BRB No. 09-0681 BLA

JOHN LEWIS PARKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STERLING GARRETT COAL OF KENTUCKY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 07/07/2010
	)	
Employer/Carrier-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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices PLLC), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-5603) of Administrative Law Judge Larry S. Merck awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim[1] filed on January 30, 2004, and is before the Board for the second time.[2]

In the initial decision, the administrative law judge found that claimant's 2004 claim was timely filed and that employer was properly designated as the responsible operator. After crediting claimant with nineteen years of coal mine employment,[3] the administrative law judge found that the new evidence established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of the miner's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered the miner's 2004 claim on the merits. Considering all of the evidence of record, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

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[1] Claimant filed three prior claims for benefits, all of which were finally denied. Claimant's most recent prior claim, filed on September 10, 1999, was denied for failure to establish the existence of pneumoconiosis. Director's Exhibit 3.

[2] The Board set forth previously this case's full procedural history. *J.P.* [*Parks*] *v. Sterling Garrett Coal of Ky.*, BRB No. 07-0790 BLA (June 30, 2008) (unpub.). Our prior discussion of the procedural history is incorporated herein by reference.

[3] The record reflects that claimant's most recent coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, 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 (1989) (*en banc*).

[4] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that employer was the responsible operator, and remanded the case for further consideration. *J.P.* [*Parks*] *v. Sterling Garrett Coal of Ky.*, BRB No. 07-0790 BLA (June 30, 2008) (unpub.). Regarding entitlement, the Board vacated the administrative law judge's finding that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* The Board, therefore, also vacated the administrative law judge's finding pursuant to 20 C.F.R. §725.309. The Board further vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).[5] *Id.*

On remand, the administrative law judge found that employer was properly designated as the responsible operator. The administrative law judge further found that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of the miner's prior claim became final. *See* 20 C.F.R. §725.309. Considering the merits of the 2004 claim, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in designating it as the responsible operator. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's designation of employer as the responsible operator.

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).

[5] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Parks*, slip op. at 9.

Impact of the Recent Amendments

By Order dated April 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant, employer, and the Director have responded.

The parties correctly state that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the miner's claim because it was filed before January 1, 2005.

Responsible Operator

Employer initially challenges the administrative law judge's determination that it is the responsible operator liable for the payment of benefits. Employer contends that it is not the responsible operator because claimant's most recent year of combined coal mine employment was with Mountainside Coal Company (Mountainside) and its successor operator, Wash Ridge Coal Company (Wash Ridge).[6]

In its initial consideration of this case, the Board held that the administrative law judge's Decision and Order did not reflect his consideration of employer's argument that Wash Ridge is the successor operator of Mountainside, and that claimant had combined coal mine employment with these companies of at least one year. *Parks*, slip op. at 4-5. The Board, therefore, instructed the administrative law judge, on remand, to address the nature of the relationship between Wash Ridge and Mountainside. *Id.* If he found that these companies operated as one entity, or that Wash Ridge was a successor operator of Mountainside, the Board instructed the administrative law judge to further determine whether claimant worked as a coal miner for these companies for a cumulative period of not less than one year, so as to relieve employer from liability for this claim. *Id.*

[6] In order to meet the regulatory definition of "a potentially liable operator," an operator must have employed the miner for a cumulative period of not less than one year and must also have the financial ability to assume liability for the payment of benefits. 20 C.F.R. §725.494(c), (e). If a miner worked for more than one operator who meets all the requirements of a potentially liable operator, then the operator for whom the miner worked most recently will be named the responsible operator. 20 C.F.R. §725.495(a)(2)(i). If the most recent operator demonstrates an inability to pay benefits, and there is no successor operator, then liability is assessed against the potentially liable operator that next most recently employed the miner. 20 C.F.R. § 725.495(a)(2)(ii), (iii).

The Administrative Law Judge's Finding on Remand

On remand, the administrative law judge reconsidered his designation of employer as the responsible operator. Assuming *arguendo* that a successor relationship existed between Mountainside and Wash Ridge, or that these companies comprised a single business entity, the administrative law judge considered whether Mountainside and Wash Ridge employed claimant for a cumulative period of at least one calendar year. Because he found that claimant's testimony was "somewhat inconsistent and was often in conflict with the documentary evidence, the administrative law judge relied upon claimant's Social Security Earnings Statements as the "most reliable evidence." Decision and Order on Remand at 8-9. Upon review of this evidence, the administrative law judge found that:

> Claimant's Social Security Earnings Statements indicate that he worked for Mountainside in 1982, 1983, 1984, and 1985, earning a total of $3,571.75. There is very little evidence regarding how much time Claimant worked for Mountainside; however, the record does include some evidence of Claimant's work in 1985. The bookkeeper for Mountainside submitted time cards for March 25, 1985, through May 3, 1985, noting 194 hours of work on twenty-three days. The dates and hours are generally consistent with paystubs from Mountainside that are included in the record. This evidence indicates that Claimant worked at Mountainside for at least a thirty-nine day period in 1985, during which he worked twenty-three days. Claimant's earnings in 1985 were the highest of his four years at Mountainside. Based on the evidence available, Claimant's work for Mountainside was sporadic, totaling less than a month and a half during his longest period of employment.
>
> There is more evidence regarding the starting and ending dates of Claimant's employment at Wash Ridge. Wash Ridge's bookkeeper completed an affidavit indicating that Claimant worked at the company from November 9, 1987, through April 13, 1988, for a total of five months and four days. During a deposition in 1990, Claimant contended that he worked at Wash Ridge for some time prior to being hired officially, and was paid in cash. He estimated that he was paid cash for three months, but stated that it "may have not even been that long." Dean Chambers, the owner of Wash Ridge testified that Claimant was never paid in cash by Wash Ridge. I find the evidence insufficient to show additional employment with Wash Ridge beyond the five months and four days recorded by the bookkeeper.

> Considering all the evidence regarding Claimant's employment at Mountainside and Wash Ridge, I find it insufficient to establish that Claimant worked for the two companies for combined periods totaling one calendar year. The evidence establishes that Wash Ridge employed Claimant for just over five months. I find the evidence insufficient, however, to establish that Mountainside employed Claimant for the nearly seven months required to find one calendar year of employment. Further, I find insufficient evidence to establish that Claimant was paid for additional work beyond that reported on his Social Security Earnings Statement.

Decision and Order on Remand at 9-10 (exhibit numbers omitted).[7]

The administrative law judge, therefore, found that employer failed to satisfy its burden, under 20 C.F.R. §725.495(c), to demonstrate that it is not the potentially liable operator that most recently employed claimant for a cumulative period of not less than one year.

Discussion

Employer contends that claimant's testimony establishes that his most recent employment of at least one year was with Mountainside and Wash Ridge. Employer's Brief at 27-28. We disagree. The administrative law judge permissibly found that claimant's testimony as to his length of his coal mine employment was unreliable and less persuasive than claimant's Social Security Earnings Statement and payroll evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We also reject employer's assertion that, because claimant's Social Security Earnings Statement shows employment with Mountainside between 1982 and 1985 and with Wash Ridge in 1987 and 1988, "it is not possible for less than a 'calendar year' to be found." Employer's Brief at 27. Contrary to employer's assertion, a calendar year is not established by showing that more than a year has elapsed between the first and last dates of a miner's employment with a coal operator. The regulations define a year 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

[7] The administrative law judge also found the record insufficient to establish that claimant worked at least 125 working days for Mountainside and Wash Ridge. Relying on 20 C.F.R. §725.101(a)(32)(iii) and average wages as computed by the Bureau of Labor Statistics, the administrative law judge determined that claimant established only sixty-two percent of a 125-working-day year of coal mine employment. Decision and Order on Remand at 10.

mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348, 1-349 (1985).

We also reject employer's assertion that the administrative law judge "d[id] not explain how employment from 1982 to 1985 cannot constitute a 'calendar year.'" Employer's Brief at 28. Substantial evidence supports the administrative law judge's findings that claimant's work at Mountainside between 1982 and 1985 was "sporadic," and that claimant's Social Security Earnings Statement and payroll records establish that he worked for Mountainside for a thirty-nine-day period in 1985. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Further, the administrative law judge rationally determined that claimant's greatest length of coal mine employment with Mountainside was the thirty-nine-day period that he worked in 1985, given that his yearly earnings were greatest for that year. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Even if the administrative law judge credited claimant with having worked thirty-nine day periods in 1982, 1983, 1984, and 1985, it would establish only 156 days, or five months and six days of coal mine employment at Mountainside.[8] *See Martin*, 400 F.3d at 305, 23 BLR at 2-283. After adding the additional five months and four days of coal mine employment with Wash Ridge, claimant's total coal mine employment would fall short of a calendar year.

Further, although employer correctly asserts that the administrative law judge failed to consider the affidavit of Lorena Chambers in calculating claimant's length of coal mine employment with Wash Ridge, Employer's Brief at 30, the administrative law judge's error is harmless. As the Director notes, even if the administrative law judge added all of the time that Ms. Chambers testified that claimant worked as a contract laborer (six weeks) to the five month and four days that the administrative law judge found established by the Social Security Earnings Statement and payroll records, it would not assist employer in establishing a cumulative year of employment with Mountainside and Wash Ridge. *See* 20 C.F.R. §725.495(c); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Brief at 17. Whether claimant worked five months and four days or six and a half months and four days at Wash Ridge, substantial evidence supports the administrative law judge's finding that, when claimant's time at Wash Ridge is added to the amount of time claimant worked at Mountainside, it does not amount to a calendar year of combined employment with the two companies. *See Martin*, 400 F.3d at

[8] As noted, the administrative law judge determined that claimant's earnings of $1,365.00 in 1985 with Mountainside established thirty-nine days of coal mine employment. In 1982, 1983, and 1984, claimant earned a lesser amount while working for Mountainside. For example, in 1982 and 1983, claimant earned less than fifty percent of what he earned in 1985, earning only $616.00 and $406.00 respectively.

305, 23 BLR at 2-283. We, therefore, affirm the administrative law judge's finding that employer did not establish that claimant was employed for a combined calendar year of coal mine employment at Mountainside and Wash Ridge. *See* 20 C.F.R. §725.495(c). *See Bungo*, 8 BLR at 1-349; *Larioni*, 6 BLR at 1-1278.

In light of our determination to affirm the administrative law judge's finding that employer failed to establish a calendar year of combined coal mine employment between Mountainside and Wash Ridge, we need not address the remainder of employer's challenges to the administrative law judge's responsible operator finding. In light of his finding that claimant's combined employment with Mountainside and Wash Ridge totaled less than one calendar year, it was not necessary for the administrative law judge to determine whether Wash Ridge was a successor operator to Mountainside or, in the alternative, whether the two companies operated as a single legal entity. *Larioni*, 6 BLR at 1-1278. Similarly, any error the administrative law judge may have made in failing to find 125 working days of combined employment is harmless in light of his failure to find a calendar year of coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-67 (1996) (*en banc*) (McGranery, J., concurring in part and dissenting in part) (holding that the 125 day rule has no applicability unless an administrative law judge initially determines that the miner has established a calendar year of coal mine employment).

Because it is based upon substantial evidence, we affirm the administrative law judge's designation of employer as the responsible operator liable for the payment of benefits.

Legal Pneumoconiosis

Employer also contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, therefore, a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d). In finding that the new medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge credited Dr. Baker's diagnosis of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due in part to coal dust exposure, noting that it was "the only well-reasoned and well-documented opinion on legal pneumoconiosis." Decision and Order on Remand at 15.

Employer initially contends that the administrative law judge erred in relying on Dr. Baker's diagnosis of legal pneumoconiosis to support a change in an applicable condition of entitlement because the doctor made prior diagnoses of pneumoconiosis that were not credited. The Board, in its 2008 Decision and Order, rejected this contention. *Parks*, slip op. at 7. The Board's previous holding on this issue constitutes the law of the

case and governs the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

We also reject employer's contention that the administrative law judge failed to provide a valid basis for crediting Dr. Baker's 2004 diagnosis of legal pneumoconiosis. In crediting Dr. Baker's opinion, the administrative law judge stated:

> Dr. Baker diagnosed COPD and chronic bronchitis, based on the results of [c]laimant's pulmonary function test, which produced qualifying results. He opined that [c]laimant's COPD was caused both by his smoking history and by his exposure to coal dust. Dr. Baker's opinion regarding [c]laimant's COPD is based on a physical examination, occupational and smoking histories, and objective medical testing, including a qualifying pulmonary function test. His opinion accounts for [c]laimant's significant coal dust exposure, without ignoring his smoking history. I also note that Dr. Baker is a highly-qualified physician, who is Board-certified in Internal Medicine and Pulmonary Diseases and a B[]reader.

Decision and Order on Remand at 15. Substantial evidence supports the administrative law judge's permissible determination that Dr. Baker's opinion was adequately reasoned and documented. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The Board previously affirmed the administrative law judge's basis for according less weight to the new medical opinions submitted by Drs. Dahhan and Broudy. Consequently, we affirm the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We, therefore, also affirm the administrative law judge's finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

Employer also challenges the administrative law judge's finding on the merits that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, employer asserts that the administrative law judge, in considering the previously submitted evidence,[9] erred in discrediting the opinions that Administrative Law Judge Joseph E. Kane credited when he denied claimant's 1999 claim for benefits. Employer's Brief at 48. Similarly, employer asserts that Dr. Baker's 2004 diagnosis of legal pneumoconiosis cannot support an award of benefits since the doctor's earlier 1999 diagnosis of legal pneumoconiosis was not

[9] The administrative law judge considered the previously submitted opinions of Drs. Baker, Westerfield, Paranthaman, and Fino.

credited in the prior claim. *Id*. at 40. We disagree. The revised regulation at 20 C.F.R. §725.309(d)(4) provides that, where, as here, the administrative law judge finds a change in an applicable condition established, no findings made in the prior claim shall be binding in the adjudication of the subsequent claim. 20 C.F.R. §725.309(d)(4). Thus, the administrative law judge was not bound by prior credibility determinations in his consideration of the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

Further, contrary to employer's assertion, the administrative law judge acted within his discretion as the fact-finder when he determined that Drs. Westerfield, Paranthaman, and Fino did not adequately explain why claimant's partial response to bronchodilators necessarily eliminated coal dust exposure as a cause of claimant's obstructive lung disease. *See Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because substantial evidence supports the administrative law judge's credibility determinations, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability Due to Pneumoconiosis

Employer also argues that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. Contrary to employer's assertion, the administrative law judge rationally discounted the causation opinions of Drs. Dahhan, Broudy, Westerfield, Paranthaman, and Fino because the physicians failed to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

In finding that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge credited Dr. Baker's opinion, and discredited the opinions of Drs. Dahhan, Broudy. Westerfield, Paranthraman, and Fino, for the same reasons that he set forth in his consideration of whether the medical opinion evidence supported a finding of legal pneumoconiosis. Employer raises the same challenges to the administrative law judge's disability causation finding that it raised with respect to his finding of legal pneumoconiosis. Because we have rejected those arguments, we affirm the administrative law judge's finding that the evidence established that claimant's total

disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge