BRB No. 09-0622 BLA

JACKIE L. BARTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/28/2010
	)	
ELDORADO COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

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

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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 Awarding Benefits (2005-BLA-5977) of Administrative Law Judge Donald W. Mosser with respect to a claim filed on August 20, 2007, 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). After crediting claimant with at least eighteen years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and a totally disabling respiratory impairment due, in part, to coal dust exposure at 20 C.F.R. §718.204(b)(2)(ii), (iv), (c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that it is not the responsible operator. In addition, employer asserts that the administrative law judge erred in his weighing of the medical opinion evidence at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief in which he argues that the administrative law judge's finding that employer is the responsible operator should be affirmed.[1]

By Order dated March 30, 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.[2] *Bartley v. Eldorado Coal Co.*, BRB No. 09-0622 BLA (Mar. 30, 2010)(unpub. Order). The Director, claimant, and employer have responded.

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[1] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least eighteen years of coal mine employment and his finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii), (iv). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, as unchallenged on appeal, the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), that the presumptions set forth in 20 C.F.R. §§718.304 and 718.306 are not applicable to this claim, and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *Id*.

[2] Section 1556 reinstated the presumption set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of

The Director alleges that the amendments are not applicable to the responsible operator issue and states that Section 1556 will not affect the outcome of this case if the Board affirms the award of benefits. However, the Director asserts that if the Board does not affirm the administrative law judge's findings, the case would have to be remanded to the administrative law judge for consideration under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, in compliance with 20 C.F.R. §725.414, since Section 1556 potentially alters the parties' respective burdens of proof. Claimant concurs with the Director's position.

Employer contends that, if it is deemed the responsible operator, the claim should be remanded to the administrative law judge to give employer the opportunity to fully investigate claimant's length of coal mine employment and to submit additional medical evidence.

We will first address employer's allegations of error regarding the administrative law judge's findings on the responsible operator issue. To determine whether this case must be remanded for consideration of invocation of the rebuttable presumption of total disability due to pneumoconiosis, we will then consider employer's arguments concerning the administrative law judge's findings at 20 C.F.R. §718.204(c).

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.[3] 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).

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qualifying coal mine employment, and that he or she has a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *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*)). As the Director notes, claimant filed his claim after January 1, 2005, and has established at least eighteen years of coal mine employment.

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

I. Responsible Operator

A. The Administrative Law Judge's Findings

The administrative law judge stated that, since employer did not assert that it is financially incapable of paying benefits, employer must prove that there is a potentially liable operator that more recently employed claimant for a period of not less than one year, pursuant to 20 C.F.R. §725.495. Decision and Order at 4. The administrative law judge acknowledged employer's argument, that two of claimant's subsequent employers, Kilowatt and Redbud, were jointly owned in a predecessor/successor relationship and employed claimant for a combined total of more than one year. *Id*. at 5. However, the administrative law judge found that claimant's testimony, the only proof employer provided to support its argument, was insufficient to establish that the two companies were the same entity or that a predecessor/successor relationship existed, in accordance with 20 C.F.R. §725.492. Further, the administrative law judge determined, based on claimant's testimony and Social Security Administration (SSA) records, that neither Kilowatt, nor Redbud, employed claimant for a full calendar year, as claimant worked for Kilowatt for thirty-six weeks and his employment with Redbud totaled thirty-nine weeks.[4] *Id*. at 5-6 n.6.

The administrative law judge further found that, even assuming that Redbud was a successor to Kilowatt, and that claimant was employed by the two companies for a combined total of at least one year, employer did not satisfy his burden of demonstrating that Redbud possessed sufficient assets to pay claimant's benefits, if awarded. Decision and Order at 6. Consequently, the administrative law judge determined that employer did

[4] Claimant testified that he earned a salary of $775 per week while employed at Redbud and Kilowatt, which the administrative law judge indicated totaled $3,100 monthly. Decision and Order at 5 n.6; Hearing Transcript at 33; Director's Exhibit 6. The administrative law judge stated that claimant's Social Security Administration records reflected that the miner earned a total of $27,895 from Kilowatt – $21,720 in 1988, $750 in 1999, and $5,425 in 1990 – for a total employment of thirty-six weeks. Decision and Order at 5 n.6; Hearing Transcript at 34-36; Director's Exhibit 8. In addition, the administrative law judge determined that claimant earned $6,200 from Redbud in 1991, which the administrative law judge stated equated to two months of employment, and $24,025 in 1991, which the administrative law judge noted was approximately thirty-one weeks of employment. Decision and Order at 5 n.6; Hearing Transcript at 33; Director's Exhibit 8. Therefore, the administrative law judge concluded that, although the miner testified that he believed he worked for Redbud for more than a year, the evidence supported a finding that he only worked for Redbud for thirty-nine weeks. Decision and Order at 5 n.6; Hearing Transcript at 34.

not meet its burden, under 20 C.F.R. §725.495(c), of proving that there is a subsequent operator who employed claimant for at least one year. *Id.* Thus, the administrative law judge concluded that employer is the properly designated responsible operator. *Id.*

B. Arguments on Appeal

Employer alleges that the district director erred in releasing Redbud as a potential responsible operator and in failing to place Kilowatt on notice, pursuant to 20 C.F.R. §725.407, that it could be a potentially liable operator. Employer argues, therefore, that the Black Lung Disability Trust Fund should be liable for any benefits payable to claimant. Employer further contends that Kilowatt and Redbud employed the miner for at least one calendar year, and for more than 125 working days, and that this employment was more recent than claimant's tenure with employer. In support of this assertion, employer alleges that the administrative law judge erred in adopting the district director's erroneous calendar year calculation. Employer also maintains that there is evidence of a successor relationship between Kilowatt and Redbud and that the administrative law judge could not have used absence of proof of insurance coverage to dismiss the companies, as this issue was not raised before the district director. Employer contends that the Director's suggestion, that employer had to identify claimant as a potential witness at his own hearing reflects an illogical interpretation of 20 C.F.R. §725.414(c). Further, employer states that because the administrative law judge did not give valid reasons for designating it as the responsible operator and did not consider all of the relevant evidence, his decision fails to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a).

The Director responds and urges the Board to affirm the administrative law judge's determination that employer is the responsible operator because employer did not show that either Kilowatt or Redbud employed clamant for at least one year subsequent to his work for employer or that Kilowatt and Redbud were the same company or in a predecessor/successor relationship. In addition, the Director asserts that any error by the administrative law judge, in finding that employer did not meet its burden because it did not show that Kilowatt and Redbud were financially incapable of assuming liability, is harmless in light of the administrative law judge's affirmable findings.

Upon review of the pertinent facts, the administrative law judge's Decision and Order, the parties' arguments on appeal and the applicable regulations, we agree with the Director that the administrative law judge rationally determined that employer is the properly designated responsible operator. Pursuant to 20 C.F.R. §§725.494(c), 725.495(c)(2), the responsible operator is the party that has most recently employed the miner "for a cumulative period of not less than one year." In 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." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. §725.101(a)(32). Employer bears the burden of proving "[t]hat it is not the potentially liable operator that most recently employed the miner." 20 C.F.R. §725.495(c)(2).

While the record does not indicate the exact beginning or ending dates for claimant's employment at Kilowatt and Redbud, the administrative law judge accurately noted that claimant's SSA records show that claimant's wages for his work at Kilowatt, from 1988 to 1990, totaled $27,895 and that his wages at Redbud, in 1990 and 1991, were $30,225.[5] In addition, the evidence shows that claimant earned $775 per week at each company. Director's Exhibit 6. The administrative law judge acted within his discretion, therefore, in relying upon these figures to determine that claimant worked for Kilowatt for thirty-six weeks and for Redbud for thirty-nine weeks. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988). Consequently, the administrative law judge rationally determined that this evidence is insufficient to prove that claimant worked for either Kilowatt or Redbud for a period of not less than one year. *See* 20 C.F.R. §§725.495(c)(2), 725.101(a)(32).

Furthermore, employer's contention that the administrative law judge was required to use the Bureau of Labor Statistics (BLS) calculation of average daily earning in coal mining to determine the length of claimant's employment with Kilowatt and Redbud is without merit. The regulations provide only that an administrative law judge "may" use

[5] Claimant did not work continuously for Kilowatt during this time period, as he also worked for Eldorado and/or Redbud during portions of all three years and had self-employment income. Director's Exhibits 5-6, 8. In addition, claimant's low level of earnings in 1989 and 1990 contradicts any suggestion that claimant worked continuously for Kilowatt during this time period. Director's Exhibit 8; *see supra* n.4.

such figures.[6] 20 C.F.R. §725.101(a)(32)(iii). In addition, the Department of Labor has indicated that the use of BLS figures was intended as a "fallback" option, to be used when the only information available regarding the length of a miner's coal mine employment is his or her total annual income from an employer. *See* 62 Fed. Reg. 2249 (Jan. 22, 1997). However, in this case, the record included evidence regarding claimant's weekly salary, which the administrative law judge rationally considered. *Dawson*, 11 BLR at 1-60; Director's Exhibits 4-7.

We also reject employer's argument that Kilowatt and Redbud were the same corporate entity, or that one of the companies was a successor to the other. The only evidence of such a relationship is claimant's testimony that the companies consisted of all the same people and that each time the owners changed mines, the company changed names. Hearing Transcript at 26, 35-36. The administrative law judge rationally found this testimony to be "vague and unclear" and, therefore, insufficient to satisfy employer's burden of proof pursuant to 20 C.F.R. §725.495(c)(2).[7] Decision and Order at 6; *Miller v. Director, OWCP*, 7 BLR 1-693 (1985).

II. 20 C.F.R. §718.204(c)

A. Claimant's Burden of Proof

Because we have affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability, the sole issue remaining for disposition is whether the administrative law judge properly found that claimant satisfied his burden of

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[6] Even if employer's argument, that the use of the Bureau of Labor Statistics (BLS) figures would show that that claimant had more than 125 working days with Kilowatt and Redbud, had merit, employer would still not meet its burden, as the regulations require that employer prove that claimant was employed by another operator *for a full calendar year or partial periods totaling one year*, during which he had at least 125 working days. 20 C.F.R. §§725.101(a)(32), 725.495(c)(2).

[7] In light of our affirmance of the administrative law judge's weighing of claimant's testimony under 20 C.F.R. §725.495(c)(2), we need not address the argument raised by the Director, Office of Workers' Compensation Programs, regarding employer's failure to designate claimant as a potential witness on liability while this case was before the district director. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see* 20 C.F.R. §725.414(c).

proving that he is totally disabled due to pneumoconiosis. Pursuant to 20 C.F.R. §718.204(c), a miner is considered to be totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. The "substantially contributing cause" standard is met when, *inter alia*, it is established that pneumoconiosis "[h]as a material adverse effect on the miner's respiratory or pulmonary condition." 20 C.F.R. §718.204(c). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that, to establish that total disability due to pneumoconiosis, a claimant must prove that his or her totally disabling impairment was due, at least in part, to pneumoconiosis. *See Adams v. Director, OWCP*, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Failure to establish this element of entitlement precludes an award of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

B. The Administrative Law Judge's Findings

The administrative law judge found that claimant proved that his totally disabling respiratory impairment was due to coal workers' pneumoconiosis at 20 C.F.R. §718.204(c), based on the opinions of Drs. Westerfield and Forehand. Decision and Order at 15. The administrative law judge found that their opinions, that claimant's totally disabling obstructive lung disease and hypoxemia are due to coal dust inhalation, were well-reasoned, based on the claimant's coal mine employment history. *Id*.; Director's Exhibits 12, 15, 19; Claimant's Exhibits 3, 5; Employer's Exhibit 2. In contrast, the administrative law judge discredited the opinion in which Dr. Jarboe stated that he could not determine, with reasonable certainty, that claimant's gas exchange impairment was caused by pneumoconiosis. Decision and Order at 15; Employer's Exhibit 3. The administrative law judge indicated that Dr. Jarboe "attributed claimant's impairment[,] in part[,] to interstitial fibrosis with an unknown etiology, which I find to be unreasoned." *Id*. The administrative law judge further noted the Dr. Dineen did not address the cause of claimant's impairment. Decision and Order at 15. Based on these findings, the administrative law judge concluded that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(c) and awarded benefits. *Id*.

C. Arguments on Appeal

With respect to the administrative law judge's discrediting of Dr. Jarboe's opinion, employer argues that the administrative law judge, in violation of the APA, did not provide any basis for his conclusory finding that Dr. Jarboe's causation opinion was unreasoned. Employer asserts that Dr. Jarboe offered a reasoned opinion in which he explained why he ruled out coal dust exposure as a cause of claimant's totally disabling impairment. In addition, employer states that the administrative law judge did not

explain why Dr. Forehand's opinion was well-reasoned, as compared to Dr. Jarboe's opinion. Further, employer argues that the administrative law judge did not address the qualifications of Drs. Forehand and Jarboe, which are relevant to resolving the conflict between the physicians' opinions. Employer states that merely setting forth their qualifications in the evidence summary does not constitute the degree of consideration required of the administrative law judge.

Regarding the administrative law judge's crediting of Dr. Westerfield's opinion, employer contends that the administrative law judge did not give valid reasons for finding it to be well-reasoned or for finding that it carried claimant's burden pursuant to 20 C.F.R. §718.204(c). Employer also states that the administrative law judge did not address Dr. Westerfield's testimony, that pneumoconiosis was only a *de minimus* contributing factor, when a *de minimus* contribution is not enough to satisfy claimant's burden under 20 C.F.R. §718.204(c). In addition, employer asserts that Dr. Westerfield's uncertainty regarding whether coal dust exposure was a significant cause of claimant's impairment renders his opinion inadequate.[8]

Employer's contentions have merit. As employer argues, the administrative law judge did not adequately identify the rationale for his determination that the medical evidence is sufficient to establish disability causation. Rather, the administrative law judge summarily credited the opinions of Drs. Westerfield and Forehand, without explaining how claimant's history of coal mine employment renders their opinions well-reasoned. Decision and Order at 8-10, 15. Similarly, the administrative law judge did not explain why Dr. Jarboe's attribution of claimant's totally disabling impairment, in part, to interstitial fibrosis with an unknown etiology, made his opinion unreasoned. *Id*. at 10-11, 15. Because the administrative law judge did not set forth the rationale for his findings with respect to the opinions of Drs. Westerfield, Forehand and Jarboe, he did not comply with the APA, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented[.]" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[8] As the parties do not contest the administrative law judge's determination that Dr. Dineen's opinion is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), as he failed to address the cause of claimant's impairment, it is affirmed. *See Skrack*, 6 BLR at 1-711.

Accordingly, we vacate the administrative law judge's findings at 20 C.F.R. §718.204(c) and remand the case for the administrative law judge to more fully discuss his weighing of the relevant medical opinions, taking into account the relative qualifications of the physicians, the persuasiveness and detail of their explanations, and the documentation underlying their conclusions. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see generally Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). When considering whether claimant has met his burden of proof under 20 C.F.R. §718.204(c), the administrative law judge must consider whether claimant has established that his totally disabling impairment was due, at least in part, to pneumoconiosis. *See Adams*, 806 F.2d at 826, BLR at 2-63-64. Evidence that pneumoconiosis has played only an infinitesimal, or *de minimus*, part in a miner's totally disabling respiratory impairment is insufficient to establish disability causation. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Further, we agree with claimant and the Director that, on remand, the administrative law judge must initially consider the impact of the recent amendments to the Act on this claim, including whether claimant has invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Consistent with employer's and the Director's positions, if it is determined that the presumption is applicable in this case, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

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

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