BRB No. 08-0661 BLA

D.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL RIDGE MINING CORPORATION	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 05/27/2009
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia for claimant.

Anne Musgrove Rife (Penn, Stuart & Eskridge), Abingdon, Virginia for employer.

Michelle S. Gerdano (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (06-BLA-5631) of Administrative Law Judge Edward Terhune Miller (the administrative law judge)

rendered on a subsequent claim[1] 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). This case involves a claim filed on March 9, 2005. Director's Exhibit 4. The administrative law judge did not make an explicit finding as to the length of claimant's coal mine employment.[2] The administrative law judge found that employer conceded the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and therefore that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge determined that the existence of pneumoconiosis was established by Administrative Law Judge V.M. McElroy's affirmative finding in his April 27, 1987 decision denying claimant's first claim for benefits. Decision and Order at 13. Additionally, the administrative law judge found that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that Dr. Rasmussen's opinion established that claimant's totally disabling respiratory impairment is due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis based upon Judge McElroy's finding that employer previously stipulated to the existence of pneumoconiosis. Employer also contends that the administrative law judge erred in finding that claimant was entitled to the rebuttable presumption of 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, because the administrative law

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[1] Claimant's initial claim, filed on January 8, 1981, was denied by Administrative Law Judge V.M. McElroy, on April 27, 1987. Director's Exhibit 1 at 6. Judge McElroy, finding that employer conceded the existence of pneumoconiosis based on the opinion of employer's expert, Dr. Sargent, determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge McElroy further found that employer successfully rebutted the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, Judge McElroy denied benefits. *Id.* The record does not reflect that any further action was taken until claimant filed a second claim for benefits on June 27, 2002. Director's Exhibit 2. Claimant's second claim was denied by the district director on May 6, 2003, for failure to establish any element of entitlement. Director's Exhibit 2 at 7. Claimant took no further action until filing the present claim for benefits on March 9, 2005. Director's Exhibit 4.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

judge erred in counting claimant's twenty-two years as a state mine inspector as qualifying coal mine employment. Claimant 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, agreeing with employer's contention that the administrative law judge erred in finding that employer previously stipulated to the existence of pneumoconiosis.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, 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*).

20 C.F.R. §718.202(a): Existence of Pneumoconiosis

Employer and the Director assert that the administrative law judge erred in finding that employer stipulated to the existence of pneumoconiosis in claimant's initial claim for benefits, and that therefore, the existence of pneumoconiosis is established for purposes of the current claim. We agree.

The administrative law judge found that claimant established the existence of pneumoconiosis because employer was bound by a "stipulation" it allegedly made in claimant's initial 1981 claim. In so finding, the administrative law judge applied 20 C.F.R. §725.309(d)(4), which provides that:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463), shall be binding on any party in the adjudication of the subsequent claim. However,

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2), and thereby established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

> any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(d)(4).

The administrative law judge found that, based on the 1987 decision of Judge McElroy, employer had stipulated to the existence of pneumoconiosis, which "is deemed binding" in the current claim. Decision and Order at 13. In the 1987 decision, Judge McElroy stated that "[a]lthough employer, at the hearing, stated that the existence of pneumoconiosis was at issue, it was indicated in the written Closing Argument that Dr. Sargent's opinion that Claimant has pneumoconiosis establishes its existence. I therefore find that the existence of pneumoconiosis has been established under Section 718.202(a)(4) as conceded by the employer." Director's Exhibit 1 at 4 (citations omitted).

Assuming, *arguendo*, the applicability of 20 C.F.R. §725.309(d)(4) to the proceedings in claimant's 1981 claim,[4] the administrative law judge erred in finding that employer stipulated to the existence of pneumoconiosis. Employer argues that it never stipulated to the existence of pneumoconiosis. Further, as the Director asserts, the actual pleading in which the stipulation is said to be contained does not appear in the record. In the absence of that pleading, there is no basis to find that employer stipulated to the existence of pneumoconiosis. *See Rose v. Saginaw County*, 353 F.Supp.2d 900, 917 (E.D. Michigan 2005)(holding that the validity of a stipulation depends on "clear and unequivocal expression" of agreement). As the Director further asserts, Judge McElroy's description of employer's hearing brief lacks sufficient specificity to demonstrate employer's actual intent. Judge McElroy did not quote from the brief, nor describe the brief's language as a stipulation of pneumoconiosis. Instead, he noted that employer stated in its brief that its expert's medical opinion "establishes" the existence of pneumoconiosis. In the absence of the original brief, however, it is unclear whether

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[4] Employer argues, *inter alia*, that 20 C.F.R. §725.309(d)(4), as revised effective January 19, 2001, cannot apply retroactively to stipulations made in claims filed before that date. The Director, Office of Workers' Compensation Programs (the Director), argues that Section 725.309(d)(4) applies only to the prior claim that immediately precedes the pending subsequent claim. The Director points out that no stipulations were made in claimant's immediately preceding, 2002 claim; however, he argues that the Board need not address this issue, given the lack of clear evidence that employer intended to stipulate to the existence of pneumoconiosis in claimant's initial claim. Based on our holding that the administrative law judge erred in finding that employer stipulated to the existence of pneumoconiosis, *see infra* at 5, we decline to address these issues at this time.

Judge McElroy accurately characterized employer's language as a clear stipulation that claimant suffered from pneumoconiosis, or whether employer was describing the conclusions of its medical expert.

Consequently, as there is no clear evidence that employer intended to stipulate to the existence of pneumoconiosis, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and remand this case for further consideration. On remand, the administrative law judge must determine whether the evidence of record as a whole establishes the existence of clinical or legal pneumoconiosis, or both, under 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

20 C.F.R. §718.203(b): Pneumoconiosis Arising out of Coal Mine Employment

Employer argues that, on remand, should claimant establish the existence of pneumoconiosis, he is not entitled to the rebuttable presumption of 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment, as this presumption requires at least ten years of coal mine employment. In this regard, employer contends that the administrative law judge erred in determining that claimant's time spent working as a mine inspector for the state of Virginia from 1977 to 1999 constituted coal mine employment. Employer argues that this time must be subtracted from the twenty-nine years of coal mine employment found by the district director, resulting in a finding that claimant has only seven years of coal mine employment.

As an initial matter, the administrative law judge must make a specific finding as to the length of claimant's coal mine employment, which was raised as a hearing issue. Director's Exhibit 31. The record reflects that claimant has alleged coal mine employment from 1954 to 1966, and from 1972 to 1977, prior to his time spent working as a state mine inspector. Director's Exhibits 1 at 426-27; 2 at 111. The record contains evidence, including Social Security earnings records pertaining to these time periods, which, if credited, may establish that claimant worked for at least ten years in coal mine employment before he became a mine inspector. Director's Exhibits 1 at 267, 271-72, 364-371; 2 at 87-106. If claimant establishes that he worked for at least ten years in coal mine employment, he will be entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203(b).

We address employer's contention that the administrative law judge erred in considering claimant's time spent working as a mine inspector from 1977 to 1999 to be coal mine employment, in the event that the administrative law judge finds, on remand, that claimant worked for less than ten years in coal mine employment between 1954-66 and 1972-77.

Under 20 C.F.R. §725.202, there is a "rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). The Board has held that a coal mine inspector is a miner under the Act. *See Bartley v. Director, OWCP*, 12 BLR 1-89, 1-90-91 (1988)(Tait, J., concurring); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2, 1-43-44 (1981). However, employer notes that the United States Court of Appeals for the Fourth Circuit has suggested that the work of a federal mine inspector is not the work of a miner under the Act. In *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989), the claimant first worked as a coal miner in Pennsylvania and subsequently worked as a federal mine inspector in the Commonwealth of Virginia. The claimant petitioned the Fourth Circuit to review the Board's decision affirming a denial of benefits. In holding that jurisdiction was in the Third Circuit because "all of claimant's coal mine employment and coal dust exposure" had occurred in Pennsylvania, the Court stated that "any coal dust exposure that claimant suffered while working for the federal government in Virginia cannot qualify as an injury under the Black Lung Benefits Act."[5] 877 F.2d at 309, 12 BLR at 2-302.

Considering the issue of claimant's status as a miner, the administrative law judge in this case determined that under the Fourth Circuit's situs and function tests, claimant's work as a mine inspector constituted the work of a "miner" under the Act because claimant credibly testified that his work as a state coal mine inspector was both integral to and essential to the coal production process. The administrative law distinguished *Kopp* because *Kopp* dealt with the issue of appellate jurisdiction, the court's language was *dicta*, and because, unlike the claimant in *Kopp*, claimant "was not working for the federal government in Virginia inspecting Pennsylvania mines." Decision and Order at 6.

However, as employer states, in an unpublished case, the Fourth Circuit, citing *Kopp*, agreed with the Director's argument that a claimant's employment as a federal mine inspector did not meet the statutory definition of a miner for the purposes of establishing eligibility for black lung benefits. *See McGraw v. OWCP*, 908 F.2d 967 (Table), 1990 WL 101412 (4th Cir., July 10, 1990). Moreover, the Board, applying

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[5] In reaching this conclusion, the Court cited its holding in *Eastern Associated Coal Corp. v. Director, OWCP* [*Patrick*], 791 F.2d 1129, 1131 (4th Cir. 1986), that a federal mine inspector's exclusive remedy for on-the-job coal dust exposure was through the Federal Employees' Compensation Act, 5 U.S.C. §8116(c). In *Patrick*, however, the court expressly declined to decide the specific issue of whether a mine inspector is a miner under the Act, noting that that issue "will be critical when a claimant needs the time spent as an inspector to qualify for the provision in 20 C.F.R. §725.203 (1985) that one who has worked as a miner for 10 years may be presumed to be disabled from pneumoconiosis." 791 F.2d at 1131. From the context of the court's discussion, it appears that the court meant to refer to the presumption of 20 C.F.R. §718.203(b).

Kopp, has held that, where a claimant worked as a mine inspector for the state of Virginia, since Virginia cannot be a responsible operator, the length of claimant's tenure with the state should be subtracted from the length of coal mine employment to be credited to him by the administrative law judge. *See Breeding v. Colley & Colley Coal Co.*, BRB No. 88-1072 BLA, slip op. at 5-6 (Oct. 13, 1994)(*en banc* recon.)(unpub.). Consequently, the administrative law judge, on remand, should take all of the foregoing into account, and make a specific determination as to the length of claimant's coal mine employment.

20 C.F.R. §718.204(c): Total Disability Due to Pneumoconiosis

In light of our determination to vacate the administrative law judge's finding as to the existence of pneumoconiosis, we additionally vacate his finding that pneumoconiosis is a substantially contributing cause of claimant's total disability under 20 C.F.R. §718.204(c). If reached, on remand, the administrative law judge must again consider the relevant evidence on this issue and explain his credibility determinations pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge