BRB No. 12-0385 BLA

TROY A. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/11/2013
	)	
NBL COAL COMPANY, INCORPORATED	)	
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (10-BLA-5813) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp.

2011)(the Act). This case involves a subsequent claim filed on November 4, 2008.[1] Director's Exhibit 3.

The administrative law judge credited claimant with 10.63 years of coal mine employment,[2] and found that employer failed to prove that it did not employ claimant for at least one year. The administrative law judge therefore determined that employer was properly designated as the responsible operator. The administrative law judge further found that the new evidence established the existence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Additionally, the administrative law judge found that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred by failing to resolve the conflicting evidence as to whether claimant worked a full year for employer. Employer further asserts that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant established the existence of complicated pneumoconiosis.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge erred by requiring employer to prove that it did not employ claimant for one year. The Director urges the Board to vacate the responsible operator determination, and remand the case for the administrative law judge to determine whether the Director has met his burden to establish that claimant worked for employer for at least one year.

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,

[1] Claimant's prior claim, filed on April 10, 1995, was denied by the district director on April 19, 1996, because claimant did not establish any element of entitlement. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[3] Employer does not challenge the administrative law judge's finding that claimant established 10.63 years of coal mine employment. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

The operator responsible for the payment of benefits is the most recent operator to employ the miner, provided that it meets the criteria of a "potentially liable operator." 20 C.F.R. §§725.494(c), 725.495(a)(1). The Director "bear[s] the burden of proving that the [designated] responsible operator . . . is a potentially liable operator." 20 C.F.R. §725.495(b). To prove that a coal mine operator is a potentially liable operator, the Director must establish, inter alia, that the operator employed the miner for a cumulative period of not less than one year.[4] 20 C.F.R. §725.494(c). 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.'"[5] 20 C.F.R. §725.101(a)(32). In "determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." *Id*. An unpaid leave of absence may be counted where there is no evidence that the employment was terminated and the record indicates that claimant retained the right to employment. *See Elswick v. New River Co.*, 2 BLR 1-1109, 1-1113-14 (1980).

In this case, the administrative law judge considered documentary evidence indicating that claimant worked for employer from March 28, 1992, until March 23, 1993, and was not paid thereafter. Decision and Order at 5-6; Director's Exhibit 6. The administrative law judge also considered an October 27, 1993 opinion from the Virginia Workers' Compensation Commission (the Commission), denying claimant's claim for compensation for a back injury that he alleged occurred at work on March 23, 1993, as he

[4] In addition to establishing that the miner worked for the operator for at least one year, the Director must also establish that the miner's disability or death arose out of employment with that operator; that the entity was an operator after June 30, 1973; that the miner's employment included at least one working day after December 31, 1969; and that the operator is financially capable of assuming liability for the claim. 20 C.F.R. §725.494(a)-(e).

[5] Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

was bending a roof bolt.[6] Director's Exhibit 6. In its opinion, the Commission summarized the testimony of claimant, his wife, and Larry Lambert (part-owner of and supervisor for employer), concerning events after March 23, 1993, which, the Director argued, evinced an ongoing employment relationship through at least May 10, 1993.[7] Director's Exhibit 6 at 2-5; Decision and Order at 5.

The administrative law judge noted employer's position that claimant did not work for employer for one year, because he worked from March 28, 1992 until March 23, 1993, he was not injured at work that day, and his absence thereafter was not authorized. Decision and Order at 5. The administrative law judge also noted the Director's position, that an employment relationship between claimant and employer continued until at least May 10, 1993, because Mr. Lambert's testimony to the Commission indicated that claimant could have returned to work on May 10, provided he had a physician's authorization. *Id*. The administrative law judge found that "the burden is on [e]mployer to . . . disprove [the] Director's position." Decision and Order at 6. The administrative law judge concluded that employer did not meet that burden because "nothing has been proffered that will permit me to find that an employment relationship [of a full year] did not . . . exist . . . ." *Id*.

The administrative law judge erred by placing the burden of proof on employer to establish that it did not employ claimant for at least one year. It is the Director's burden to establish that employer is a potentially liable operator because it employed claimant for at least one year. 20 C.F.R. §725.495(b); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 329, 24 BLR 2-1, 2-15 (4th Cir. 2002); *Armco, Inc. v. Martin*, 277 F.3d 468, 475, 22

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[6] The Commission denied the claim because claimant did not establish that a work-related injury occurred. Director's Exhibit 6 at 10.

[7] As summarized by the Commission, claimant and his wife testified that they informed employer that claimant was injured at work. Director's Exhibit 6 at 3, 4. Larry Lambert testified that claimant's wife called him on March 24, 1993, and told him that claimant pulled a muscle in his back, but did not indicate where the injury took place. *Id*. Mr. Lambert testified further that claimant spoke with him on March 26, 1993, but told him "he didn't know" what happened. Director's Exhibit 6 at 4. Mr. Lambert testified that his next contact with claimant was on May 3, 1993, when claimant called to advise that he would return to work the following Monday (May 10); Mr. Lambert told claimant to bring a physician's release with him. *Id*. On May 10, however, claimant called Mr. Lambert and told him that he would be unable to return to work. *Id*. The Commission also summarized the testimony of Luther Willis, a foreman for employer, who stated that claimant worked the entire shift on March 23, 1993, and did not report any accident to him. *Id*.

BLR 2-334, 2-344 (4th Cir. 2002). Therefore, we must vacate the administrative law judge's finding that employer is the responsible operator, and remand this case to the administrative law judge for further consideration of that issue. On remand, the administrative law judge must consider all of the relevant evidence,[8] make specific findings and credibility determinations, and determine whether the Director has established that claimant's employment relationship with employer lasted at least one year, or whether, as employer argues, claimant's employment ended on March 23, 1993. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988)(en banc); *Elswick*, 2 BLR at 1-1113-14. Since, as discussed below, we affirm the award of benefits, if the administrative law judge determines that the Director has not carried his burden to establish that employer is the responsible operator, the Black Lung Disability Trust Fund will be liable for the payment of benefits. *See* 26 U.S.C. §9501(d)(1)(B).

Complicated Pneumoconiosis

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. 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 that "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(d); *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(d)(2). Claimant's prior claim was denied for failure to establish any element of entitlement. Director's Exhibit 1. Consequently, in order to obtain review of the merits of his current claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, there is an irrebuttable presumption of total disability due to pneumoconiosis if claimant suffers from a chronic dust disease of the lung which, (a)

[8] The Director notes that, in addition to the documentary evidence, claimant testified at the hearing that his employment was not terminated by employer prior to May 10, 1993. Director's Brief at 4 n.2, *citing* Hearing Transcript at 25-26. The Director argues, however, that on remand, the administrative law judge may not rely on claimant's hearing testimony, because no party designated claimant as a "liability witness" while the claim was before the district director. Director's Brief at 4 n.2, *citing* 20 C.F.R. §725.414(c).

when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; [9] or (c) when diagnosed by other means, is a condition that could reasonably be expected to yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge must consider all of the relevant evidence before determining whether invocation of the irrebuttable presumption has been established. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered seven readings of four new x-rays, and considered the readers' radiological qualifications.[10] The administrative law judge found that the March 17 and July 14, 2009 x-rays were positive for Category A large opacities, and that the March 2, 2010 and October 11, 2011 x-rays were "indeterminate." Decision and Order at 7-11. In so finding, the administrative law judge discounted Dr. Wheeler's negative readings, because Dr. Wheeler was the only physician who did not diagnose claimant with even simple pneumoconiosis. *Id*. at 7. The administrative law judge discounted the possible diagnosis of sarcoidosis provided by both Drs. Hippensteel and Wheeler, as there was no

[9] In this case, there was no biopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b).

[10] Drs. DePonte and Navani, both dually-qualified as Board-certified radiologists and B readers, interpreted the March 17, 2009 x-ray as "3/2" for small opacities of simple pneumoconiosis, and as positive for "Category A" large opacities. Director's Exhibit 12; Claimant's Exhibit 3. Dr. Alexander, also a Board-certified radiologist and B reader, interpreted the same x-ray as "3/3" for small opacities of simple pneumoconiosis, and as positive for "Category A" large opacities. Claimant's Exhibit 1. Dr. DePonte interpreted the July 14, 2009 x-ray as "2/3" for small opacities, and as positive for "Category A" large opacities. Director's Exhibit 35. Dr. Wheeler, a Board-certified radiologist and B reader, classified the same x-ray as "0/1," or negative, for small opacities, and as negative for large opacities. Employer's Exhibit 2. Dr. Wheeler also interpreted the March 2, 2010 x-ray as "0/1" for small opacities of simple pneumoconiosis, and as negative for large opacities. Employer's Exhibit 1. In both of his x-ray readings, Dr. Wheeler described four- and five-centimeter masses "compatible with" granulomatous disease. Employer's Exhibits 1, 2. Dr. Hippensteel, a B reader, interpreted the October 11, 2011 x-ray as "3/2" for small opacities, and classified the x-ray as positive for "Category A" large opacities, but placed a question mark beside that classification. Employer's Exhibit 3. The administrative law judge discounted Dr. Hippensteel's "Category A" classification as equivocal. Decision and Order at 7.

evidence of record that claimant was diagnosed with, or treated for, sarcoidosis. *Id*. at 10, 11. The administrative law judge therefore found that the preponderance of the x-ray evidence established the existence of Category A large opacities.

Employer contends that the administrative law judge erred by "fail[ing] to recognize that the readings of the most recent—therefore the most probative—films were negative." Employer's Brief at 5-6. Contrary to employer's contention, a more recent negative x-ray is not necessarily more reliable than an earlier, positive x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-65 (4th Cir. 1992). Moreover, employer does not challenge the administrative law judge's determination to discount Dr. Wheeler's negative readings because Dr. Wheeler stood alone in failing to diagnose simple pneumoconiosis on claimant's x-ray. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, the administrative law judge permissibly discounted the negative readings of Drs. Wheeler and Hippensteel, in which the physicians noted possible diagnoses of sarcoidosis or granulomatous disease, because there was no evidence that claimant was diagnosed with, or treated for, those diseases. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010). As the administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence, *see Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66, we affirm his finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the new medical opinions of Drs. Agarwal and Hippensteel. Decision and Order at 8-11. Dr. Agarwal diagnosed claimant with progressive massive fibrosis. Director's Exhibit 12. Dr. Hippensteel opined that claimant does not have complicated pneumoconiosis, but has sarcoidosis and possibly lung cancer, both unrelated to coal mine dust exposure. Employer's Exhibit 3.

The administrative law judge discounted Dr. Hippensteel's opinion, because he found that Dr. Hippensteel did not adequately explain how claimant's angiotensin-converting enzyme (ACE) level, which Dr. Hippensteel stated was "consistent with" sarcoidosis, was diagnostic of sarcoidosis. Decision and Order at 10-11. Further, the administrative law judge discounted Dr. Hippensteel's opinion because he found no indication in the record that claimant was ever diagnosed with, or treated for, sarcoidosis. *Id*.

Employer contends that the administrative law judge erred in discounting Dr. Hippensteel's opinion because, employer asserts, Dr. Hippensteel's opinion is supported by extensive data and is well-reasoned. Employer's Brief at 5-6. Employer's contention lacks merit. Whether a medical opinion is adequately reasoned is a determination committed to the discretion of the administrative law judge. *See Milburn Colliery Co. v.*

Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Here, the administrative law judge acted within his discretion in finding that Dr. Hippensteel did not adequately explain his basis for diagnosing sarcoidosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR -149, 1-155 (1989)(en banc). Moreover, the administrative law judge reasonably discounted Dr. Hippensteel's opinion, that claimant has sarcoidosis, and not complicated pneumoconiosis, because the record did not reflect that claimant was ever diagnosed with, or treated for, sarcoidosis. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84. We therefore reject employer's allegation of error.

Weighing all of the evidence together under 20 C.F.R. §718.304, the administrative law judge found that the positive x-ray evidence outweighed Dr. Hippensteel's opinion, and established complicated pneumoconiosis. Decision and Order at 11. Substantial evidence supports that finding, which is therefore affirmed. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84. Consequently, we affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) and invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[11] Therefore, we affirm the award of benefits.

[11] Employer does not challenge the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Therefore, that finding is affirmed. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge