BRB No. 89-1963 BLA

WARREN FLEMING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STANDARD SIGN & SIGNAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Lawrence R. Webster, Pikeville, Kentucky, for claimant.

James P. Anasiewicz (Arter & Hadden), Washington, D.C., for employer.

E. Francine Stokes (Marshall J. Breger, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

PER CURIAM:

Claimant appeals the Decision and Order (85-BLA-1990) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge determined that employer was not properly identified as the responsible operator herein pursuant to 20 C.F.R. §725.493(a)(1), because it employed claimant for a cumulative period of less than one year. The administrative law judge therefore dismissed employer as a party to this action. The administrative law judge credited claimant with seventeen and one-quarter years of qualifying coal mine employment, but found that claimant failed to establish either invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a), or total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 410, Subpart D, 20 C.F.R. §410.490, or 20 C.F.R. Part 718. Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's findings at Section 727.203(a)(1) and (a)(4), his denial of

benefits pursuant to Parts 410 and 718, and his dismissal of employer as responsible operator herein. Employer and the Director, Office of Workers' Compensation Programs, respond, urging affirmance.[1]

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).

[1] The administrative law judge's finding that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2) and (a)(3), and his findings with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Claimant first contends that the administrative law judge, in finding that employer did not satisfy the requisite criterion for identification as a responsible operator pursuant to Section 725.493(a)(1), erroneously ignored the clear language of the regulation. We disagree. The administrative law judge determined that the uncontradicted evidence of record established that claimant worked for employer from January 17, 1972, to April 11, 1972, and from November 23, 1973, to August 1, 1974, for a cumulative total of eleven months and one day. Decision and Order at 4; Director's Exhibit 28. Inasmuch as Section 725.493(a)(1) requires a period of cumulative employment of not less than one year, and the administrative law judge found that claimant's cumulative employment did not total a full calendar year, the administrative law judge properly dismissed employer as responsible operator in this action.[2] See Tackett v. Cargo Mining Co., 12 BLR 1-11 (1988), aff'd sub nom. Director, OWCP v. Cargo Mining Co., Nos. 88-3531 and 88-3578 (6th Cir., May 11, 1989)

(unpublished); Dawson v. Old Ben Coal Co., 11 BLR 1-58 (1988); Bungo v.

[2] Employer correctly maintains that claimant is not adversely affected by the administrative law judge's findings pursuant to Section 725.493(a)(1), inasmuch as claimant's entitlement does not depend upon the issue of whether employer was properly identified as the responsible operator herein. Consequently, claimant lacks standing to appeal the issue. See Seewald v. Imperial Coal Co., 8 BLR 1-469 (1986); McKinney v. Benjamin Coal Co., 6 BLR 1-529 (1983). The Director notes his agreement with claimant's position concerning the proper interpretation of Section 725.493(a)(1), but concedes that the administrative law judge's holding comports with well-established Board case law. See Bungo v. Bethlehem Mines Corp., 8 BLR 1-348 (1985).

Bethlehem Mines Corp., 8 BLR 1-348 (1985). The administrative law judge's findings pursuant to Section 725.493(a)(1) are supported by substantial evidence, and are affirmed.

Turning to the merits, claimant contends that the administrative law judge, in finding that the x-ray evidence of record was insufficient to establish invocation of the interim presumption at Section 727.203(a)(1), merely counted the number of positive and negative readings by B-readers and improperly relied on a numerical preponderance of negative interpretations. Claimant also asserts that the administrative law judge accorded weight to negative interpretations by physicians without B-reader status, while ignoring a positive interpretation by Dr. Myers. Contrary to claimant's arguments, however, the administrative law judge properly considered all of the x-ray evidence of record, consisting of twenty interpretations of thirteen films, and the qualifications of the readers, and acted within his discretion in according greatest weight to the opinions of physicians possessing dual qualifications as Board-certified radiologists and B-readers. Decision and Order at 5-7; see Trent v. Director, OWCP, 11 BLR 1-26 (1987); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985). As only one film was interpreted by a qualified reader as positive for pneumoconiosis, and as that reading was a minimal finding of 1/0, see Director's Exhibit 12, the administrative law judge reasonably found that this single positive interpretation by a qualified reader was outweighed by the negative interpretations by equally qualified readers of four more recent films. Decision and

Order at 6, 7; Director's Exhibits 11, 13, 18, 20, 23, 24; see Handy v. Director, OWCP, 16 BLR 1-73 (1990); Prater v. Clinchfield Coal Co., 12 BLR 1-121 (1989); Trent, supra. We, therefore, affirm the administrative law judge's findings pursuant to Section 727.203(a)(1), as supported by substantial evidence.

Claimant next contends that the administrative law judge, in finding that the medical opinions of record were insufficient to establish invocation of the interim presumption at Section 727.203(a)(4), erred in mischaracterizing the opinions of Drs. Myers and Page. Claimant's contention is without foundation in the record. The administrative law judge determined that of eight examining physicians and one consulting physician, only Dr. T.L. Wright diagnosed pneumo and found that claimant was totally disabled. The administrative law judge, within his discretion, accorded little weight to Dr. Wright's opinion because the record does not reflect the objective basis for his conclusions, see generally Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Cosalter v. Mathies Coal Co., 6 BLR 1-1182 (1984); and permissibly relied on the numerical preponderance of medical opinions by Drs. Page, Ballard Wright, Broudy, Penman, Anderson, Myers and Lane, which either found no evidence of lung impairment or explicitly stated that claimant was able to perform his usual coal mine employment. Decision and Order at 7, 8; see generally Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989). Contrary to claimant's arguments, the opinion of Dr. Myers, who stated that "best medical judgment would dictate against return to underground coal mining," and the opinion of Dr. Page, who

stated that claimant "should be removed from the dusty atmosphere of mining and should not be permitted or required to work in or about a dust related industry" are insufficient to establish invocation of the interim presumption at subsection (a)(4). Director's Exhibit 8; see Zimmerman v. Director, OWCP, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988). Moreover, Dr. Myers expressly found that claimant "has only minimal restriction from a pulmonary standpoint and could probably perform his job perfectly all right from that standpoint alone," see Director's Exhibit 8; and Dr. Page, after reviewing claimant's pulmonary function study results in 1987, opined that claimant had the respiratory ability to do the work of an underground coal miner. See Employer's Exhibit 2. Consequently, we affirm the alj's findings pursuant to Section 727.203(a)(4), as supported by substantial evidence.

Claimant finally challenges the administrative law judge's denial of benefits pursuant to Part 410, Subpart D, Section 410.490, and Part 718. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court decided Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). In light of Pauley, since claimant established more than ten years of coal mine employment and failed to establish entitlement pursuant to Part 727, the administrative law judge properly adjudicated the claim pursuant to the provisions at Part 718,[3]as the provisions at Part 410, Subpart D, and Section 410.490 are not

[3] As this claim lies within the appellate jurisdiction of the United States Court of

available to claimant. See Knuckles v. Director, OWCP, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991)(en banc). The administrative law judge's finding that the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment is supported by substantial evidence and precludes entitlement pursuant to Part 718. See Decision and Order at 8; see generally Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Roberts, supra. We, therefore, affirm the administrative law judge's denial of benefits.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER

Appeals for the Sixth Circuit and was filed before March 31, 1980, but adjudicated by the administrative law judge after that date, it is entitled to consideration pursuant to 20 C.F.R. Part 718. Knuckles v. Director, OWCP, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989).

Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge