BRB No. 09-0370 BLA

RUBEN W. RASNICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CSX TRANSPORTATION, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/26/2010
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Jarrett D. Gerlach (Huddleston Bolen LLP), Huntington, West Virginia, for employer.

Sarah M. Hurley (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:

Employer appeals the Decision and Order (07-BLA-5828) of Administrative Law Judge Linda S. Chapman 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). This case involves a subsequent claim filed on March 8, 2004.[1] The administrative law judge found that claimant's work for employer constituted the work of a miner, and credited claimant with 28.42 years of coal mine employment.[2] The administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2004 claim on the merits. The administrative law judge found that all the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. The administrative law judge further found that claimant's benefits should not be offset for monies he previously received from

[1] Claimant initially filed a claim for benefits on October 19, 1998. Director's Exhibit 1. The district director denied the claim on March 8, 1999 and May 20, 1999 because claimant did not establish any element of entitlement. *Id.* Claimant requested modification on July 7, 1999. *Id.* In a Proposed Decision and Order dated June 16, 2000, the district director denied claimant's request for modification. *Id.* On July 18, 2000, claimant requested a 120 day extension in which to submit new evidence. *Id.* By letter dated July 24, 2000, the district director notified claimant that no extensions could be granted on a "closed claim." *Id.* The district director advised claimant that he could "again request a modification of his claim within one year of [the] most recent denial and submit [his] additional evidence in support of his modification." *Id.* There is no indication that claimant took any further action in regard to his 1998 claim.

[2] The Board will apply the law of the United States Court of Appeals for the Circuit in which the miner most recently performed coal mine employment. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*). In this case, claimant's work as a railroad employee occurred in both Virginia and Kentucky, within the appellate jurisdiction of the United States Courts of Appeals for the Fourth and Sixth Circuits, respectively, and the record does not reflect which state was the location of claimant's last coal mine employment. *See* Director's Exhibits 3, 7. Because the laws of both circuits are compatible in regard to the issues raised on appeal in this case, it is unnecessary to determine which circuit's law should be applied. *Shupe*, 12 BLR at 1-202.

employer in settlement of a lawsuit he filed under the Federal Employers' Liability Act (the FELA), 45 U.S.C. §§51 *et seq.*

On appeal, employer contends that the administrative law judge erred in determining that claimant worked as a miner and erred in calculating the length of claimant's coal mine employment. Employer also contends that the administrative law judge erred in finding that the new x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Employer argues further that the administrative law judge erred in finding that the evidence established that claimant is totally disabled by a respiratory impairment that is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Finally, employer argues that the administrative law judge erred in determining that claimant's Federal black lung benefits should not be offset. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board affirm the administrative law judge's finding that an offset of claimant's award is not appropriate. In separate reply briefs, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Status as a Miner

Employer contends that the administrative law judge erred in finding that all of claimant's employment as a brakeman and engineer qualified as coal mine employment under the Act. Claimant bears the burden of establishing all elements of entitlement. *See White v. Director, OWCP*, 6 BLR 1-368 (1983). The issue of whether a worker is a miner is a factual finding to be made by the administrative law judge. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985).

Section 725.101(a)(19) provides that:

> *Miner* or *coal miner* means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or

> preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (*see* §725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. §725.101(a)(19).[3]

In *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985), the Board set out a three-prong test by which to define a miner under the Act and regulations. In order to establish the work of a miner under the Act, it must be established that (1) the coal with which the miner worked was still in the course of being processed, and was not yet a finished product in the stream of commerce (status of the coal test); (2) the miner performed a function integral to the extraction or preparation of coal, and not one merely ancillary to the delivery and commercial use of processed coal (function test); and (3) the miner's work occurred in or around a coal mine or coal preparation facility (situs test).[4] Railroad

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[3] The regulations further provide that "[t]here shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). The presumption may be rebutted by proof that: (1) the person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or (2) the individual was not regularly employed in or around a coal mine or coal preparation facility. *Id.*

The regulations also provide that:

> A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal.

20 C.F.R. §725.202(b).

[4] The Fourth Circuit applies a two-prong situs-function test. *See Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986). Both the situs and function tests must be met. *Id.* The Fourth Circuit has indicated that the "status of the coal" test is usually included in the function part of its two-step test. *Glem Co. v. McKinney*, 33 F.3d 340, 342 n.1, 18 BLR 2-368, 2-371 n.1 (4th Cir. 1994). The Sixth Circuit similarly requires that a worker satisfy a two-prong test of situs and function in order to establish that his work was that

employees may, under appropriate circumstances, qualify for benefits under the Act. *See Norfolk and Western Ry. Co. v. Roberson*, 918 F.2d 1144, 1150, 14 BLR 2-106, 2-117 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991).

The Administrative Law Judge's Finding

In this case, the administrative law judge explained in detail her basis for finding that claimant's work satisfied the function test:

> I find that [claimant's] work was integral to the preparation of coal. [Claimant] testified that in his thirty-one years and five months working for Employer as a brakeman and engineer, he spent 90% of his time working with coal as freight. He testified that he spent his time hauling raw coal to tipple preparation plants, to designated tracks at preparation plants for raw coal, and to designated places for weighing and classification. He also took empty cars back to the point of origin for reloading of coal. The coal he handled was raw, and was taken to preparation plants to be treated, rather than to consumers as a finished product.
>
> [Claimant] also testified that there was a lot of coal dust on the tipple and the track, and that the dust was heavy when he threw the switch to start the engine and when the coal was being loaded. When he was a driver, the dust was so prevalent that he had to keep the windows closed in the locomotive, an area that did not have air conditioning for 20 to 30 years of his employment, to avoid choking to death. [Claimant] testified that the transportation of coal to and from the mines to the processing plant is necessary for the mining and extraction of coal.
>
> In addition, six of [claimant]'s co-workers affirmed in affidavits that [claimant] performed work that was integral to coal production, that he delivered raw coal to coal processing plants for loading, that he delivered empty cars to a loading dock or tipple for loading of raw coal, and that he worked in an extremely dusty environment, and was exposed to coal dust because of his location at many different coal preparation facilities and when transporting the coal.
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> Based on all of the evidence of record, I find that [claimant]'s work with Employer fulfills the function prong because his work was integral to the preparation of coal.

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of a "miner" as defined by the Act. *See Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989).

Decision and Order at 20-22 (citations omitted).

The administrative law judge further found the situs test satisfied, explaining that:

> [Claimant] testified that he worked as a brakeman at Elkhorn Yard for 75% of his time, and 25% at Dante Yard as an engineer, he worked at Elkhorn Yard for five years, and then at Dante Yard for the remainder of his thirty-one years with the Employer. He took coal cars between these yards' loading facilities and the tipple preparation plants. At some of the facilities at which he worked, the coal came directly out of the mine on a conveyor belt into the tipple. The document entitled "Clinchfield Country" describes the coal treatment process of Clinchfield Coal in eastern Kentucky and southwest Virginia. This document indicates that the coal came from the mountains around the Dante and Elkhorn City sites where [claimant] worked to be processed in plants in the area.
>
> I find that [claimant]'s transportation of the raw coal from the extraction and loading sites to the preparation plant was essential to coal preparation activities; thus, the track on which the coal was transported is in an area of land used in the preparation of coal. I also find that [claimant] worked around a coal mine or coal preparation facility in the preparation and transportation of coal when he traveled between the Dante and Elkhorn City sites and preparation plants. Furthermore, I find that the intended use of the area of land on which [claimant] was employed was for the extraction and preparation of coal.

Decision and Order at 21-22.

The administrative law judge, therefore, concluded that:

> I find that [claimant] has established 28.42 years of coal mine employment, representing 90% of his 31.58 years with Employer, as [claimant] credibly testified that he worked with coal for 90% of his total employment. [Claimant]'s testimony that he spent 31 years and 5 months transporting raw coal from excavation and loading sites to preparation facilities for Employer sufficiently establishes that he was performing coal mining duties during this time.

Decision and Order at 22.

Discussion

Employer contends that the administrative law judge failed to adequately explain

the basis for her findings regarding the nature and length of claimant's coal mine employment. We disagree. Based upon claimant's testimony, the affidavits of his co-workers, and his time records, the administrative law judge explained in detail how claimant's work transporting raw coal to processing plants satisfied the situs and function tests, and explained how she calculated the length of claimant's coal mine employment.

Employer also contends that the administrative law judge "ignored" an affidavit completed by Steve Crum, a CSX employee. Specifically, employer argues that the administrative law judge did not address Mr. Crum's statement that, after early 1990, no raw coal was transported to cleaning plants by CSX. Director's Exhibit 64. Contrary to employer's assertion, the administrative law judge considered the statements made in Mr. Crum's affidavit. Decision and Order at 9. Moreover, employer's focus on whether the coal was raw or processed after 1990 is misplaced. The administrative law judge correctly focused on the specific jobs that claimant performed in and around the coal mine facilities. The United States Court of Appeals for the Fourth Circuit has held that the delivery of empty railroad cars to a coal preparation facility to be loaded with processed coal is integral to the process of loading coal at the preparation facility and therefore, is part of coal preparation, noting that the loading of coal is included in the statutory definition of coal preparation. *See* 30 U.S.C. §802(i), as implemented by 20 C.F.R. §725.101(13); *Norfolk and Western Ry. Co. v. Director, OWCP [Shrader]*, 5 F.3d 777, 780, 18 BLR 2-35, 2-39 (4th Cir. 1993). In this case, the administrative law judge relied on the fact that claimant "delivered empty cars to a loading dock or tipple for loading . . . ." Decision and Order at 21. The administrative law judge permissibly determined that claimant's work with processed coal involved one of the steps in the coal preparation process. *See Shrader*, 5 F.3d at 780, 18 BLR at 2-39. Employer points to no evidence that claimant's work involved coal that was already in the stream of commerce.

Under the facts of this case, we affirm the administrative law judge's determination that claimant's work satisfied the situs and function requirements, as it is supported by substantial evidence. 20 C.F.R. §725.202(a); *Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989). Consequently, we affirm the administrative law judge's finding of 28.42 years of coal mine employment.

Section 725.309

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based."

20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he suffers from pneumoconiosis or is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

The administrative law judge found that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).[5] Weighing all of the new evidence of record together, the administrative law judge found that it established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge, therefore, found that claimant established that an applicable condition of entitlement had changed since the date upon which the order denying the prior claim became final.

Employer challenges the administrative law judge's findings that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1), (4).

Section 718.202(a)(1)

The administrative law judge considered six interpretations of four x-rays taken on September 28, 2000, August 26, 2004, January 24, 2005, and March 6, 2008.[6] The administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 23.

Dr. Patel, a B reader and Board-certified radiologist, interpreted the September 28, 2000 and August 26, 2004 x-rays as positive for pneumoconiosis, and there were no contrary readings. Director's Exhibits 30, 41. The administrative law judge, therefore, found that these x-rays are positive for pneumoconiosis. Decision and Order at 23.

While Dr. DePonte, a B reader and Board-certified radiologist, interpreted the January 24, 2005 x-ray as positive for pneumoconiosis, Claimant's Exhibit 6, Dr. Wheeler, an equally qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 1. Dr. Goldstein, a B reader, also interpreted the x-ray as negative

[5] The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). Decision and Order at 4-6.

[6] The administrative law judge misidentified the March 6, 2008 x-ray as a March 6, 2006 x-ray. Decision and Order at 11, 23.

for pneumoconiosis. Employer's Exhibit 2. Because this x-ray was interpreted as positive and negative for pneumoconiosis by the "most highly qualified" physicians, the administrative law judge found that the January 24, 2005 x-ray was "in equipoise" and, therefore, insufficient to support a finding of pneumoconiosis. Decision and Order at 23.

Finally, Dr. DePonte interpreted the most recent x-ray, a March 6, 2008 film, as positive for pneumoconiosis, and there were no contrary readings. Claimant's Exhibit 1. The administrative law judge, therefore, found that this x-ray is positive for pneumoconiosis. Decision and Order at 23. Because "three out of the four [new] x-rays were interpreted as positive by dually qualified physicians," the administrative law judge found that the new x-ray evidence established the existence of pneumoconiosis. Decision and Order at 24.

We reject employer's contention that the administrative law judge failed to assign appropriate weight to Dr. Goldstein's negative interpretation of the January 24, 2005 x-ray, and thereby erred in failing to determine that the January 24, 2005 x-ray was negative for pneumoconiosis. Having determined that the interpretations of the dually qualified physicians were entitled to the greatest weight, *see Sheckler*, 7 BLR at 1-131, the administrative law judge properly declined to accord determinative weight to an x-ray interpretation rendered by a lesser qualified B reader to resolve the evidentiary conflict.

We also reject employer's contention that the administrative law judge erred in not addressing whether Dr. Wheeler's education, employment, and publication histories entitled his x-ray interpretations to additional weight. While an administrative law judge may accord greater weight to x-ray readings provided by physicians who are dually qualified as B readers and Board-certified radiologists, and who possess additional radiological qualifications, she is not required to do so. *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36-37 (1991)(*en banc*). Because it is based upon substantial evidence, the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Section 718.202(a)(4)

In considering whether the new medical opinion evidence established the existence of clinical coal workers' pneumoconiosis,[7] the administrative law judge

[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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses." 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers'

reviewed the reports of Drs. Smiddy, Rasmussen, McCurry, and Goldstein. Drs. Smiddy and Rasmussen diagnosed clinical coal workers' pneumoconiosis. Director's Exhibits 29, 30, 41; Claimant's Exhibits 2, 3. Drs. McSharry and Goldstein each opined that claimant does not suffer from clinical coal workers' pneumoconiosis. Employer's Exhibits 3, 7. Dr. McSharry opined that the pattern of claimant's respiratory impairment suggested emphysema due to cigarette smoking. Employer's Exhibit 7. Dr. Goldstein diagnosed chronic obstructive pulmonary disease due to cigarette smoking. Employer's Exhibit 3. The administrative law judge found that the opinions of Drs. Smiddy and Rasmussen were both well-reasoned and supported by the objective evidence. Decision and Order at 25-26. Conversely, the administrative law judge found that the opinions of Drs. McSharry and Goldstein, that claimant does not suffer from clinical coal workers' pneumoconiosis, were not well-reasoned because they did not account for the positive x-ray evidence of record. *Id.* The administrative law judge, therefore, found that the new medical opinion evidence established the existence of clinical coal workers' pneumoconiosis.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. McSharry and Goldstein. We disagree. The administrative law judge found that the opinions of Drs. McSharry and Goldstein were not well-reasoned because they did not account for the new positive x-ray evidence, which the administrative law judge found supported a finding of clinical coal workers' pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984).

Employer's remaining statements regarding the administrative law judge's consideration of the opinions of Drs. Smiddy and Rasmussen amount to a request to reweigh the evidence of record.[8] Such a request is beyond the Board's scope of review.

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pneumoconiosis, anthracosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.* "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).

[8] Employer further contends that the administrative law judge failed to adequately address the opinions of Drs. McSharry and Goldstein that claimant suffers from obstructive lung disease attributable to his cigarette smoking. We need not address these contentions. Because the administrative law judge found that the evidence established the existence of clinical coal workers' pneumoconiosis, she was not required to address whether the evidence also established the existence of legal pneumoconiosis. *See* n.7, *supra*. Moreover, neither Dr. Rasmussen nor Dr. Smiddy opined that claimant suffers

See Cox v. Benefits Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence established the existence of clinical coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because employer does not challenge the administrative law judge's finding that all of the relevant new medical evidence, when weighed together, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of our affirmance of the administrative law judge's finding that the new medical evidence established the existence of clinical coal workers' pneumoconiosis pursuant to 20 C.F.R. 718.202(a), we affirm the administrative law judge's finding that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309.

The Merits of Claimant's 2004 Claim

In considering the merits of claimant's 2004 claim, the administrative law judge found that all of the evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 26-28. The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Id.* at 28. Because employer does not challenge these findings, they are affirmed. *Skrack*, 6 BLR at 1-711. Employer, however, challenges the administrative law judge's findings that the evidence established a totally disabling pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Drs. Smiddy and Rasmussen opined that claimant suffers from a totally disabling pulmonary impairment. Director's Exhibits 29, 30. Dr. McSharry characterized claimant's pulmonary impairment as "severe," and opined that "[d]isability is present on the basis of respiratory impairment." Employer's Exhibit 7. Dr. Goldstein did not address the extent of claimant's pulmonary impairment. Employer's Exhibit 3. The administrative law judge found that "the preponderance of the medical opinion evidence establishes that [claimant's] pulmonary impairment prevents him from engaging

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from a lung disease, other than coal workers' pneumoconiosis, that arose out of his coal mine employment. Thus, neither Dr. Rasmussen nor Dr. Smiddy diagnosed legal pneumoconiosis.

in his usual coal mine work . . . ." Decision and Order at 29.

Employer argues that the administrative law judge erred in relying upon Dr. Rasmussen's opinion because Dr. Rasmussen relied upon non-qualifying[9] arterial blood gas study results. Contrary to employer's contention, test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In this case, the administrative law judge noted that Dr. Rasmussen interpreted claimant's non-qualifying August 26, 2004 arterial blood gas study as revealing a "marked impairment in oxygen transfer during exercise." Decision and Order at 29; Director's Exhibit 30. We therefore reject employer's allegation of error. Because employer does not allege any other errors in regard to the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), this finding is affirmed. Further, because employer does not challenge the administrative law judge's determination that all of the relevant evidence, when weighed together, established total disability pursuant to 20 C.F.R. 718.204(b), this finding is also affirmed. *Skrack*, 6 BLR at 1-711.

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to clinical coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the opinions of Drs. McSharry and Goldstein, because they did not diagnose claimant with clinical coal workers' pneumoconiosis.[10] *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

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[9] A "qualifying" arterial blood gas study meets the values specified in the tables found in Appendix C to Part 718. 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[10] In discrediting the opinions of Drs. McSharry and Goldstein regarding the cause of claimant's totally disabling pulmonary impairment, the administrative law judge noted that Dr. McSharry did not find "radiographic abnormalities suggestive of pneumoconiosis" and Dr. Goldstein "ignored objective x-ray findings which . . . show the presence of pneumoconiosis." Decision and Order at 29-30.

Dr. Rasmussen opined that claimant's clinical coal workers' pneumoconiosis, a condition the doctor attributed to his coal dust exposure, was a major cause of claimant's total disability. Director's Exhibit 30. Dr. Smiddy opined that claimant had a sufficient degree of coal workers' pneumoconiosis to "produce 100% total and permanent disability." Director's Exhibit 29. The administrative law judge rationally relied on the "well-reasoned" opinions of Drs. Smiddy and Rasmussen to find that claimant is totally disabled due to pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 270, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 29. We, therefore, affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).

Offset of Benefits

Employer argues that the claimant's Federal black lung benefits should be offset for monies that he previously received from employer in settlement of a lawsuit he filed under the FELA.

Background Information

Claimant filed a civil action against employer in the Circuit Court of Dickenson County, Virginia, claiming that he "was required to work in and around toxic substances, including coal dust, sand, asbestos and asbestos-containing materials," and that he was "required to inhale large amounts of coal dust, sand and asbestos particles which caused him to suffer severe and permanent injury."[11] Director's Exhibit 71. Claimant sought three million dollars in damages. *Id.*

On August 28, 1998, claimant executed a "release agreement" with employer, whereby he agreed to accept $275,000 in "full settlement and satisfaction" of all claims specified in the document. Claimant specifically released employer from:

> all liability for all claims for occupational disease or personal injury now known to have resulted or suspected to have resulted from [his]

[11] Under the Federal Employers' Liability Act (the FELA), 45 U.S.C. §§51 *et seq*., claimant alleged that employer, *inter alia*, failed to provide him "with a reasonably safe work environment, failed to furnish him with "protective masks and protection inhalation devices," and failed to warn him of the "true nature and hazardous effects of the toxic substances, including coal dust, sand, asbestos, and asbestos-containing materials." Director's Exhibit 71. As a result, claimant alleged that he "suffered exposure to toxic substances, including coal dust, sand, asbestos, and asbestos-containing materials, which caused him to sustain severe injury to his body and respiratory system." *Id.*

> employment with [employer], and also for all known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries to the respiratory system, including cancer of the respiratory system, arising from or contributed to by the inhalation or ingestion of any and all substances while employed by [employer].

Director's Exhibit 26.

Claimant further agreed to release employer from liability for "all known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries, including cancer, arising from or contributed to by asbestos." *Id.* The parties further agreed that a portion of the monies paid was compensation to claimant for "risk, fear and/or possible future manifestation of either the effects of asbestos and/or injury or disease to the respiratory system . . . . ," and in consideration for claimant's agreement not to return to work for employer. *Id.* The release agreement also specified that claimant's civil actions pending in the Circuit Court of Dickenson County, Virginia, were to be dismissed with prejudice. *Id.*

The offset provisions of the Black Lung Benefits Act contemplate a reduction or offset in Federal black lung benefits by any other State or Federal award made on the basis of the miner's "death or partial or total disability due to pneumoconiosis." 20 C.F.R. §725.533(a)(1), (2). The regulations define the term, "State or Federal benefit," as "a payment to an individual on account of total or partial disability or death due to pneumoconiosis only under State or Federal laws relating to workers' compensation." 20 C.F.R. §725.535(a).

The Administrative Law Judge's Finding

The administrative law judge provided four reasons that it was "inappropriate," in this case, to offset claimant's Federal black lung benefits. The administrative law judge found that offset was not required because: (1) the FELA is not a workers' compensation based law; (2) there was no indication that claimant established, or that employer conceded, that claimant was either partially or totally disabled due to pneumoconiosis; (3) while claimant's FELA claim listed that he was exposed to and "injured" by coal dust, claimant also listed injury from asbestos, sand, and asbestos-containing materials, suggesting that asbestos and asbestos-related diseases "were the main impetus for the settlement;" and (4) the Act does not provide for the settlement of black lung claims. Decision and Order at 32-33.

Discussion

Employer argues that all of the reasons provided by the administrative law judge

for declining to offset claimant's Federal black lung benefits are "flawed and in error."[12] Employer's Brief at 18. The Director disagrees and urges the Board to affirm the administrative law judge's determination that offset of claimant's Federal black lung benefits is not appropriate. In support of his argument that substantial evidence supports the administrative law judge's finding, the Director explains that the settlement and release agreement is too vague to support an offset determination:

> The statutory and regulatory language is clear. Offset is appropriate only if the claimant is receiving compensation or benefits under or pursuant to a [F]ederal or [S]tate workmen's compensation law because of death or disability due to pneumoconiosis. 30 U.S.C. §902(g); 20 C.F.R. §§725.533, 725.535.
>
> The agreement at issue is too vague to support offset. It is a global settlement that purports to resolve any and all claims for occupational injury or disease that claimant had or would ever have against the employer. It is not limited to a claim for disabling pneumoconiosis. Moreover, the agreement does not indicate what portion, if any, of the money paid is for total or partial disability due to pneumoconiosis and does not constitute an admission by the employer that claimant was so afflicted.
>
> Even assuming the agreement is intended to compensate the claimant for disabling pneumoconiosis to some degree, it is evident that not all of the settlement monies were directed at that purpose. For example, the agreement indicates that a portion of the settlement monies are intended to compensate the claimant for emotional distress caused by fear of disease. In addition, the claimant agreed never to return to work for the employer "in further consideration of the sum of monies" provided.

[12] Employer contends that the FELA is, in effect, a workers' compensation law for railroad workers. Employer's Brief at 19-23. Employer also asserts that claimant did, in fact, allege disability due to pneumoconiosis in his FELA claim, by alleging "severe injury" to his respiratory system, at the same time he was gathering medical evidence that he was totally disabled due to pneumoconiosis. *Id.* at 23-25. Employer further contends that the administrative law judge was incorrect in speculating that asbestos and asbestos-related injury were the "main impetus" for the settlement. *Id.* at 26-27. Employer finally notes that it does not claim that claimant cannot bring a Federal claim for black lung benefits because his FELA claim has been settled. Rather, employer contends that it is entitled to an offset for the compensation that it has already paid to claimant under FELA for his total disability due to pneumoconiosis. *Id.* at 27-28.

> In short, even assuming this agreement can be said to be related to a workers' compensation law, it is too vague regarding the purpose of the settlement payments to form a basis upon which to offset the claimant's current [F]ederal black lung award.

Director's Brief at 4-5.

We agree with the Director. The release agreement does not indicate what portion of the money, if any, was paid as compensation for total or partial disability due to pneumoconiosis. *See* 20 C.F.R. §725.535(a). As the administrative law judge found, employer did not acknowledge, nor was a finding made, that claimant was totally or partially disabled due to pneumoconiosis. Furthermore, the Director accurately notes that the release agreement is too vague to permit a determination of the amount of payment, if any, that was made for total or partial disability due to pneumoconiosis.[13] Consequently, we affirm the administrative law judge's finding that claimant's Federal black lung benefits are not subject to offset for monies he previously received from employer in settlement of the lawsuit he filed under the FELA.[14]

[13] When a State or Federal compensation award is premised upon a finding that a specific percentage of a miner's total disability is due to pneumoconiosis, that percentage determines the amount of the offset necessitated by 20 C.F.R. §725.535. 30 U.S.C. §922(b); *see Burnette v. Director, OWCP*, 14 BLR 1-151 (1990). Since employer seeks the offset in this case, it has the burden to demonstrate clearly the amount of the offset. *See generally* 30 U.S.C. §932(g); 20 C.F.R. §§725.533, 725.535. Because the release agreement provides no basis to allocate the percentage of the monies paid in compensation for partial or total disability due to pneumoconiosis, the Director accurately notes that the agreement is too vague to offset claimant's Federal black lung benefits.

[14] In light of our holding, we need not address employer's arguments regarding the other reasons that the administrative law judge provided for determining that offset was not appropriate in this case. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge