Hussain "relied on a smoking history [rate] that is half of that to which [claimant] testified."[9] *Id*. at 29. The administrative law judge, however, noted that "the [smoking] history Dr. Hussain considered was still significant, and found Dr. Hussain's "opinion that both [c]laimant's coal dust exposure and cigarette smoking contributed to his [COPD] logical in light of [claimant's] mine dust exposure." Decision and Order at 18-19.

Because the administrative law judge has discretion to determine the credibility of the medical experts, we affirm the administrative law judge's determination that Dr. Hussain's opinion is reasoned and documented and sufficient to satisfy claimant's burden of proving that he is totally disabled by COPD due, in part, to coal dust exposure. *See Wolf Creek Collieries v. Director, OWCP [Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21. We, therefore, affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

[9] Dr. Hussain reported a thirty-eight year smoking history at the rate of one pack of cigarettes every two days, Director's Exhibit 16, while claimant testified during his deposition that he smoked "maybe a pack per day" for thirty years, Employer's Exhibit 4 at 27. Claimant also testified at the hearing that he smoked for thirty-six or thirty-seven years at the rate of one and one-half packs of cigarettes a day. Hearing Transcript at 23, 31. The administrative law judge found that claimant's smoking history is "somewhat contradictory" and that claimant has "over a thirty-three pack-year history." Decision and Order at 6.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge