BRB No. 02-0868 BLA

BOBBY R. BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE B MINING, INCORPORATED	)	
	)	DATE ISSUED: 09/30/2003
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 on Third Remand-Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp, Grundy, Virginia, for claimant.

Ronald E. Gilbertson and Michael J. Schrier (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (Howard Radzley, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the administrative law judge's Decision and Order on Third Remand – Awarding Benefits. This case has been before the Board previously.[1] The procedural history of this claim is set forth in the Board's Decision and Orders dated May 16, 2001 and July 14, 1999. *See Blankenship v. Double B. Mining, Inc.*, BRB No. 00-0538 BLA (May 16, 2001)(unpub.); *Blankenship v. Double B. Mining, Inc.*, BRB No.98-0736 BLA (July 14, 1999)(unpub.). In the Decision and Order issued on May 16, 2001, the Board affirmed the administrative law judge's finding that the x-ray evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c) (2000), and the Board rejected several arguments made by employer with respect to the administrative law judge's weighing of the CT scan evidence under Section 718.304(c) (2000). The Board, however, held that the administrative law judge erred in failing to discuss deposition testimony from Dr. Wheeler in weighing the medical opinions under Section 718.304(c) (2000). Thus the Board vacated the administrative law judge's finding that the evidence of record established the existence of complicated pneumoconiosis under Section 718.304(c) (2000), and remanded the case for the administrative law judge to reconsider Dr. Wheeler's opinion. *Blankenship v. Double B. Mining, Inc.*, BRB No. 00-0538 BLA (May 16, 2001)(unpub.).

Employer then filed a Motion for Reconsideration. In its Decision and Order on Reconsideration *En Banc*, the Board reaffirmed its 2001 Decision and Order, but granted employer's request to instruct the administrative law judge to make a specific finding identifying the mistake made in Judge Giles J. McCarthy's 1989 Decision and Order. *See Blankenship v. Double B Mining, Inc.*, BRB No. 00-0538 BLA (Jan. 30, 2002)(*en banc* Decision and Order on Reconsideration)(McGranery, J., concurring in result only)(unpub.).

In his Decision and Order on Third Remand – Awarding Benefits, the administrative law judge found the evidence sufficient to establish complicated pneumoconiosis, and thereby found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis under Section 718.304. The administrative law judge found that Judge McCarthy's failure to find complicated

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[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.

pneumoconiosis constituted a mistake of fact under 20 C.F.R. §725.310 (2000), and therefore, the administrative law judge found a basis for modification established. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the medical opinions and the administrative law judge's finding that a basis for modification has been established. Employer also maintains that it cannot be named as the responsible operator. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that employer is properly identified 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).

Employer asserts that the administrative law judge improperly acted as a medical expert when he discounted Dr. Wheeler's explanation for his opinion that claimant does not suffer from complicated pneumoconiosis. Employer notes that there is no expert testimony refuting Dr. Wheeler's opinion. Employer maintains that Dr. Wheeler does explain his determination that claimant had tuberculosis despite the negative tuberculin tests, and employer asserts that Dr. Wheeler explained the factors that supported his diagnosis of tuberculosis in claimant's specific case.

We reject employer's assertion that the administrative law judge substituted his opinion for that of the physician. Instead, the administrative law judge considered Dr. Wheeler's testimony and explanation,[2] Employer's Exhibit 3, and,

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[2] When asked whether claimant has complicated pneumoconiosis, Dr. Wheeler stated:

> the pattern looks like large silicotic opacities, but their location is very atypical for large opacities. And in all likelihood, in view of the calcification, particularly in the one in the right apex, in all likelihood, they are scars from healed tuberculosis.

Employer's Exhibit 3 at 44. Dr. Wheeler also addressed questions concerning his diagnosis of tuberculosis in light of claimant's negative tuberculin tests. Dr. Wheeler stated:

within a proper exercise of his discretion as the trier-of-fact, was unpersuaded by Dr. Wheeler's opinion. The administrative law judge reasonably found that Dr. Wheeler did not "adequately explain the reason for the *Claimant's* numerous negative tuberculin test results," 2002 Decision and Order at 10 (emphasis added), as this portion of Dr. Wheeler's opinion was general and not focused on claimant. *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985)(Decision and Order on Reconsideration); Employer's Exhibit 3. Moreover, the administrative law judge is not required to accept an uncontradicted medical opinion. *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-296 (1985), *recon. denied*, 8 BLR 1-5(1985); *Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984). Accordingly, we hold that the administrative law judge did not err in finding that Dr. Wheeler's opinion is not persuasive.

Employer also asserts that the administrative law judge improperly shifted the burden from claimant to employer regarding whether claimant has complicated pneumoconiosis despite the negative tuberculosis tests. We disagree. Contrary to employer's assertion, the administrative law judge did not shift the burden to employer to establish that claimant did not suffer from complicated pneumoconiosis. Rather, the administrative law judge, who is charged with evaluating and weighing the evidence, was simply not persuaded by Dr. Wheeler's opinion regarding an alternate explanation for the large opacities. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); 2002 Decision and Order at 10; Employer's Exhibit 3.

Employer also argues that the administrative law judge has not provided a valid basis for crediting the opinions of Drs. Bassali, Navani, Dumic, Fulchero, Sargent and Cander, who found the existence of complicated pneumoconiosis, over the contrary opinions of Drs. Wheeler, Fishman, Smith, Patel, Baxter, Endres-Bercher, Fino and Castle. Employer challenges the administrative law judge's finding that the opinions he relies upon are most consistent with claimant's coal mine employment and his negative

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> It's quite confusing, because most people will be, will have a positive tuberculin test. But there are several very well-known situations where they don't have positive tuberculin tests…..
>
> So the fact that he has never had a history of tuberculosis and has never been treated for it means in my opinion that these scars certainly are likely to be the result of self-curing tuberculosis. And that occurs in about 90 percent of the cases anyway.

Employer's Exhibit 3 at 45-46.

tuberculin test results, arguing that a history of coal mine employment is not one of the allowed methods for establishing the existence of complicated pneumoconiosis.

The administrative law judge considered the credentials of all of the physicians and noted that most of the physicians are well-qualified in either radiology or pulmonary medicine, but stated "Under the particular facts of this case…I find the radiological expertise is more relevant. Therefore, I find the opinions of the dual-qualified B-readers and Board-certified radiologists are most probative." 2002 Decision and Order at 11. The administrative law judge stated:

> Even though some well-credentialed radiologists, such as Dr. Wheeler, did not find complicated pneumoconiosis, I find that his opinion is outweighed by those of other dual-qualified B-readers and Board-certified radiologists, such as Drs. Bassali and Navani, who found the presence of complicated coal worker's (sic) pneumoconiosis.

2002 Decision and Order at 11.

As the administrative law judge found, Drs. Wheeler, Navani and Bassali are the only physicians who are dually qualified as B-readers and Board-certified radiologists. Director's Exhibits 67, 70, 81, 83, 84; Employer's Exhibit 3. The administrative law judge permissibly found that the opinions of the dually-qualified B-readers and Board-certified radiologists are the most probative. In addition, we hold that the administrative law judge permissibly relied upon the opinions of Drs. Bassali and Navani, both of whom are dually-qualified as B-readers and Board-certified Radiologists, and who diagnosed complicated pneumoconiosis, Director's Exhibits 67, 83, over the contrary opinion of dually-qualified Dr. Wheeler, Director's Exhibit 84; Employer's Exhibit 3. Because the administrative law judge considered both the quality and the quantity of the evidence in finding it sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c), we affirm the administrative law judge's finding as it is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Because the administrative law judge has provided a valid basis for his finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis at Section 718.304(c) (2000), we need not address employer's assertions regarding the other bases provided by the administrative law judge for his evaluation of the evidence at this subsection, *i.e.*, that the opinions of the

physicians he relied upon are most consistent with claimant's significant coal mine employment and the negative readings on the tuberculin tests. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Employer does not challenge the administrative law judge's weighing of the relevant like and unlike evidence together at Section 718.304. S*ee Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Therefore, we affirm the administrative law judge's finding that claimant has established the existence of complicated pneumoconiosis. *See* 2002 Decision and Order at 12; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further, in view of our affirmance of the administrative law judge's weighing of the evidence at Section 718.304(c), we affirm the administrative law judge's finding that claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(c).

Employer also argues that the administrative law judge has not explained the mistake Judge McCarthy made in his 1989 Decision and Order, in finding that complicated pneumoconiosis was not established. In addition, employer alleges that the administrative law judge's Decision and Order violates the law of the case doctrine, which employer asserts should be applied in this case. Finally, employer asserts that the administrative law judge erred in finding that Judge McCarthy's decision was mistaken simply because entitlement was not found.

The administrative law judge stated:

> Under the 'ultimate fact' standard set forth in *Jessee*, Judge McCarthy's decisions denying benefits…are mistaken, simply because entitlement was not found. In addition, I make the more specific factual finding that Judge McCarthy's failure to find complicated pneumoconiosis constituted a mistake of fact under §725.310.

2002 Decision and Order at 12.

We reject employer's assertion that the administrative law judge's award of benefits violates the law of the case doctrine. The United States Court of Appeals for the Fourth Circuit has held that modification may be established where the "ultimate fact" was mistakenly decided, and the Court has held that the principle of finality does not apply when a timely petition for modification is filed. *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25, 18 BLR 2-26, 2-28-29 (4th Cir. 1993). We also reject employer's assertion that the administrative law judge has not identified a specific mistake in Judge McCarthy's findings. To the contrary, after stating that Judge McCarthy's findings were mistaken because entitlement was not found, the administrative law judge stated "I make

the more specific factual finding that Judge McCarthy's failure to find complicated pneumoconiosis constituted a mistake of fact under §725.310." 2002 Decision and Order at 12. Accordingly, the administrative law judge has provided a valid basis for finding modification established. *See Jessee*, 5 F.3d at 724-25, 18 BLR at 2-28.

Employer also asserts that, as a matter of law, it cannot be the responsible operator. Therefore, employer urges the Board to revisit the responsible operator issue. Employer refers to 20 C.F.R. §725.493(a) (2000), which states that the responsible operator is the "employer with which the miner had the most recent periods of cumulative employment of not less than 1 year," 20 C.F.R. §725.493(a) (2000), and to the definition of a "year" provided by the amended regulations, 20 C.F.R. §725.101(a)(32). Based on 20 C.F.R. §725.101(a)(32)(iii),[3] employer calculates that claimant had more than one year of employment with Bounty Mining Corporation (Bounty) prior to June 1, 1986, the date of determination of complicated pneumoconiosis. *See Blankenship*, BRB No. 98-0736 BLA, slip op. at 9. Therefore, employer contends that it is not the proper responsible operator.

The revised regulations governing the identification of the responsible operator, 20 C.F.R. §§725-491-725.495, are only to be applied prospectively and thus do not apply to this claim. *See* 20 C.F.R. §725.2(c). Consequently, Section 725.493 (2000) governs the responsible operator determination in this case. Section 725.493 (2000) provides in relevant part:

> (a)(1) [T]he operator…with which the miner had the most recent periods of cumulative employment of not less than 1 year, as determined in accordance with paragraph (b) of this section, shall be the responsible operator.

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[3] Section 725.101(a)(32)(iii) provides that:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(iii).

> (b) From the evidence presented, the identity of the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year and, to the extent the evidence permits, the beginning and ending dates of such periods, shall be ascertained. For purposes of this section, a year of employment means a period of 1 year, or partial periods totaling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witness, and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employer for a cumulative year by such operator or employer for the purposes of paragraph (a) of this section.

20 C.F.R. §725.493 (2000).

Because Section 725.493 (2000) provides an adequate mechanism for computing the length of a miner's coal mine employment *for purposes of identifying the proper responsible operator*, we hold that the administrative law judge was not required to utilize Section 725.101(a)(32)(iii) in making his length of coal mine employment finding.[4]

In addition, our holding comports with the Board's analysis in *Clark v. Barnwell Coal Co.*, ___ BLR ___, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003)(McGranery, J., concurring),[5] where the Board stated:

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[4] We further note that Section 725.101(a)(32)(iii) provides that an adjudication officer "may" utilize the formula put forth therein, not that the adjudication office is required to do so.

[5] As in the instant case, the claim for benefits in *Clark v. Barnwell Coal Co.*, ___ BLR ___, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003)(McGranery, J., concurring), was pending prior to January 19, 2001, the effective date of the amended regulations, see 20 C.F.R. §725.2. The Decision and Order in *Clark* was issued after that date.

> Section 725.493(b) (2000) contemplates a two-step inquiry into a miner's employment to determine if an employer is the responsible operator. First, the administrative law judge must determine whether the miner worked for an operator for one calendar year or partial periods totaling one calendar year. Then, if the administrative law judge finds that the threshold one-year requirement is met, the administrative law judge must determine whether the miner's employment was regular….

Clark, slip op. at 5. In the instant case, there is substantial evidence that claimant did not work for Bounty for a calendar year,[6] as previously found by the administrative law judge, 1998 Decision and Order; *see Blankenship*, BRB No. 98-0736 BLA, slip op. at 9-10; Director's Exhibit 6. In addition, there is no evidence of any other periods of cumulative employment with Bounty. Moreover, employer does not assert that claimant had a calendar year of employment with Bounty. Rather, it asserts merely that a "year" of employment can be shown based on calculations using claimant's earnings with Bounty and the values in the Table of Coal Mine Industry Average Earnings. 20 C.F.R. §725.101(a)(32)(iii); Employer's Brief at 15-16.

We reject employer's assertion that it should be dismissed as the responsible operator and we reaffirm our prior holding that employer is properly named as the responsible operator, a finding which has most recently been determined to be the law of the case. *See Blankenship v. Double B Mining, Inc.*, BRB No. 00-0538 BLA (May 16, 2001)(unpub.), slip op. at 8.

[6] The evidence regarding claimant's employment with Bounty is uncontradicted; the President of Bounty, C. A. Ramey, submitted a statement that the company employed claimant from August 19, 1985 to May 9, 1986. Director's Exhibit 6.

Accordingly, the administrative law judge's Decision and Order on Third Remand-Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge