BRB No. 08-0492 BLA

H.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/13/2009
	)	
KINCER/BENTLEY COAL COMPANY, INCORPORATED	)	
	)	
	)	
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 Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-5491) of Administrative Law Judge Ralph A. Romano 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). This case involves a claim filed on March 24,

2006.[1] Director's Exhibit 2. Initially, the administrative law judge found that employer was properly designated as the responsible operator. The administrative law judge credited claimant with twenty years of coal mine employment, as stipulated by the parties,[2] and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that he is totally disabled by a respiratory or pulmonary impairment that is due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv), 718.204(c). Accordingly, the administrative law judge awarded benefits, and found that they should commence as of the month in which the claim was filed.

On appeal, employer challenges the administrative law judge's responsible operator determination. Employer further asserts that the administrative law judge erred in his analysis of the medical evidence when he found that claimant established the existence of pneumoconiosis, total disability, and that he is totally disabled due to pneumoconiosis. Additionally, employer contends that the administrative law judge erred in his determination of the date from which benefits should commence. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in support of the administrative law judge's finding that employer is the properly designated responsible operator, but he takes no position on employer's challenge to the administrative law judge's award of benefits. Employer has filed a reply brief reiterating its contention that it is not the properly designated 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 rational, supported by substantial evidence, and in accordance with applicable law. 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 argues that, because claimant did not work for at least 125 days in his last period of coal mine employment with employer in 1992, claimant did not have regular employment with employer, and therefore, employer is not the properly

[1] Previously, claimant filed a claim on January 31, 2002, but withdrew it. Decision and Order at 3 n.4; Director's Exhibit 73; *see* 20 C.F.R. §725.306.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 5, 24. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

designated responsible operator pursuant to 20 C.F.R. §725.494(c). Employer's contention lacks merit.

The responsible operator is the "potentially liable operator . . . that most recently employed the miner." 20 C.F.R. §725.495(a)(1). There is no dispute that employer most recently employed claimant in 1992, the year in which he left coal mine employment. To be a "potentially liable operator," employer must have employed claimant for a cumulative period of at least one year, during which claimant worked as a miner for at least 125 working days.[3] 20 C.F.R. §§725.494(c); 725.101(a)(32). A "working day" is "any day or part of a day for which a miner received pay for work as a miner . . . ." 20 C.F.R. §725.101(a)(32).

The evidence before the administrative law judge included work history forms, Social Security Administration (SSA) earnings records, and claimant's testimony. This evidence indicated that claimant worked for employer from April 24, 1974 until November 1975, intermittently from 1982 to 1984, and for five months in 1992. Based on the 1974-1975 and 1992 employment periods, the administrative law judge reasonably found that claimant worked for a cumulative period of "at least 1 year and 5 months" with employer.[4] Decision and Order at 6; *see* 20 C.F.R. §§725.101(a)(32)(ii), 725.494(c); *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458, 1-460 (1986). Substantial evidence supports this finding, which is unchallenged on appeal. It is therefore affirmed.

Turning to the issue of whether claimant worked for employer as a miner for 125 days during the cumulative period of at least one year, the administrative law judge reasonably calculated the number of working days by dividing claimant's annual earnings, as reflected in the SSA records, by the average daily earnings of coal miners, using a table contained in Exhibit 610 to the Coal Mine Procedure Manual, which was admitted into evidence. *See* 20 C.F.R. §725.101(a)(32)(iii); Director's Exhibit 9; Administrative Law Judge's Exhibit 3. Employer does not challenge the administrative law judge's finding that claimant worked for employer as a miner for 257.03 days in 1974 and 1975, and for 7.26 days in 1992, for a total of 264.29 working days. Nor does employer challenge the administrative law judge's alternative finding that claimant worked as a miner for employer for "well over 125 days in 1974 alone." *Id*. Thus, we

[3] The remaining criteria for a potentially liable operator, set forth at 20 C.F.R. §725.494(a),(b),(d),(e), are not at issue herein.

[4] Because the administrative law judge could not ascertain the starting and ending dates of the intermittent employment in the years 1982, 1983, and 1984, he omitted this period from his calculation of the length of claimant's coal mine employment with employer. Decision and Order at 5-6.

affirm the administrative law judge's finding that claimant worked for employer for at least 125 days during the one year and five months in which it employed him. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, we agree with the Director that whether claimant worked for employer for fewer than 125 days in 1992 is irrelevant. Because claimant most recently worked for employer, and because he worked for a cumulative period of at least one year for employer during which he had at least 125 working days, employer is the responsible operator. *See* 20 C.F.R. §§725.101(a)(32); 725.494(c); *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 562, 22 BLR 2-349, 2-360 (6th Cir. 2002); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 2-280 (2003).

Employer argues further that it cannot be held the responsible operator because claimant did not have significant periods of coal dust exposure while in its employ. Employer's Brief at 12. Claimant is presumed to have been "regularly and continuously exposed to coal mine dust during the course of [his] employment." 20 C.F.R. §725.491(d). It is employer's burden to rebut this presumption by "showing that [its] employee was not exposed to coal mine dust for significant periods during such employment." *Id*. However, the record reflects that employer neither raised this issue before the administrative law judge nor presented any evidence regarding the extent of claimant's coal mine dust exposure during his work with employer. Decision and Order at 4; Employer's Post Hearing Brief at 20-21. Because employer has raised this argument for the first time on appeal, the Board will not consider it. *See McKinney v. Benjamin Coal Co.*, 6 BLR 1-529, 1-531 (1983). Therefore, we affirm the administrative law judge's finding that employer is the responsible operator.

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).

Pursuant to Section 718.202(a)(1), employer argues that the administrative law judge erred in weighing the conflicting readings of a June 5, 2006 x-ray, based on a "simple head count," without consideration of the differences in the readers' radiological qualifications. Employer's Brief at 14. We agree. The June 5, 2006 x-ray was read as positive by Dr. Rasmussen, a B reader. Director's Exhibit 16. Subsequently, the same x-ray was reread as positive and negative by Board-certified radiologists and B readers, Drs. Alexander and Wheeler, respectively.[5] Director's Exhibit 18; Employer's Exhibit 4.

[5] The June 5, 2006 x-ray was also reread for film quality only (quality 1) by Dr. Barrett, a Board-certified radiologist and B reader. Director's Exhibit 17.

The September 14, 2006 x-ray was read as negative by Dr. Jarboe, a B reader, and the June 25, 2007 x-ray was read as positive by Dr. Halbert, a Board-certified radiologist and B reader. Director's Exhibit 19; Employer's Exhibit 1.

The administrative law judge found that the September 14, 2006 x-ray was negative for pneumoconiosis, and that the June 25, 2007 x-ray was positive for pneumoconiosis. The administrative law judge further found that the June 5, 2006 x-ray was positive for pneumoconiosis because the positive readings outnumbered the negative readings:

> The film taken on June 5, 2006 was interpreted as positive by Dr. Rasmussen and Dr. Alexander. Conversely, Dr. Wheeler interpreted the film as negative. As the number of positive interpretations exceeds the negative, I find this X-ray is positive for the presence of pneumoconiosis.

Decision and Order at 8. Considering all three x-rays together, the administrative law judge found that, "The number of positive interpretations exceeds the number of negative interpretations. Therefore . . . the weight of the X-ray evidence . . . supports a finding of the presence of pneumoconiosis." Decision and Order at 9.

The administrative law judge erred in considering the quantity of the positive readings of the June 5, 2006 x-ray, and of the overall x-rays, "without an attendant qualitative evaluation of the x-rays and their readers. . . ."[6] *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). We must therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) and remand this case for further consideration of the x-ray evidence. On remand, the administrative law judge must take into account the relative qualifications of the readers in determining whether the June 5, 2006 x-ray is positive or negative for pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). After reconsidering the readings of the June 5, 2006 x-ray, the administrative law judge must qualitatively evaluate the overall x-ray

[6] For example, with respect to the June 5, 2006 x-ray, employer notes that the administrative law judge did not consider whether "Dr. Wheeler has superior qualifications to Dr. Rasmussen." Employer's Brief at 13. Although the administrative law judge should consider the physicians' relative qualifications on remand, contrary to employer's suggestion, the additional qualifications of Dr. Wheeler do not mandate that this reading be accorded greater weight than that of Dr. Rasmussen. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

evidence to determine whether it establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established based on the opinions of Drs. Rasmussen and Rosenberg. Specifically, employer argues that these opinions cannot constitute reasoned medical judgments with respect to the existence of pneumoconiosis, because they are based solely on an x-ray and a reference to claimant's coal mine employment history.[7] Employer's Brief at 15-16. A determination of whether an opinion is reasoned and documented is committed to the discretion of the administrative law judge. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). On the other hand, "a mere restatement of an x-ray should not count as a reasoned medical judgment." *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Drs. Rasmussen and Rosenberg diagnosed claimant with clinical coal workers' pneumoconiosis, citing claimant's x-ray and coal mine employment history. Director's Exhibit 16; Employer's Exhibit 1. The extent to which these doctors may have also relied on other factors is not clear.[8] The administrative law

[7] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The record reflects that no physician diagnosed claimant with legal pneumoconiosis. The administrative law judge found that the medical opinions established that "[c]laimant has pneumoconiosis." Decision and Order at 11. Viewed in context, this appears to have been a finding that claimant established clinical pneumoconiosis by the medical opinions at 20 C.F.R. §718.202(a)(4).

[8] The record reflects that Dr. Rasmussen examined claimant and diagnosed coal workers' pneumoconiosis, citing claimant's twenty-four years of coal mine employment and x-ray evidence of pneumoconiosis. Director's Exhibit 16 at 34. In evaluating claimant, Dr. Rasmussen conducted a pulmonary function study, blood gas study, and a diffusion capacity test. Director's Exhibit 16. Dr. Rosenberg examined claimant and reviewed the medical evidence of record, and diagnosed simple clinical pneumoconiosis, noting that claimant's x-ray revealed micronodules related to coal mine dust exposure. Employer's Exhibits 1 at 3; 2 at 8. Dr. Rosenberg also discussed the results of a pulmonary function study, blood gas study, diffusion capacity test, and physical examination. Employer's Exhibit 1 at 3. Dr. Jarboe examined claimant and reviewed the medical evidence of record and stated that claimant has neither clinical nor legal pneumoconiosis. Director's Exhibit 19 at 5; Employer's Exhibit 3.

judge credited their opinions over the contrary opinion of Dr. Jarboe because they were "better supported by the objective medical evidence." Decision and Order 11.

Because we have vacated the administrative law judge's finding pursuant to Section 718.202(a)(1), given the physicians' reliance on x-rays to diagnose clinical pneumoconiosis in their medical opinions, we also vacate the administrative law judge's finding pursuant to Section 718.202(a)(4). On remand, the administrative law judge must reconsider the medical opinion evidence, if reached, pursuant to Section 718.202(a)(4). If, on remand, the administrative law judge finds that the x-ray evidence does not establish the existence of clinical pneumoconiosis, he must specifically address the extent to which the medical opinions diagnosing pneumoconiosis are based on more than x-ray readings. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Rowe*, 710 at 255, 5 BLR at 2-103.

Pursuant to Section 718.204(b)(2)(ii), employer argues that the administrative law judge erred by failing to weigh the June 25, 2007 non-qualifying[9] blood gas study with the remaining blood gas studies in determining that claimant established total disability by the blood gas study evidence. Employer's Brief at 17. We agree. There are resting and exercise blood gas studies of record dated June 5 and September 14, 2006, and June 25, 2007. Director's Exhibits 16, 19; Employer's Exhibit 1. Both the 2006 blood gas studies yielded non-qualifying values at rest, and qualifying values on exercise. Director's Exhibits 16, 19. The June 25, 2007 blood gas study yielded qualifying values at rest, but non-qualifying values on exercise.[10] Decision and Order at 13; Employer's Exhibit 1. Without determining whether the weight of all three blood gas studies considered together supported a finding of total disability, the administrative law judge found that "The June 5, 2006 and September 14, 2006 post-exercise arterial blood gas study results support a finding of total disability." Decision and Order at 15.

Because the administrative law judge did not indicate the weight accorded to the June 25, 2007 blood gas study, we must vacate the administrative law judge's finding at Section 718.204(b)(2)(ii), and instruct him to reconsider the blood gas studies. On

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, in Appendices B and C of Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] On appeal, employer points to Dr. Rosenberg's testimony that the more recent, June 25, 2007 exercise blood gas study he conducted indicated that claimant's respiratory condition had improved since the earlier blood gas studies conducted by Drs. Rasmussen and Jarboe. Employer's Exhibit 2 at 23.

remand, the administrative law judge must weigh all the blood gas studies together to determine whether they establish total disability. *See generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Pursuant to Section 718.204(b)(2)(iv), employer argues that the administrative law judge erred by failing to properly explain why he discredited Dr. Rosenberg's opinion that claimant is not totally disabled. Employer's Brief at 18. Employer also contends that the administrative law judge erred in finding that Drs. Rasmussen, Jarboe, and Rosenberg were similarly qualified, as Dr. Rasmussen is Board-certified in Internal and Forensic Medicine, whereas Drs. Jarboe and Rosenberg are Board-certified in Internal Medicine and Pulmonary Disease. Employer's Brief at 21. Dr. Rasmussen opined that claimant has a totally disabling respiratory impairment, as did Dr. Jarboe. Director's Exhibits 16 at 34; 19 at 6; Employer's Exhibit 3 at 4. Dr. Rosenberg opined that the more recent evaluation and testing that he conducted indicated that claimant does not have a totally disabling respiratory impairment. Employer's Exhibits 1 at 3; 2 at 23.

In weighing the three medical opinions, the administrative law judge initially noted that the doctors were "similarly qualified." Decision and Order at 10, 15. The administrative law judge credited the opinions of Drs. Rasmussen and Jarboe over that of Dr. Rosenberg, finding that the former opinions were better supported by the objective medical data. *Id*.

Because we have vacated the administrative law judge's finding as to the objective medical data, specifically, the blood gas studies,[11] we also vacate the administrative law judge's finding at Section 718.204(b)(2)(iv) and instruct him to reconsider the medical opinions on remand. In so doing, however, we disagree with employer that Dr. Rasmussen's lack of Board-certification in Pulmonary Disease necessitates the administrative law judge's regarding him as less qualified than Drs. Rosenberg and Jarboe. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005). However, on remand, the administrative law judge must specify a basis in the record for his finding that Drs. Rasmussen, Jarboe, and Rosenberg are similarly qualified. Further, when reconsidering, on remand, whether the medical opinions reflect a correct understanding of the exertional requirements of claimant's usual coal mine employment, the administrative law judge should consider that Dr. Rosenberg reviewed the opinions of both Drs. Rasmussen and Jarboe, whom the administrative law judge found had a sufficient understanding of claimant's usual coal mine employment. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

[11] The administrative law judge found that claimant's pulmonary function studies did not establish total disability.

Before finding total disability established on remand, the administrative law judge must weigh all the contrary, probative evidence together. *See Fields*, 10 BLR at 1-21.

Pursuant to Section 718.204(c), employer argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion over those of Drs. Jarboe and Rosenberg. Because we have vacated the findings that the existence of pneumoconiosis and total disability were established, we also vacate the administrative law judge's disability causation finding. On remand, the administrative law judge must reconsider disability causation pursuant to Section 718.204(c), if reached, in accordance with the proper legal standard in the Sixth Circuit. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989).

Pursuant to Section 725.503(b), employer argues that the administrative law judge erred in awarding benefits as of the month of filing, March 2006, when the earliest medical opinion of total disability due to pneumoconiosis is June 5, 2006.[12] Employer's Brief at 22-23. The administrative law judge awarded benefits from March 2006, the month in which the claim was filed, because he found that the evidence did not establish when claimant became totally disabled due to pneumoconiosis. Decision and Order at 17. Because we vacate the administrative law judge's finding of entitlement to benefits, we vacate his onset finding. If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, he must again determine the date from which benefits commence. *See* 20 C.F.R. §725.503(b). If the evidence does not establish when claimant first became totally disabled due to pneumoconiosis, benefits may be awarded as of the month of filing, unless credited medical evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

[12] Employer further notes that claimant worked as a heavy equipment operator for the Kentucky Department of Transportation until June of 2006. However, this non-coal mine employment is irrelevant to determining the onset date for the commencement of black lung benefits. *See* 20 C.F.R. §§725.503, 725.504.

Accordingly, the administrative law judge's responsible operator determination is affirmed, the award of benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge