BRB No. 09-0737 BLA

HOMER LAUDERMILT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RUECON COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/22/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (08-BLA-5563) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Initially, the administrative law judge found that employer is the properly designated responsible operator in this case. On the merits of entitlement, the administrative law judge credited claimant with twenty years of coal mine employment,[1] and found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and disability causation under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer was properly designated as the responsible operator. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b)(2), (c). Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's responsible operator finding.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Impact of the Recent Amendments

By Order dated May 4, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded.

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. Specifically, the Director notes that, although Section 1556 reinstated a rebuttable presumption of total disability due to

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3, 6.

pneumoconiosis that is potentially applicable to claims such as this one,[2] the administrative law judge awarded benefits pursuant to the pre-amendment version of the Act, which required claimant to establish all elements of the claim by a preponderance of the evidence. Therefore, the Director concludes, if the Board affirms the administrative law judge's award of benefits, the reinstated presumption need not be considered. Director's Supplemental Brief at 2. The Director further states, however, that if the award of benefits cannot be affirmed, the case must be remanded for the administrative law judge to address whether claimant has established total disability due to pneumoconiosis under the Section 411(c)(4) presumption. The Director states that, if the Section 411(c)(4) presumption is considered on remand, the administrative law judge should allow for the submission of additional evidence by the employer, and from claimant in response to employer's new evidence. *Id*.

Employer filed a supplemental brief, stating that "Ruecon does not believe that [the amendment to the Act] applies to Mr. Laudermilt's claim," because "he did not work as an underground miner." Employer's Supplemental Brief at 1.

Based upon the parties' responses, and our review, we hold that the disposition of this case is not affected by Section 1556. As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, we agree with the Director that there is no need to consider whether claimant could establish entitlement with the aid of the rebuttable presumption reinstated by Section 1556.

Responsible Operator

Before the administrative law judge, employer did not dispute that it meets the criteria for a potentially liable operator.[3] 20 C.F.R. §725.495. Employer argued,

[2] Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Supplemental Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4). As the Director notes, claimant filed his claim after January 1, 2005, and the administrative law judge credited claimant with twenty years of coal mine employment.

[3] In order to meet the regulatory definition of "a potentially liable operator," an operator must have employed the miner for a cumulative period of not less than one year

however, that two subsequent employers, Addie Enterprises and Vaughan Brothers, were related and employed claimant as a miner for a combined period of at least one year, and thus, should have been designated as the responsible operator. The administrative law judge considered claimant's testimony, answers to interrogatories, application for benefits and Social Security Earnings Statement,[4] and found that employer did not satisfy its burden under 20 C.F.R. §725.495(c) to show that there was a liable operator who more recently employed claimant for a period of at least one year. Decision and Order at 3-6. Employer does not challenge the administrative law judge's finding. Rather, citing, *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), employer argues that, because claimant waited more than three decades after his last coal mine employment to file this claim for benefits, the imposition of the burden of proof on Ruecon Coal Corporation (Ruecon) to establish that another operator employed claimant more recently for at least one year "is not consistent with principles of due process or fundamental fairness," as "[a]ll the relevant employment records are long gone and memories have faded, leaving Ruecon with no meaningful opportunity to defend." Employer's Brief at 10-11. As the Director states, however, *Lockhart* involved a situation where the government failed to notify the responsible operator of the claim until seventeen years after the claim had been filed. Director's Brief at 3; *Lockhart*, 137 F.3d at 802, 21 BLR at 2-311. In the case at bar, claimant filed his claim on June 14, 2007, the district director timely notified employer of the claim on July 26, 2007, Director's

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and must also have the financial ability to assume liability for the payment of benefits. 20 C.F.R. §725.494(c), (e). If a miner worked for more than one operator who meets all the requirements of a potentially liable operator, the operator for whom the miner worked most recently will be named the responsible operator. 20 C.F.R. §725.495(a)(2)(i). If the most recent operator demonstrates an inability to pay benefits, and there is no successor operator, then liability is assessed against the potentially liable operator that next most recently employed the miner. 20 C.F.R. § 725.495(a)(2)(ii), (iii).

[4] Claimant's application for benefits lists the companies for which he worked. The starting and ending dates stated are inexact. Director's Exhibit 3. Claimant testified that the Social Security Earnings Statement reflected his employment history "near as [he] knew." Hearing Transcript at 13. Claimant's Social Security Earnings Statement indicates that he was paid the following wages with Addie Enterprises and Vaughn Brothers:

Director's Exhibit 6. In his answers to employer's interrogatories, claimant stated that he believed there was some relationship between Vaughan Brothers and Addie Enterprises. Director's Exhibit 21 at 4.

Exhibit 13A, and employer responded on August 23, 2007, indicating that it had been notified that it was a potential responsible operator. Director's Brief at 16. Thus, as the Director contends, this is not a case, like *Lockhart*, where the Department failed to notify employer promptly. Director's Brief at 3.

Moreover, contrary to employer's assertion, employer was provided with a fair opportunity to mount a meaningful defense. The due process rights of confrontation and cross-examination, as they are incorporated into 20 C.F.R. §725.455(c), require only that the parties be allowed a reasonable opportunity to know the claims of the opposing party and to meet them. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). As previously mentioned, employer was timely notified of its designation as a potential responsible operator. Further, as the Director states, employer was able to cross-examine claimant regarding his employment history with Ruecon. Director's Brief at 3; *see* Hearing Transcript at 23-24. Thus, employer's due process argument lacks merit, and we affirm the administrative law judge's Responsible Operator finding.

Merits of Entitlement

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*).

Pneumoconiosis Arising Out of Coal Mine Employment

Relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered three interpretations of three x-rays. Dr. Zaldivar, a B reader, interpreted the August 1, 2007 x-ray as positive for simple pneumoconiosis.[5] Director's Exhibit 10. Dr. Goodman, a B reader, interpreted x-rays dated February 18, 2007 and March 8, 2007 as showing opacities consistent with pneumoconiosis;[6] however, Dr. Goodman further noted that these opacities were "not the typical pattern of coal workers' pneumoconiosis." Employer's Exhibit 6. The administrative law judge found

[5] Dr. Gaziano, a B reader, read this x-ray for quality purposes only. Director's Exhibit 10.

[6] Dr. Goodman classified the February 18, 2007 x-ray as showing "s,s" opacities of "2/2" profusion in five of the six lung zones. Employer's Exhibit 6 at 9. He classified the March 8, 2007 x-ray as showing "s,s" opacities in the middle and lower lung zones, at a profusion of "2/2." *Id*. at 11.

that Dr. Goodman's comments on the x-ray reports addressed the source of the pneumoconiosis, and thus, should be considered at 20 C.F.R. §718.203. Decision and Order at 18, citing *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999). Further finding that all of the x-rays were interpreted as positive for opacities consistent with pneumoconiosis, the administrative law judge determined that the preponderance of the x-ray evidence is positive for pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 19. Employer does not challenge this finding. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that, because claimant was credited with twenty years of coal mine employment, he was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. Decision and Order at 22. Further, the administrative law judge found Dr. Goodman's statement that "[t]here is no radiologic evidence of coal workers' pneumoconiosis" to be "insufficient to rebut the presumption regarding causation" in light of Dr. Goodman's "acknowledgement that claimant's x-rays show a pattern that 'indeed is seen in some respiratory illnesses due to occupational dust exposure.'" *Id*. at 22 n. 24. The administrative law judge therefore found that employer did not rebut the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

Employer asserts that the administrative law judge erred in finding that the evidence did not establish rebuttal pursuant to 20 C.F.R. §718.203(b). Employer's Brief at 12-13. Specifically, employer asserts that the administrative law judge erred in summarily discounting Dr. Goodman's opinion and in failing to consider Dr. Crisalli's opinion under 20 C.F.R. §718.203(b). We disagree.

Employer alleges that the administrative law judge "mischaracterizes [Dr. Goodman's] opinion by focusing on one half of the doctor's statement and ignoring the rest of the doctor's statements that[,] although seen in some illnesses due to occupational dust exposure, the findings in [claimant's] case were not found in cases of coal dust exposure." Employer's Brief at 14. Contrary to employer's contention, the administrative law judge considered this aspect of Dr. Goodman's opinion under 20 C.F.R. §718.202(a)(4), and found it to be based on generalities. Specifically, the administrative law judge stated:

> With regard to clinical pneumoconiosis, Dr. Goodman stated that while there are parenchymal findings *consistent* with pneumoconiosis, there are no findings *typical* of coal workers' pneumoconiosis. . . . In addition, he acknowledged that the presence of small irregular opacities in the lower and mid zones is seen in some respiratory illness due to occupational dust

> exposure. However, he does not explain *why* such a pattern is not due to coal dust exposure in this instance.

Decision and Order at 21 (emphasis included). The administrative law judge, therefore, acted within his discretion in finding Dr. Goodman's opinion as to the etiology of claimant's pneumoconiosis "insufficiently well-reasoned." *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 21.

Further, employer alleges that the administrative law judge erred in failing to consider Dr. Crisalli's opinion as to the etiology of the "positive markings" on claimant's x-rays at 20 C.F.R. §718.203. Employer's Brief at 12. The administrative law judge considered Dr. Crisalli's opinion at 20 C.F.R. §718.202(a)(4) and found it to be based on generalities:

> With regard to clinical pneumoconiosis, Dr. Crisalli acknowledged that the x-rays revealed pulmonary fibrosis, but stated that it is not a presentation found with coal workers' pneumoconiosis which "initially" presents as rounded nodules in the upper zones. However, he does not explain his reasoning in light of Dr. Zaldivar's reading of the August 1, 2007 x-ray in which he noted rounded q shaped opacities in the upper zones. Furthermore, I note that Dr. Crisalli is not a B-reader. Finally, his explanation regarding the differences between coal workers' pneumoconiosis and pulmonary fibrosis in his deposition testimony speaks in generalities and not specifically to what is revealed by this particular [c]laimant's x-rays.

Decision and Order at 21. The administrative law judge therefore permissibly found Dr. Crisalli's opinion as to the etiology of the pneumoconiosis seen on claimant's x-rays "insufficiently well-reasoned." *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Williams*, 338 F.3d at 518, 22 BLR at 2-655; *Knizner*, 8 BLR at 1-7; Decision and Order at 21. Consequently, because the administrative law judge considered the opinions of Drs. Goodman and Crisalli relevant to the etiology of the pneumoconiosis seen on the miner's x-ray, and explained his permissible credibility determinations, we affirm his finding that employer failed to rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

Total Disability

Employer additionally challenges the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge found that total disability

was established because both of claimant's blood gas studies were qualifying[7] under 20 C.F.R. §718.204(b)(2)(ii), and all of the physicians opined that claimant is totally disabled by a respiratory or pulmonary impairment.[8] Employer asserts that the administrative law judge erred in failing to address whether the impairment "reflected a primary respiratory or pulmonary disease or the effects of a non-pulmonary disease," namely, heart disease. Employer's Brief at 16. We disagree.

Contrary to employer's assertion, the existence of a totally disabling respiratory or pulmonary impairment, and its causation, are separate inquiries. 20 C.F.R. §718.204(b), (c). The regulations specifically state that "if a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). Therefore, we reject employer's argument that the administrative law judge needed to determine whether claimant's impairment is a "primary respiratory or pulmonary disease" before he could find that total disability is established. As employer raises no other challenge to the administrative law judge's findings at 20 C.F.R. §718.204(b)(2), they are affirmed.

Disability Causation

Relevant to 20 C.F.R. §718.204(c), the administrative law judge considered the opinions of Drs. Zaldivar,[9] Crisalli,[10] and Goodman.[11] The administrative law judge

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendix C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[8] Dr. Zaldivar opined that claimant is "severely impaired overall" and that he has "severe" impairment based on his "abnormal" arterial blood gas studies, indicating that he has hypoxemia. Director's Exhibit 10. Dr. Crisalli opined that claimant does not have the physical capacity to perform his previous coal mine employment "due to the severe diffusion impairment," noting that the arterial blood gas studies showed hypoxemia. Employer's Exhibit 1. Dr. Goodman stated that "claimant surely is disabled from a pulmonary standpoint. . . . [t]he severe reduction in diffusion capacity documented on two separate occasions with pulmonary function testing also speaks strongly for a disabling pulmonary limitation due to gas exchange, making performance of his previous coal mine employment impossible." Employer's Exhibit 6 at 5.

[9] Dr. Zaldivar stated that there is "severe cardiac impairment, hypoxemia due to cardiac disease and fibrosis of undetermined cause plus smoking and [coal workers' pneumoconiosis.]" Director's Exhibit 10. He opined that "most of the impairment is

found that the opinions of Drs. Crisalli and Goodman were entitled to "little weight" because they failed to diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). Further, the administrative law judge found Dr. Zaldivar's opinion to be well-reasoned and documented, stating:

> From his statements, it is apparent that Dr. Zaldivar relied upon [c]laimant's smoking and employment histories and the objective findings of the arterial blood gas studies and the chest x-ray in forming his opinion regarding total disability causation. While Dr. Zaldivar stated that he can not quantify the impairment due to each cause, apportionment of multiple causes is not required. Furthermore, while Dr. Zaldivar attributed impairment "to a lesser degree" to CWP, as stated above [c]laimant need only establish that his totally disabling respiratory impairment was due "in part" to pneumoconiosis. As such, I find Dr. Zaldivar's opinion regarding total disability causation to be sufficiently well-documented and well-reasoned. Therefore, I accord it probative weight.

Decision and Order at 25. The administrative law judge therefore found that the preponderance of the evidence established that claimant's total disability is due in part to pneumoconiosis. *Id*. at 26.

Employer asserts that the administrative law judge erred in failing to resolve whether claimant is disabled by a "primary pulmonary disease" or by heart disease. Employer's Brief at 16. It is not claimant's burden to establish that he is disabled by a "primary pulmonary disease." As stated by the administrative law judge, claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory impairment.[12] Decision and Order at 24, *quoting* 20 C.F.R.

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cardiac," but that there was impairment due to bullous emphysema, pulmonary fibrosis, and "[t]o a lesser degree impairment from [coal workers' pneumoconiosis.]" *Id*.

[10] Dr. Crisalli stated that "[claimant's] hypoxemia is disabling, but is secondary to a combination of factors including [his] coronary artery disease and his pulmonary fibrosis." Employer's Exhibit 1 at 7. Dr. Crisalli further stated that claimant's pulmonary fibrosis "is not a presentation found with coal workers' pneumoconiosis." *Id*.

[11] Dr. Goodman opined that claimant's pulmonary disability is not due to coal dust exposure; rather, it is due to smoking, cardiac illness, and fibrotic lung disease. Employer's Exhibit 6 at 5.

[12] Section 718.204(c)(1) provides that:

§718.204(c); *see also Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989)(holding that a miner "must affirmatively establish only that his totally disabling respiratory impairment . . . was due 'at least in part' to his pneumoconiosis"). Therefore, we reject employer's argument that the administrative law judge did not apply the proper disability causation standard.

Additionally, we reject employer's assertion that the administrative law judge erred in crediting Dr. Zaldivar's opinion over the contrary opinions of Drs. Crisalli and Goodman. Substantial evidence supports the administrative law judge's finding that Drs. Crisalli and Goodman failed to diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). Therefore, the administrative law judge permissibly discounted their opinions as to the cause of claimant's total disability. *See 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); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Further, substantial evidence supports the administrative law judge's finding that Dr. Zaldivar opined that claimant's hypoxemia is due, in part, to clinical pneumoconiosis and that Dr. Zaldivar based his opinion on claimant's blood gas studies, and smoking and work histories. Therefore, the administrative law judge permissibly found Dr. Zaldivar's causation opinion to be adequately reasoned and documented. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Thus, we affirm the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Adams*, 886 F.2d at 825, 13 BLR at 2-63.

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge