BRB No. 06-0491 BLA

VIVIAN STONE, o/b/o EUGENE STONE (deceased)	)	
Claimant-Respondent	)	
v.	)	
ZEIGLER COAL COMPANY	)	DATE ISSUED: 04/27/2007
and	)	
HORIZON NATURAL RESOURCES	)	
and	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Employers/Intervenor-Petitioners	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Fred C. Statum III and Philip L. Robertson (Manier & Herod), Nashville, Tennessee, for employers and intervenor.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1995-BLA-01623) of Administrative Law Judge Daniel F. Solomon awarding benefits on a miner's 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 has a lengthy procedural history, which was set forth fully in *Stone v. Zeigler Coal Co.*, BRB No. 04-0433 BLA (July 19, 2005)(unpub.). In that appeal, the Board rejected employer's argument that Administrative Law Judge Mollie W. Neal abused her discretion in refusing to reopen the record on reconsideration, and upheld her determination that the miner's original 1980 claim was still pending on modification. The Board affirmed Judge Neal's finding that the weight of the evidence established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but vacated her finding that invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.305 was established, and remanded this case for her to make a specific finding as to whether the miner worked in surface conditions substantially similar to conditions in an underground mine for at least fifteen years. If, on remand, Judge Neal again found that invocation of the presumption at Section 718.305 was established, she was instructed to reweigh the medical evidence and to provide a medical reason for preferring any physician's opinion over another's, consistent with *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), and to determine whether, given all the evidence, the presumption was rebutted.[1] If Judge Neal found that invocation of the Section 718.305 presumption was not established on remand, she was instructed to determine whether the evidence demonstrated that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b); whether the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c); and if benefits were awarded, to reconsider the onset date of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.503(b), (d).

On remand, this case was assigned to Judge Solomon (the administrative law judge), who determined that the evidence established that the miner had worked for an underground coal mining company, either underground or in surface conditions substantially similar to those in an underground mine, for a period of at least fifteen years. The administrative law judge thus invoked the presumption at Section 718.305, and found that the evidence failed to establish rebuttal thereof or a conclusive onset date of total disability due to pneumoconiosis. Accordingly, benefits were awarded from September 1980, the month in which the miner filed his claim.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as all of the miner's coal mine employment occurred in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

In the present appeal, employer challenges the administrative law judge's findings of invocation with no rebuttal at Section 718.305, and the date from which benefits commence pursuant to 20 C.F.R. §725.503(b). Claimant responds, urging affirmance.[2] The Director, Office of Workers' Compensation Programs, 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 rational, supported by substantial evidence, and 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).

To be entitled to the Section 718.305 presumption of total disability due to pneumoconiosis based on fifteen years of coal mine employment, an above-ground miner must demonstrate that his or her work conditions were "substantially similar to conditions in an underground mine." 20 C.F.R. §718.305(a). A surface miner need proffer only evidence of the surface mining conditions in which he or she worked. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then the responsibility of the administrative law judge, based on his expertise, knowledge of the industry and appropriate objective factors, "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

In the present case, the administrative law judge accurately determined that the miner worked for the same underground coal mining company for thirty-seven years between 1944 and 1981, with at least two, and up to five years spent underground as a repairman, and the remainder working on the surface as a common laborer, bulldozer operator, crane operator, turn-a-pull operator, and hoisting engineer. Decision and Order on Remand at 6-7; Director's Exhibits 22, 24, 47; Employer's Exhibit 3. The administrative law judge found that the evidence established that the miner was exposed to dust, gas and fumes in all of his positions;[3] that the machines he operated from 1950 to

[2] Claimant is Vivian Stone, the miner's widow, who is pursuing the miner's claim on his behalf. Employer's Exhibit 1; Claimant's Letter dated May 15, 1995.

[3] Although the miner's original employment history form listed exposure to dust in all of his mining positions except that of hoisting engineer, the miner's subsequent employment history form and letter dated March 11, 1991 indicated exposure in all positions. *See* Director's Exhibits 2, 20. Further, the administrative law judge acted within his discretion in crediting the miner's deposition testimony that the hoisting job

1972 did not have cabs on them; and that the miner's above-ground work was primarily involved with the mine's gob piles, with the exception of the approximately eight years he worked as a hoisting engineer from 1972 to 1980 and the final ten months he worked operating machinery in the slurry pit.[4] Decision and Order on Remand at 8-9. The administrative law judge further determined that the miner's deposition testimony established that he was regularly exposed to heavy smoke and fumes when operating machinery around the gob piles as the piles frequently caught on fire;[5] that the miner bid for the hoisting engineer job to lessen his exposure to dust and smoke, but that he was still exposed to dust from the adjacent bull ring when the wind blew; and that his working conditions in the slurry pit were very dusty. Decision and Order on Remand at 8-9; Director's Exhibit 22, Miner's Deposition at 7-9, 12-13, 15, 19, 21-22.

Employer argues that the evidence is insufficient to establish invocation at Section 718.305(a) because the miner never specified the degree of dust to which he was exposed. However, the administrative law judge reasonably inferred from the miner's description of his working conditions that the miner's above-ground coal mine dust exposure was heavy and substantially similar to the conditions prevailing in underground mining. Decision and Order at Remand at 9; *Summers*, 272 F.3d at 479-480, 22 BLR at 2-275; *Leachman*, 855 F.2d at 512. The administrative law judge thus acted within his discretion in finding invocation established at Section 718.305(a) based on the miner's credible testimony, and we affirm his finding as supported by substantial evidence.[6]

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also exposed him to dust from the bull ring when the wind blew. Decision and Order on Remand at 9; Director's Exhibit 22, Miner's Deposition at 15.

[4] As previously found by Judge Neal, the administrative law judge noted that gob is a mine spoil of coal, rock, clay and other impurities, *see Old Ben Coal Co. v. Luker*, 826 F.2d 688, 10 BLR 2-249 (7th Cir. 1987), while slurry is very fine coal. Decision and Order on Remand at 8-9.

[5] The miner's testimony reflects that he operated a bulldozer for approximately 20 years, pushing "a million tons" of gob and putting out the flames when the gob caught on fire. Director's Exhibit 22, Miner's Deposition at 5-13; Director's Exhibit 24, 1991 Hearing Transcript at 12.

[6] Employer additionally challenges the administrative law judge's finding, based on the Board's decision in *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979), that an above-ground miner working at an underground mine is not required to show comparability of working conditions in order to invoke the presumption at 20 C.F.R. §718.305. We need not address employer's arguments, however, as we affirm the administrative law judge's alternative finding that claimant established substantial similarity of working conditions.

Employer next challenges the administrative law judge's finding that the Section 718.305 presumption was not rebutted. In order to meet its burden on rebuttal, employer must prove, by a preponderance of all relevant evidence, either prong of the following two-part test imposed by the regulations: (1) that the miner had neither clinical nor legal pneumoconiosis; or (2) that the miner's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(a); *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Mitchell v. Director, OWCP*, 25 F.3d 500, 18 BLR 2-257 (7th Cir. 1994). Employer asserts that the x-ray evidence is, at best, in equipoise, and that the medical opinion and autopsy evidence of record, when given appropriate weight, preponderate against a finding of the existence of pneumoconiosis. Employer's Brief at 17-26. As discussed, *infra*, employer's arguments regarding the first prong of rebuttal are without merit. Moreover, employer has waived a challenge to the second prong by failing to brief with specificity any error made by the administrative law judge in his evaluation of the evidence or in his application of the law with regard thereto. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).[7]

In evaluating the x-ray evidence of record, the administrative law judge permissibly accorded greater weight to the interpretations of the more recent x-rays since pneumoconiosis may be a progressive disease. Decision and Order on Remand at 14; *see* 20 C.F.R. §718.201(c); *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998). The administrative law judge properly considered both the quality and the quantity of the conflicting x-ray evidence, and permissibly accorded greater weight to the interpretations of the dually-qualified Board-certified radiologists and B readers. Decision and Order on Remand at 14; *see generally Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-442 (7th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

We reject employer's assertion that the administrative law judge was required to adopt Judge Neal's 1996 finding that Drs. Binns, Abramowitz and Gogineni possessed dual qualifications since the basis for that finding is unknown: Judge Neal did not take judicial notice of such qualifications, and they are not contained in the record. Moreover, even if the administrative law judge had accepted employer's argument that the x-ray evidence is in equipoise, employer would still have failed to meet its burden on rebuttal

[7] Employer specifically stated in its brief that it did not intend to brief this issue: "[A]dditionally, the evidence further demonstrates that the miner's total disability was not caused by his coal mine employment. . . .But, . . . Employer will spare the BRB of [sic] an extensive briefing at this time." Employer's Brief at 26. In fact, employer spared us any briefing of the issue.

by a preponderance of the evidence. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203. As substantial evidence supports the administrative law judge's determination that the better qualified readers interpreted the December 10, 1991 and March 30, 1994 films as positive for pneumoconiosis,[8] and that the most recent film, dated August 30, 1994, was interpreted by a B reader as positive for pneumoconiosis without contradiction, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption pursuant to Section 718.305(a) based on the x-ray evidence of record. *Id*.

Employer next maintains that the medical opinions of record are insufficient to support a finding that the miner suffered from pneumoconiosis, arguing that the opinions of Drs. Kao[9] and Kahn[10] diagnosing pneumoconiosis were flawed, and that this was demonstrated by the opinion of Dr. Selby, a pulmonologist, which was well-reasoned and entitled to greater weight. Yet employer acknowledges Dr. Selby "**did not specifically determine if the miner suffered from pneumoconiosis**." Employer's Brief at 21 (emphasis in original). Employer has confused its burden, however, as it cannot rely upon evidence which does not rebut the existence of clinical and legal pneumoconiosis.[11] *Mitchell*, 25 F.3d at 506, 18 BLR at 2-269. Moreover, as the administrative law judge correctly found, Dr. Selby diagnosed pneumoconiosis by x-ray and indicated that the miner's severe pulmonary disability was primarily due to smoking with a possible

[8] The administrative law judge accurately determined that the March 30, 1994 film was interpreted as positive for pneumoconiosis by Drs. Bassali and Mathur, both dually-qualified readers, and as negative by Drs. Binns, Abrmowitz and Gogineni, all B readers; and that the December 10, 1991 film was interpreted as positive by the dually-qualified Drs. Fisher and Ahmed, and as negative by Drs. Renn, Stewart, Castle and Hippensteel, all B readers. Decision and Order on Remand at 11, 14.

[9] Dr. Kao was the miner's oncologist. He opined that the miner's totally disabling pulmonary impairment was due to significant coal dust exposure and smoking. Decision and Order on Remand at 13.

[10] Dr. Kahn, a Board-certified internist, concluded from his examination and clinical findings that the miner is totally disabled due to pneumoconiosis and emphysema. Decision and Order on Remand at 13.

[11] Similarly, we reject employer's argument that the pulmonary function studies of record reveal little evidence of pneumoconiosis, Employer's Brief at 18-19, as this evidence, even in concert with the other evidence cited by employer, is not sufficient to establish rebuttal.

minimal contribution from coal mine dust exposure.[12] Decision and Order on Remand at 13, 15; Employer's Exhibit 3. As substantial evidence supports the administrative law judge's findings that the medical opinions of record were insufficient to establish rebuttal at Section 718.305(a) by disproving the existence of pneumoconiosis, they are affirmed. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Mitchell*, 25 F.3d at 506, 18 BLR at 2-269.

Employer next maintains that autopsy evidence constitutes the most probative evidence in this case and preponderates against a finding of pneumoconiosis. Employer argues that the administrative law judge failed to subject Drs. Jones's diagnosis of pneumoconiosis to appropriate scrutiny by addressing the errors and inconsistencies in his report as previously directed by the Board.[13] Employer further asserts that the opinion of Dr. Katubig, the autopsy prosector, that "there is no evidence of coal miner's pneumoconiosis [black lung]," Employer's Exhibit 2, and the opinion of Dr. Crouch, that despite "evidence of mild deposition within the lung parenchyma, there is no histologically discernable dust related lung disease," Employer's Exhibit 4, are sufficient to establish that the miner did not have pneumoconiosis. Employer's Brief at 21-26. Employer, however, has ignored its burden on rebuttal to disprove the existence of both clinical and legal pneumoconiosis, the latter of which encompasses any chronic restrictive or obstructive lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2); *Mitchell*, 25 F.3d at 507, 18 BLR at 2-270-273. In turn, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b); *Mitchell*, 25 F.3d at 507, 18 BLR at 2-270-273. In the present case, the

[12] Dr. Selby found parenchymal abnormalities consistent with pneumoconiosis in a 2/1 s/t perfusion, and some pleural disease that might be consistent with pneumoconiosis. Employer's Exhibit 3.

[13] We reject employer's argument that Dr. Jones's opinion is inherently unreliable and entitled to little, if any, weight, based on employer's submission of evidence to the administrative law judge which showed that the physician's license was subsequently revoked or suspended in some states. Employer also asserts that Dr. Jones's "mis-analysis of medical data has previously been noted by the BRB." Employer's Brief at 22-23. The administrative law judge was required to base his decision on the record evidence before him, and he permissibly concluded that the materials attached to employer's brief had no bearing on the weight to which Dr. Jones's report was entitled, as they did not establish that any problems existed with the physician's licensure at the time he rendered his opinion in this case, nor did they reveal the reasons for the alleged lapses in licensure. Decision and Order at 14 n. 8.

record documents multiple chronic pulmonary conditions, including lung cancer, tuberculosis, chronic bronchitis, severe obstructive lung disease, emphysema and fibrosis. Decision and Order on Remand at 12-14; Director's Exhibits 22, 47; Claimant's Exhibit 1; Employer's Exhibits 1-4. While the reports of Drs. Katubig and Crouch, if credited, could support a finding that the miner did not have clinical pneumoconiosis, employer has not demonstrated how these reports, or any other evidence presented, affirmatively disprove the existence of legal pneumoconiosis. *See Mitchell*, 25 F.3d at 508-509, 18 BLR at 2-276-277; *Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995). In *Barber*, as in the case at bar, employer relied on an autopsy report and opinions based on a review of autopsy slides to rebut the Section 718.305 presumption that the miner had pneumoconiosis. The court held that this evidence was insufficient as a matter of law because it did not rebut the presumption of legal pneumoconiosis.[14] *Barber*, 43 F.3d at 901, 19 BLR at 2-67. Consequently, we affirm the administrative law judge's finding that employer failed to meet its burden on rebuttal at Section 718.305(a), and we affirm his award of benefits.

Lastly, employer challenges the administrative law judge's finding that, pursuant to 20 C.F.R. §725.503(b), benefits are payable from September 1980, the month in which the miner's claim was filed, because the evidence of record does not establish a conclusive onset date of total disability due to pneumoconiosis. Employer notes that it can refute that default date by bringing forth credible medical evidence that the miner was not disabled on the date of filing, *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989), and employer asserts that the x-ray and pulmonary function tests of record demonstrate that the miner was not disabled by pneumoconiosis as late as 1987, 1990, and/or March 1994.[15] Employer's Brief at 26-27. Employer's arguments are without merit.

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[14] Similarly, in connection with rebuttal of the 20 C.F.R. §727.203(a)(2) presumption, the Seventh Circuit observed:

> So if in attempted rebuttal of the statutory presumption of pneumoconiosis the coal company tendered a doctor's report which merely stated that the miner had no signs of clinical pneumoconiosis (as that doctor understood the term), without commenting on the possibility that he might have another chronic lung disease caused or exacerbated by inhaling coal dust, the rebuttal would indeed fail.

Freeman United Coal Co. v. Director, OWCP [*Shelton*], 957 F.2d 302, 16 BLR 2-40, 2-42 (7th Cir. 1992).

[15] Although employer argues that the administrative law judge selectively viewed the medical evidence, employer does not cite any specific medical evidence to establish

In finding that the evidence did not establish the month of onset, the administrative law judge properly concluded that the x-ray evidence was inadequate, by itself, to determine the extent of disability, that non-qualifying tests do not establish the absence of disability, *see generally Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994), and that the first qualifying pulmonary function test merely established that the miner became totally disabled at some point prior to the date the test was obtained. Decision and Order on Remand at 17; *see Tobrey v. Director, OWCP*, 7 BLR 1-407 (1984). As the administrative law judge determined that the medical reports failed to pinpoint the date of onset of total disability, he properly concluded that claimant was entitled to benefits from September 1980, the month in which the miner filed his claim. 20 C.F.R. §725.503(b); Decision and Order on Remand at 17.

Employer further maintains that the miner's testimony regarding his continuing ability to perform his usual coal mine employment until his retirement in August 1981 affirmatively demonstrates that the miner was not totally disabled by pneumoconiosis well after September 1980. Employer's Brief at 26-27. Although a miner cannot receive benefits, absent a finding of complicated pneumoconiosis, for any period during which he was engaged in coal mine employment, *see* 20 C.F.R. §725.504; *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989), the date of filing remains as the correct default date from which benefits commence, with benefits suspended during the period of the miner's employment. 20 C.F.R. §725.503(b); *see Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). Consequently, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §725.503(b), as supported by substantial evidence, but modify the Decision and Order to reflect that benefits are suspended from September 1980, the date of filing, until August 1981, the date of the miner's retirement.

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the date of onset other than the x-ray and pulmonary function studies. The reports of Drs. Kahn, Kao, and Jones, which employer cites, do not address the date of onset, as employer concedes. Employer's Brief at 27.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is modified to reflect a suspension of benefits from September 1980 until August 1981. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge