BRB No. 11-0429 BLA

AVERY MURPHY (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
IDA CARBON CORPORATION	)	
	)	DATE ISSUED: 03/12/2012
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 Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer, Ida Carbon Corporation (Ida Carbon), appeals the Decision and Order (09-BLA-5306) of Administrative Law Judge Pamela J. Lakes awarding benefits 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). This case involves a miner's claim filed on April 4, 2008. After crediting claimant with seven years of coal mine employment,[1] the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found that the evidence established that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, the administrative law judge awarded benefits.

On appeal, Ida Carbon argues that the administrative law judge erred in finding that claimant's claim was timely filed pursuant to 20 C.F.R. §725.308. Ida Carbon also contends that the administrative law judge erred in designating Ida Carbon as the responsible operator. Further, Ida Carbon contends that the administrative law judge erred in finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Claimant[2] 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, arguing that the administrative law judge correctly determined that claimant's 2008 claim was timely filed. The Director also requests that the Board affirm the administrative law judge's designation of Ida Carbon as the responsible operator. In a reply brief, Ida Carbon reiterates its previous contentions.[3]

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Decision and Order at 2; Director's Exhibit 4; Transcript at 35. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*). Because the administrative law judge found that claimant had fewer than fifteen years of coal mine employment, she determined that a recent amendment to the Act did not affect this case. Decision and Order at 21-22; *see* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[2] Claimant died on December 23, 2009, while his claim was pending before the administrative law judge. Director's Brief at 1 n.1; Employer's Reply Brief at 2 n.1.

[3] Because Ida Carbon does not challenge the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Timeliness of Claim

Ida Carbon argues that the administrative law judge erred in finding that claimant's claim was timely filed pursuant to 20 C.F.R. §725.308. The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).

Ida Carbon argues that claimant received a diagnosis of complicated pneumoconiosis more than three years before he filed this claim in 2008, thus rendering his claim untimely. Ida Carbon relies upon Dr. Jarboe's positive x-ray interpretation dated March 19, 2003, as well as the doctor's August 25, 2004 report. Director's Exhibit 17. The administrative law judge found Ida Carbon's argument unpersuasive. The administrative law judge found that Dr. Jarboe's diagnosis of complicated pneumoconiosis did not constitute "a medical determination of total disability due to pneumoconiosis," and that, even if it did, Ida Carbon "failed to prove that Dr. Jarboe's diagnosis of complicated pneumoconiosis was communicated to claimant more than three years before he filed his 2008 claim." Decision and Order at 13-14.

On appeal, Ida Carbon fails to explain, and a review of the record does not reveal, how a diagnosis of complicated pneumoconiosis, without more, is sufficient to trigger the running of the three-year statute of limitations. In his August 25, 2004 letter to claimant's attorney, Dr. Jarboe noted that, while he interpreted an x-ray as revealing complicated pneumoconiosis, he was unable to determine whether claimant's "pneumoconiosis is a substantial contributing factor to his pulmonary impairment." Director's Exhibit 17. Moreover, Dr. Jarboe did not describe claimant's pulmonary impairment as totally disabling. *Id.* Consequently, the administrative law judge reasonably determined that Dr. Jarboe's x-ray interpretation, and subsequent August 25,

2004 letter, did not constitute "a medical determination of total disability due to pneumoconiosis" necessary to trigger the running of the Section 725.308 statute of limitations. *See Hatfield*, 556 F.3d at 481-82, 24 BLR at 2-151.

Moreover, even if we assume *arguendo* that Dr. Jarboe's diagnosis could trigger the running of the statute of limitations, the administrative law judge found that it was unclear when Dr. Jarboe's diagnosis of complicated pneumoconiosis was communicated to claimant. Ida Carbon contends that communication to claimant's attorney in the August 25, 2004 letter was sufficient to trigger the statute of limitations. Ida Carbon's Brief at 11. We disagree. Section 725.308(a) provides, in relevant part, that "[a] claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis . . . has been communicated to the miner or a person responsible for the care of the miner . . . ." 20 C.F.R. §725.308(a). Under the regulations, communication to the miner's attorney does not constitute communication to the miner unless the attorney is the miner's guardian. 20 C.F.R. §725.308(a); *see Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95, 1-99 (1993). In this case, the administrative law judge rationally determined that there was no credible evidence that Dr. Jarboe's diagnosis of complicated pneumoconiosis was communicated to the miner three years before he filed his claim.[4] As this determination is within the discretion of the administrative law judge to evaluate the evidence, this finding is affirmed. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003). Consequently, we affirm the administrative law judge's determination that Ida Carbon failed to rebut the presumption that claimant's claim was timely filed. *See* 20 C.F.R. §725.308; *Hatfield*, 556 F.3d at 481, 24 BLR at 2-151.

Responsible Operator

Ida Carbon challenges the administrative law judge's determination that it is the responsible operator liable for the payment of benefits. If a miner worked for more than one coal mine operator during his career, the responsible operator is the most recent coal

[4] Relying upon claimant's April 21, 2008 statement, and claimant's July 16, 2008 deposition testimony, Ida Carbon contends that Dr. Jarboe's diagnosis of complicated pneumoconiosis was communicated directly to claimant in 2003. Ida Carbon's argument is unpersuasive. Although claimant referenced Dr. Jarboe's diagnosis of complicated pneumoconiosis in an April 21, 2008 statement, claimant did not indicate when he learned of the diagnosis. Director's Exhibit 5. Likewise, during his deposition, claimant testified that Dr. Jarboe informed claimant's attorney of the diagnosis of complicated pneumoconiosis. Director's Exhibit 19 at 25. Claimant testified that, after he spoke with his attorney, he was aware that he had "black lung," but "didn't know . . . how serious it was." *Id.* at 26.

mine operator to employ the miner, provided that the operator qualifies as a "potentially liable operator." 20 C.F.R. §725.495. In order to qualify as a "potentially liable operator," the operator must have, *inter alia*, employed the miner "for a cumulative period of not less than one year." 20 C.F.R. §725.494(c).

Ida Carbon employed claimant in various positions, from 1982 to 1988, including that of foreman, superintendent, vice president, and general manager. Hearing Transcript at 25. Claimant testified that, while working for Ida Carbon, he was the overseer of production at a surface mine. *Id.* at 26. Ida Carbon does not contest its designation as a "potential responsible operator." Rather, Ida Carbon argues that it was not the potential responsible operator that "most recently employed the miner." Ida Carbon contends that either Bizzack, Incorporated (Bizzack) or Elmo Greer & Sons, Incorporated (Elmo Greer) should have been designated as the responsible operator.

After claimant ceased his employment with Ida Carbon, he ran a bulldozer on road construction projects for Bizzack from 1988 to 2000, and for Elmo Greer from 2000 to 2002. Director's Exhibit 8. The administrative law judge summarized claimant's testimony regarding his work as a bulldozer operator for Bizzack and Elmo Greer, and noted that, at times "during road construction [claimant] would have to strip the coal seam and recover [the] coal," which the construction company then sold.[5] Decision and

[5] As the administrative law judge summarized in detail:

> From 1988 through 2000, Claimant worked full time for Bizzack, Inc., a road construction firm, for which he ran a bulldozer on projects in both Kentucky and West Virginia. He was exposed to coal dust on the job when, during road construction, he would have to strip the coal seam and recover the coal. The coal recovered from coal mine operations was sold by the construction company to bidders. He was exposed to rock or coal dust every day on the job. When he would do a "box cut," that is, when the company would cut through the mountain on both sides, he would be in the coal dust constantly, but when he did a contour cut or side cuts, he would not be in it as often. He said that a box cut could take "[s]everal months" and a contour cut would go faster, and the coal seams could reach forty inches. Claimant testified that the road construction company got paid for the coal they sold, and the profits would be factored into the bid. However, he did not know how much time he spent removing coal relative to the company's other operations. He also helped put in a coal load out near a tipple with J&M Equipment and Construction Company, where coal trucks would dump their coal; after that, he returned to Bizzack Construction. Claimant testified that he received a Steelworkers' pension, but not a United Mine Workers' pension, and he was credited with fourteen years of

Order at 5. The administrative law judge further noted, however, that claimant "did not know how much time he spent removing coal" relative to his other work in non-coal mine employment-related road construction. *Id.*

Although the administrative law judge determined that some of claimant's work for Bizzack and Elmo Greer constituted coal mine employment, she found that the evidence failed to establish that either Bizzack or Elmo Greer employed claimant for one year:

> Because Claimant was unable to provide clear information on the duration or frequency of the "box cuts" that he performed for either Bizzack Construction or Elmo Greer, and as there is no other evidence of record on the issue, I cannot determine whether he was engaged in coal mine employment for at least one year (defined as a calendar year in which he engaged in coal mine employment for at least 125 working days) for either employer. He was employed for both road construction companies for more than one calendar year. During the course of his road construction employment, Claimant likely had significant coal and rock dust exposure. Likewise, during the period of time that he was involved in box cutting and other processes involving coal extraction, he worked as a miner. However, in view of the lack of information as to the duration of these activities, I would have to engage in speculation to find that he worked for at least one year (involving 125 working days) in coal mine employment as defined in the regulations for either construction company. Accordingly, I agree with [the] Director that [Ida Carbon] has failed to show that Claimant engaged in one year of qualifying coal mine employment with either Bizzack or Elmo Greer.

Decision and Order at 20.

Ida Carbon initially contends that, because the district director did not provide Bizzack with notice of the claim, liability in this case should be transferred to the Trust Fund. However, Ida Carbon did not argue, before the administrative law judge, that the

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> construction work. Claimant also testified that he had some work with Mountain Enterprises involving stripping overburden down to limestone rock. From 2001 to 2002, Claimant worked for Elmo Greer & Sons running a bulldozer on road construction operations. He testified it was similar to the Bizzack Construction job, and he was exposed to coal dust.

Decision and Order at 5 (Hearing Transcript citations omitted).

district director's failure to provide Bizzack with notice of the claim prevented Ida Carbon from developing evidence establishing that either Bizzack or Elmo Greer is the proper responsible operator in this case. Therefore, the administrative law judge made no findings for the Board to review regarding the district director's alleged failure to properly notify Bizzack of its status as a potential responsible operator. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). Consequently, we decline to further address Ida Carbon's contentions regarding the district director's handling of this case.[6]

Because the district director identified Ida Carbon as the responsible operator, Ida Carbon bears the burden of proving that it was "not the potentially liable operator that most recently employed the miner." 20 C.F.R. §725.495(c)(2). Ida Carbon contends that Bizzack and Elmo Greer each employed claimant for a cumulative period of at least one year. In support of its contention, Ida Carbon notes that claimant was employed by Bizzack from 1988 to 2000, and by Elmo Greer from 2000 to 2002. Employer's Reply Brief at 8.

Contrary to employer's assertion, a calendar year is not established by showing that more than a year has elapsed between the first and last dates of a miner's employment with a coal mine operator. The regulations define a year as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). The regulations further state that "[t]o the extent the evidence permits, the beginning and ending dates of all periods of employment shall be ascertained." 20 C.F.R. §725.101(a)(32)(ii). Moreover, the "dates and length of coal mine employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits and sworn testimony." *Id.*

[6] Moreover, a review of the record does not reveal that the district director handled this case improperly. While this case was pending before the district director, Ida Carbon was made aware of claimant's subsequent employment with both Bizzack and Elmo Greer. There is no evidence that the district director took any action to prevent Ida Carbon from developing evidence relevant to its designation as the responsible operator. During a July 16, 2008 deposition, Ida Carbon asked claimant specific questions regarding the nature of his employment with Bizzack and Elmo Greer. Employer's Exhibit 19 at 32-35. If Ida Carbon believed that Bizzack was the responsible operator, it could have requested that the district director provide notice to Bizzack of its potential liability. *See* 20 C.F.R. §725.407(d). Ida Carbon, however, never took the position that Bizzack was the responsible operator while the case was before the district director.

As the Director notes, claimant was working as a miner only during the time that he was engaged in the extraction or preparation of coal with Bizzack and Elmo Greer. 20 C.F.R. §725.101(a)(19). Thus, the Director correctly asserts that Ida Carbon had the burden of establishing that claimant spent at least one year extracting coal while employed by Bizzack or Elmo Greer.[7]

In this case, the administrative law judge reasonably found that, given claimant's inability to provide reliable specific testimony regarding the duration of the time that he spent extracting coal, as opposed to the amount of time that he spent performing his general road construction duties, it was impossible for the administrative law judge to determine whether claimant spent a cumulative year engaged in coal mine employment while employed by either Bizzack or Elmo Greer. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Accordingly, we affirm the administrative law judge's finding that Ida Carbon failed to satisfy its burden to show that claimant was engaged in one year of coal mine employment with either Bizzack or Elmo Greer. In light of our affirmance of these findings, neither Bizzack nor Elmo Greer qualifies as a "potential responsible operator." *See* 20 C.F.R. §§725.494, 725.495(a)(1). We, therefore, affirm the administrative law judge's designation of Ida Carbon as the responsible operator.

Section 718.203

Employer argues that the administrative law judge erred in finding that the evidence established that claimant's complicated pneumoconiosis arose out his coal mine employment pursuant to 20 C.F.R. §718.203(c). Pursuant to Section 718.203(c), the administrative law judge noted correctly that, because claimant established less than ten years of coal mine employment, he was required to prove by "competent evidence" that his pneumoconiosis arose out of coal mine employment. Decision and Order at 27. The administrative law judge also accurately noted that claimant need not "establish what portion of his disease is due to non-mine exposure, and what portion is due to mine exposure. It is enough that the mine exposure is an exposure that contributed to the disease at least in part." *Southard v. Director, OWCP*, 732 F.2d 66, 72, 6 BLR 2-26, 2-35 (6th Cir. 1984).

In evaluating whether the evidence established that claimant's complicated pneumoconiosis arose out his coal mine employment, the administrative law judge

[7] The comments to the revised regulations provide support for the interpretation put forth by the Director, Office of Workers' Compensation Programs, regarding the definition of a year of coal mine employment: "The Department believes the partial periods must be aggregated until they amount to one year of coal mine employment comprising a 365-day period." 65 Fed. Reg. 79920, 79960 (Dec. 20, 2000).

considered the opinions of Drs. Jarboe and Habre. Dr. Jarboe opined that claimant's complicated pneumoconiosis was due to his "coal and rock dust in the course of his employment." Director's Exhibit 14. Dr. Habre opined that claimant's pneumoconiosis was due to his occupational history. Claimant's Exhibit 1. The administrative law judge found that "[g]iven [c]laimant's credible testimony that his coal mine dust exposure was constant among his different jobs and Dr. Habre's and Dr. Jarboe's conclusions that his total exposure contributed to his lung disease . . . [c]laimant has successfully established that his coal mine employment made a contribution to his complicated pneumoconiosis." Decision and Order at 30.

Employer argues that the administrative law judge erred in relying upon the opinions of Drs. Jarboe and Habre to support her finding that the evidence established that claimant's complicated pneumoconiosis arose of his coal mine employment pursuant to 20 C.F.R. §718.203(c). We disagree. Employer argues that Dr. Jarboe "did not state that the complicated pneumoconiosis arose, even in part, from claimant's specific qualifying coal mine employment for [seven] years." Employer's Brief at 7. Dr. Jarboe's medical report, however, reveals that the doctor reviewed claimant's employment history, and was aware that claimant worked as both a miner and a road construction worker at different times. Dr. Jarboe's opinion, that claimant's complicated pneumoconiosis was attributable to "coal and rock dust in the course of his employment," is legally sufficient to establish the required causal relation under Section 718.203(c). *See Southard*, 732 F.2d at 72, 6 BLR at 2-35.

Employer also argues that Dr. Habre relied upon an inaccurate coal mine employment history. While the administrative law judge credited claimant with seven years of coal mine employment, Dr. Habre relied upon a twenty-four year history of employment in surface mining.[8] Claimant's Exhibit 1. However, Dr. Harbre opined that the primary etiology of claimant's lung disease was his occupational history. *Id.* Given claimant's testimony that his coal mine dust exposure was constant during his qualifying and non-qualifying employment, the administrative law judge reasonably found Dr. Habre's opinion, that claimant's pneumoconiosis was due to his entire occupational history, to be sufficient to support a finding that claimant's complicated pneumoconiosis was due to his coal mine employment. *See Southard*, 732 F.2d at 72, 6 BLR at 2-35. Because it is based upon substantial evidence, we affirm the administrative law judge's

[8] Employer argues that Dr. Habre relied upon a twenty-four year history of *underground* coal mine employment. Although Dr. Habre characterized claimant's coal mine employment as being underground when he addressed the cause of claimant's pulmonary impairment, Dr. Habre accurately characterized claimant's coal mine employment as "surface mining" in the "Employment History" section of his report. Claimant's Exhibit 1.

finding that the evidence established that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). *Id.*

Accordingly, the administrative law judge's Decision and Order awarding benefits is 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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REGINA C. McGRANERY
Administrative Appeals Judge