BRB No. 02-0431 BLA

JIMMY C. COOK

Claimant-Respondent

v.

NAVARO MINING, INCORPORATED

Employer

FRAY RESOURCES, INCORPORATED

and

OLD REPUBLIC INSURANCE COMPANY

Employer/Carrier-Petitioners

LESLIE COAL COMPANY, INCORPORATED

and

A.T. MASSEY COAL COMPANY

Employer/Carrier-Cross-Petitioners

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND

Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

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)	) DECISION AND ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C, for Fray Resources, Inc. and Old Republic Insurance Company.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for A.T. Massey Coal Company and Leslie Coal Company, Inc.

Jeffrey S. Goldberg (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Fray Resources, Incorporated appeals the Decision and Order (2000-BLA-0812) of Administrative Law Judge Mollie W. Neal 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).[1] The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's May 3, 1999 application date, and credited claimant with twenty-two years of coal mine employment. The administrative law judge further found that Navaro Mining, Incorporated (Navaro), the company with which claimant was most recently employed for at least one year, was no longer in business and was not capable of assuming financial liability for payment of benefits pursuant to the criteria set forth at 20 C.F.R. §§725.492, 725.493 (2000).[2] The administrative law judge, therefore, dismissed Navaro and named Fray Resources, Inc. (hereinafter referred to as employer), the next most recent employer which satisfies the requirements of Sections 725.492 and 725.493 (2000), as the operator responsible for payment of benefits and also dismissed Leslie Coal Company, the other putatively named responsible operator. Addressing the merits of entitlement, the administrative law judge accepted the stipulation of the parties regarding the existence of a totally disabling respiratory or pulmonary impairment. Weighing the medical evidence of record, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis and also sufficient to establish that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits, commencing as of May 1, 1999.

On appeal, employer challenges the administrative law judge's award of benefits.

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] While the regulations governing the designation of responsible operators have been revised, the revised regulations at 20 C.F.R. §§725.491-495 apply only to claims filed after January 19, 2001. Thus, the applicable regulations in this case are contained at 20 C.F.R. §§725.491-495 (2000).

Initially, employer contends that the administrative law judge erred in dismissing Navaro as the responsible operator and naming Fray Resources as the operator liable for payment of benefits. In addition, employer contends that the administrative law judge erred in determining that the opinion of Dr. Rasmussen outweighed the contrary evidence of record and was sufficient to establish the existence of pneumoconiosis. Employer further contends that the administrative law judge erred in finding the medical evidence sufficient to establish that claimant's total disability was due to pneumoconiosis.[3] In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's determination that Employer is the operator responsible for payment of benefits as supported by substantial evidence. The Director does not otherwise respond on the merits in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer's contention that the administrative law judge erred in designating it as the responsible operator in this claim. Specifically, employer asserts that the Department of Labor did not satisfy its obligation to investigate whether Navaro, or a successor operator, was capable of assuming financial liability for benefits before

[3] Fray Resources submitted a Reply brief wherein it reiterated its earlier position.

[4] The parties do not challenge: the administrative law judge's decision to credit claimant with twenty-two years of coal mine employment, the dismissal of Leslie Coal Company as a possible responsible operator, or her finding of the existence of a total respiratory disability. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

designating it as a prior operator.

The administrative law judge found that Navaro is the employer with whom the miner had the most recent cumulative employment of not less than one year pursuant to 20 C.F.R. §725.491-493 (2000).[5] Decision and Order at 4. However, the administrative law judge found that Navaro is no longer in existence, that it was not insured at the time of claimant's last employment with the company, its assets have been liquidated, and it does not have the financial ability to pay. Decision and Order at 4-6. The administrative law judge also found that the record contains no factual evidence that there was a successor operator to Navaro. Decision and Order at 4, 5. The administrative law judge then considered the arguments raised in Employer's brief, particularly those regarding the sufficiency of the record and the Director's obligations in developing the record, as well as the possible liability of the corporate officers of Navaro based on their failure to properly insure the company. Decision and Order at 4-7. The administrative law judge rejected employer's contention that the Director failed to adequately develop the record on the ability of Navaro to assume financial liability, finding that "OWCP made reasonable efforts to investigate the issue and was unable to definitively resolve the inquiry, due in part to the unavailability of relevant official records." Decision and Order at 5, n.4. The administrative law judge further found that the Director was not required to hold that the corporate officers of Navaro are liable for payment of benefits for failing to secure the appropriate insurance, since the enforcement of penalties under the regulations is a discretionary power of the Director. Decision and Order at 6. The administrative law judge therefore dismissed Navaro as the responsible operator and found that employer was the most recent operator capable of assuming liability pursuant to Sections 725.492 and 725.493 (2000). Decision and Order at 6-7.

[5] The administrative law judge found that claimant's last coal mine employment was with Lone Wolfe Coal Company, from October 13, 1997 to November 10, 1997. However, since this was less than one year, Lone Wolf Coal Co. did not qualify as a responsible operator. Decision and Order at 4; 20 C.F.R. §725.493(a)(1) (2000).

Contrary to employer's contention, the administrative law judge rationally exercised her discretion in examining the evidence of record and finding that the Director sufficiently investigated the circumstances regarding the status of Navaro and whether it was financially capable of assuming liability. Decision and Order at 4-6; *see Lester v. Mack Coal Co.*, 21 BLR 1-126, 132 (1999)(*on recon*.)(*en banc*); *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993); *see generally Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). In particular, the administrative law judge reasonably found that the West Virginia CWP Fund ceased insuring Navaro in November 1994 and that there was insufficient evidence to support a finding that Navaro had subsequently obtained insurance. Decision and Order at 5-6; Director's Exhibits 26, 29. Similarly, the administrative law judge reasonably found that the Director exercised reasonable diligence in determining that Navaro was no longer in business since the Department of Labor records show that both the Commonwealth of Virginia and State of West Virginia revoked its corporate charter and also that Navaro's assets are subject to liens by secured creditors, *see* Director's Exhibit 26. Decision and Order at 5. Therefore, the administrative law judge's determination that the Director made "reasonable efforts to investigate the issue and was unable to definitively resolve the inquiry, due in part to the unavailability of relevant official records," is supported by substantial evidence. Decision and Order at 6; 20 C.F.R. §§725.492, 725.493 (2000); *see generally Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Employer further contends that the Department of Labor erred in failing to determine whether Navaro's officers and directors had the ability to assume liability in this claim before naming it as the most recent operator capable of assuming liability. Contrary to employer's contention, the Director is not required to consider whether the corporate officers of a potential responsible operator are financially capable of assuming liability and can be held liable as responsible operators pursuant to 20 C.F.R. §725.491(a) (2000). *See Lester*, 21 BLR at 1-132; *see also Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-162 (1999)(*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting), *aff'd on recon.*, 22 BLR 1-24 (1999)(*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting).

Since employer does not challenge the administrative law judge's findings that it was the next most recent company to employ claimant for a cumulative period of at least one year and that it is financially capable of assuming liability for the payment of benefits, we affirm the administrative law judge's finding that employer is the operator responsible for payment of benefits herein. Decision and Order at 6-7; 20 C.F.R. §§725.492, 725.493 (2000); *see Skrack v. Island*

Creek Coal Co., 6 BLR 1-710 (1983).

In challenging the administrative law judge's finding that the medical evidence of record was sufficient to establish the existence of pneumoconiosis, employer contends that the administrative law judge erred in shifting the burden to employer to 'refute' Dr. Rasmussen's diagnosis of pneumoconiosis. Employer further contends that the administrative law judge erred in applying an inconsistent and inequitable treatment in the weighing of the medical opinion evidence and also that the administrative law judge mischaracterized the evidence, particularly the medical opinions of Drs. Castle, Hippensteel, Fino and Jarboe.

The administrative law judge found that the record contains the medical opinions of six physicians. Drs. Jarboe, Fino, Castle, Hippensteel and Vasudevan, each diagnosed a disabling respiratory impairment due to cigarette smoking and/or asthma. Decision and Order at 19. The administrative law judge found that the remaining medical opinion, that of Dr. Rasmussen, stated that claimant suffered from a disabling respiratory impairment that was due to coal dust exposure as well as smoking and asthma. Decision and Order at 19. Weighing this medical opinion evidence, the administrative law judge credited the opinion of Dr. Rasmussen over the contrary medical opinions, finding that Dr. Rasmussen's opinion is better supported by the objective medical evidence and "consistent with the Department of Labor's position, that there is a direct relationship between dust exposure and decline in pulmonary function in miners, who are smokers, and who have no radiographic evidence of clinical pneumoconiosis." Decision and Order at 20. In addition, the administrative law judge found that the contrary medical opinions of record failed to refute Dr. Rasmussen's interpretation of the significance of the impairment shown by the blood gas study evidence. Decision and Order at 21-23. Consequently, the administrative law judge found the medical opinion of Dr. Rasmussen to be the most probative and, thus, determined that claimant satisfied his burden of establishing a respiratory or pulmonary impairment caused by coal dust exposure. Decision and Order at 23.

As employer correctly contends, the administrative law judge has not adequately weighed the relevant medical opinion evidence of record. In particular, the administrative law judge did not weigh the individual medical reports to determine whether they are reasoned and documented. Rather, the administrative law judge accepted the opinion of Dr. Rasmussen and then compared the contrary medical reports to that opinion. *See* Decision and Order at 19-23. As the administrative law judge has not adequately weighed the

medical opinions of record, we vacate her findings pursuant to Section 718.202(a) and remand the case for the administrative law judge to render specific findings on whether the medical opinions of record, including the opinion of Dr. Rasmussen, are reasoned and documented by addressing the physicians' explanation of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Furthermore, as employer correctly contends, the administrative law judge did not accurately characterize the medical opinions of record, in particular, the medical opinions of Drs. Castle and Hippensteel. Contrary to the administrative law judge's finding, in their deposition testimony, Drs. Castle and Hippensteel considered not only the definition of clinical pneumoconiosis, but also discussed the elements of legal pneumoconiosis and how the examination and testing results in this case do not support a diagnosis of pneumoconiosis. *See* Fray Resources's Exhibits 3, 7; Leslie Coal's Exhibits 5, 13. Likewise, these physicians discussed the relevance of the blood gas study findings and their disagreement with Dr. Rasmussen's interpretation of the results and their significance. *Id*.
Therefore, on remand, the administrative law judge must consider the entirety of the medical opinions of each physician in determining their credibility. *See Hicks, supra; Akers, supra*.

If, on appeal, the administrative law judge again finds the evidence sufficient to establish the existence of pneumoconiosis established pursuant to Section 718.202(a), she must then determine whether the evidence is sufficient to establish whether such pneumoconiosis was a substantially contributing cause of claimant's total respiratory disability pursuant to Section 718.204(c). In particular, contrary to the administrative law judge's prior determination, the mere presence of pneumoconiosis together with a totally disabling respiratory impairment is not sufficient to establish the causal nexus pursuant to Section 718.204(c). Rather, the administrative law judge must weigh the relevant medical evidence of record and provide a specific determination as to whether this evidence is sufficient to establish that pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment as defined by Section 718.204(c). 20 C.F.R. §718.204(c)(1)(i), (ii); *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge