BRB No. 01-0453 BLA

JAMES E. SMITH Claimant-Respondent v. ALTEC ENERGY, INCORPORATED TWIN PINES, INCORPORATED and AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY Employer-Carrier/ Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order--Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William L. Roberts, Pikeville, Kentucky, for claimant.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for Altec Energy, Inc.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Twin Pines, Inc.

Richard A. Seid (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order--Award of Benefits (1999-BLA-1117) of Administrative Law Judge Daniel J. Roketenetz rendered on a 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). Claimant filed this application for benefits on October 13, 1998. Director's Exhibit 1. The District Director of the Office of Workers' Compensation Programs awarded benefits and notified Twin Pines, Inc. (Twin Pines) of its potential liability as the responsible operator. Director's Exhibits 19-21. Twin Pines requested a hearing and challenged its designation as the responsible operator. Director's Exhibits 22, 26, 27.

Upon further investigation of the responsible operator issue, the District Director discovered that claimant had at least one year of coal mine employment with Altec Energy, Inc. (Altec), from 1997 to 1998, subsequent to his employment

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[1] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant withdrew a previous application filed in 1993. Director's Exhibit 34. His earlier claim is therefore "considered not to have been filed." 20 C.F.R. §725.306(b).

with Twin Pines from 1994 to 1997. Consequently, the District Director named Altec as the primary putative responsible operator, but retained Twin Pines as the secondary putative responsible operator. Director's Exhibit 29; *see* 20 C.F.R. §725.493(a)(2000).

After holding a hearing, the administrative law judge credited claimant with thirty-three and one-quarter years of coal mine employment, and found that the existence of complicated pneumoconiosis was established by chest x-ray, CT-scan, and biopsy evidence. The administrative law judge found that the onset date of claimant's total disability due to complicated pneumoconiosis was April 1995, "the month in which [claimant's] x-rays first conclusively established the existence of complicated pneumoconiosis." Decision and Order at 15. Accordingly, the administrative law judge found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis as of April 1995. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Because claimant was irrebuttably presumed to be totally disabled due to pneumoconiosis as of April 1995, which was prior to his employment with Altec, the administrative law judge dismissed Altec as the responsible operator. The record indicated that Twin Pines employed claimant in April 1995, but the administrative law judge also dismissed Twin Pines. The administrative law judge reasoned that although complicated pneumoconiosis was not found established until 1995, the record contained evidence suggesting that "complicated pneumoconiosis may have been present as early as 1993. . . ." Decision and Order at 13. The operator that employed claimant in 1993, Meador Coal, was not named as a potential responsible operator. The administrative law judge therefore found that the Director failed to investigate and identify the proper responsible operator. Consequently, the administrative law judge dismissed Twin Pines and ordered the Black Lung Disability Trust Fund (the Trust Fund) to pay benefits commencing April 1, 1995.

On appeal, the Director contends that the administrative law judge erred in finding that the Trust Fund, rather than Twin Pines, is liable for the payment of benefits. Altec and Twin Pines respond, urging affirmance of the administrative law judge's responsible operator findings, and claimant responds that he takes no position as to who is responsible for the payment of benefits.

The Board's scope of review is defined by statute. The administrative law

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has thirty-three and one-quarter years of coal mine employment and that the existence of complicated pneumoconiosis was established. *See* 20 C.F.R. §718.304; *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

To be entitled 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).

It is undisputed that claimant has established entitlement to benefits by proving that he suffers from complicated pneumoconiosis. As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Where entitlement is established by operation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must determine whether the evidence establishes a specific onset date of claimant's complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If the evidence does not establish a specific onset date of complicated pneumoconiosis, then the date for the commencement of benefits is the month during which the claim was filed, unless credited evidence establishes that claimant had only simple pneumoconiosis as of some point subsequent to the filing date. 20 C.F.R. §725.503(b); *Williams, supra*.

The administrative law judge's finding that the onset date of claimant's complicated pneumoconiosis was April 1995 is supported by substantial evidence. Dr. Bruce Broudy, a B-reader whose opinion the administrative law judge credited in finding the existence of complicated pneumoconiosis established, read a series of chest x-rays dating from 1974 to 1999 and concluded that claimant's April 4, 1995 x-ray presented the first clear evidence of complicated pneumoconiosis in the form of a large opacity measuring greater than one centimeter in diameter. Twin Pines Exhibit 1; *see* 33 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). Additionally, Dr. Broudy reviewed an August 31, 1993 examination report by the West Virginia Occupational Pneumoconiosis Board reflecting that an unspecified chest x-ray had revealed small opacities consistent with pneumoconiosis and "a small ovoid density" of indeterminate nature. Director's Exhibit 7. Dr. Broudy considered that the ovoid lesion referred to in the 1993 report "may be the one that is present also in 1995" since it was reportedly in the "same location" as the complicated pneumoconiosis

seen on the 1995 x-ray. Twin Pines Exhibit 1 at 2. Although Dr. Broudy thought that it was "highly likely" that the lesion noted in the 1993 report was complicated pneumoconiosis, he reported that he could not determine the presence or absence of complicated pneumoconiosis in 1993 because the only 1993 x-ray available for his review was of poor quality. *Id*. On these facts, the administrative law judge acted within his discretion in finding that April 1995 was the month in which complicated pneumoconiosis was first definitively diagnosed. *See Williams, supra*. Therefore, we affirm the administrative law judge's finding that the onset date of claimant's complicated pneumoconiosis was April 1995.

The Director contends that, having found the onset of complicated pneumoconiosis established as of April 1995, the administrative law judge erred in dismissing Twin Pines, the operator who employed claimant in April 1995. The Director's contention has merit.

Where a claimant has been irrebuttably presumed to be totally disabled due to pneumoconiosis, "[l]iability is established as of the date of determination of complicated pneumoconiosis." *Swanson v. R. G. Johnson Co*., 15 BLR 1-49, 1-51 (1991). Consequently, "[t]he issue . . . is basically one of onset date. . . ." *Truitt v. North American Coal Corp*., 2 BLR 1-199, 1-204 (1979), *appeal dismissed sub nom. Director, OWCP v. North American Coal Corp*., 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). "[T]he employer for whom claimant worked as of the time complicated pneumoconiosis was diagnosed" is liable for the payment of benefits. *Swanson*, 15 BLR at 1-51. However, "in cases in which the onset of complicated pneumoconiosis . . . predates coal mine employment with [an] employer, that employer is relieved [of liability] as the responsible operator under Section 725.493(a)(6)." *Rowan v. Lewis Coal and Coke Co*., 12 BLR 1-31, 1-33 (1988); *Truitt, supra*.

Here, the administrative law judge found the onset of claimant's complicated pneumoconiosis to be April 1995. The April 1995 onset of complicated pneumoconiosis predated claimant's employment with Altec. Therefore, the administrative law judge properly dismissed Altec as the responsible operator. *See* 20 C.F.R. §725.493(a)(6)(2000); *Rowan, supra*; *Truitt, supra*. However, the record indicates that Twin Pines employed claimant as of April 1995, the date upon which liability for benefits was established. Director's Exhibits 4, 6; *see Swanson, supra*;

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[4] The only other physician to address the onset of complicated pneumoconiosis concluded that the disease was present "by 1998," but stated that he could not determine when complicated pneumoconiosis actually developed. Claimant's Exhibit 1 at 3-4.

[5] For purposes of identifying the responsible operator, 20 C.F.R. §725.493(a)(6)(2000) provides a "rebuttable presumption that the miner's pneumoconiosis arose in whole or in part out of his or her employment with such operator." 20 C.F.R. §725.493(a)(6)(2000).

Truitt, supra. Therefore, the Director correctly named Twin Pines as the responsible operator, and the administrative law judge erred in dismissing Twin Pines and imposing liability on the Trust Fund. Director's Exhibits 20, 21; *see Swanson, supra*; *Rowan, supra*; *Truitt, supra*.

That the administrative law judge inferred from Dr. Broudy's report that complicated pneumoconiosis "may have been present" in 1993, Decision and Order at 13, does not alter the analysis. The administrative law judge specifically found that the onset date of claimant's complicated pneumoconiosis was April 1995, not 1993. Decision and Order at 14-15; *see Swanson, supra*; *Rowan, supra*; *Truitt, supra*. In this factual context, the administrative law judge's reliance on *England v. Island Creek Coal Co*., 17 BLR 1-141 (1993) to dismiss Twin Pines was misplaced. *England* involved an employer which was properly dismissed because it proved that it was not the most recent operator to have employed the claimant for one year, and thus did not meet the criteria of a responsible operator. *England*, 17 BLR at 1-143-44; *see* 20 C.F.R. §725.493(a)(1)(2000). Here, by contrast, the administrative law judge did not find that Twin Pines proved the fact that was essential for its responsible operator defense, namely, that the onset of claimant's complicated pneumoconiosis predated his employment with Twin Pines. *See* 20 C.F.R. §725.493(a)(6)(2000); *Truitt, supra*. Rather, the administrative law judge found that the onset of claimant's complicated pneumoconiosis occurred in 1995, during his employment with Twin Pines. As the "employer for whom claimant worked as of the time complicated pneumoconiosis was diagnosed," *Swanson*, 15 BLR at 1-51, Twin Pines is liable as the responsible operator.

Therefore, we affirm the administrative law judge's dismissal of Altec and reverse the administrative law judge's order dismissing Twin Pines and directing the Trust Fund to pay benefits and attorney's fees. Twin Pines is reinstated as the responsible operator to pay benefits as of the onset date of claimant's complicated pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order--Award of Benefits is affirmed in part and reversed in part.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge