BRB No. 10-0610 BLA

BEN C. MORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 04/29/2011
HIGHLAND COAL COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (06-BLA-5350) of Administrative Law Judge Ralph A. Romano awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a claim filed on November 19, 2004, and is before the Board for the second time. Director's Exhibit 2. In the initial decision, the administrative law judge credited claimant with ten years of coal mine employment,[1] and found that employer was properly designated as the responsible operator. The administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Additionally, the administrative law judge found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R §718.203(b), and found that employer did not rebut the presumption. Further, the administrative law judge determined that the evidence established the existence of simple pneumoconiosis that arose out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). The administrative law judge further determined that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), that is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the finding of total disability under Section 718.204(b)(2), but held that the administrative law judge erred in all of his other findings. *B.M.* [*Morris*] *v. Highland Coal Co.*, BRB No. 07-1010 BLA (Sept. 29, 2008)(unpub.). Accordingly, the Board vacated the award of benefits and remanded the case for the administrative law judge to reconsider the evidence regarding the responsible operator, the length of claimant's coal mine employment, the existence of complicated pneumoconiosis under Section 718.304, the existence of simple pneumoconiosis under Section 718.202(a)(1), (4), and the cause of claimant's total disability under Section 718.204(c).

On remand, the administrative law judge reconsidered the relevant evidence, and found that employer is the responsible operator. Additionally, the administrative law judge found that the documentary evidence of record and claimant's testimony established that claimant worked for 12.3 years in coal mine employment. Further, the administrative law judge found that the medical evidence established the existence of

[1] The record reflects that claimant's coal mine employment was in Tennessee. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

clinical and legal pneumoconiosis pursuant to Section 718.202(a)(1), (4), that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and that claimant is totally disabled due to legal pneumoconiosis pursuant to Section 718.204(c).[2] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator, and that the evidence established 12.3 years of coal mine employment. Employer further contends that the administrative law judge erred in finding that the evidence established the existence of clinical and legal pneumoconiosis pursuant to Section 718.202(a)(1), (4), that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's finding that employer is the responsible operator, but takes no position on the remaining issues. Claimant did not file a response brief.[3]

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).

Responsible Operator

In the prior appeal, the Board remanded the case for the administrative law judge to address employer's contention that it was not the responsible operator because it did not most recently employ claimant for at least one year. *See* 20 C.F.R. §§725.494(c); 725.495(a)(1). Specifically, employer contended that claimant's most recent employer, Black Face Mining, Incorporated (Black Face Mining) was the successor operator[4] of

[2] On remand, the administrative law judge found that claimant did not establish that he has complicated pneumoconiosis and thus, did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304.

[3] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Those amendments, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim, filed on November 19, 2004.

[4] A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior

Rex Mining Company (Rex Mining), which employed claimant before he worked for employer. Employer argued that, since Rex Mining and its successor, Black Face Mining, employed claimant for a cumulative period of at least one year, Black Face Mining was the responsible operator.

On remand, the administrative law judge considered the relevant evidence, consisting of claimant's answers to interrogatories, his deposition testimony, and his hearing testimony regarding the various coal companies that employed him. In response to an employment questionnaire, claimant stated that Rex Mining, Southland Construction, and Black Face Mining operated "at the same mine and [were] operated by the same family." Director's Exhibit 7. When deposed, however, claimant testified that Rex Mining and Southland Construction had the same owners, same mine sites, and used the same equipment, but that Black Face Mining was not related to any other coal company for which he worked. Director's Exhibits 5 at 8-10; 6 at 10, 18-20, 23. At the hearing, claimant initially testified that Rex Mining, Southland Construction, and Black Face Mining were the same entity with the same owners, same workers, and same equipment. Hearing Transcript at 23-26, 32-33. He later testified, however, that Rex Mining, McGlothin Coal Company and Black Face Mining were three different mines with three different owners. *Id*. at 35. When questioned about his change in hearing testimony, claimant stated that he was "confused," and that it was "possible" that his testimony was "wrong." *Id*. at 38.

The administrative law judge found that employer did not establish that Black Face Mining was related to Rex Mining because claimant's testimony was "inconsistent on this point and he had specific contrary recollections. There is alternate testimony of equal credibility that Black Face was independent of Rex and its related companies." Decision and Order at 5. Consequently, the administrative law judge found that, because employer did not establish that Black Face Mining was the successor operator of Rex Mining, employer is the responsible operator.

Employer argues that the administrative law judge irrationally found that claimant's testimony was unreliable. We disagree. Since employer was designated as the responsible operator, it bore the burden of proving that it was not the potentially liable

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operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492. Additionally, Section 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). If the prior operator does not meet the conditions set forth in 20 C.F.R. §725.494, the successor operator is primarily liable for the payment of benefits to any miners previously employed by the prior operator. *See* 20 C.F.R. §725.492(d)(1).

operator that most recently employed claimant. 20 C.F.R. §725.495(c)(2). As claimant's testimony regarding the relationship between Rex Mining and Black Face Mining was inconsistent, the administrative law judge was not required to accept it. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). Substantial evidence supports the administrative law judge's determination that employer did not establish that Black Face Mining is the successor operator to Rex Mining. Therefore, we affirm the administrative law judge's finding that employer is the responsible operator.

Length of Coal Mine Employment

In the prior appeal, the Board vacated the administrative law judge's finding of ten years of coal mine employment, and remanded the case for him to reconsider the relevant evidence and explain how he arrived at a total of ten years of coal mine employment. On remand, the administrative law judge found that claimant's Social Security Administration (SSA) earnings records established 5.8 years of coal mine employment, and that claimant's testimony, that he worked in coal mine employment for his father and for a family friend, established an additional 6.5 years of coal mine employment. The administrative law judge therefore found that claimant established a total of 12.3 years of coal mine employment.

Employer does not challenge the administrative law judge's finding that the SSA earnings records established 5.8 years of coal mine employment.[5] Its sole contention is that the administrative law judge erred in crediting claimant's testimony that he worked in coal mine employment, for cash, for his father for another four years, and for a family friend, Pearly Hatmaker, for an additional two and one-half years. Hearing Transcript at 12-14, 17. Specifically, employer argues that it was irrational for the administrative law judge to accept claimant's testimony on that point, when he discredited, as inconsistent, claimant's testimony on the relationship between Black Face Mining and Rex Mining. Employer's contention lacks merit.

The administrative law judge reasonably relied on claimant's hearing testimony to establish an additional 6.5 years of coal mine employment. *See Croucher v. Director, OWCP*, 20 BLR 1-68, 1-72 (1996)(*en banc*). Although the administrative law judge chose not to credit claimant's testimony concerning the relationship between Rex Mining and Black Face Mining because he found the testimony "inconsistent on [that] point," the administrative law judge did not find claimant's testimony regarding where and when he worked in coal mine employment to be inconsistent. Therefore, he reasonably credited

[5] Employer calculates 6.7 years of coal mine employment using the Social Security Administration earnings records. Employer's Brief at 17.

claimant's uncontradicted testimony as to the length of his coal mine employment. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Croucher*, 20 BLR at 1-72. Consequently, we affirm the administrative law judge's finding of 12.3 years of coal mine employment, as it is supported by substantial evidence.

Merits of Entitlement

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Section 718.202(a)(4)-Legal Pneumoconiosis

In its decision in the prior appeal, the Board instructed the administrative law judge to address the issue of whether claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). On remand, the administrative law judge considered the medical opinions of Drs. Baker, Dahhan, and Hudson. In a report dated December 29, 2004, Dr. Baker diagnosed claimant with chronic bronchitis and chronic obstructive pulmonary disease (COPD), due to both coal mine dust exposure and smoking. Director's Exhibit 12. Dr. Baker based that opinion on a coal mine employment history of twenty-two to twenty-three years, and a smoking history of one pack of cigarettes per day for twenty-five years. *Id*. Thereafter, the district director informed Dr. Baker that claimant's SSA earnings records established approximately six years and eleven months of coal mine employment, and asked Dr. Baker to clarify whether the shorter coal mine employment history affected his opinion on the etiology of claimant's chronic lung disease. In a letter dated May 21, 2005, Dr. Baker responded that, if claimant "indeed has only 6 years and 11 months," his COPD "would not be caused by inhalation of coal [mine] dust. It is felt that at least a 10-year history of coal [mine] dust exposure is necessary to consider this strongly as a possible etiology of a respiratory condition." Director's Exhibit 12 at 7. Dr. Baker added that, although coal mine dust may be as potent as smoking in causing obstructive lung disease, six years and eleven months of coal mine dust exposure "would not play a significant role in causing [claimant's] pulmonary impairment . . . . It would take at least 10 years of coal [mine] dust exposure to be considered significant." Director's Exhibit 12 at 8. Drs. Dahhan and Hudson opined that claimant suffers from COPD that is due solely to smoking. Director's Exhibit 14.

Viewing Dr. Baker's opinion in light of the finding of 12.3 years of coal mine employment, the administrative law judge interpreted Dr. Baker's amended opinion as

diagnosing legal pneumoconiosis if it were shown that claimant has at least ten years of coal mine dust exposure, and he found Dr. Baker's opinion to be well-documented and reasoned. In contrast, the administrative law judge accorded no weight to Dr. Dahhan's opinion, because the doctor's reasoning for excluding coal mine dust exposure as a cause of claimant's impairment--that disabling obstruction is rarely seen with coal mine dust exposure, and that claimant was not exposed to coal mine dust since 1984--conflicted with the premises underlying the regulations, namely, that pneumoconiosis is a latent and progressive disease, which may first be detected after cessation of coal mine employment, and that coal mine dust exposure can cause obstruction. Decision and Order at 9, *citing* 20 C.F.R. §718.201(c); 65 Fed. Reg. 79920, 79937-39 (Dec. 20, 2000). Further, the administrative law judge accorded no weight to Dr. Hudson's opinion, because Dr. Hudson relied on a coal mine employment history of less than ten years. Finding that Dr. Baker's opinion was "the only opinion entitled to weight," Decision and Order at 9, the administrative law judge found that legal pneumoconiosis was established.

Employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), based on Dr. Baker's opinion. Employer asserts that Dr. Baker clarified his initial report, upon learning that claimant was credited by the district director with six years and eleven months of coal mine employment, and argues that the doctor did not intend to diagnose legal pneumoconiosis in his second report. Employer's Brief at 26.

The administrative law judge's crediting of Dr. Baker's opinion reflects that the administrative law judge based his finding that it established legal pneumoconiosis on Dr. Baker's supplemental report, and not Dr. Baker's initial report. Moreover, as the administrative law judge found 12.3 years of coal mine employment, it was not unreasonable for him to interpret Dr. Baker's supplemental report as establishing a significant relationship between claimant's coal mine dust exposure and his chronic bronchitis and COPD, given Dr. Baker's statement that it would take at least ten years of coal mine dust exposure to play a significant role in claimant's impairment. *See Anderson*, 12 BLR at 1-113. Contrary to employer's additional contention, the administrative law judge permissibly found that Dr. Baker's supplemental opinion is not based on an erroneous coal mine employment history, as the evidence established 12.3 years of coal mine employment, a finding we have affirmed. As the administrative law judge reasonably interpreted Dr. Baker's clarification letter of May 21, 2005, we affirm the administrative law judge's reliance on it to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). 20 C.F.R. §718.201(a)(2), (b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). As employer raises no other arguments regarding the administrative law judge's finding that claimant established the

existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), it is affirmed.[6]

Section 718.204(c)-Total Disability Due to Pneumoconiosis

In the prior appeal, since the Board vacated the administrative law judge's finding of the existence of pneumoconiosis, it also vacated the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c), and instructed the administrative law judge to reconsider that issue, if reached, on remand. On remand, the administrative law judge found that total disability due to pneumoconiosis was established, based on Dr. Baker's supplemental opinion. The administrative law judge found that Dr. Baker's opinion was well-documented and well-reasoned, and that the contrary opinions of Drs. Dahhan and Hudson were not entitled to weight, because they did not diagnose pneumoconiosis.

Reiterating the arguments it made regarding the existence of legal pneumoconiosis, employer argues that the administrative law judge erred in relying on Dr. Baker's opinion to find disability causation established, because Dr. Baker relied on an inaccurate length of coal mine employment in his initial report, and because he specified in his supplemental report that if claimant has only six years and eleven months of coal mine employment, he is not totally disabled due to pneumoconiosis. Employer's Brief at 28-36. Employer argues further that the administrative law judge ignored the opinions of Drs. Dahhan and Hudson. *Id.*

The administrative law judge did not ignore the opinions of Drs. Dahhan and Hudson. Rather, the administrative law judge permissibly discounted their opinions because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Additionally, contrary to employer's contention, the administrative law judge reasonably considered Dr. Baker's supplemental opinion in light of the finding of 12.3 years of coal mine employment, and found that it was adequate to

[6] Because 20 C.F.R. §718.202(a) provides alternative methods of establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985), and we have affirmed the finding of legal pneumoconiosis based on the medical opinion evidence under 20 C.F.R. §718.202(a)(4), we need not address employer's challenge to the administrative law judge's finding that the x-ray evidence established clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1). Employer's Brief at 18-23, 27-28.

link claimant's pneumoconiosis and his total disability, in view of Dr. Baker's statement that it would take at least ten years of coal mine dust exposure to play a significant role in claimant's impairment. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 506-07, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Therefore, we affirm the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge