BRB No. 03-0493 BLA

WILLIAM CARL MAXFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EL PASO ENERGY/COASTAL COAL COMPANY	)	
	)	
	)	DATE ISSUED: 02/26/2004
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Coastal Coal Company (Coastal) appeals the Decision and Order (02-BLA-0510) of Administrative Law Judge Daniel F. Solomon awarding benefits 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).[1] In his Decision and Order, the administrative law judge indicated that claimant's eligibility for benefits was not contested, as the parties had stipulated that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 based upon readings of an x-ray dated January 9, 2001. The administrative law judge relied upon this stipulation to determine the date of onset as well. The administrative law judge further found, pursuant to 20 C.F.R. §725.494, that Coastal was the operator responsible for the payment of benefits because it was the most recent employer for whom claimant had worked at least one year.

Coastal argues on appeal that the administrative law judge erred in designating it the responsible operator, because claimant contracted complicated pneumoconiosis before he began working for Coastal in June of 2000. Coastal also contends that the administrative law judge erred in finding that an alleged stipulation precluded Coastal from alleging that claimant had complicated pneumoconiosis before he commenced his employment with Coastal. The Director, Office of Workers' Compensation Programs, has responded and urges affirmance of the administrative law judge's finding that claimant's entitlement to benefits commenced in January of 2001. Claimant submitted a letter indicating that he takes no position as to the date of onset issue.[2]

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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the

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[1] Claimant, a living miner, filed an application for benefits on May 23, 2001. Director's Exhibit 1.

[2] The administrative law judge's finding that claimant is entitled to benefits and his finding that Coastal is the coal mine operator by whom claimant was most recently employed for at least one year are not challenged on appeal and are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Pursuant to the Board's decisions in *Swanson v. R. G. Johnson Co*., 15 BLR 1-49, 1-51 (1991) and *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), when a claimant has been irrebuttably presumed, pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), to be totally disabled due to pneumoconiosis, "[l]iability is established as of the date of determination of complicated pneumoconiosis." *Swanson*, 15 BLR 1-49, 1-51.

In this case, the administrative law judge properly designated January 9, 2001 as the date of determination of complicated pneumoconiosis under 20 C.F.R. §718.304. In this regard, the administrative law judge reviewed the evidence of record and rationally determined that it establishes that claimant's complicated pneumoconiosis arose as of January 9, 2001 x-ray – the date of the first x-ray that was read as positive for complicated pneumoconiosis. Decision and Order at 8-9; Director's Exhibit 24; Employer's Exhibit 1. Coastal relies upon the opinion of Dr. Wiot, who determined that a film dated July 7, 1995, which had apparently been interpreted as positive for simple pneumoconiosis, was unreadable. Dr. Wiot testified at his deposition that "even though I couldn't say [complicated pneumoconiosis] was there in [19]95, [it] probably was, because he had it in [20]00, and that's only a five year span. It's less than a five year span. I would think he probably had it then." Employer's Exhibit 1 at 20. The administrative law judge acted within his discretion as trier-of-fact in determining that Dr. Wiot's opinion was entitled to little or no weight, as it was based on "mere speculation" because "evidence that may relate an etiology from simple to complicated pneumo is not documented in the record as the miner's medical history prior to January 9, 2001 was not adduced and was not entered into evidence." Decision and Order at 9; *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 (4th Cir. 1997).[3]

Coastal also argues that the administrative law judge erred in finding that Dr. Wiot's misidentification of the date of the January 9, 2001 x-ray detracted from the credibility of his opinion. Error, if any, in this finding is harmless, however, as the administrative law judge rationally found that, in addition to Dr. Wiot's mistaken belief as to the date of the x-ray, his opinion regarding an earlier onset date was entitled to little weight because it was not supported by any documentation in the record. *See Johnson v.*

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's qualifying coal mine employment occurred in the Commonwealth of Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

Jeddo-Highland Coal Co., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we affirm the administrative law judge's designation of January 1, 2001 as the date from which claimant was entitled to benefits as it is rational and supported by substantial evidence. *Swanson*, 15 BLR 1-49; *Truitt*, 2 BLR 1-199.

Turning to the administrative law judge's finding that Coastal is the responsible operator, the Board held in *Swanson* that the employer for whom a miner worked as of the time complicated pneumoconiosis was diagnosed is liable for the payment of benefits. *Swanson*, 15 BLR at 1-51. The Board further held in *Rowan v. Lewis Coal and Coke Co.*, 12 BLR 1-31, 1-33 (1988), however, that "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[.]" *Rowan v. Lewis Coal and Coke Co.*, 12 BLR 1-31, 1-33 (1988); *Truitt, supra*. Based upon the administrative law judge's finding in this case that the evidence of record does not establish that claimant's complicated pneumoconiosis arose prior to his employment with Coastal, the administrative law judge acted properly in identifying Coastal as the responsible operator in this case. Contrary to Coastal's argument, there is no requirement that a miner be employed by the responsible operator for one year prior to developing a condition that establishes entitlement under the Act. Claimant need only have worked for Coastal for at least one year regardless of when, during that period, his complicated pneumoconiosis developed. *See* 20 C.F.R. §725.494.

Finally, we note that there is merit in Coastal's assertion that the administrative law judge erred in finding that Coastal stipulated to an onset date of January 9, 2001, thereby precluding it from contesting the date of onset and its designation as the responsible operator. Coastal agreed that an x-ray dated January 9, 2001, established that claimant has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. There is no evidence in the record, however, indicating that Coastal specifically agreed th the positive x-ray obtained on that date established conclusively that January 9, 2001 was the date of determination of complicated pneumoconiosis for the purposes of determining the date of onset of total disability due to pneumoconiosis or the identity of the responsible operator. Nevertheless, this error is harmless in light of the administrative law judge's rational finding that the readings of the x-ray dated January 9, 2001, establish the onset date of claimant's complicated pneumoconiosis. *See Johnson*, 12 BLR 1-53; *Larioni*, 6 BLR 1-1276.

Accordingly, the Decision and Order awarding benefits of the administrative law judge is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge