BRB No. 01-0291 BLA

DELTA BREEDING (Widow of CLYDE BREEDING)	)	
Claimant- Respondent	)	DATE ISSUED:
v.	)	
COLLEY & COLLEY COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington Schelin & Herrell, P.C.), Bristol, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-0386) of Administrative Law Judge Stuart A. Levin awarding benefits with respect to a miner's claim and a survivor'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).[1] This case has a lengthy procedural history. In its most recent Decision and Order, the Board vacated Administrative Law Judge Richard T. Stansell-Gamm's award of benefits in the miner's claim on the ground that Judge Stansell-Gamm did not properly adjudicate the survivor's claim and did not properly address the evidence relevant to both claims. *Breeding v. Colley & Colley Coal Co.*, BRB No. 98-1274 BLA (June 25, 1999)(unpub.); Director's Exhibit 143. The Board remanded the case for appropriate consideration of both claims in light of all of the evidence of record. *Id*. In turn, Judge Stansell-Gamm remanded the case to the district director for additional evidentiary development and processing with respect to the survivor's claim. Director's Exhibit 147. Before the district director, new evidence obtained from the miner's autopsy and additional information regarding the length of his coal mine employment were submitted. The district director found, in a Proposed Decision and Order, that the miner had 16.75 years of coal mine employment and that both the miner and his surviving widow were entitled to benefits. Director's Exhibit 153. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Stuart A. Levin (the administrative law judge).

[1]Claimant is Delta Breeding, the surviving spouse of Clyde Breeding. Mrs. Breeding is pursuing her own claim, filed on April 21, 1992, as well as the claim filed by her husband on September 29, 1980. Mr. Breeding died on March 25, 1992. Director's Exhibits 1, 96. The death certificate identified the causes of death as cardiorespiratory failure, chronic obstructive disease, pneumoconiosis, and cor pulmonale. Director's Exhibit 95.

Subsequent to the hearing, the administrative law judge issued the Decision and Order that is the subject of this appeal. The administrative law judge credited the miner with 16.75 years of coal mine employment and found that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2) (2000).[2] The administrative law judge further determined that the miner was entitled to the presumption that his pneumoconiosis arose out of coal mine employment and the presumption that his pneumoconiosis was totally disabling. 20 C.F.R. §§718.203(b), 718.305 (2000). Accordingly, benefits were awarded in the miner's claim. The administrative law judge also awarded benefits in the survivor's claim based upon the derivative entitlement provisions set forth in 20 C.F.R. §725.212 (2000).

Employer argues on appeal that the administrative law judge erred in readjudicating the issue of the length of the miner's coal mine employment and in finding that the miner worked for 16.75 years as a miner. Employer also asserts that the administrative law judge did not properly weigh the evidence relevant to the issues of the existence of pneumoconiosis and total disability due to pneumoconiosis. Finally, employer maintains that it is not the properly designated responsible operator and, therefore, liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund. Claimant has responded and urges affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has also responded and urges the Board to reject employer's arguments concerning the length of the miner's coal mine employment and the identity of the responsible operator.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially challenges the administrative law judge's finding of 16.75 years of qualifying coal mine employment, arguing that the administrative law judge erred in addressing this issue following its resolution by Judges Rippey and Stansell-Gamm. In a Decision and Order issued on January 28, 1997, the Board affirmed the finding of Administrative Law Judge Charles P. Rippey that the miner had 12.46 years of coal mine

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). Unless otherwise noted, all citations are to the new regulations.

employment, but remanded the case for reconsideration of the merits of the miner's claim. *Breeding v. Colley & Colley Coal Co.*, BRB No. 96-0487 BLA (Jan. 28, 1997)(unpub.); Director's Exhibit 120. Due to Judge Rippey's unavailability, the case was reassigned, without any objection from the parties, to Judge Stansell-Gamm. Judge Stansell-Gamm issued a Notice of Additional Evidence, informing the parties that the record now contained evidence submitted with the survivor's claim, filed by the miner's widow in 1992, and that he would address this evidence when adjudicating the miner's claim. Director's Exhibit 125. Employer responded and requested that the case be remanded to the district director for consolidation of the two claims and for the development of additional evidence. Director's Exhibit 126. Without revisiting the issue of the length of the miner's coal mine employment, Judge Stansell-Gamm rejected employer's remand request and determined that the miner established the requisite elements of entitlement by a preponderance of the evidence. Accordingly, he awarded benefits in the miner's claim.

In response to employer's appeal, in which the issue of the length of the miner's coal mine employment was not raised, the Board vacated the award of benefits in the miner's claim and remanded the case for proper adjudication of the survivor's claim and for the development of evidence responsive to the evidence submitted with the survivor's claim. *Breeding v. Colley & Colley Coal Co.*, BRB No. 98-1274 BLA (June 25, 1999)(unpub.); Director's Exhibit 143. When processing the survivor's claim, the district director determined that Mr. Breeding had 16.75 years of coal mine employment Director's Exhibit 151. After the district director found that both the miner and claimant were entitled to benefits, the case was transferred to the OALJ and assigned to the administrative law judge.

In his Decision and Order, the administrative law judge addressed the issue of the length of the miner's coal mine employment, noting that the record contained documents that were not part of the record when the Board affirmed Judge Rippey's finding of 12.46 years of coal mine employment. Decision and Order at 7. The administrative law judge determined that if he applied Judge Rippey's method of calculation, he would find that the miner engaged in coal mine employment for 14.18 years.[3] *Id*. at 8. The administrative law judge concluded, however, that:

[3]Judge Rippey determined that between 1941 and 1963, Mr. Breeding earned at least fifty dollars as a miner in twenty-eight quarters. Judge Rippey found that in these quarters, Mr. Breeding actually performed coal mine work 63.8% of the time. He calculated this percentage by considering the separate periods during this span of years when Mr. Breeding was employed as a miner and, for each distinct period, dividing the coal mine employment earnings in any particular quarter by the earnings Mr. Breeding received in the quarter in which he was paid the most for his work as a miner. Judge Rippey then determined that 63.8% of 28 quarters is 17.86 quarters or 4.46 years. He

> Neither in its most recent expression of disagreement with the District Director's Proposed D&O nor in its post-hearing brief does the Employer challenge the finding of 16.75 years of coal mine employment or the method used by the District Director in arriving at the same. In a discussion at the hearing before me regarding the length of employment, counsel for the Employer announced that they were now only willing to concede that the miner worked for them from September 1969 to December 1970. No evidence was submitted by the Employer to dispute the District Director's calculations. Consequently, I will adopt the District Director's findings of 16.75 years of coal mine employment as it is based on a more accurate review of the Social Security records and a methodology which I consider fairer than that used by Judge Rippey.

Id. at 9.

Contrary to employer's contention, the administrative law judge did not err in making a finding regarding the length of the miner's coal mine employment. The principle of collateral estoppel did not bar the administrative law judge from considering this issue, inasmuch as the Board had vacated Judge Rippey's Decision and Order awarding benefits with respect to the miner's claim, hence, Judge Rippey's finding was not part of a final and valid judgement. *See Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987). In addition, this issue was not a critical and necessary part of Judge Rippey's disposition of the miner's application for benefits, as he did not rely upon the "fifteen years" presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.305 to find that the miner was entitled to benefits. *See Ramsay, supra*.

Nor did the doctrine of "law of the case" preclude the administrative law judge from addressing the length of the miner's coal mine employment under the facts of this particular case. It is proper for a court to depart from a prior holding if it is apparent that the prior holding was erroneous and would work a manifest injustice. *See Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988); *citing Arizona v. California*, 460 U.S. 605

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added this figure to the eight years of coal mine employment that employer acknowledged between 1963 and 1970 to arrive at a total of 12.46 years of coal mine employment. Director's Exhibit 106.

(1983). These conditions exist in this case inasmuch as when the miner's and survivor's claims were finally consolidated, the record contained evidence which, if properly credited, establishes that the miner actually worked for more than fifteen years in coal mine employment and, thus, is entitled to the presumption set forth in Section 718.305. We affirm, therefore, the administrative law judge's decision to address the issue of the length of the miner's coal mine employment.

Employer also maintains that the administrative law judge erred in relying upon the district director's finding, rather than referring to his independent determination of 14.18 years of coal mine employment. Employer further argues that even assuming that the administrative law judge did not err in adopting the district director's calculations, the method used by the district director is flawed, as it represented the premature application of the amended regulation now set forth in 20 C.F.R. §718.301. Finally, employer contends that even if the new regulation applied in this case, it does not support a finding of 16.75 years of coal mine employment.

As an initial matter, we reject employer's contention that the administrative law judge did not make an independent finding when determining the length of the miner's coal mine employment. The administrative law judge considered the method used by Judge Rippey which, in light of additional evidence, yielded a total of 14.18 years of coal mine employment, and the method used by the district director, which yielded a total of 16.75 years. Decision and Order at 8-9. The administrative law judge assessed the merits of each approach and within an exercise of his judgement and discretion, concluded that the method used by the district director produced the correct figure, because it was "based on a more accurate review of the Social Security records and a methodology which I consider fairer than that used by Judge Ramsey." *Id*. at 9. Contrary to employer's allegation of error, therefore, the administrative law judge did not abdicate his authority as fact-finder to the district director.

The remainder of employer's allegations of error concern whether the administrative law judge chose the proper method for computing the length of the miner's coal mine employment and whether he applied it correctly. In the present case, the method used to arrive at the figure of 16.75 years of coal mine employment involved identifying the average daily wage earned by miners in a particular year and multiplying that figure by 125 to arrive at an "Earning Standard" for each year that Mr. Breeding engaged in coal mine employment. If Mr. Breeding's actual annual wages, as recorded by the Social Security Administration, exceeded the Earnings Standard for that year, he was credited with a year of coal mine employment. Director's Exhibit 151.

Employer asserts that this method essentially credits the miner for a year of coal mine employment whenever it is established that his earnings were at least equal to or

greater than 125 working days; a result that either conflicts with the interpretation of the "125 day rule" in effect at the time that the administrative law judge made his finding or represents the improper application of a yet-to-be-adopted amended regulation. We reject employer's contentions. Pursuant to 20 C.F.R. §718.101, Section 718.301, the amended regulation pertaining to the calculation of the length of a miner's coal mine employment, applies to all claims, regardless of their filing date. Section 718.301 provides that "[t]he length of the miner's coal mine work history must be computed as provided by 20 C.F.R. §725.101(a)(32)." 20 C.F.R. §718.301. Under Section 725.101(a)(32), a "year" is defined as "a period of one calendar year (365 days or 366 if one of the days is February 29), 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). If it is established that the miner worked in or around coal mines for at least 125 working days during a "year," the miner is credited with one year of coal mine employment "for all purposes under the Act." *Id*. Section 725.101(a)(32) further provides that in the event that the beginning and ending dates of a miner's tenure in coal mine work cannot be ascertained, the length of the miner's coal mine employment can be computed by dividing the miner's yearly income from coal mine work by the coal mine industry's average daily earnings for that year as reported by the Bureau of Labor Statistics (BLS). *Id*.

Thus, the method used to determine that the miner had 16.75 years of coal mine employment, which the administrative law judge deemed appropriate, is consistent with the regulatory provision that applies in the present claim. Inasmuch as employer has not identified any actual factual error produced by the application of this method or explained how it has suffered actual prejudice that would be rectified on remand, we decline to vacate the administrative law judge's determination. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Accordingly, the administrative law judge's finding of 16.75 years of coal mine employment and his finding that claimant established invocation of the Section 718.305 presumption of total disability due to pneumoconiosis are affirmed.

With respect to the administrative law judge's consideration of the medical opinion evidence under Section 718.305 (2000), employer argues that the administrative law judge erred in discrediting the medical opinions of Drs. Harnsbarger, Tomashefski, Dahhan, and Castle and in according great weight to the opinions of Drs. O'Neill and Buddington. The administrative law judge determined that the opinions of Drs. Harnsbarger, Tomashefski, Dahhan, and Castle were entitled to little weight, as these physicians focused upon the medical/clinical definition of pneumoconiosis in assessing the miner's condition and did not fully address whether dust exposure in coal mine employment was a contributing cause of the miner's respiratory impairment. We affirm the administrative law judge's determination that the medical opinions in which the physicians concluded that the miner's totally disabling impairment was solely attributable

to smoking were insufficient to rebut the Section 718.305 presumption. The administrative law judge carefully examined each opinion and acted within his discretion in finding that these physicians did not fully address the evidence of record suggesting that coal dust exposure contributed to the miner's totally disabling impairment. Decision and Order at 14-15; Director's Exhibits 34, 38, 64, 65; Employer's Exhibits 2, 4, 8, 9; *see King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). With respect to the opinions of Drs. Buddington and O'Neill, the administrative law judge rationally determined that their opinions, that the miner was totally disabled due to pneumoconiosis, were entitled to greater weight, as their conclusions are better-supported by the objective evidence of record, particularly the pulmonary function studies which revealed that the miner had a mixed obstructive and restrictive impairment. Decision and Order at 14-15; Director's Exhibits 34, 36, 39, 149; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We affirm, therefore, the administrative law judge's finding that the evidence of record was insufficient to establish rebuttal of the presumption of total disability due to pneumoconiosis set forth in Section 718.305. Accordingly, we also affirm the award of benefits in both the miner's claim and the survivor's claim. *See* 20 C.F.R. §725.212.

Turning to the administrative law judge's finding regarding the date of onset of total disability, the administrative law judge determined that the date on which the miner became eligible for benefits was Sept. 1, 1980, the first day of the month in which his claim was filed. The administrative law judge addressed the issue of whether the miner's subsequent employment as a mine inspector for the Commonwealth of Virginia constituted comparable and gainful employment such that the date of onset would not occur until the date the miner left this employment. The administrative law judge determined that the level of compensation, skill requirements, and knowledge were roughly comparable between the two positions. The administrative law judge concluded, however, that inasmuch as the physical demands of the job as a mine inspector were significantly less arduous than those required of a mine foreman, the miner's subsequent work did not constitute comparable and gainful employment. Based upon this determination and his finding that the medical evidence of record did not establish when the miner became totally disabled due to pneumoconiosis, the administrative law judge identified the date of filing as the date of onset.

Employer argues that the administrative law judge erred in finding that Mr. Breeding's duties as a mine inspector did not constitute comparable and gainful employment, as the administrative law judge incorrectly focused on the functional requirements of each position. This contention is without merit. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that

for the purposes of comparing employment, an administrative law judge should address a range of factors, with no single factor assuming paramount importance as a matter of law. The range of factors may include compensation, skills and abilities required, levels of exertion, status, responsibility, working conditions and work location. The weight to be assigned a given factor in a particular case is within the province of the fact finder. *Harris v. Director, OWCP*, 3 F.3d 103, 18 BLR 2-1 (4th Cir. 1993). In the present case, the administrative law judge reviewed the respective compensation, skills, knowledge, and exertional requirements and acted within his discretion as fact-finder in assigning determinative weight to the latter factor. We affirm, therefore, the administrative law judge's identification of September 1, 1980, as the date on which the miner became eligible for benefits.

Finally, we decline employer's invitation to revisit the issue of whether it is the properly designated responsible operator. The responsible operator issue was resolved in the Decision and Order on Reconsideration *En Banc* issued on October 13, 1994 and employer has not set forth any ground which requires the Board to alter its prior disposition of this issue. *Breeding v. Colley & Colley Coal Co.*, BRB No. 88-1072 BLA (Oct. 13, 1994)(unpub.); *see Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see also Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Contrary to employer's assertion, the amended version of 20 C.F.R. §725.491(f), which provides that neither the states nor the federal government can be designated a responsible operator, does not retroactively provide the requisite, unequivocal and textual evidence of Congress's alleged intent to allow citizens to sue a state under the Act. *See Atascadero State Hosp. v. Scanlon*, 105 S.Ct. 3142, 473 U.S. 234, 87 L.Ed.2d 171, *rehearing den.*, 106 S.Ct. 18, 473 U.S. 926, 87 L.Ed.2d 696 (1985); *see also Blatchford v. Native Village of Noatak and Circle Village*, 111 S.Ct. 2578, 115 L.Ed. 2d 686 (1991); *Dellmuth v. Muth, Pa.*, 109 S.Ct. 2397, 491 U.S. 223, 105 L.Ed.2d 181 (1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits in both the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge