BRB No. 08-0759 BLA

C.E.S., JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRANHAM & BAKER UNDERGROUND CORPORATION	)	DATE ISSUED: 07/27/2009
	)	
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 - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Randy G. Clark (Clark & Johnson Law Offices), Pikeville, Kentucky, for claimant.

Paul E. Jones and Todd P. Kennedy (Jones, Walter, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (Carol A. DeDeo, 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 - Award of Benefits (2007-BLA-5815) of Administrative Law Judge Daniel F. Solomon rendered on a miner's 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 the claim to be timely filed, and further found employer to be the properly designated responsible operator herein. Upon stipulation of the parties, the administrative law judge credited claimant with fourteen years of coal mine employment, and adjudicated this claim, filed on August 23, 2006, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges its designation as responsible operator, as well as the administrative law judge's findings that the evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that employer was properly designated the responsible operator herein.[1]

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.[2] 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 first contends that the administrative law judge erred in finding it to be the properly designated responsible operator herein, and asserts that the administrative law judge shifted the burden of proof on this issue. Employer asserts that it did not employ claimant for a period of one year, and that employer is not the same company as Kiah Creek Mining, claimant's previous employer. Employer's Brief at 2-4. Upon review of the administrative law judge's Decision and Order, the arguments raised on

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment, as well as his findings that the claim was timely filed, and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

appeal, and the evidence of record, we conclude that the administrative law judge's findings on the responsible operator issue cannot be affirmed.

Employer correctly notes that the Director bears the burden of proving that the designated responsible operator initially found liable for the payment of benefits pursuant to 20 C.F.R. §725.410 is a potentially liable operator. 20 C.F.R. §725.495(b). To be considered a potentially liable operator, the Director must establish, *inter alia*, that employer was the last coal mine operator to have employed claimant for a period of at least one year, during which claimant must have worked at least 125 days as a coal miner. 20 C.F.R. §725.494.

The record reflects that claimant worked for Kiah Creek Mining in 1996, earning $13,816.02, and in 1997, earning $11,447.60. The record reflects that claimant also worked for employer, Branham & Baker Underground Corporation in 1997, earning $5,729.64, and in 1998, earning $9,689.88. The district director named employer as a potentially liable operator in its Notice of Claim, and employer timely filed a controversion of liability. Director's Exhibits 26, 27; *see* 20 C.F.R. §725.408. Subsequently, the district director issued a Schedule for Submission of Additional Evidence, in which employer was named as the designated responsible operator. As support for the liability designation, the district director stated that, "Branham purchased Kiah Creek on June 1, 1997," but he failed to enter into evidence the documentation upon which this assertion was based.[3] Director's Exhibit 28. As the administrative law judge did not make a specific finding that employer was the successor operator to Kiah Creek Mining, but found only that "no evidence was presented to show that Kiah Creek is not Branham and Baker," and that "although there is confusion, claimant credibly worked for Branham," Decision and Order at 5, we must vacate the administrative law judge's finding that employer is the properly designated responsible operator, and remand this case for the administrative law judge to reassess the evidence of record in determining whether the Director has met his initial burden of establishing that employer meets the criteria of a potentially liable operator. *See* 20 C.F.R. §725.495(b); Decision and Order at 5. On remand, the administrative law judge may, in his discretion, reopen the record or take judicial notice of the relevant evidence necessary to make his determination.

Turning to the merits of the case, employer challenges the administrative law judge's reliance on the opinions of Drs. Forehand and Baker, over the contrary opinions of Drs. Fino and Rosenberg, to support his finding that the medical opinion evidence of

[3] The Director acknowledges that no evidence was entered into evidence, but asserts that the Mine Safety and Health Administration Data Retrieval System, which is publicly available via the internet, indicates that Branham & Baker took over the mines previously owned by Kiah Creek Mining in July and October 1997.

record was sufficient to establish the existence of legal pneumoconiosis and disability causation at Sections 718.202(a)(4) and 718.204(c), respectively. Employer's Brief at 5-12. Employer asserts that the opinions of Drs. Forehand and Baker are too equivocal to meet claimant's burden; that Dr. Forehand relied on an incorrect smoking history; and that Drs. Fino and Rosenberg are better qualified physicians who supplied better-reasoned and supported opinions. Some of employer's arguments have merit.

In evaluating the conflicting medical opinions of record, the administrative law judge found that Dr. Forehand's opinion,[4] that claimant had chronic obstructive pulmonary impairment (COPD) from centrilobular emphysema caused by smoking and coal dust exposure, was well-reasoned and documented, and that the rationale he provided for attributing claimant's disabling respiratory impairment to both smoking and coal dust exposure was the most reasonable. Decision and Order at 10-11. The administrative law judge did not indicate the weight he accorded to the opinion of Dr. Baker, but merely credited the opinion on the issues of legal pneumoconiosis and disability causation, noting that it substantiated Dr. Forehand's opinion. Decision and Order at 11. The administrative law judge gave less weight to the contrary opinions of Drs. Rosenberg and Fino, that claimant does not have legal pneumoconiosis and that his disabling COPD/emphysema is due entirely to smoking, as he found that the Attfield and Hodous study cited by Dr. Rosenberg did not support his conclusions, but instead supported Dr. Forehand's rationale; that the medical sources cited by Dr. Fino predated the new regulations defining legal pneumoconiosis; that neither Dr. Rosenberg nor Dr. Fino directly addressed the combined effects of smoking and coal dust exposure or the possible aggravation of emphysema from coal dust exposure; that Dr. Rosenberg's rationale was not supported by the studies relied upon by the Department of Labor in amending the regulations; and that both doctors "speak in generalities and do not address this Claimant's exposure and work history." Decision and Order at 10.

We reject employer's argument that, because Dr. Forehand admitted that "I cannot state with any degree of accuracy exactly what percent of [claimant's] respiratory impairment was due to cigarette smoking and to coal mine dust exposure," Claimant's Exhibit 1, the opinion is "equivocal at best." Employer's Brief at 7. Dr. Forehand opined unequivocally that claimant's impairment was due to the combined effects of smoking and coal dust exposure, and was not required to apportion with particularity the relative

[4] Dr. Forehand examined claimant on January 8, 2008, and diagnosed a severe respiratory impairment consistent with chronic obstructive pulmonary disease (COPD) stemming from centrilobular emphysema due to claimant's twenty pack-year smoking history and his fourteen years of coal dust exposure. Dr. Forehand opined that claimant had a totally and permanently disabling respiratory impairment due to the combined effects of smoking and inhaling coal mine dust and silica particles. Claimant's Exhibit 1.

contributions of each, as claimant need only show that his impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See* 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

We also reject employer's argument that Dr. Forehand relied on an inaccurate smoking history in determining that claimant's respiratory impairment was due to the combined effects of smoking and coal dust inhalation. Drs. Forehand and Baker both recorded a smoking history of twenty pack-years, and Dr. Fino noted a smoking history of one-half to one pack per day since 1973, while Dr. Rosenberg noted that claimant felt he generally smoked one-half to one pack per day since he was a youngster, but is currently trying to smoke only five cigarettes a day. Director's Exhibits 17, 20, 22; Claimant's Exhibit 2; Employer's Exhibit 2. In light of claimant's non-specific testimony,[5] and the administrative law judge's acknowledgment that employer alleged a greater smoking history, we find no error in the administrative law judge's acceptance of Dr. Forehand's stated smoking history of twenty pack-years, as supported by substantial evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). We find merit, however, to employer's contention that the administrative law judge incorrectly identified Dr. Forehand as a Board-certified pulmonologist, when the record reflects that the physician is Board-certified in allergy and immunology and in pediatrics.[6] Claimant's Exhibit 1. By contrast, Drs. Baker, Fino and Rosenberg are all Board-certified in internal medicine and pulmonary diseases, and Dr. Rosenberg is additionally Board-certified in occupational medicine. Consequently, we vacate the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c), and remand this case for the administrative law judge to reconsider the relative qualifications of the physicians in assigning weight to their opinions. However, contrary to employer's assertion, the administrative law judge is not required to accord greater weight to the opinions of physicians with superior qualifications. Employer's Brief at 11-12; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Next, we find merit in employer's argument that the administrative law judge failed to consider the equivocal nature of Dr. Baker's opinion. While Dr. Baker initially

[5] Claimant testified that he smoked one-half to one pack of cigarettes per day for twenty-five to thirty years, but that he quit periodically during that time, and he currently tries to smoke only three to five cigarettes a day. Director's Exhibit 22 at 25; Hearing Transcript at 34.

[6] The administrative law judge stated that all of the physicians were Board-certified pulmonologists. Decision and Order at 11.

diagnosed a severe obstructive impairment caused nearly equally by coal dust exposure and smoking, relying upon a coal mine employment history of twenty-six years, the physician indicated that a diagnosis of legal pneumoconiosis was "borderline" when he was presented with claimant's accurate coal mine employment history of fourteen years.[7] Employer's Brief at 12. Because the administrative law judge summarized Dr. Baker's initial medical report but failed to discuss his supplemental report, in which the physician stated that "legal pneumoconiosis would be borderline but also could work synergistically with the smoking or in an additive fashion to cause a worsened lung condition than if claimant had either a smoking or coal dust exposure alone," Director's Exhibit 20, we instruct the administrative law judge, on remand, to consider and weigh Dr. Baker's supplemental opinion on the issues of legal pneumoconiosis and disability causation, and to reassign weight to all of the medical opinions of record. Director's Exhibits 17, 20.

Lastly, employer asserts that, contary to the administrative law judge's findings, Drs. Rosenberg[8] and Fino[9] provided well-reasoned opinions that explained why claimant's disabling COPD/emphysema was caused by smoking and was unrelated to coal dust exposure. Employer's Brief at 9-10. The administrative law judge summarized the reports of Drs. Rosenberg and Fino, and noted that Dr. Fino referenced numerous

[7] Dr. Baker performed the Department of Labor examination, and diagnosed COPD with severe obstructive defect, mild resting hypoxemia and chronic bronchitis, which contribute to claimant's Class 4 impairment (50-100% impairment of the whole person) caused nearly equally by coal dust exposure and smoking. Dr. Baker based his opinion on twenty-six years of coal mine employment and twenty pack-years of smoking. Director's Exhibit 17. On April 14, 2007, Dr. Baker supplemented his opinion to reflect fourteen years of coal mine employment. Director's Exhibit 20.

[8] Dr. Rosenberg examined claimant on February 14, 2007, and opined that claimant does not have either medical or legal pneumoconiosis, but has a respiratory disability attributable to smoking-related emphysema. Dr. Rosenberg explained that, absent documentation that claimant has some form of nodular coal workers' pneumoconiosis, any emphysema that claimant has is not coal dust related. Director's Exhibit 22; Employer's Exhibit 4.

[9] Dr. Fino examined claimant on March 1, 2007, and diagnosed severe pulmonary emphysema due to cigarette smoking. Dr. Fino opined that, while there is no doubt that coal dust inhalation causes emphysema, and that there is good evidence that coal miners have more pathological emphysema than non-coal miners, studies do not show that coal dust-induced emphysema results in a clinically significant impairment or disability in all patients. Employer's Exhibits 1, 2.

articles in reaching his ultimate diagnosis of severe pulmonary emphysema due to cigarette smoking, but that these articles predated the revised regulations and did not address the "effects of aggravation by mining or smoking." Decision and Order at 10. The administrative law judge further determined that, in promulgating the amended regulations, the Department of Labor noted that smokers who mine have an additive risk for developing significant obstruction, while "none of the papers that Drs. Rosenberg and Fino refer to address the new regulations," which include the definition of legal pneumoconiosis. Decision and Order at 9, *citing* 65 Fed. Reg. 79941 (Dec. 20, 2000). The administrative law judge found that Dr. Rosenberg's rationale, that centrilobular emphysema would not be related to coal dust exposure in the absence of nodular coal workers' pneumoconiosis, is not supported by the studies referenced in the preamble to the revised regulations. Decision and Order at 10. Because we have vacated the administrative law judge's findings of legal pneumoconiosis and disability causation, and the administrative law judge must reweigh all medical opinions of record on remand, we specifically note that the administrative law judge may permissibly evaluate a medical opinion in conjunction with the Department of Labor's discussion of prevailing medical science in the preamble to the revised regulations, which recognizes that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis. 65 Fed. Reg. 79941 (Dec. 20, 2000); *see* 20 C.F.R. §718.201(a)(2); *J.O. v. Helen Mining Co.*, BLR 1- (June 24, 2009). We find merit, however, in employer's argument that the administrative law judge erred in finding that "Dr. Fino does not establish a well reasoned basis to exclude pneumoconiosis as a cause [of claimant's emphysema], considering that 14 years of exposure is established…[h]is entire analysis is to establish that smoking is a cause….[b]ut there can be more than one cause." Decision and Order at 10. While the administrative law judge is correct that there can be more than one cause of claimant's obstructive lung disease/emphysema, and that smokers who mine have an additive risk for developing significant obstruction, Dr. Fino stated his reasons for concluding that claimant's condition was unrelated to coal dust exposure. Thus, the administrative law judge appears to have shifted the burden of proof to employer. Consequently, on remand, the administrative law judge is instructed to reevaluate and weigh the medical opinion evidence of record, giving consideration to the qualifications of the physicians, in determining whether the weight of the evidence as a whole establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and whether pneumoconiosis was a substantially contributing cause of claimant's disability pursuant to Section 718.204(c), if reached.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge