BRB No. 11-0443 BLA

ESTATE OF JIMMY YORK[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHAYNE SUPPLY COMPANY	)	DATE ISSUED: 03/23/2012
	)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Paul Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Paul L. Edenfield (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.

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[1] The miner died on January 26, 2008, prior to the hearing. Although the miner was represented by counsel, no representative was found to pursue the miner's interests, and the administrative law judge eventually dismissed the miner as a party to the claim. As interim benefits had been paid by the Black Lung Disability Trust Fund during the miner's lifetime, the Director, Office of Workers' Compensation Programs, exercised his right of subrogation on behalf of the Secretary of Labor. Decision and Order at 2.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5830) of Administrative Law Judge Theresa C. Timlin rendered on a subsequent 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). The administrative law judge credited the miner with 17.75 years of coal mine employment, as stipulated by the parties, and adjudicated this subsequent claim,[2] filed on June 26, 2006, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that the claim was timely filed; that the miner met the statutory definition of a miner under the Act; and that employer was the correctly named responsible operator herein. The administrative law judge further determined that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the weight of the evidence established the existence of legal pneumoconiosis and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b), (c). The administrative law judge further found that the miner was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to establish rebuttal.[3] Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in dismissing the miner as a party and allowing the Black Lung Disability Trust Fund (Trust Fund) to pursue the claim. Employer also challenges the administrative law judge's finding that the work performed for employer constituted work as a "miner" as defined

[2] The miner's initial claim, filed on January 3, 2002, was denied by the district director, who determined that the evidence was insufficient to establish pneumoconiosis or that the miner was totally disabled by the disease. Director's Exhibit 1.

[3] Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

by the Act, and that employer is the properly designated responsible operator. On the merits, employer challenges the administrative law judge's findings of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), as well as her findings that the miner was entitled to invocation of the presumption at amended Section 411(c)(4), and that employer failed to establish rebuttal. The miner's counsel and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the award of benefits. Employer has filed a reply in support of its position.[4]

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.[5] 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 initially contends that the administrative law judge erred in allowing the Trust Fund to pursue this claim, arguing that there was no longer a viable claim or right to which the Trust Fund could be subrogated after the miner was dismissed as a party. Employer's Brief at 8-9. We disagree. The regulations specifically provide that the Director is a party to all black lung claims; that the Secretary of Labor may, as appropriate, exercise subrogation rights in any case where benefit payments have been made by the Trust Fund; and that a claim in which a miner has been paid interim benefits from the Trust Fund cannot be dismissed absent the Director's motion or written agreement. *See* 20 C.F.R. §§725.360(a), 725.465(d), 725.602(b); *Boggs v. Falcon Coal Co.*, 17 BLR 1-62 (1992). In the instant case, the miner received interim benefits from the Trust Fund, and the Director did not file a motion requesting dismissal of the claim or provide his written consent for such a dismissal. Rather, the Director exercised subrogation rights on behalf of the Secretary, and the administrative law judge properly decided the case on its merits. We therefore reject employer's arguments.

Employer next contends that the administrative law judge erred in finding that the miner's work for employer, as a field technician servicing heavy equipment, satisfies the function prong of the test necessary to show that Mr. York was a "miner" under the Act.

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] 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); Decision and Order at 6.

Specifically, employer contends that the administrative law judge failed to make findings regarding how Mr. York's particular work activities were not "merely a convenience" provided to customers, as opposed to activities that were vital or essential to the production and/or extraction of coal. Employer asserts that the administrative law judge erred in finding that the work performed was integral to coal production, arguing that there was no testimony or evidence in the record that operations at any of the mine sites where Mr. York worked would have halted in his absence. Employer's Brief at 9-10; Reply Brief at 2. Employer's arguments lack merit.

The regulatory definition of a "miner" includes "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal," as well as "any person who works or has worked in coal mine construction or maintenance in or around a coal mine." 20 C.F.R. §725.202(a); *see also* 725.101(a)(19). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a situs-function test in determining whether an individual is a "miner" under the Act. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). The situs portion of the test requires that a person's work occur in or around a coal mine or coal preparation facility. *Id*. An individual meets the function requirement if his or her work was necessary and integral to the extraction or preparation of coal. *Id*. The Sixth Circuit has also held that "[t]hose whose tasks are merely convenient but not vital or essential to production and/or extraction are generally not classified as 'miners.'" *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989).

In the present case, the administrative law judge addressed both the situs and the function requirements, and rationally concluded that the miner's work as a field technician/mechanic met the regulatory definition of a miner. In so finding, the administrative law judge considered the testimony of employer's witness, that if the miner's work had not been done, it would have negatively affected coal production by employer's customers, Decision and Order at 5; Hearing Transcript at 32-34; and the miner's testimony, that the mining companies which contracted with employer generally wanted the equipment fixed as quickly as possible, to minimize interference with coal production. Decision and Order at 7; Director's Exhibit 29 at 37-38. Contrary to employer's assertion, the administrative law judge permissibly concluded that since "coal cannot be mined efficiently without the use of machines that the miner was employed to repair, his work was integral to the process of coal production," and met the function requirement. Decision and Order at 7; *see* 20 C.F.R. §725.202(a); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Etzweiler v. Cleveland Bros. Equipment Co.*, 16 BLR 1-38 (1992)(en banc). With regard to the situs prong, the administrative law judge credited the miner's testimony, as corroborated by the miner's direct supervisor, Tim Embry, that 90-95% of the jobs assigned to the miner were at coal mine sites, Director's Exhibit 46-12; that the miner

generally went straight to the mine site without checking in at the office, Hearing Transcript at 37; and that the miner often worked on machines in the coal pits. Director's Exhibit 29 at 13-14; Decision and Order at 7-8. The administrative law judge rationally found that the miner satisfied the situs test, noting that the miner spent nearly all of his working hours on-site at coal mines, and that even if a machine was pushed out of the actual coal pit into an adjacent area, the miner's work was still situated "in or around" the coal mine. Decision and Order at 8; *see Petracca*, 884 F.2d at 931, 13 BLR at 2-41-42. Accordingly, we affirm the administrative law judge's determination that the miner's work satisfied the situs-function test and established that he was a "miner" under the Act.

Employer next challenges the administrative law judge's determination that employer is the properly designated responsible operator herein, arguing that its activities as an independent equipment dealer do not meet the definition of a coal mine operator under the Act.[6] Employer asserts that it cannot be considered a responsible operator, as it only sold or leased equipment to mining companies and provided field service technicians to service the equipment when needed. Employer's Brief at 10-11; Reply Brief at 2-3. Employer's argument lacks merit. The administrative law judge correctly noted that although employer never leased, owned or operated a mine, employer met the regulatory definition of an "operator" pursuant to 20 C.F.R. §725.491(a)(1),[7] as employer was an independent equipment repair contractor whose employees provided services at various coal mines. Decision and Order at 8; s*ee* 20 C.F.R. §725.491(a)(1). As the miner was sent by employer to perform repair services at coal mines, and was regularly and continuously exposed to coal dust while performing his job for employer, we affirm the administrative law judge's determination that employer is an "operator" under the Act. Decision and Order at 8; *see* 20 C.F.R. §725.491; *Etzweiler v. Cleveland Brothers Equipment Co*., 16 BLR 1-38 (1992).

Turning to the merits of entitlement, employer challenges the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4), arguing that the

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[6] Mr. Embry, a service manager with employer, stated that employer is a Caterpillar equipment dealer that sells and services Caterpillar equipment predominantly out of the Hazard store and in the mining area. Hearing Transcript at 27.

[7] Section 725.491(a)(1) provides that the term "operator" shall include:

> any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine.

20 C.F.R. §725.491(a)(1).

administrative law judge failed to adequately consider the relative qualifications of the physicians, and provided no valid reason for crediting the opinion of Dr. Rasmussen over the opinion of Dr. Broudy. Employer's Brief at 11-14; Reply Brief at 3-4. Employer essentially seeks a reweighing of the evidence, which is beyond the scope of our review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

In evaluating the newly submitted medical opinions of record, the administrative law judge initially determined that the miner had a smoking history of 19 pack-years, and that Drs. Rasmussen and Broudy both considered accurate smoking and coal mine employment histories. Decision and Order at 14. While Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD)/emphysema attributable to cigarette smoking and coal dust exposure,[8] Director's Exhibit 19, Dr. Broudy opined that the miner's COPD/emphysema was due solely to cigarette smoking,[9] Director's Exhibits 21,

[8] While finding insufficient evidence of clinical pneumoconiosis, Dr. Rasmussen noted that emphysema (of various types, including centriacinar and panacinar emphysema) is caused by both smoking and occupational dust exposures. He explained that:

> The mechanism by which dust and smoke causes lung tissue destruction is identical involving identical stimulation or activation of the lung scavenger cells, which unleashes identical cellular and enzymatic cascade. Occupational dust exposure can cause disabling emphysema even absent radiographic changes of pneumoconiosis.

Director's Exhibit 19. Dr. Rasmussen concluded that the miner's legal pneumoconiosis was a significant contributing cause of his disabling lung disease, noting that:

> [The miner's] very severe lung disease appears to be out of proportion to [his smoking and coal dust exposures,] suggesting he has an unusual susceptibility to these adverse substances. However, his occupational dusts including his 18 years of coal mine dust exposure must be considered a significant contributing cause.

Director's Exhibit 19.

[9] Dr. Broudy reviewed the medical report of Dr. Rasmussen and performed examinations on March 27, 2003 and on December 22, 2006. In 2003, Dr. Broudy diagnosed a severe obstructive airway disease with secondary restriction, and in 2006, he diagnosed severe obstruction with no response to bronchodilation. Dr. Broudy determined that the miner did not retain the respiratory capacity to perform his work as a

23. Decision and Order at 12-14. Finding that Dr. Rasmussen considered the miner's relative exposures and persuasively explained the rationale behind his diagnosis, the administrative law judge acted within her discretion in concluding that Dr. Rasmussen's opinion was well-reasoned and entitled to full probative weight. Decision and Order at 14-15; *see 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). By contrast, the administrative law judge determined that Dr. Broudy failed to explain why he opined that smoking was very likely to have caused the miner's impairment and that coal dust was an unlikely factor, given the roughly equal length of the miner's exposure to both smoking and coal dust. Finding that Dr. Broudy also failed to explain why coal dust exposure was not a contributing or aggravating factor, the administrative law judge permissibly determined that his opinion was inadequately reasoned and entitled to less weight. Decision and Order at 15, *citing* 20 C.F.R. §718.201; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Thus, the administrative law judge concluded that the weight of the newly submitted evidence established the presence of legal pneumoconiosis, and a change in an applicable condition of entitlement pursuant to Section 725.309. Decision and Order at 15.

Considering the entire record, the administrative law judge determined that the opinion of Dr. Baker was equivocal, as the physician diagnosed COPD, chronic bronchitis and hypoxemia due to "cigarette smoking/question coal dust exposure," but also checked a box indicating that the miner's lung disease was not caused by his coal mine employment. Decision and Order at 17; Director's Exhibit 1; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Additionally, in view of the progressive nature of pneumoconiosis, the administrative law judge properly found that Dr. Baker's 2002

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coal miner, and that his very severe obstruction with large lungs, indicating pulmonary emphysema, was due to cigarette smoking. He explained that:

> When coal dust exposure causes severe impairment, the lungs are usually small and the defect is restrictive, or at least a mixed restrictive and obstructive defect. In this case, the lungs are large suggesting hyperinflation due to emphysema from cigarette smoking.

Director's Exhibit 21.

Dr. Broudy further stated that, given the patient's history of exposures, it is far more medically likely that the impairment is due to cigarette smoking and COPD resulting therefrom, and that it is medically improbable that any of the miner's impairment is related to the inhalation of coal dust. Director's Exhibits 21, 23.

opinion was not as probative as the more recent medical opinions, and was entitled to less weight. Finding that Dr. Rasmussen provided the most persuasive rationale for his diagnosis, the administrative law judge permissibly concluded that weight of the evidence of record was sufficient to establish the existence of legal pneumoconiosis at Section 718.204(a)(4). Decision and Order at 17; *see Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22. We reject employer's contention that the administrative law judge erred in failing to give proper consideration to the qualifications of Drs. Broudy and Baker, as the administrative law judge correctly noted the doctors' respective qualifications, but was not required to assign determinative weight based on qualifications alone. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm her findings that the newly submitted evidence was sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), and that the weight of the evidence of record established the existence of legal pneumoconiosis at Section 718.202(a).

We also reject employer's assertion that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Employer's Brief at 12. Because Drs. Broudy and Baker did not diagnose legal pneumoconiosis, in direct conflict with the administrative law judge's finding, the administrative law judge properly concluded that their opinions were entitled to little weight on the issue of the cause of the miner's totally disabling respiratory impairment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge acted within her discretion in finding that Dr. Rasmussen provided a reasoned and documented opinion demonstrating that the miner's total disability was due, at least in part, to coal dust exposure, and we affirm her finding of disability causation at Section 718.204(c), as supported by substantial evidence. Decision and Order at 22; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1988).

Because the administrative law judge determined that, even without the benefit of the amended Section 411(c)(4) presumption, the miner demonstrated by a preponderance of the evidence that he was totally disabled due to pneumoconiosis arising out of coal mine employment, we affirm the award of benefits. Thus, we need not reach employer's arguments regarding the conditions of the miner's coal mine employment.

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