BRB Nos. 09-0270 BLA
and 09-0270 BLA-A

FRANKLIN D. WALKER)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
HIGHLAND COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 12/14/2009
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Franklin D. Walker, Lake City, Tennessee, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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:

Claimant appeals, without the assistance of counsel,[1] and employer cross-appeals, the Decision and Order Denying Benefits (2006-BLA-5365) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a subsequent claim[2] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with ten years of qualifying coal mine employment, and found that this claim was timely filed and that employer was the properly designated responsible operator herein.[3] The administrative law judge adjudicated this subsequent claim, filed on November 5, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718 and 20 C.F.R. §725.309(d), and found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to Section 725.309(d). Reviewing the entire record, however, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's weighing of the evidence and his denial of benefits. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, contending that the administrative law judge erred in his designations of the responsible operator and carrier herein. 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 and carrier were

[1] Before the administrative law judge, claimant was represented by Christie Hutson, a Program Coordinator at Regional Education and Community Health Services, Inc. (REACHS). A benefits counselor with REACHS has requested, on behalf of claimant, that the Board review the claim in its entirety. Hearing Transcript at 5; Director's Exhibit 38; Claimant's Notice of Appeal.

[2] Claimant's prior claim, filed on May 11, 1998, was finally denied by the district director on July 29, 1998, because claimant failed to establish any element of entitlement. No further action was taken on this claim. Director's Exhibit 1.

[3] At the hearing, employer withdrew the previously contested issue regarding whether claimant met the regulatory definition of a miner. Transcript at 6.

properly designated parties herein.[4] Employer has filed a reply brief in support of its position.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We will first address employer's arguments on cross-appeal, challenging the administrative law judge's designation of employer and its insurer, Old Republic Insurance Company (Old Republic), as the properly named responsible operator and carrier herein. Employer maintains that liability should have been assessed against claimant's more recent employer, Barley Hollow Mining Company (Barley Hollow), and its carrier, Rockwood Insurance Carrier (Rockwood), through its reinsurer, the Tennessee Insurance Guaranty Association (TIGA).[6] Employer does not challenge the administrative law judge's findings that Barley Hollow and Rockwood are not capable of assuming liability, and that there was a successor relationship between employer and Barley Hollow, but contends that the administrative law judge erred in finding that TIGA had the authority to limit its liability for claims against Barley Hollow's bankrupt insurer, Rockwood. Rather, employer asserts that TIGA is not permitted under the Act, regulations, or case law, to limit its liability, and thus, to the extent that the federal black lung insurance endorsement provision conflicts with TIGA's limitations on liability, the

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment, and his findings that the claim was timely filed and that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

[6] Rockwood Insurance Carrier was dissolved in bankruptcy. Director's Exhibit 18.

TIGA bankruptcy claim time-bar is invalid as to federal claims. Employer's Brief at 15-20. Employer argues further that it is no longer in business; that there is no evidence that it has any assets to pay this claim; and that Old Republic cannot be held liable as the responsible carrier because Old Republic had no contract of insurance with employer or Barley Hollow as of the date of claimant's last exposure. Employer's Reply Brief at 1-2. Employer's arguments are without merit.

The administrative law judge determined that from 1975 to September 23, 1985, claimant worked for employer, and from September 23, 1985 to October 3, 1986, claimant worked for Barley Hollow. The administrative law judge further determined that Old Republic provided insurance coverage on claimant's last day of work for employer, and also provided insurance coverage for Barley Hollow, the last operator for which claimant worked for more than one year, until March 27, 1986. Rockwood then provided insurance coverage through claimant's last day of work for Barley Hollow; subsequently, Barley Hollow and Rockwood were dissolved. Decision and Order at 6; Director's Exhibits 1, 4, 6-9, 11, 23.

Under the Tennessee Insurance Guaranty Association Act, TIGA assumes the liabilities of its liquidated members in certain instances; however, Section 56-12-121 sets deadlines for the filing of claims and specifies that:

> In no case shall a covered claim include any claim filed with the association, domiciliary receiver, ancillary receiver or liquidator, after the earlier of (1) eighteen months after the date of the order of liquidation; or (2) the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

Tenn. Ins. Code Ann. §56-12-121(a)(1), (2). While Rockwood was liquidated on August 26, 1991, and the bankruptcy court set the proof of claim date as August 26, 1992, claimant did not file his initial claim for benefits until May 11, 1998, or the instant subsequent claim until November 5, 2004. Thus, the administrative law judge properly determined that TIGA, as guarantor for the bankrupt Rockwood, was not subject to the provision at 20 C.F.R. §725.203, prohibiting limitation of liability for black lung claims, as that provision applies to carriers who have a contractual relationship with the mine operator, and does not automatically extend to a state insurance guaranty association. *See Boyd & Stevenson Coal Co. v. Director, OWCP* [*Slone*], 407 F.3d 663, 23 BLR 2-288 (4th Cir. 2005); *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998), *aff'g*, 20 BLR 1-58 (1996); Decision and Order at 9; Director's Brief at 7. We find no merit to employer's contention that the State of Tennessee could not set a date from which coverage of claims against TIGA is barred. *See* Tenn. Ins. Code Ann. §56-12-121(a)(1), (2). Because Barley Hollow and its carrier, Rockwood, are not financially capable of assuming liability, employer, as the predecessor to Barley Hollow and the

operator that next most recently employed claimant for a period of at least one year, retains operator liability pursuant to 20 C.F.R. §§725.492, 725.495(a)(1), (3), as determined by the administrative law judge and supported by substantial evidence in the record.[7] Decision and Order at 6-8. Accordingly, we affirm the administrative law judge's findings that employer was properly designated the responsible operator and that Old Republic was properly designated the responsible carrier herein.

Turning to the merits, in order to establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge considered nine interpretations of five x-rays taken between 2004 and 2006, and properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist.[8] *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985);

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[7] The applicable regulation provides that "[t]he operator responsible for the payment of benefits in a claim adjudicated under this part shall be the potentially liable operator, . . . that most recently employed the miner," 20 C.F.R. §725.495(a)(1), and that "[i]f the operator that most recently employed the miner may not be considered a potentially liable operator, . . . the responsible operator shall be the potentially liable operator that next most recently employed the miner." 20 C.F.R. §725.495(a)(3).

The administrative law judge found that Barley Hollow and employer were separate legal entities and that Barley Hollow was employer's successor pursuant to 20 C.F.R. §725.492, which states, in part, that a successor operator is created "if an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization, however effected . . . the resulting entity shall be considered a successor operator with respect to any miners previously employed by such prior operator." 20 C.F.R. §725.492(b)(1); Decision and Order at 6-8.

[8] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B-reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays

Sheckler v. Clinchfield Coal Co., 7 BLR 1-128 (1984); Decision and Order at 19. The administrative law judge further determined that the September 20, 2004 x-ray was inconclusive as to the presence of pneumoconiosis, as it was read as positive by Dr. Ahmed, Director's Exhibit 15, and as negative by Dr. Wiot, both dually qualified physicians. Director's Exhibit 16. Because claimant's December 7, 2004 x-ray was read as positive by Dr. Baker, a B reader, Director's Exhibit 14, and as negative by Dr. Wiot, a dually qualified physician, the administrative law judge acted within his discretion in finding that this x-ray was negative for pneumoconiosis. *See* 20 C.F.R. §718.202(a); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Director's Exhibit 16. Dr. Ahmed**,** a dually qualified reader, interpreted the June 8, 2005 x-ray as positive, Director's Exhibit 15, but Dr. Wiot, an equally qualified physician, interpreted this x-ray as negative for the disease. Director's Exhibit 16. Because claimant's June 8, 2005 x-ray was read as both positive and negative by equally qualified readers, the administrative law judge acted within his discretion in finding that this x-ray was inconclusive as to the presence of pneumoconiosis. The administrative law judge determined that the July 18, 2005 x-ray was read as positive by Dr. Miller, a dually qualified physician, Claimant's Exhibit 1, and as negative by Dr. Dahhan, a B reader, and acted within his discretion in finding that this x-ray was positive for pneumoconiosis, based on the reading by the doctor with superior qualifications. Employer's Exhibit 1. Lastly, the administrative law judge determined that the July 21, 2006 x-ray was interpreted as negative for pneumoconiosis, without contradiction, by Dr. Wheeler, a dually qualified physician. Employer's Exhibit 8; Decision and Order at 19.

Noting that there were two negative x-rays, two inconclusive x-rays, and one positive x-ray, with the most recent x-ray being negative, the administrative law judge permissibly found that the newly submitted x-ray evidence of record was negative for pneumoconiosis at Section 718.202(a)(1), based on a numerical preponderance of negative interpretations by highly qualified physicians. Decision and Order at 19; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). As both x-rays contained in the record of the prior claim[9] were negative for pneumoconiosis, as read by a B reader and a dually qualified physician, Director's Exhibit 1, we affirm the

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according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

[9] Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim. 20 C.F.R. §725.309(d)(1).

administrative law judge's findings pursuant to Section 718.202(a)(1), as supported by substantial evidence.

At Section 718.202(a)(2), (3) we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis thereunder, as the record contains no lung biopsy evidence and the presumptions at 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable.[10]

At Section 718.202(a)(4), the administrative law judge accurately summarized the medical opinions of Drs. Baker, Dahhan, and Rosenberg, as well as an opinion from a nurse practitioner, Ms. King. Decision and Order at 14-17. The administrative law judge found that Dr. Baker's diagnosis of clinical pneumoconiosis did not constitute a sufficiently reasoned medical opinion, as it was based solely on a positive x-ray and a history of coal dust exposure, and the physician failed to explain how the duration of the miner's coal dust exposure supported his diagnosis. Decision and Order at 21; Director's Exhibit 14; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, while the administrative law judge determined that Dr. Baker's diagnosis of chronic obstructive pulmonary disease (COPD) was supported by the record, he rationally found that Dr. Baker's diagnosis of legal pneumoconiosis was entitled to little weight, as the doctor failed to explain how he determined that claimant's COPD was due to smoking and coal dust exposure, and failed to provide support for his diagnosis of chronic bronchitis, other than noting that it was "by history." Thus, the administrative law judge permissibly found that Dr. Baker's opinion was not well-reasoned, and was entitled to little weight. Decision and Order at 21; *see Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Similarly, the administrative law judge properly determined that Nurse Practitioner King's opinion was insufficient to support a diagnosis of legal pneumoconiosis, as she did not indicate that claimant's coal dust exposure was in any way related to the evidence of COPD seen on claimant's CT scan and x-ray. 20 C.F.R. §718.201(a)(2); Decision and Order at 21; Claimant's Exhibit 5. Because Dr. Dahhan's opinion, that the few opacities seen on x-ray were insufficient to diagnose clinical pneumoconiosis and that claimant's COPD was due to smoking, was based on objective evidence, claimant's smoking history, and the "variable nature of claimant's obstruction

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[10] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, because the presumption at 20 C.F.R. §718.306 pertains to survivor's claims, it is also inapplicable.

over time and claimant's response to bronchodilation," the administrative law judge found the opinion to be well-reasoned and documented. Decision and Order at 20. The administrative law judge also permissibly credited Dr. Rosenberg's opinion, that claimant did not have clinical or legal pneumoconiosis, as well-reasoned and documented because it based on, and supported by, the objective evidence, testing, and physical examination findings. Decision and Order at 7; 20 C.F.R. §718.202(a)(4); *Fields*, 10 BLR at 1-21; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). The administrative law judge, therefore, concluded that the weight of the medical opinions of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), and we affirm his findings thereunder, as supported by substantial evidence.

Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 197 (6th Cir. 1997); *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge