U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0207 BLA

JAMES PHILLIPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARBON RESOURCES, INCORPORATED	)	
	)	DATE ISSUED: 06/09/2020
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-06047) of Administrative Law Judge Natalie A. Appetta on a subsequent claim[1] filed on July 21, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found employer is the responsible operator. She credited claimant with twelve years of coal mine employment[2] and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Considering claimant's entitlement under 20 C.F.R. Part 718, she determined he established a totally disabling respiratory or pulmonary impairment based on the newly submitted evidence. 20 C.F.R. §718.204(b)(2). Thus he established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). She further found he did not establish clinical pneumoconiosis, but established he is totally disabled due to legal pneumoconiosis,[4] and awarded benefits. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c).

On appeal, employer argues the administrative law judge erred in finding it is the responsible operator and claimant is totally disabled due to legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief agreeing the administrative law judge erred in finding employer is the responsible operator.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C.

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[1] Claimant filed an initial claim on September 9, 2013, which the district director denied because he did not establish total disability. Director's Exhibit 1.

[2] Because claimant's most recent coal mine employment occurred in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 22.

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b).

[4] Legal pneumoconiosis includes any "chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

§921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

Entitlement to Benefits

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

We initially address employer's argument that the administrative law judge erred in finding claimant totally disabled, as this finding is relevant to whether he established a change in an applicable condition of entitlement.[5] 20 C.F.R. §725.309(c). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[6] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence and determine whether claimant established total disability by a preponderance of the evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-

[5] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because claimant's prior claim was denied for failure to establish total disability, claimant is required to establish this element in order for his subsequent claim to be considered on the merits. Director's Exhibit 1.

[6] The administrative law judge found claimant's "last position in the coal mines was that of a general laborer" and this required "heavy labor" because he "was required to build forms, ready equipment, pull cable by hand, climb stairs while carrying 40 to 50 pounds at a prep plant, and running heavy machinery." Decision and Order at 6, *quoting* Hearing Transcript at 21-24, 32. This finding is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge first considered four pulmonary function studies conducted on August 10, 2016, March 14, 2017, November 15, 2017, and June 13, 2018. Decision and Order at 10-11. The August 10, 2016 and June 13, 2018 studies produced non-qualifying[7] values while the March 14, 2017 and November 15, 2017 studies produced qualifying values. Director's Exhibit 9; Claimant's Exhibit 5; Employer's Exhibits 1, 4. She found the August 10, 2016, March 14, 2017, and November 15, 2017 studies all invalid based on Dr. Fino's and Dr. Basheda's medical opinions. Decision and Order at 11. As the record contains no valid qualifying pulmonary function study, she found this evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11.

The administrative law judge then considered three arterial blood gas studies conducted on August 10, 2016, June 13, 2018, and September 26, 2018. Decision and Order at 12. The June 13, 2018 and September 26, 2018 studies produced non-qualifying values while the August 10, 2016 study produced qualifying values. Director's Exhibit 9; Claimant's Exhibit 6; Employer's Exhibit 11. She found this evidence does not establish total disability because the preponderance of the testing, including the most recent, is non-qualifying. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12.

Next she weighed Dr. Fino's and Dr. Basheda's opinions that claimant is not totally disabled and Dr. Holt's opinion that he is totally disabled.[8] Decision and Order at 12-17; Director's Exhibits 9, 10; Employer's Exhibits 1, 3, 4, 6. She discredited Dr. Fino's and Dr. Basheda's opinions because she found they considered objective testing and treatment records not admitted into the record and because they did not adequately address claimant's use of home oxygen therapy. Decision and Order at 17. She credited Dr. Holt's opinion, finding it reasoned and documented. *Id*. at 16-17. Thus she found the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge also considered Dr. Saludes's opinion that claimant has a fifteen to twenty percent respiratory impairment, but she found he did not address whether this impairment would prevent claimant from performing his usual coal mine employment. Decision and Order at 16; Claimant's Exhibit 4.

Finally, weighing all the relevant supporting evidence against all the relevant contrary evidence, the administrative law judge found that although the "majority" of the blood gas studies are non-qualifying and the valid pulmonary function studies are non-qualifying, Dr. Holt's opinion is "sufficient to establish disability" and thus claimant "established, by a preponderance of the evidence, that he is totally disabled due to a respiratory or pulmonary condition" under 20 C.F.R. §718.204(b)(2). Decision and Order at 18.

We agree with employer's argument that the administrative law judge committed a number of errors in weighing the conflicting evidence on total disability and that remand is required. As set forth below, her crediting of Dr. Holt's medical opinion was inconsistent with her determinations as to the credibility and weight to be given evidence he relied on. Specifically, the objective evidence of total disability Dr. Holt identified and relied on consisted of a pulmonary function study and an arterial blood gas study; but the administrative law judge found the pulmonary function study invalid and the arterial blood gas study outweighed by two more recent non-qualifying studies. Nonetheless, she credited Dr. Holt's opinion, found it outweighed all of the other relevant evidence, and rested her determination that claimant is totally disabled upon it. 20 C.F.R. §718.204(b)(2). Further, she did not apply the same level of scrutiny to the conflicting medical opinions, substituted her opinion for that of medical experts, inadequately explained her credibility findings, and failed to consider all relevant evidence. 20 C.F.R. §718.204(b)(2)(iv).

Drs. Fino and Basheda

The administrative law judge first erred in discrediting the opinions of Drs. Fino and Basheda. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17. Dr. Fino testified claimant's pulmonary function studies evidence a mild respiratory impairment reflected by reductions in the FEV1 and FVC values and his arterial blood gas studies evidence mild hypoxemia, but opined these impairments are not disabling. Employer's Exhibit 6 at 11-16, 18. Dr. Basheda diagnosed a non-disabling class II impairment, also based on reductions in the FEV1 and FVC values on claimant's pulmonary function studies.[9] Employer's Exhibit 1 at 23-24.

The administrative law judge assigned their opinions reduced weight because she found they "neglect[ed]" to address claimant's supplemental home oxygen therapy "in any way, beyond noting it in their summaries." Decision and Order at 17. She found they "noted that [c]laimant is using supplemental oxygen 24 hours per day. However, neither physician addressed this home oxygen use in the context of the presence or absence of

[9] Dr. Basheda further diagnosed a reversible obstructive lung defect based on pulmonary function testing consistent with asthma. Employer's Exhibit 1 at 23.

pulmonary disability" or "in the context of another, non-pulmonary condition requiring home oxygen." *Id*. We agree with employer's argument that the administrative law judge did not identify the medical evidence she found credibly establishes claimant's home oxygen use supports the existence of a disabling respiratory or pulmonary impairment. Employer's Brief at 25-26. Thus in requiring Drs. Fino and Basheda to address this "notable factor" in the context of whether claimant is totally disabled, the administrative law judge failed to satisfy the explanatory requirements of the Administrative Procedure Act[10] (APA) and impermissibly substituted her opinion for those of the medical experts.[11] Decision and Order at 17; *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The administrative law judge also erred in discrediting the opinions of Drs. Fino and Basheda because they considered evidence outside of the record. The applicable regulations are silent as to what an administrative law judge should do when evidence not admitted in the record is referenced in an otherwise admissible medical opinion. 20 C.F.R. §725.414(a)(2)(i), (3)(i). Thus, the disposition of this issue is committed to an administrative law judge's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004). An administrative law judge, however, must first ascertain what portions of the opinion, if any, are tainted by reliance on inadmissible evidence. *Id*. Moreover, even if an administrative law judge finds that a medical opinion

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[10] The Administrative Procedure Act provides that every adjudicatory decision must 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 30 U.S.C. §932(a).

[11] Further, Dr. Fino questioned whether claimant needs oxygen therapy to conduct exertional work based on the results of his blood gas testing. Employer's Exhibit 6 at 18-20. He noted claimant's blood gas testing improved with exercise, indicating his resting hypoxemia was related to his obesity. *Id*. at 22. He explained claimant does not need oxygen therapy with any exertion because obesity prevents air from getting into the lungs at rest but not during exercise. *Id*. According to Dr. Fino, when individuals "exercise" they "breathe deeper and harder and [get] more air" into the lungs while "exchang[ing] more oxygen." *Id*. at 22-23. The administrative law judge erred by not addressing this aspect of Dr. Fino's testimony. 30 U.S.C. §923(b); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984).

is tainted, she is not required to exclude the report or testimony in its entirety. *Id*. Rather, she may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67. Exclusion of evidence is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id*.

The administrative law judge found, and employer concedes, Drs. Fino and Basheda listed medical evidence in their reports that was not admitted into the record. Decision and Order at 17; Employer's Brief at 22-24. Although the administrative law judge indicated they based their total disability opinions on this evidence, Decision and Order at 17, we agree with employer's argument that she did not properly determine whether their opinions *relied* on the unadmitted evidence and she neither adequately explained how the opinions relied on such evidence nor ascertained what portions of their opinions, if any, were consequently tainted. *See Harris*, 23 BLR at 1-108; Employer's Brief at 22-24. Thus this rationale for assigning less weight to the contrary opinions of Drs. Fino and Basheda does not comply with the APA.[12] *Wojtowicz*, 12 BLR at 1-165.

Dr. Holt

Although the administrative law judge discredited the opinions of Dr. Fino and Basheda for considering evidence outside of the record, employer correctly contends she did not evaluate whether Dr. Holt's opinion[13] suffered from the same defect when finding his opinion establishes total disability. Employer's Brief at 24-25. Whether a physician's opinion is adequately reasoned is for the administrative law judge to determine. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163. However, the administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny in determining the credibility of the medical opinion

[12] *See* n. 10.

[13] Dr. Holt indicated claimant's usual coal mine employment was as a "general laborer which would have entailed a fair amount of carrying of equipment and/or tools as well as walking, pushing, pulling, and lifting." Director's Exhibit 9 at 5 (unpaginated). He noted the August 10, 2016 pulmonary function study shows "good tracings" and an FEV1 value that is seventy percent of predicted. *Id*. at 7. The physician opined the test is consistent with a minimal obstructive lung defect. *Id*. at 7. He also summarized the results of the August 10, 2016 arterial blood gas study which, as noted above, is qualifying for total disability. *Id*. Based on this objective testing, Dr. Holt opined claimant is totally disabled from his usual coal mine employment because it "would have been a rather physically active job." *Id*.

evidence. 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). Employer identifies medical evidence it asserts was not admitted into the record but Dr. Holt relied on to diagnose total disability.[14] Employer's Brief at 24; Director's Exhibit 9. In evaluating Dr. Holt's opinion, the administrative law judge erred by not addressing whether he also relied on evidence outside of the record and applying the same level of scrutiny she applied to the opinions of Drs. Fino and Basheda. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67; *Hughes*, 21 BLR at 1-139-40.

Similarly, employer points out the administrative law judge discredited Drs. Fino and Basheda for not addressing claimant's use of oxygen, but did not discuss this factor in considering the weight to give Dr. Holt's opinion. Employer's Brief at 24-25. We agree with employer that the administrative law judge erred by selectively and inconsistently applying these criteria when weighing the medical opinion evidence. *Hughes*, 21 BLR at 1-139-40.

Further, her crediting of Dr. Holt's opinion was inconsistent with her determination that the pulmonary function study he cited as objective evidence of total disability was invalid. *Director, OWCP v. Siwiec*, 894 F.2d 635, 639 (3d Cir. 1990). In considering whether an opinion is reasoned and documented, the documentation underlying the opinion must be evaluated. *See Kramer*, 305 F.3d at 211; *Kertesz*, 788 F.2d at 163. Having determined that the August 10, 2016 pulmonary function study was invalid, the administrative law judge failed to explain why she nonetheless considered Dr. Holt's opinion reasoned and documented.[15] *Wojtowicz*, 12 BLR at 1-165.

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[14] Dr. Holt indicated in his report that claimant "did have a recent physical examination with his pulmonologist. They did diagnose the patient also with having coal miners' pneumoconiosis. Their report is in our chart." Director's Exhibit 9.

[15] A non-qualifying objective test differs from an invalid objective test. A non-qualifying test is one on which the claimant fails to meet the standard the Department of Labor set forth for establishing total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). A validly conducted non-qualifying test is an accurate representation of the individual's capability. *Director, OWCP v. Siwiec*, 894 F.2d 635, 639-40 (3d Cir. 1990). A claimant may be found totally disabled based on a non-qualifying test when the non-qualifying test indicates a level of capability that is insufficient to meet the exertional requirements of claimant's last coal mining job. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 578 (6th Cir. 2000). An invalid test is just that – not valid. Absent adequate explanation, it cannot be accepted as an accurate representation of the individual's capability. *Siwiec*, 894 F.2d at 639-40, *citing Director, OWCP v. Mangifest*, 826 F.2d 1318, 1319 (3d Cir. 1987). Thus, without proper explanation, an invalid test cannot constitute the basis for a valid judgment that a claimant is totally disabled. *Id*. The administrative law judge noted that Dr. Holt considered the

Finally, notwithstanding whether Dr. Holt's opinion taken in isolation would tend to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge erred by failing to explain the basis upon which she found Dr. Holt's opinion outweighed all the contrary evidence and failing to resolve her inconsistent and conflicting determinations when finding claimant established total disability based on the preponderance of all the relevant evidence at 20 C.F.R. §718.204(b)(2). *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165; Employer's Brief at 27-30. The administrative law judge found Dr. Holt's opinion reasoned and documented because he "considered factors including qualifying [arterial blood gas testing], symptoms, [home-oxygen use]," and the exertional levels of claimant's usual coal mine employment which entailed "a rather physically active job." Decision and Order at 16-17; *see* 20 C.F.R. §718.204(b)(2)(iv). She did not reconcile this finding with her determination that the preponderance of the arterial blood gas testing does not support total disability. 20 C.F.R. §718.204(b)(2)(ii). More specifically, the administrative law judge found the August 10, 2016 qualifying blood gas study that formed the basis of Dr. Holt's opinion outweighed by the more recent June 13, 2018 and September 26, 2018 non-qualifying studies. Decision and Order at 12.[16] She thus failed to recognize that her findings were inconsistent and that Dr. Holt's opinion did not take into account later evidence she had found more significant. *Rowe*, 710 F.2d at 255; *Wojtowicz*, 12 BLR at 1-165. Thus she erred by not weighing all relevant supporting evidence against all relevant contrary evidence when determining whether claimant established total disability by a preponderance of the evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Based on the forgoing errors, we vacate the administrative law judge's finding that claimant established total disability and a change in an applicable condition of entitlement, and remand this case for further consideration of these issues. 20 C.F.R. §§718.204(b)(2),

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pulmonary function test as a non-qualifying test. Decision and Order at 17-18. She failed to recognize, however, that the value of Dr. Holt's opinion was affected by his apparently further considering it a valid test. Although the administrative law judge did not cite the pulmonary function study as supporting Dr. Holt's opinion, Dr. Holt himself reported that he relied upon the study, along with the arterial blood gas testing. Director's Exhibit 9 at 6, 11 (unpaginated). This cannot be ignored.

[16] Dr. Holt also did not identify any other findings resulting from the August 10, 2016 qualifying blood gas study that formed the basis of his opinion that would, when compared to the exertional requirements of claimant's last coal mining job, nevertheless indicate that claimant would be unable to perform that job. Director's Exhibit 9; *see Cornett v. Benham Coal Co.*, 227 F.3d 569, 578 (6th Cir. 2000). Moreover, as noted above, the administrative law judge also failed to recognize that in formulating his opinion, Dr. Holt relied on pulmonary function test evidence she found invalid.

725.309. In reconsidering whether the medical opinions establish total disability, the administrative law judge must apply equal scrutiny to the physicians' opinions and consider all relevant evidence. *Hughes*, 21 BLR at 1-139-40; *McCune*, 6 BLR at 1-998; 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge should address the explanations the physicians have provided for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Kramer*, 305 F.3d at 211; *Kertesz*, 788 F.2d at 163. When evaluating whether claimant established total disability by a preponderance of the evidence, she must weigh all relevant supporting evidence against all relevant contrary evidence.[17] *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718204(b)(2). She must set forth her findings in detail, including the underlying rationale for her decision, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Further, because the administrative law judge's reweighing of the evidence concerning total disability could affect her weighing of the medical opinions concerning legal pneumoconiosis and total disability causation, we must vacate her determination that claimant has legal pneumoconiosis and his total disability is due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(c). We decline to address, as premature, employer's arguments pertaining to these issues.

Responsible Operator

The responsible operator is the "potentially liable operator"[18] that most recently employed claimant for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). The Director bears the burden of proving that the responsible operator is a potentially liable operator. 20 C.F.R. §725.495(b). Once designated, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits

[17] An administrative law judge may compare the physicians' assessments of respiratory impairment with the exertional requirements of claimant's usual coal mine employment in order to assess whether claimant is totally disabled. *See Cornett*, 277 F.3d at 578; *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985).

[18] To meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, it must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and it must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

or another operator financially capable of assuming liability more recently employed claimant for at least one year. *See* 20 C.F.R. §725.495(c).

The administrative law judge noted the two most recent entities to employ claimant in coal mining were employer and Merit[19] Contracting (Merit). Decision and Order at 5-6. In finding employer is a potentially liable operator, she determined claimant worked for employer for five years from 1993 to 1997 based on his testimony and Social Security Administration (SSA) earnings records. *Id.* She then evaluated whether Merit is a potentially liable operator and found the same evidence establishes claimant worked for Merit for partial periods in 1993 and 1998 for a cumulative total of one-half of a year.[20] *Id*. Moreover, she concluded employer failed to meet its burden of establishing Merit is financially capable of assuming liability for the claim. *Id*. at 6. Thus she found Merit is not a potentially liable operator. *Id*. Because she found employer the potentially liable operator that most recently employed claimant, she concluded it is the responsible operator. 20 C.F.R. §§725.494, 725.495(a)(1); Decision and Order at 6.

We first reject employer's argument that the administrative law judge erred in calculating claimant's employment with Merit. Employer's Brief at 16-20. In calculating the length of claimant's 1998 employment with Merit, she noted claimant's SSA records reflect he earned $10,221.70 in 1998. Decision and Order at 4-6; Director's Exhibit 5. She acknowledged claimant provided conflicting testimony on the actual length of his employment in 1998: he first testified he did not work for Merit for one year, but then testified he did work there for one year. Decision and Order at 4; Hearing Transcript at 22, 24-25; Employer's Brief at 16-20. She further noted, however, that claimant testified he stopped working for Merit in May 1998 because he suffered a shoulder injury and was told he could no longer return to the job site. Decision and Order at 4; Hearing Transcript at 25, 36. He indicated he was "off for a year" receiving workers' compensation and

[19] Conflicting spellings of this entity appear throughout the record, as it is listed as Merritt Contracting in some instances, but as Merit Contracting in other instances. *See* Director's Exhibit 5; Hearing Transcript at 22-26. Claimant's Social Security Administration (SSA) records list it as Merit Contracting (Merit). Director's Exhibit 5.

[20] Based on claimant's testimony, the administrative law judge found Merit and Atlas Services Corporation are the same company. Decision and Order at 5-6; Hearing Transcript at 24-25. She found claimant's SSA records reflected claimant earned coal mining income equating to one-eighth of a year from Atlas Services Corporation in 1997 and 1998. Decision and Order at 5-6; Director's Exhibit 5. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711. After adding this time to the one-half of a year the administrative law judge found claimant worked for Merit, she reiterated her finding that claimant worked for Merit for less than one year. Decision and Order at 6.

"wouldn't be able to go back" to work for Merit. Hearing Transcript at 25-26. He stated he never returned to "this type of work" again.[21] *Id*. at 26-27. When the administrative law judge questioned him at the hearing, he reiterated that after his injury in May 1998, he did not go back to work for Merit and this job was the last coal mining job he performed. *Id*. at 32.

Contrary to employer's argument, the administrative law judge permissibly found claimant's testimony[22] established his employment relationship with Merit ended in May 1998 and thus he worked for Merit for one-half of a year in 1998.[23] *See Jericol Mining, Inc. v. Napi*er, 301 F.3d 703, 713-14 (6th Cir. 2002); *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 563 (6th Cir. 2002); Decision and Order at 5-6. Thus we affirm, as supported by substantial evidence, her finding that Merit is not a potentially liable operator because it employed claimant for less than one year.[24] *See Mancia v. Director, OWCP*, 130 F.3d

[21] Although claimant testified he also worked for Atlas Services Corporation for part of 1998, he indicated he worked for Atlas before working for Merit. Hearing Transcript at 27-28.

[22] Employer argues the administrative law judge did not evaluate the employment histories claimant provided when he filed his claim. Employer's Brief at 18. Contrary to employer's argument, she permissibly assigned this evidence "little weight" because she found claimant set forth "overlapping dates in non-consecutive order and does not clarify his employment dates." Decision and Order at 5; *see Jericol Mining, Inc. v. Napi*er, 301 F.3d 703, 713-14 (6th Cir. 2002). Moreover, she permissibly found his SSA records, considered in conjunction with his hearing testimony, the more credible evidence of his employment history. *Napi*er, 301 F.3d at 713-14; Decision and Order at 5.

[23] Employer asserts the administrative law judge erred by not including the time period claimant worked for Merit in 1993 in her calculation. Employer's Brief at 18-19. We consider any error by the administrative law judge in failing to address this employment to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). In calculating claimant's employment with Atlas Services Corporation in 1997 and 1998, the administrative law judge used claimant's earnings with Merit in 1998 as a wage base. Decision and Order at 6. Specifically, if claimant earned $10,221.70 for one-half year of full-time employment with Merit, she assumed he would have earned $20,443.40 for a full year of employment with Merit. *Id*. The record reflects claimant earned only $281.70 with Merit in 1993. Director's Exhibit 5. Thus employer does not show how including the time period claimant worked for Merit in 1993 would result in the requisite period of employment.

[24] Because we affirm the administrative law judge's finding Merit employed claimant for less than one year, we need not address employer's argument that she erred in

579, 584 (3d Cir. 1997) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); 20 C.F.R. §725.494(c); Decision and Order at 6.

Employer next argues the administrative law judge erred in finding it is a potentially liable operator because she erroneously determined it employed claimant for at least one year in coal mining.[25] 20 C.F.R. §725.494(c); Employer's Brief at 16-20. A "year" is defined as "one calendar year . . . 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.'" 20 C.F.R. §725.101(a)(32). 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. 20 C.F.R. §725.101(a)(32).

Claimant testified he worked for employer in 1993 when it used the name Warrior Constructors, building "paths and stuff" at coal mine sites. Hearing Transcript at 21. Claimant's SSA records reflect claimant earned $825.60 in 1993 for Warrior Constructors. Director's Exhibit 5. He testified he subsequently worked at mine sites as a construction laborer for employer when it used the name Carbon Resources from 1993 to 1997. Hearing Transcript at 21-24, 32. He stated the mines were active when he worked for employer and he was exposed to a lot of coal dust. *Id*. Further, he testified he often worked at the preparation plant under dusty conditions. *Id*. at 23-24. Claimant's SSA records reflect claimant's earnings from Carbon Resources were $3,780.56 in 1993, $6,508.48 in 1994, $3,706.22 in 1995, $5,439.50 in 1996, and $8,925.00 in 1997. Director's Exhibit 5. The administrative law judge found claimant "did not testify as to how long he worked at Warrior Construction [*sic*], but it was certainly less than a year because his wages totaled only [$825.60] in 1993." Decision and Order at 5-6. She further found his testimony and SSA records "consistent as to his work for Carbon Resources" and credited him with five years for 1993 through 1997. *Id*.

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evaluating whether Merit is financially capable of assuming liability for the claim. *Larioni*, 6 BLR at 1-1278; *see* 20 C.F.R. §725.494(c), (e); Employer's Brief at 19-20.

[25] Because it is unchallenged on appeal, we affirm the administrative law judge's findings that claimant's disability arose out of his employment with Carbon Resources, Carbon Resources was in business after June 30, 1973, claimant had at least one day of the employment with Carbon Resources that occurred after December 31, 1969, and Carbon Resources is financially capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(a), (b), (d), (e); *see Skrack*, 6 BLR at 1-711; Decision and Order at 6.

Employer does not dispute that it employed claimant for five calendar years from 1993 to 1997, but contends the administrative law judge erred in failing to evaluate whether the evidence establishes it employed claimant in coal mining for 125 working days during that time. Employer's Brief at 16-20. Employer maintains she did not address relevant evidence that establishes it employed claimant in coal mining for less than 125 working days. *Id*. This evidence consists of correspondence from employer to the district director dated March 8, 2010, February 6, 2014, and August 15, 2016. Director's Exhibits 1, 15. This correspondence indicates the types of projects claimant worked on for employer, and date ranges and claimant's working hours for projects that involved coal mining. *Id*. The Director asserts the evidence on which employer relies is not credible, but agrees the administrative law judge erred in not addressing employer's argument. Director's Brief at 4-7. In view of the Director's concession, we vacate the administrative law judge's finding that employer is the responsible operator. *See* 30 U.S.C. §923(b); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989)*; Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998.

On remand, because employer concedes claimant's employment with it lasted for five calendar years from 1993 to 1997, it must be presumed that claimant spent at least 125 working days in such employment for each of those years. 20 C.F.R. §725.101(a)(32)(ii). The administrative law judge must address employer's argument that the evidence credibly establishes it did not employ claimant for 125 working days in coal mining.[26] She must explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[26] Employer urges the Board to reverse the administrative law judge's finding that it is a potentially liable operator. Employer's Brief at 17. We decline to do so. As the Director asserts, the administrative law judge is tasked with evaluating the credibility of the documentary evidence employer submitted and resolving the conflict in the evidence. *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *McCune*, 6 BLR at 1-998 (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion); Director's Brief at 4-7.

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge