BRB No. 04-0206 BLA

WILLIAM E. DALTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRONTIER-KEMPER CONSTRUCTORS, INCORPORATED	)	
	)	DATE ISSUED: 11/26/2004
Employer-Petitioner	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (01-BLA-0315) of Administrative Law Judge Rudolf L. Jansen 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). Claimant filed his claim for benefits on June 1, 1999. In a Decision and Order dated October 14, 2003, the administrative law judge credited claimant with twenty-two years and three months of coal mine employment, and determined that employer is the responsible operator liable for the payment of any benefits because it was the most recent employer that employed claimant as a "miner" for at least one year. With regard to the merits of the claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3), but determined that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge further found claimant entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and concluded that the presumption was not rebutted. The administrative law judge then found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) on the ground that employer did not contest the issue. Finally, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, he awarded benefits.

On appeal, employer challenges the administrative law judge's length of coal mine employment finding, and contends that the administrative law judge erroneously determined that employer employed claimant as a "miner" for more than one year. Employer further challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1) and (a)(4), 718.203(b) and 718.204(c). Claimant has filed a response brief in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter urging the Board to reject employer's contentions with respect to the administrative law judge's length of coal mine employment finding, and finding that employer is the responsible operator because it was the last employer employing claimant as a "miner" for more than one year. The Director further indicates he does not intend to respond to employer's contentions regarding the administrative law judge's findings on the merits.

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).

Employer first contends that the administrative law judge erred in finding that claimant engaged in coal mine employment as a "miner" for sixteen years with employer between 1974 and 1991, which consequently tainted the administrative law judge's findings that claimant established in excess of ten years of coal mine employment and that employer is the responsible operator. In support of its contention, employer argues that, except for a three month period during a mine construction project beginning in May

1983, near Sesser, Illinois, claimant's coal mine construction work for employer for sixteen years occurred above ground, and did not involve significant coal dust exposure. Employer further argues that, moreover, claimant's pre-1978 work for employer for four years, from 1974 until 1978, cannot be construed as work as a "miner" because, prior to the 1978 amendments to the Act, coal mine construction companies were not potential responsible operators. Employer's contentions lack merit.

The regulations at 20 C.F.R. §725.202, implementing 30 U.S.C. §902(d), include special provisions for coal mine construction workers.[1] 20 C.F.R. §725.202(b) (2000). Construction workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted by evidence which demonstrates that a worker was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

Employer does not dispute that it is claimant's most recent employer. Instead, employer argues that the administrative law judge erred in finding that employer failed to rebut the presumption that claimant was exposed to coal dust in his coal mine employment. In determining that employer failed to demonstrate that claimant was not exposed to coal dust while he was working for employer for a total of sixteen years between 1974 to 1991, the administrative law judge permissibly credited claimant's affidavit, dated January 3, 2002, in which claimant testified that he was continually exposed to coal dust in all of his coal mine construction work. The administrative law judge properly found that claimant's affidavit provided a very detailed work history, where claimant described the specific activities he engaged in at each coal mine construction project, and how these activities exposed him to coal dust. Decision and Order at 5; Claimant's Exhibit 4. *R & H Steel Buildings, Inc. v. Director, OWCP* [*Seibert*], 146 F.3d 514, 517, 21 BLR 2-439, 2-446 (7th Cir. 1998). The administrative law judge properly found that, in contrast, employer submitted a more general description of claimant's duties, and merely asserted, without establishing that claimant was not exposed to coal dust, that the potential for coal dust exposure in claimant's coal mine construction work for employer was limited or minimal since claimant usually worked above ground, not underground in the extraction and preparation of coal. *Seibert,* 146

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[1]The regulations at 20 C.F.R. §725.202 (2000) were initially promulgated pursuant to the 1977 amendments to the Act, 30 U.S.C. §901 *et seq.*, as amended, and became effective on February 9, 1978. Amended provisions under 20 C.F.R. §725.202 became effective on January 19, 2001 and apply to all claims.

F.3d at 517, 21 BLR at 2-446; Decision and Order at 8; Director's Exhibit 29. The Department of Labor believes that limiting inclusion of construction workers in the definition of a "miner" at 30 U.S.C. §902(d) to those construction workers whose jobs are integral to the extraction or preparation of coal is inconsistent with Congressional intent in extending coverage to construction workers. 65 Fed. Reg. at 79961 (Dec. 20, 2002). The United States Court of Appeals for the Fourth Circuit also recognized that coal mine construction involves neither the preparation nor the extraction of coal and that, if this were the test, coal mine construction workers would rarely, if ever, qualify as miners under the Act. *The Glem Co. v. McKinney*, 33 F.3d 340, 342, 18 BLR 2-368, 2-372 (4th Cir. 1994). The court thus held that the logical inquiry concerning construction workers' activities must thus focus on coal mine construction, which inevitably involves the pre-extraction work of building the mine facility. *Id*. Similarly, the Board has held that "coal mine dust" exposure pursuant to Section 725.202 refers not only to coal mine dust generated in the extraction or preparation of coal, but also includes dust which arises from other activities such as coal mine construction. *Garrett v. Cowin & Co.*, 16 BLR 1-77 (1991); *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990). Furthermore, contrary to employer's contention, the fact that claimant worked on construction projects at non-operational mine sites does not, by itself, demonstrate a lack of coal mine dust exposure.[2] *Seibert*, 146 F.3d at 517, 21 BLR at 2-446; 65 Fed. Reg. at 79961 (Dec. 20, 2002).

Employer's additional argument in challenging the administrative law judge's length of coal mine employment and responsible operator findings focuses on claimant's four years of employment with employer prior to 1978, when the 1977 amendments to the Act became effective. Prior to 1978, the definition of an "operator" did not specifically include mine construction companies, but the revised Act included in the definition of an "operator," independent contractors performing construction at coal mines. 30 U.S.C. §802(d). Relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Hughes v. Heyl & Patterson*, 647 F.2d 452, 3 BLR 2-15 (4th Cir. 1981), employer argues that it would be unjust to apply the coal dust exposure presumption provided at Section 725.202(b)(1) to claimant's work for employer before 1978 because, prior to the amendments, employer did not have any reason to believe that its coal mine construction activities would render it liable as an "operator." Employer is correct that the court in *Hughes* held that "injustice would result from retroactive application of the expanded definition." *Hughes*, 647 F.2d at 454, 3 BLR at 2-20. The court in *Hughes* further determined, however, that the employer in that case was an "operator" under the old definition of "operator" because the employer fell within the

[2] In promulgating the amended regulations at 20 C.F.R. §725.202, the Department of Labor determined that the construction process itself may expose the miner to coal dust. 65 Fed. Reg. at 79961 (Dec. 20, 2002).

statutory language a "person who…controls or supervises a coal mine." *Hughes*. 647 F.2d at 457, 3 BLR at 2-25; 30 U.S.C. §802(d) (1970).

In rejecting employer's argument in this case, that claimant's work from 1974 to 1978 is not qualifying coal mine employment, the administrative law judge found that employer could not assert an absence of notice that claimant could be considered a miner for his pre-1978 work for employer, since employer continued to employ claimant until 1991, after the amended definition of "operator" became effective. Decision and Order at 9. To the extent the administrative law judge erred in crediting claimant with four years of qualifying coal mine employment with employer from 1974 to 1978, such error was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge's length of coal mine employment finding is relevant in this case to the issues of employer's status as a responsible operator, and claimant's entitlement to the rebuttable presumption of pneumoconiosis arising out of coal mine employment based on ten years of coal mine employment. 20 C.F.R. 718.203(b). The administrative law judge properly credited claimant with in excess of ten years of coal mine employment from February 9, 1978, the effective date of the 1977 amendments to the Act, to 1991, based on claimant's affidavit, Social Security records and employer's records. As discussed *supra*, the administrative law judge properly determined that, during his employment with employer, claimant was exposed to coal dust pursuant to Section 725.202(b). *Vickery v. Director,* OWCP, 8 BLR 1-430 (1986); Decision and Order at 11-12; Director's Exhibit 2; Claimant's Exhibit 6. We affirm, therefore, the administrative law judge's finding that claimant established at least ten years of coal mine employment. In addition, we affirm the administrative law judge's finding that employer was the last employer to employ claimant as a miner for at least one year, and is, therefore, the responsible operator. 20 C.F.R. §725.493(a); Decision and Order at 13.

With regard to the merits of the claim, employer argues that the administrative law judge mischaracterized the x-ray evidence of record and improperly found it sufficient to establish the existence of pneumoconiosis on the ground that a preponderance of the most recent x-ray readings was positive for the disease. Employer's contention has merit. While we disagree with employer's argument that it was improper for the administrative law judge to consider the recency of the positive x-ray readings, employer correctly avers that the administrative law judge mischaracterized the most recent x-ray evidence. Specifically, the administrative law judge erroneously stated that the record includes three recent chest x-rays, taken on November 11, 2002, December 20, 2002 and December 30, 2002. Decision and Order at 20. As employer notes, the record does not, in fact, contain an x-ray dated December 20, 2002. Decision and Order at 20. The administrative law judge also mischaracterized the evidence by stating:

> …Of the most recent x-rays, six were positive for pneumoconiosis and four were negative. All of the positive interpretations were read by dually

> qualified physicians. The negative interpretations were read by B-readers. Because the positive readings constitute the majority of most recent interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence supports a finding of pneumoconiosis.

Decision and Order at 20. Actually, the record contains six positive *readings* and four negative *readings* of the two most recent x-rays, which were taken on November 11, 2002 and December 30, 2002. The administrative law judge improperly found that the "negative interpretations were read by B-readers," without considering that these B readers are also Board-certified radiologists, and thus have comparable credentials to the physicians submitting the positive readings.[3] The November 11, 2002 and December 30, 2002 films were read as positive by Drs. Miller, Cappiello and Ahmed, dually-qualified Board-certified radiologist/ B readers. These two x-rays were read as negative by Drs. Wheeler and Scott, who are also Board-certified radiologist/ B readers. Inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, we vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer further contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Employer argues that the administrative law judge improperly credited, as well-reasoned and documented, the opinions of Drs. Cohen and Diaz, which indicate that claimant suffers from pneumoconiosis. Employer further argues that the administrative law judge improperly discounted Dr. Selby's contrary opinion as poorly reasoned. Employer also contends that the administrative law judge erred in failing to draw a negative inference that Dr. Jani's treatment records, which do not indicate a diagnosis of pneumoconiosis, support a finding that claimant does not have the disease, and in failing to credit Dr. Jani's records on the ground that the doctor was claimant's treating physician. Finally, employer argues that the administrative law judge erred in failing to weigh the negative CT scan readings, submitted by Drs. Scott and Wheeler, of a CT scan administered on January 6, 1999.

Employer's contentions have merit, in part. Whether a medical opinion is reasoned and documented is for the administrative law judge as fact-finder to decide.

[3]While the administrative law judge's reference to six positive *x-rays* and four negative *x-rays* is evidently an inadvertent reference to x-rays, as opposed to x-ray *readings*, we cannot hold that the error is harmless in light of the administrative law judge's failure to properly consider the dual qualifications of the physicians who submitted the negative readings. Decision and Order at 20.

Clark v. Karst-Robins Coal Co., 12 BLR 1-149 (1989)(*en banc*). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge properly credited Dr. Cohen's opinion as well-reasoned and documented upon finding that Dr. Cohen issued a detailed report, and based his opinion on his review of all of the objective data of record. *Clark*, 12 BLR at 1-155; Decision and Order at 21; Claimant's Exhibit 5. Similarly, the administrative law judge properly found Dr. Diaz's opinion to be well-reasoned and documented as Dr. Diaz indicated he based his opinion on his review of the objective evidence of record, and claimant's work history and examination findings. *Clark*, 12 BLR at 1-155; Decision and Order at 20; Claimant's Exhibit 6. Furthermore, the administrative law judge permissibly credited the opinions of Drs. Cohen and Diaz for the additional reason that they possess superior qualifications as Board-certified pulmonary specialists. *Livermore v. Amax Coal Co*., 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002); Decision and Order at 20-21; Claimant's Exhibits 5, 6. The administrative law judge permissibly discounted Dr. Selby's opinion, notwithstanding employer's argument that his opinion should have been credited in light of the fact that Dr. Selby was the only physician to have examined claimant, on the basis that Dr. Selby issued a conclusory opinion that claimant's chronic obstructive disease was due entirely to smoking. *Clark*, 12 BLR at 1-155; Decision and Order at 21; Director's Exhibit 20. In addition, the administrative law judge did not err in failing to draw a negative inference that Dr. Jani opined that claimant does not have pneumoconiosis because Dr. Jani consistently diagnosed chronic obstructive pulmonary disease in his numerous treatment records of claimant without connecting the condition to coal dust exposure. *See Gober v. Reading Anthracite Co.*, 12 BLR 1-67, 1-69 (1988). As the administrative law judge found, Dr. Jani did not indicate in his records *any* cause for claimant's chronic obstructive pulmonary disease. Decision and Order at 21; Director's Exhibit 20. Consequently, the administrative law judge properly found that Dr. Jani's treatment records were not probative of whether claimant has pneumoconiosis. *Id*.

We are unable to affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), however, because employer is correct in contending that the administrative law judge failed to weigh the negative CT scan readings of a CT scan administered on January 6, 1999. *Peabody Coal Co. v. Hale* 771 F.2d 246, 249, 8 BLR 2-34, 2-39 (7th Cir. 1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Director's Exhibit 22. On remand, the administrative law judge must reconsider this evidence under Section 718.202(a)(4) if, after reconsidering the x-ray evidence on remand under Section 718.202(a)(1), he determines that claimant failed to establish the existence of pneumoconiosis by that alternative method. Employer argues that the administrative law judge erred in failing to weigh, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the evidence relevant under Section 718.202(a)(4) together with the x-ray evidence at Section 718.202(a)(1) before ultimately concluding

that claimant established the existence of pneumoconiosis. In arguing that the decision of the United States Court of Appeals for the Fourth Circuit in *Compton* is applicable in this case, employer notes that, while claimant's most recent employment with employer occurred in Illinois, in which case jurisdiction lies within the United States Court of Appeals for the Seventh Circuit, claimant previously worked on projects for employer in Virginia and West Virginia, states in which the United States Court of Appeals for the Fourth Circuit has jurisdiction. Employer argues that the law of any circuit in which claimant was employed should be followed, absent a conflict of law between jurisdictions. Where a miner has worked within the jurisdiction of more than one circuit and the laws of those circuits are compatible it is unnecessary to determine which law applies. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*). Otherwise, the Board will apply the law of the circuit within whose jurisdiction the miner most recently performed coal mine employment. *Id*. Because the Seventh Circuit has not issued a decision following the holding in *Compton*, the law in the Fourth Circuit is not compatible with the law in the Seventh Circuit. Thus, in the Seventh Circuit, the methods of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) are alternative methods. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). In this case, claimant's most recent coal mine employment occurred in Illinois, and we will apply, therefore, the law of the Seventh Circuit.

In light of our decision to vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4), we vacate the administrative law judge's findings with regard to the causation of pneumoconiosis and total disability causation under 20 C.F.R. §§718.203(b) and 718.204(c), respectively. If on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis under either Section 718.202(a)(1) or (a)(4), he must then reconsider the evidence under Section 718.203(b)[4] and 718.204(c) before reaching his ultimate determination on entitlement.

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[4]If the administrative law judge, on remand, reaches the issue of whether employer established rebuttal of the presumption of pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b), we agree with employer that the rebuttal standard requires the administrative law judge to address whether the evidence establishes that claimant's pneumoconiosis did not arise out of coal employment, not whether the evidence establishes an alternative etiology of claimant's pneumoconiosis. *See* 20 C.F.R. §718.203(b).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration 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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BETTY JEAN HALL
Administrative Appeals Judge