BRB No. 05-0830 BLA

CHARLES T. WAUGH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VESTA MINING COMPANY	)	
	)	DATE ISSUED: 07/18/2006
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Granting Director's Motion for Partial Summary Decision and the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

James Poerio (Tucker Arensberg, P.C.), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Director's Motion for Partial Summary Decision and the Decision and Order – Awarding Benefits (04-BLA-6102) of Michael P. Lesniak with respect to 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 his application for benefits on July 1, 2002. Director's Exhibit 2. The district director notified both R.G. Johnson Company (Johnson) and Vesta Mining Company (employer) of the claim and continued to serve both entities with documents relevant to the processing of the claim. Prior to the date of the formal hearing, the Director, Office of Workers' Compensation Programs (the Director), filed a motion requesting that the administrative law judge dismiss Johnson and designate employer as the responsible operator. The administrative law judge granted the Director's motion.

Subsequent to the hearing on the merits of the claim, the administrative law judge issued a Decision and Order in which he credited claimant with eleven and one-half years of coal mine employment and noted that employer conceded that claimant is suffering from a totally disabling respiratory impairment. The administrative law judge considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718 and determined that claimant established that he has pneumoconiosis arising out of coal mine employment that pneumoconiosis is a contributing cause of his total disability. Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(c). Employer also contends that the administrative law judge erred in identifying it as the responsible operator. Claimant responds and urges affirmance of the award of benefits. The Director has also responded and urges the Board to reject employer's arguments on the responsible operator issue.

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).

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).

We will first address employer's allegations of error regarding the administrative law judge's findings on the merits of the claim. Employer argues that the administrative law judge erred in neglecting to weigh Dr. Cohen's reading of a digital x-ray and the numerous negative readings contained in claimant's treatment records from the Centerville Clinic. Employer also maintains that the administrative law judge erred in relying upon the "later is better" principle when assessing the x-ray evidence. These contentions are without merit.

With respect to Dr. Cohen's reading of the digital x-ray dated January 9, 2003, although Dr. Cohen's interpretation of this x-ray is attached to his report, neither claimant nor employer designated this reading as part of its affirmative or rebuttal case at Section 718.202(a)(1) or 718.107. Claimant's Exhibit 1; *see* Hearing Transcript at 5-7. Furthermore, in determining that the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion as fact-finder in according greatest weight to the positive readings by the physicians with the best qualifications. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Because the administrative law judge identified this factor as a separate basis for his weighing of the x-ray evidence, we need not address employer's allegation of error regarding the administrative law judge's reference to the fact that Drs. Ahmed and Cappiello read the most recent film of record. Decision and Order at 14; *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). With respect to the x-ray readings that appear in the Centerville Clinic records, error, if any, by the administrative law judge in not weighing this evidence at Section 718.202(a)(1) is harmless in light of the administrative law judge's permissible reliance upon the readers' qualifications to resolve the conflict in the x-ray evidence. *Johnson*, 12 BLR 1-53; *Larioni*, 6 BLR 1-1276. The radiological qualifications of the physicians whose interpretations appear in the treatment notes are not of record. Employer's Exhibit E. We affirm, therefore, the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as it is rational and supported by substantial evidence.[1]

[1] The administrative law judge accepted employer's designation of Dr. Fino's negative reading of a digital x-ray dated October 10, 2003 as part of its affirmative case pursuant to 20 C.F.R. §725.414(a)(3)(i) and weighed this reading at 20 C.F.R. §718.202(a)(1). Decision and Order at 5, 14. At the hearing, claimant objected, suggesting that the use of digital x-rays was prohibited. The administrative law judge overruled the objection on the ground that claimant had already developed and designated his rebuttal x-ray evidence. Hearing Transcript at 6. Because claimant had no further objection and the parties have not raised any allegations of error on appeal, we will not address this issue.

With respect to the administrative law judge's finding that the medical opinions of Drs. Cohen and Garson were sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), employer argues that the administrative law judge relied upon an inaccurate smoking history in discrediting the reports of Drs. Renn and Fino and erred in crediting the opinions of Drs. Cohen and Garson. These allegations of error do not have merit. With respect to the opinions of Drs. Renn and Fino, although the administrative law judge referred to the disparity between the smoking history he found and that relied upon by Dr. Renn, he gave additional, valid reasons for discrediting the opinions of Drs. Renn and Fino, that claimant does not have legal or clinical pneumoconiosis. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983). We affirm, therefore, the administrative law judge's determination that Dr. Renn's statement regarding the absence of clinical pneumoconiosis is entitled to little weight because he relied upon his negative x-ray reading, which was contradicted by physicians with superior radiological qualifications. Decision and Order at 15; *White*, 23 BLR at 1-4-5; *Edmiston*, 14 BLR at 1-67. In addition, the administrative law judge rationally found that the probative value of Dr. Renn's determination that claimant does not have legal pneumoconiosis was diminished by his belief that coal dust exposure cannot cause centrilobular emphysema, a conclusion that was directly contradicted by Dr. Cohen, who cited studies supporting the existence of a causal connection. Decision and Order at 15; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993). With respect to Dr. Fino's opinion, the administrative law judge acted within his discretion as fact-finder in concluding that Dr. Fino did not unequivocally exclude coal dust exposure as a contributing cause of claimant's chronic obstructive pulmonary disease. Decision and Order at 15; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Dr. Fino stated that he could not rule out some contribution to the worsening of claimant's lung condition by coal dust exposure. Employer's Exhibits A, C.

Regarding the administrative law judge's weighing of the opinions of Drs. Cohen and Garson, employer argues that remand is required, as the administrative law judge erred in failing to address the inaccurate smoking and employment histories upon which Drs. Cohen and Garson relied. We disagree. The administrative law judge rationally determined that Dr. Cohen's opinion, that claimant has clinical pneumoconiosis and is also totally disabled by chronic obstructive pulmonary disease (COPD) caused, in part, by coal dust exposure, was entitled to great weight and was, therefore, sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). As the administrative law judge indicated, although Dr. Cohen referred to a coal mine employment history of nineteen years and a smoking history of approximately twelve years, Dr. Cohen indicated at his deposition that even if claimant had worked eleven and one-half years and smoked three packages of cigarettes per day, he would not alter his opinion that coal dust exposure is a significant contributing factor to claimant's disabling COPD/emphysema. Decision and Order at 8, 15; Claimant's Exhibits 1, 8 at 24.

Furthermore, the administrative law judge acted within his discretion in according great weight to Dr. Cohen's opinion based upon the combination of Dr. Cohen's qualifications as a Board certified pulmonologist and the fact that Dr. Cohen explained his diagnoses of clinical and legal pneumoconiosis thoroughly, specifically refuting criticisms made by Dr. Renn, stated why the negative x-ray readings did not change his opinion, and cited extensive evidence in the record and studies in the medical literature that supported his diagnoses. *Id*.; *Trumbo*, 17 BLR at 1-88-89. We also affirm the administrative law judge's decision to give great weight to Dr. Ginart's diagnosis of pneumoconiosis, as employer does not challenge this finding on appeal. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983). Because we have affirmed the administrative law judge's finding that Dr. Cohen's and Dr. Ginart's diagnoses of pneumoconiosis are reasoned and documented and entitled to great weight under Section 718.202(a)(4), error, if any, in his assessment of Dr. Garson's opinion is harmless. *Johnson*, 12 BLR 1-53; *Larioni*, 6 BLR 1-1276.

Employer also contends that the administrative law judge erred in finding the existence of pneumoconiosis was established without addressing Dr. Renn's interpretation of an enhanced computerized tomography (CT) scan dated January 12, 1994. This allegation of error is without merit. The administrative law judge indicated correctly that the record does not contain a reading of this scan by Dr. Renn. The administrative law judge noted that the only reading of this CT scan in the record was performed by Dr. McMahon during claimant's hospitalization for suspected pneumonia on January 7, 1994.[2] Decision and Order at 6. Employer merely indicates in its brief that the CT scan "is recited . . . as item 14 in Dr. Renn's report of June 14, 2004 (Employer's Exhibit D)." Brief in Support of Petition for Review at 13. Employer does not identify where Dr. Renn's actual interpretation of the scan is located in the record nor does employer describe the contents of Dr. Renn's interpretation. Thus, employer has not sufficiently set forth an allegation of error in the administrative law judge's conclusion that the CT scan evidence did not outweigh Dr. Cohen's diagnosis of COPD/emphysema related to dust exposure in coal mine employment. Decision and Order at 16; *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

We affirm, therefore, the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Finally,

[2] Dr. McMahon stated that the CT scan showed linear densities within the anterior medial aspect of the lower right thorax but no pulmonary consolidation or pleural fluid. He further indicated that there were no significant abnormalities of the chest, although pulmonary scars were present on the right. Employer's Exhibit F.

inasmuch as the administrative law judge relied upon the permissible findings that he made under Section 718.202(a)(4) regarding the source of claimant's COPD in determining that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c) and employer does not raise any separate allegations of error, we also affirm this finding and the award of benefits under Part 718.

We must now address the administrative law judge's determination that employer is the operator responsible for the payment of benefits in this case. After claimant filed his claim for benefits, the district director issued Notices of Claim addressed to Johnson and employer. Director's Exhibits 16, 17. Johnson did not respond. On January 28, 2003, the district director issued a Schedule for the Submission of Additional Evidence in which he designated Johnson as the responsible operator. Director's Exhibit 22. In a letter dated February 11, 2003, employer asked the district director if anyone had filed an appearance as Johnson's counsel or whether Johnson had agreed that it was the properly designated responsible operator. Director's Exhibit 24. The district director issued a letter in which he informed Johnson that pursuant to the Schedule for Submission of Additional Evidence, the deadline to reject its designation as responsible operator was February 13, 2003. Director's Exhibit 23.

By letter dated May 2, 2003, an attorney entered an appearance on behalf of Johnson. On May 13, 2003, Johnson requested an extension of time within which to submit evidence opposing claimant's entitlement to benefits. Director's Exhibit 27. The district director granted the request and indicated that Johnson could submit evidence relevant to entitlement and to the issue of whether it is the responsible operator. Director's Exhibit 28. Johnson submitted payroll records indicating that claimant began employment on or around July 9, 1989, was laid off on December 16, 1989, returned to work on May 5, 1990, and ended his employment with Johnson on May 26, 1990. Director's Exhibit 29.

Employer objected to the district director's decision to allow Johnson to untimely submit evidence regarding its status as responsible operator. Director's Exhibit 30. In a letter dated July 11, 2003, the district director responded that identifying the proper responsible operator took precedence over other concerns. The district director also notified employer of the dismissal of Johnson as the responsible operator. Director's Exhibit 31. After the case was referred to the Office of Administrative Law Judges (OALJ) for a hearing, the Director submitted a Motion for Partial Summary Decision as to the Status of Vesta Mining Company as Responsible Operator. In an Order dated November 10, 1994, the administrative law judge granted the Director's motion and named employer as the properly designated responsible operator.

Employer asserts that the regulations set forth in 20 C.F.R. §§725.408 and 725.412(a)(2) contain mandatory language which precluded the district director from

granting an extension to allow Johnson to submit evidence establishing that it is not the responsible operator. The Director has responded and concedes that the district director erred in admitting Johnson's payroll records after the time period set forth in the Schedule for Admission of Additional Evidence expired. The Director further contends, however, that other evidence in the record establishes that claimant worked for Johnson for less than the one-year period required in 20 C.F.R. §725.494. The Director also argues that the regulations in question do not require the district director to designate a responsible operator based upon an employer's failure to respond. According to the Director, the regulations were promulgated to limit a dilatory employer's ability to later challenge the Director's ultimate decision on the responsible operator issue.

When the Department of Labor amended the regulations pertaining to the identification of the responsible operator, it created a requirement that the responsible operator be identified before the case was transferred to the OALJ for a hearing. 20 C.F.R. §725.407(d). The regulations appearing at 20 C.F.R. §§725.407-412 set forth the means by which this requirement is to be met. Section 725.408(a)(3) provides in relevant part that "[a]n operator which receives notification . . . and fails to file a response within the time limit provided . . . shall not be allowed to contest its liability for the payment of benefits[.]" With respect to the submission of evidence concerning the identification of the responsible operator, Section 725.408(b)(2) mandates that "[n]o documentary evidence . . . may be admitted in any further proceedings unless it is submitted within the time limits set forth in this section." Pursuant to Section 725.412(a)(2), after the issuance of the schedule for the admission of additional evidence:

> If the responsible operator designated by the district director does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim.

20 C.F.R. §725.412(a)(2). Section 725.410(a)(3) provides that before transfer to an administrative law judge, the Director may, "in his discretion," dismiss as parties any of the operators notified of their potential liability and redesignate a previously dismissed operator if appropriate. 20 C.F.R. §725.410(a)(3).

As the Director has indicated, these provisions set forth explicit and specific limits upon the actions an employer can take to challenge its designation as the responsible operator if it does not timely respond to the notice of claim or the schedule for admission of additional evidence. At the same time, the regulations created procedural devices that the Director can use to reach the correct ultimate conclusion regarding the identity of the responsible operator without indicating that these are the only tools at the Director's disposal. In addition, Section 725.410(a)(3) explicitly allows the Director to bring a

dismissed potential responsible operator back into a case provided that the case has not been transferred to the OALJ. Thus, we hold that the Director's position, that the designation of the responsible operator is left to his discretion and that he was not required to name Johnson solely based on its failure to timely respond to the Notice of Claim and the Schedule for Admission of Additional Evidence, represents a reasonable interpretation of the regulations. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Director, OWCP v. Eastern Associated Coal Corp.* [*O'Brockta*], 54 F.3d 141, 146, 19 BLR 2-164, 2-174 (3d Cir. 1995); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994).

Whether the administrative law judge acted rationally in dismissing Johnson and determining that employer is the properly designated responsible operator is a separate issue, however. The Director is correct in asserting that the Director was barred by Section 725.408(b)(2) from allowing Johnson to submit the payroll records which establish that it is not the responsible operator because it did not employ claimant as a miner for at least one year. *See* 20 C.F.R. 725.408(b)(2), 725.494(c). Nevertheless, the properly admitted evidence does not conclusively establish that claimant worked for Johnson for at least one year and employer does not identify any such evidence.[3] In addition, employer does not dispute that it received the notices required by the regulations nor does employer contest the administrative law judge's finding that it meets the requirements set forth in Sections 725.408(a)(2) and 725.494(c). Thus, we affirm the administrative law judge's designation of employer as the responsible operator as the administrative law judge's finding is rational and within his discretion as fact-finder.

[3] Claimant's coal mine employment history form indicates that he worked for Johnson from July 1989 until May 1990. Director's Exhibit 3. Without designating in which quarters the wages were earned, the Social Security Administration records show that Johnson paid claimant $18,523.75 in 1989 and $2,219.75 in 1990. Director's Exhibit 7. There is also a handwritten note, purportedly authored by claimant, in which he states that he worked for Johnson for more than one year and that "we will have to see S.S. for records." Director's Exhibit 5.

Accordingly, the administrative law judge's Order Granting Director's Motion for Partial Summary Decision and Decision and Order – Awarding Benefits are 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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JUDITH S. BOGGS
Administrative Appeals Judge