

BRB Nos. 91-1964 BLA
and 91-1964 BLA-A
and 91-1964 BLA-B

BOBBIE E. ARRINGTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
GULF & WESTERN INDUSTRIES, INCORPORATED)	
)	
and)	
)	
OAKWOOD RED ASH COAL CORPORATION)	
)	
Employer/Respondents- Cross-Petitioners)	
)	
and)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Petitioner)	

Appeal of the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Melissa M. Robinson (Jackson & Kelly), Charleston, West Virginia, for Gulf & Western Industries, Incorporated.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for Oakwood Red Ash Coal Corporation.

Sarah M. Hurley (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate

Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and Gulf & Western Industries Incorporated (Gulf & Western), and Oakwood Red Ash Coal Corporation (Oakwood) cross-appeal the Decision and Order (90-BLA-1033) of Administrative Law Judge Robert S. Amery awarding benefits on a claim¹ 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). The administrative law judge credited claimant with "at least" ten years of coal mine employment, Decision and Order at 4, and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) under the true-doubt rule. The administrative law judge also found total disability due to pneumoconiosis established pursuant to Section 718.204 and, accordingly, awarded benefits. Finally, the administrative law judge dismissed both Gulf & Western and Oakwood as potential responsible operators and ordered the Black Lung Disability Trust Fund to pay benefits.

On appeal, the Director challenges the administrative law judge's responsible operator finding. Gulf & Western and Oakwood respond, urging affirmance; claimant responds that he takes no position on the responsible operator issue. On cross-appeal, Gulf & Western and Oakwood challenge the administrative law judge's weighing of the evidence pursuant to Sections 718.202(a)(4) and 718.204. Oakwood also challenges the administrative law judge's length of coal mine employment finding. The Director has declined to participate in and claimant has not responded to the cross-appeals.²

¹ Claimant is Bobbie E. Arrington, the miner, whose claim for benefits filed on April 6, 1989 was awarded on January 10, 1990. Director's Exhibits 1, 46.

² We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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).

Oakwood contends initially that the administrative law judge's finding of at least ten years of coal mine employment is not supported by substantial evidence because claimant's "substantiated" periods of coal mine employment total only eight and three quarter years. Oakwood's Brief at 6-9. The administrative law judge considered claimant's benefits application, employment history form, Social Security earnings records, and testimony, and noted that claimant testified to and listed fifteen to eighteen years of coal mine employment. Decision and Order at 3-4. The administrative law judge found that the Social Security earnings records indicated forty-one quarters of coal mine employment, and concluded that the record established at least ten years of coal mine employment. Decision and Order at 4.

Review of the record indicates thirty-eight quarters of coal mine employment on the Social Security earnings records, and that the miner listed and testified to five years of coal mine employment not reflected in the Social Security records. Director's Exhibits 1, 2, 4; Hearing Transcript at 30. Inasmuch as the administrative law judge discussed all relevant evidence, see *Tackett v. Cargo Mining Company*, 12 BLR 1-11 (1988), and permissibly credited the miner's uncontradicted testimony as to length of coal mine employment, *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984), we reject Oakwood's contention and affirm as supported by substantial evidence the administrative law judge's finding of at least ten years of coal mine employment.³

Both Gulf & Western and Oakwood challenge the administrative law judge's finding pursuant to Section 718.202(a)(4). Gulf & Western's Brief at 9-11; Oakwood's Brief at 10-15. The administrative law judge's finding was based on the true-doubt rule, Decision and Order at 14, which was subsequently invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 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). Since we must apply the law in effect at the time of this decision, see *Cole v. East Kentucky Collieries*, BLR , BRB No. 94-0398 BLA (June 27, 1996); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989), we vacate the administrative law judge's finding at Section 718.202(a)(4) as inconsistent with law and remand the case for him to reconsider the medical opinion evidence. On remand, the administrative law judge must

³ Although the administrative law judge apparently double counted three quarters of coal mine employment from the Social Security earnings records, any error is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as substantial evidence supports his finding of at least ten years of coal mine employment.

determine whether claimant has met his burden of proof pursuant to Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *Cole*, BRB No. 94-0398 at 4.

Pursuant to Section 718.204(b), as both Gulf & Western and Oakwood contend, the administrative law judge failed to weigh the conflicting medical opinions before finding that claimant's total disability was "to some extent contributed to" by pneumoconiosis. Decision and Order at 16. We therefore vacate his finding and remand the case for him to consider all relevant evidence, Director's Exhibits 16, 17, 36; Claimant's Exhibit 1; Employer's Exhibits 3-5, 8, 11, 12, 14, 15, to determine whether the miner's pneumoconiosis is at least a contributing cause of his totally disabling respiratory impairment. See *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990). If the administrative law judge again finds total disability due to pneumoconiosis established, he must consider all relevant evidence to determine the date for the commencement of benefits. See *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Finally, the Director contends that the administrative law judge failed to consider all evidence of record regarding the responsible operator. Director's Brief at 6-9. Review of the record indicates that claimant last worked for at least one year for "Double D Enterprises" of Lebanon, Virginia. Director's Exhibits 2, 4; Hearing Transcript at 28. His next most recent employers of at least one year were Gulf & Western and Oakwood. Director's Exhibits 2, 4; Hearing Transcript at 34. The Department of Labor named Gulf & Western and Oakwood as potential responsible operators, Director's Exhibit 27; the record does not indicate whether it attempted to name Double D Enterprises.

At the hearing, claimant testified that to the best of his knowledge, Double D Enterprises "sold out" and went out of business in 1981. Hearing Transcript at 27-28, 70. At that time, counsel for the Director requested and was granted thirty days to present post-hearing evidence that Double D Enterprises was not insured, its corporate charter had been revoked, and there were no known successors.⁴ Hearing Transcript at 71. The Director, however, did not submit this evidence.

Gulf & Western did submit post-hearing evidence consisting of Old Republic Insurance Company documents indicating that a "Double D Coal Company, Inc." of "Bee, Dickenson County, Virginia" carried Black Lung insurance from February of 1978 to February of 1981, a period covering claimant's employment with "Double D Enterprises." Gulf & Western Letter dated December 21, 1990 and Exhibit (unstamped).

⁴ The other parties were given thirty days in which to submit evidence in rebuttal. Hearing Transcript at 71.

The administrative law judge noted that Gulf & Western "produced documents indicating that Double D was insured," while the Director "submitted nothing in opposition." Decision and Order at 17. On this basis alone, the administrative law judge concluded that "Double D Coal Company" was claimant's most recent employer of at least one year and found that it was insured during claimant's employment. The administrative law judge therefore dismissed Gulf & Western and Oakwood as potential responsible operators and transferred responsibility for benefits to the Black Lung Disability Trust Fund pursuant to *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984).

As the Director contends, the administrative law judge failed to consider all the evidence of record or explain how he resolved the conflict between claimant's testimony and the employment records indicating that he worked for "Double D Enterprises" of Lebanon, Virginia, and Oakwood's evidence that the "Double D Coal Company, Inc." of Bee, Dickenson County, Virginia was insured. Therefore, we vacate the administrative law judge's finding and remand the case for him to consider all relevant evidence and adequately explain his finding.⁵ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁵ Because claimant has not established entitlement to benefits and Gulf & Western and Oakwood have litigated this claim from the beginning, we reject their contention that our holding in *Crabtree* requires the Black Lung Disability Trust Fund to assume liability for benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____NANCY S. DOLDER
Administrative Appeals Judge