BRB Nos. 95-0391 BLA
and 95-0391 BLA-A

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| CARL HARBER | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: |
| YALE MINING CORPORATION | ) | |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carl Harber, Pennington Gap, Virginia, *pro se*.

Janine F. Goodman (Arter & Hadden), Washington, D.C., for employer.

Rodger Pitcairn (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the

Decision and Order (93-BLA-1562) of Administrative Law Judge Paul H. Teitler denying 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). The administrative law judge found that claimant established a material change in conditions and, pursuant to the parties' stipulation, credited claimant with thirteen and one-quarter years of coal mine employment. Based on the Social Security records, the administrative law judge found that employer was the responsible operator, but concluded that the evidence failed to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. On cross-appeal, employer asserts that the administrative law judge erred in finding it to be the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, urging remand, asserting that the administrative law judge erred in weighing the medical and responsible operator evidence.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). 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 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 establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Initially, inasmuch as we will vacate the administrative law judge's Decision and Order and remand the case for further consideration, *see* discussion, *infra*, we also vacate his finding pursuant to 20 C.F.R. §725.309(d). Decision and Order at 4-5. The administrative law judge applied the material change in condition standard enunciated in *Shupink v. LTV Steel Co*., 17 BLR 1-24 (1992). *Id*. On remand, the administrative law judge must determine the site of claimant's last coal mine

employment, which appears to be within the appellate jurisdiction of the United States Court of Appeals for either the fourth or sixth circuits,[3] and apply the appropriate material change in conditions standard, which, in either circuit, differs from the Board's holding in *Shupink*. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Lisa Lee Mines v. Director, OWCP* [Rutter], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc*, No. 94-2523 (November 16, 1995).

Pursuant to Section 718.202(a)(1), the administrative law judge correctly noted that of the nineteen readings of x-rays taken for the purpose of classifying pneumoconiosis, only three were positive.[4] Decision and Order at 6-7; Director's Exhibits 17-19, 26-28, 33-37; Employer's Exhibits 1, 3, 5. The administrative law judge permissibly accorded greater weight to the negative readings by Board-certified radiologists and B-readers in finding the preponderance of the x-ray evidence negative for pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Johnson v. Island Creek Coal Co*., 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Sections 718.202(a)(2) and (3), the administrative law judge correctly found that there is no biopsy evidence in the record and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 8; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

At Section 718.202(a)(4), the administrative law judge considered the six medical opinions addressing the existence of pneumoconiosis and found the evidence insufficient to establish that claimant suffered from the disease. Decision and Order at 11. However, as the Director notes, the administrative law judge erred by discrediting the opinions of Drs. Kapadia and Paranthaman that claimant had pneumoconiosis because they relied on positive x-rays, when the administrative law judge found the x-ray evidence to be negative for pneumoconiosis. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

Moreover, the administrative law judge did not explain why he found the reports of Drs. Dahhan, Garcia-Pulido, Renn, and Taylor to be better reasoned and documented than those of Drs. Kapadia and Paranthaman, which were also based upon documented physical examinations, histories, objective tests, and x-rays.

Director's Exhibits 15, 32, 33, 37; Employer's Exhibits 9-11. Inasmuch as the administrative law judge failed to provide a rationale for his finding as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Arnold v. Secretary of HEW*, 567 F.2d 258 (4th Cir. 1977), we vacate his finding pursuant to Section 718.202(a)(4) and remand the case for him to reconsider the medical opinion evidence. *See Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *cf. Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, BLR (4th Cir. 1995).

In finding that the evidence failed to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b), the administrative law judge incorporated by reference his defective weighing of the medical opinions at Section 718.202(a)(4). Decision and Order at 11-12; *see* discussion, *supra*. Therefore, we vacate his finding pursuant to Section 718.204(b).

Regarding the responsible operator issue, the administrative law judge relied solely upon the Social Security earnings records, finding that:

> While these records do not indicate in which quarters claimant was employed, he earned $8,372 in 1981 and $2,544 in 1982. I find these records sufficient to establish that the miner worked a period of at least one year with Yale Mining Corporation.

Decision and Order at 5. The administrative law judge failed to discuss why the $10,916.00 in earnings, without quarterly breakdowns, established that claimant had worked for employer for at least one calendar year, nor did the administrative law judge consider claimant's testimony that he had worked for employer for only nine months. [1990] Hearing Transcript at 11. Therefore, we vacate the administrative law judge's finding and instruct him to weigh all of the responsible operator evidence on remand.

We reject employer's argument that because the Department of Labor did not designate employer as a responsible operator in either of claimant's earlier claims, it was precluded from doing so in claimant's third claim. Employer's Brief at 24; Employer's Reply Brief at 4-6. Contrary to employer's contention, the deputy commissioner may identify a responsible operator "at any time during the processing of a claim." 20 C.F.R. §725.412(a); *see Goddard v. Oglebay Norton Co*., 877 F.2d 1300 (6th Cir. 1989); *Hoskins v. Shamrock Coal Co*., 12 BLR 1-117 (1989).

Moreover, employer's reliance on *Crabtree v. Bethlehem Steel Corp*., 7 BLR

1-354 (1984), and *Director, OWCP v. Trace Fork Coal Co. [Matney]*, F.3d No. 93-2379 (4th Cir. 1995) is misplaced because the due process concerns cited by the Board and by the Court are not present here. In both cases, the original claim had been fully litigated and decided in claimant's favor but the named responsible operator had been dismissed, and the Director sought remand for the designation of a new responsible operator who would have been entitled to contest entitlement, forcing claimant to prove his case again. *See Crabtree*, *supra*; *Matney*, *supra*. By contrast, there has been no finding of entitlement in this case, and the present application is a duplicate claim, separate from claimant's earlier two claims, and had not been fully litigated when employer was designated as the responsible operator.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge