BRB No. 07-0945 BLA

T.F.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AUSTIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 08/22/2008
	)	
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 - Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 – Awarding Benefits (05-BLA-6212) of Administrative Law Judge Donald W. Mosser rendered on a miner's claim 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 the miner with at least fifteen years of qualifying coal mine employment, and adjudicated this claim, filed on September 26, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator herein, and that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, employer challenges its designation as responsible operator, as well as the administrative law judge's findings that the evidence was sufficient to establish the existence of pneumoconiosis and disability causation. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that employer is the responsible operator.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred in finding employer to be the properly designated responsible operator herein. Employer argues that the evidence of record is insufficient to establish that claimant was continuously

[1] Because no party challenges the administrative law judge's findings regarding the length of claimant's coal mine employment or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

employed by employer for a period of not less than one year.[3] *See* 20 C.F.R. §§725.494(c), 725.101(a)(32). Upon review of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's findings on the responsible operator issue cannot be affirmed.

The administrative law judge determined, using employer's payroll records, that claimant worked for employer from September 24, 2003 through July 24, 2004. Decision and Order at 3; Director's Exhibits 5, 9. The administrative law judge also noted a pay stub indicating fifty hours of work from October 10-16, 2004, along with claimant's testimony that he last worked for employer on "October 28 or 29 of 2004." Decision and Order at 4; Director's Exhibits 8, 11; Transcript at 14, 27. Relying on claimant's testimony, the administrative law judge concluded that, "[t]he named employer has not provided any evidence to contradict . . . [claimant's] statement and consequently it has not met its burden in proving that it is not the potentially liable operator." Decision and Order at 4. The regulations explicitly require, however, that the Director bears the initial burden of proof in this instance, not employer.[4] *See* 20 C.F.R. §725.495(b). Furthermore, we note that the administrative law judge failed to discuss and weigh all relevant evidence in determining whether the Director has shown that claimant's employment with employer was continuous from September 2003 through October 2004.[5] Consequently, we vacate the administrative law judge's finding that employer is the properly designated responsible operator, and remand this case for the administrative

[3] Whitaker Coal Corporation and Modern Construction, Incorporated were initially named as potentially liable operators. Director's Exhibits 12, 43, 46, 47. Both parties were ultimately dismissed. Director's Exhibits 60, 83, 87.

[4] Section 725.495(b) provides, in part, that "the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to §725.410 (the "designated responsible operator") is a potentially liable operator." 20 C.F.R. §725.495(b).

[5] In addition to payroll records, claimant's October 2004 pay stub, and claimant's testimony that he last worked for employer on October 28, 2004, the administrative law judge should address all other relevant evidence, including claimant's testimony that he "worked two years and two or three months for employer," and Dr. Rosenberg's September 1, 2004 letter referencing his August 12, 2004 examination of claimant, in which he stated that, "[claimant] is a 43 year old gentleman *formerly employed* in the coal mine industry." In the same letter, Dr. Rosenberg also stated that, "[Claimant] currently was a welder on a strip job," and that "He was continuing to work on the strip job doing welding." Employer's Exhibit 1.

law judge to address and weigh all relevant evidence in determining whether the Director has met his burden of establishing that claimant was employed by employer for a period of not less than one year. *See* 20 C.F.R. §§725.494, 725.101(a)(32).

Employer next contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Specifically, employer contends that the x-ray evidence is "equal" for positive and negative interpretations, and that the administrative law judge erred in concluding that this evidence supports a finding of pneumoconiosis. Employer's argument is without merit.

In finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge accurately reviewed the x-ray evidence of record, consisting of seven interpretations of three x-rays dated February 9, 2004, February 24, 2004, and August 12, 2004. Decision and Order at 10; *see* 20 C.F.R. §§718.202(a), 718.102. The administrative law judge determined that the film dated February 9, 2004 was read as Category 1/0 by a B reader and a dually-qualified Board-certified radiologist and B reader,[6] Director's Exhibits 18, 33, and as negative by a dually-qualified reader, Director's Exhibit 27; Decision and Order at 10. The administrative law judge further determined that the film dated February 24, 2004, was interpreted as Category 1/0 by a dually-qualified reader, Director's Exhibit 93, and as negative by a B reader, Director's Exhibit 21; Decision and Order at 10. In addition, the administrative law judge found that the film dated August 12, 2004, was read as Category 1/0 by a dually-qualified reader, Director's Exhibit 93, and as negative by a reader of no specified qualifications,[7] Employer's Exhibit 1; Decision and Order at 10. Based on the preponderance of Category 1/0 classifications by the best qualified readers,[8] the

[6] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

[7] The administrative law judge correctly noted that Dr. Rosenberg was not a B reader at the time he read the August 12, 2004 x-ray. His *curriculum vitae* states that he was a B reader from July 1, 2000 – June 30, 2004. Employer's Exhibit 1.

[8] Section 718.202(a)(1) provides that where two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the physicians

administrative law judge acted within his discretion in finding that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 10; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1 (2004); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4 (1990). The administrative law judge's findings are supported by substantial evidence, and thus are affirmed.

Regarding Section 718.202(a)(4), employer contends that the opinions of Drs. Baker and Koura are not well reasoned and are insufficient to support a finding of "legal pneumoconiosis," *i.e.*, a chronic dust disease of the lung arising out of coal mine employment, *see* 20 C.F.R. §718.201, because neither doctor could accurately quantify the impact that coal dust had on claimant's pulmonary condition. Employer's argument lacks merit.

The record contains numerous medical reports from four physicians. Drs. Baker and Koura both diagnosed a chronic obstructive pulmonary disease with significant contribution from coal dust exposure. Director's Exhibits 18, 34; Claimant's Exhibits 1, 5, 6. Dr. Broudy found no evidence of coal workers' pneumoconiosis, silicosis or any chronic lung disease caused by the inhalation of coal mine dust, and opined that claimant's pulmonary impairment is due to cigarette smoking and some predisposition to asthma or bronchospasm. Director's Exhibits 21, 23. Dr. Rosenberg opined that claimant does not have either medical or legal coal workers' pneumoconiosis. He stated that claimant's disabling pulmonary impairment is related to his long and continued smoking history, and has not been caused or hastened by the past inhalation of coal mine dust. Employer's Exhibits 1, 5, 6.

In determining that the weight of the medical opinions supported a finding of legal pneumoconiosis, the administrative law judge acted within his discretion in according little weight to the opinions of Drs. Broudy and Rosenberg for failing to adequately explain how the miner's fifteen years of coal dust exposure played no role in his pulmonary impairment. Decision and Order at 11-12; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), citing *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge permissibly accorded controlling weight to the opinion of Dr. Koura, claimant's treating physician for the past year, as he found that the opinion was persuasive and in accordance with the objective evidence of record. Decision and Order

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interpreting such x-rays. 20 C.F.R. §718.202(a)(1). The United States Court of Appeals for the Sixth Circuit has also held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

at 12; *see* 20 C.F.R. §718.104(d). The administrative law judge further found Dr. Koura's opinion to be bolstered by the well reasoned opinion of Dr. Baker, whose opinion he determined was also supported by the objective evidence and "addressed in detail the miner's significant coal mine employment history and the effects of coal dust on the miner's respiratory condition." Decision and Order at 12; *see Groves*, 277 F.3d at 834, 22 BLR at 2-327; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Contrary to employer's contention, Drs. Baker and Koura, who both diagnosed chronic obstructive pulmonary disease significantly related to coal dust exposure, were not required to quantify, with any more specificity, the impact that coal dust exposure had on claimant's pulmonary condition. 20 C.F.R. §718.201(a)(2). Accordingly, the administrative law judge's weighing of the conflicting medical opinions, and his finding of legal pneumoconiosis at Section 718.202(a)(4), are affirmed as supported by substantial evidence.

Employer next contends that the administrative law judge erred in crediting the opinions of Drs. Baker and Koura over those of Drs. Broudy and Rosenberg in finding that claimant established disability causation at Section 718.204(c). We disagree. The administrative law judge accorded little weight to the opinions of Drs. Broudy and Rosenberg because their opinions are based on findings contrary to the administrative law judge's findings and the record as a whole. Decision and Order at 14; Director's Exhibit 21; Employer's Exhibit 1. The administrative law judge permissibly discounted the opinions of Drs. Broudy and Rosenberg because they are based on a determination that the miner did not suffer from pneumoconiosis, contrary to the administrative law judge's finding. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 (2002)(*en banc*).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts. *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Mabe v. Bishop Coal Co.*, 9 BLR at 1-8 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-81 (1984). It is also within the administrative law judge's discretion to determine whether an opinion is documented and reasoned. *See Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). We, therefore, affirm the administrative law judge's findings at Section 718.204(c),[9] as supported by substantial evidence, and affirm the administrative law judge's award of benefits.

[9] The administrative law judge erroneously referenced 20 C.F.R. §718.204(b) when discussing disability causation. Decision and Order at 13.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further proceedings 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