BRB No. 05-0132 BLA

JAMES C. MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANIELS COMPANY	)	
	)	DATE ISSUED: 11/30/2005
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 on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Kathy L. Snyder, (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (02-BLA-0186) of Administrative Law Judge Linda S. Chapman denying employer's request for modification of a decision awarding benefits on a 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). This case has been before the Board twice previously. In the Board's last decision, we affirmed the administrative law judge's finding that claimant, who is now deceased,[1] was entitled to benefits, but we remanded the case for the administrative law judge to consider employer's argument on modification that it was not the responsible operator. *Mitchell v. Daniels Co.*, BRB Nos. 01-0364 BLA, 03-0134 BLA, slip op. at 9, 10-13 (Feb. 12, 2004)(unpub.). Accordingly, we now focus primarily on the procedural history of this claim as it relates to the administrative law judge's decision to deny employer's modification request on the responsible operator issue. Both the Director, Office of Workers' Compensation Programs (the Director), and claimant urge affirmance of that decision.

Claimant filed his application for benefits on January 8, 1997. Director's Exhibit 1. Employer was notified of the claim and controverted its liability. Director's Exhibit 27. The district director held an informal conference on the claim and subsequently, on September 29, 1997, issued a Proposed Decision and Order Memorandum of Conference. Director's Exhibit 29. In the Proposed Decision and Order, under the heading "Resolved Issues," the district director found that "[a]ll parties agreed that [employer] meets all requirements for designation as the responsible operator," and that claimant had "12 years of employment as a coal miner." Director's Exhibit 29 at 3. The district director additionally found that claimant did not establish that he was totally disabled due to pneumoconiosis, and denied benefits. Director's Exhibit 29 at 9.

The Proposed Decision and Order Memorandum of Conference was served on the parties; it stated that the parties had thirty days to object in writing to all or to any part of the district director's recommendations. Director's Exhibit 29 at 1. The parties were further informed that any recommendations not rejected within thirty days would be deemed accepted. *Id*. Only claimant responded to the Proposed Decision and Order, and requested a hearing on his entitlement to benefits. Director's Exhibit 30. Accordingly, the only issue identified as contested for the hearing was whether claimant was totally disabled. Director's Exhibit 31.

At the October 7, 1998 hearing before Administrative Law Judge Stuart A. Levin, employer appeared without counsel; instead, it was represented by its personnel director and a shop foreman. Although the sole issue set for hearing was claimant's entitlement to benefits, employer's representatives raised questions as to the extent of claimant's coal mine employment and the extent of his dust exposure while doing repair and construction work at tipples. Director's Exhibit 42 at 10, 11, 22, 37-60.

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[1] On November 5, 2004, claimant's counsel notified the Board of the claimant's death.

In a Decision and Order awarding benefits issued on May 18, 1999, Judge Levin found that at the district director's informal conference, the parties had agreed that employer was the responsible operator and that claimant had twelve years of coal mine employment. Director's Exhibit 40 at 1. In view of employer's representatives' statements at the hearing, however, Judge Levin additionally found that the stipulations were supported by the record. Director's Exhibit 40 at 2 and n.2.

Upon review of employer's appeal, the Board held that employer was bound by the district director's finding in the Memorandum of Conference that employer was the responsible operator because employer failed to object to the finding. *Mitchell v. Daniels Co.*, 22 BLR 1-73, 1-77 (2000). The Board further held that substantial evidence supported Judge Levin's finding that employer was the responsible operator. *Mitchell*, 22 BLR at 1-77 n.2. However, the Board remanded the case for Judge Levin to consider and weigh all of the relevant evidence regarding the existence of complicated pneumoconiosis to determine whether claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304. *Mitchell*, 22 BLR at 1-78-79.

On remand, Judge Levin again awarded benefits pursuant to 20 C.F.R. §718.304. Director's Exhibit 65. Employer appealed to the Board, but subsequently filed a request for modification with the district director pursuant to 20 C.F.R. §725.310 (2000).[2] Director's Exhibits 78, 79. On May 7, 2001, the Board dismissed employer's appeal, subject to reinstatement, and remanded the case to the district director. Director's Exhibit 80.

In employer's modification petition, it alleged that Judge Levin had mistakenly found that employer was the responsible operator and that claimant had complicated pneumoconiosis. Director's Exhibit 79. After the district director denied modification, employer requested a hearing, which was held before Administrative Law Judge Linda S. Chapman on June 26, 2002. Director's Exhibits 86, 87. In a Decision and Order issued on September 18, 2002, the administrative law judge denied employer's modification request and awarded benefits. The administrative law judge determined that Judge Levin's findings that claimant worked as a miner for employer for twelve years and that employer was the responsible operator were the law of the case and could not be challenged by employer on modification.

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[2] The recent revisions to 20 C.F.R. §725.310 do not apply to claims such as this one that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

Employer appealed the administrative law judge's decision and requested reinstatement of its appeal of Judge Levin's decision on remand. The Board rejected employer's allegations of error in Judge Levin's decision, and affirmed the administrative law judge's finding on modification that claimant established the existence of complicated pneumoconiosis and thus was entitled to benefits pursuant to 20 C.F.R. §718.304. *Mitchell v. Daniels Co.*, BRB Nos. 01-0364 BLA, 03-0134 BLA, slip op. at 9 (Feb. 12, 2004)(unpub.). However, the Board remanded the case for the administrative law judge to consider the responsible operator and length of coal mine employment issues raised in employer's modification petition. Specifically, the Board held that, contrary to the administrative law judge's analysis, the law of the case doctrine is generally inapplicable on modification. *Mitchell*, slip op. at 11. We also observed, however, that the parties could be bound on modification by their earlier stipulations, so long as the parties fairly entered into them. *Mitchell*, slip op. at 11-13, discussing *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), and *Sullivan v. Newport News Shipbuilding and Dry Dock Co*., No. 96-1922, 1997 WL 425686 (4th Cir. Jul. 30, 1997). Because the administrative law judge had not considered that issue, we remanded the case for her to "determine whether the stipulation [that] employer meets all of the requirements of being the responsible operator had been fairly entered into by the parties." *Mitchell*, slip op. at 13. We instructed the administrative law judge that if she found that the parties fairly entered into the stipulations, she could permissibly find that there was no mistake in a determination of fact in Judge Levin's acceptance of the parties' stipulations. *Id*. We additionally instructed her that if she found that the stipulations were not fairly entered into, she should make findings as to the length of claimant's coal mine employment and whether employer met the requirements of a responsible operator. *Id*.

On remand, the administrative law judge initially reiterated her belief that it was "against the interests of justice under the Act" to allow employer to reopen the responsible operator and length of coal mine employment determinations in this case. Decision and Order on Remand at 9. The administrative law judge then found that the responsible operator and length of coal mine employment stipulations were fairly entered into in 1997 and remained binding on employer on modification. Decision and Order on Remand at 10-12. Although employer argued that it did not fairly enter the stipulations because it was not present at the district director's 1997 informal conference,[3] and the administrative law judge found that employer did not attend, the administrative law judge concluded that employer nevertheless fairly accepted the responsible operator and length of coal mine employment stipulations by failing to respond to the district director's Memorandum of Conference. Decision and Order on Remand at 11-12. Additionally,

[3] Review of the record reflects that this was the first point in the claim proceedings at which employer stated that it was not present at the informal conference in 1997.

the administrative law judge found that even if the stipulations had not been fairly entered into, the record supported a finding that employer was the responsible operator and that claimant had twelve years of coal mine employment. Decision and Order on Remand at 12-15. Accordingly, the administrative law judge found that Judge Levin made no mistake in any determination of fact, and she ordered employer to pay benefits to claimant. Decision and Order on Remand at 16.

On appeal, employer argues that the administrative law judge erred in considering whether modification of the decision awarding benefits would be in the interest of justice and in finding that employer had fairly entered into stipulations that it is the responsible operator and that claimant had twelve years of coal mine employment. Employer contends that it was unduly prejudiced by the administrative law judge's reliance on these stipulations. Recognizing that the administrative law judge made alternative findings that the record supported the stipulations, employer argues that the administrative law judge erred in both determinations and that therefore entitlement and liability must be reconsidered. Claimant urges affirmance of the administrative law judge's decision and the Director responds to employer's appeal, addressing only the responsible operator issue; the Director argues that the administrative law judge reasonably applied the regulations to determine that employer is the responsible operator in the case at bar. Employer has filed a reply brief reiterating its contentions.[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. 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).

There is no merit to employer's argument that the administrative law judge erred in considering whether granting its request to modify the prior decision awarding benefits would be in the interest of justice. In the only published decision addressing this issue, the United States Court of Appeals for the Fourth Circuit declared that the modification procedure is "intended to secure justice under the act." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999). Building upon the false premise that the administrative law judge erred in considering whether modification would be in the interest of justice, employer contends that because the

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[4] The Board has received employer's motion requesting the Board to set oral argument in the captioned case. 20 C.F.R. §802.305. No response to employer's motion has been received. The Board has determined that the issues raised do not warrant oral argument. Employer's request for oral argument is therefore denied. 20 C.F.R. §802.306.

administrative law judge found it would not be in the interest of justice in the instant case, her decision should be reversed or vacated. Employer overlooks the fact that the administrative law judge did not rely upon that determination to deny employer's request; instead, she fully considered the evidence and addressed employer's arguments before concluding that employer had not proven a mistake in a determination of fact. 33 U.S.C. §922. Thus, the administrative law judge's discussion of the modification procedure provides no basis to reverse or vacate her decision.

There is merit, however, to employer's argument that the administrative law judge erred in finding that employer fairly entered into stipulations before the district director. The record reflects, as the administrative law judge found, that employer did not participate in the informal conference before the district director. Director's Exhibit 29. The United States Court of Appeals for the Fourth Circuit has held that a valid memorandum of conference cannot be issued when the parties are not present to discuss and resolve the relevant questions. *Wellmore Coal Corp. v. Stiltner*, 81 F.3d 490, 497, 20 BLR 2-211, 2-224-25 (4th Cir. 1996). Because the "stipulations" at issue were contained in the Memorandum of Conference held in employer's absence they are a nullity and can play no part in the administrative law judge's decision on entitlement or liability for benefits. *See Stiltner*, 81 F.3d at 497-98, 20 BLR at 2-226.

Employer contends that the administrative law judge relied upon the stipulations and as a result, her decisions on both entitlement and liability are fatally flawed. Recognizing that the administrative law judge held alternatively that the record supported both stipulations, employer argues that these determinations were likewise in error and the decision should be vacated or the case remanded for reconsideration. We disagree. Our review of the record reveals that the administrative law judge did not rely upon the stipulations to determine either entitlement or the responsible operator.

First, employer asserts that the administrative law judge relied upon the years of coal mine employment "stipulation" both to find that claimant had established that his pneumoconiosis arose out of coal mine employment and to "discredit [] the medical reports from physicians who did not base their assessment on twelve years of coal mine employment . . . ." Brief for Employer at 23. The unspoken premise of employer's argument is that claimant could not prove that his complicated pneumoconiosis arose out of coal mine employment, a requisite element of entitlement, unless the "stipulation" to twelve years of coal mine employment gave claimant the benefit of the presumption at 20 C.F.R. §718.203(b) (it is presumed that the pneumoconiosis of a miner who was employed at least ten years in coal mine employment arose out of this employment). However, the record reflects that every time this case was before an administrative law judge, at issue was whether the anomalies shown on x-ray constituted complicated pneumoconiosis arising out of coal mine employment and the issue was resolved without benefit of the presumption. Hence, the administrative law judge properly denied

employer's petition for modification because employer failed to prove a mistake in fact in Judge Levin's decision awarding benefits based on a findings of complicated pneumoconiosis arising out of coal mine employment. 2002 Decision and Order at 11-13. For that reason, the Board affirmed the administrative law judge's decision on entitlement and remanded the case to reconsider only the stipulation issue.

At the first hearing in this case, employer argued that claimant's evidence of complicated pneumoconiosis should not be credited because claimant had worked in coal mine employment for only 670 hours over a fourteen-year period. Hearing Transcript (Tr.) at 52. In response, claimant questioned the accuracy of employer's records and argued that notwithstanding how the length of claimant's coal mine employment was calculated, he had proved with medical evidence the existence of complicated pneumoconiosis arising out of coal mine employment. Tr. at 62. Persuaded by claimant's argument, Judge Levin concluded that claimant had established complicated pneumoconiosis arising out of coal mine employment based upon evidence in the record: that x-ray evidence showed claimant had a history of pneumoconiosis; that the "record is replete with readings of highly qualified physicians that the claimant has complicated pneumoconiosis," that "[c]ancer has been ruled out, and a final diagnosis of complicated pneumoconiosis made," and that claimant's only exposure to coal and silica dust occurred in claimant's coal mine employment. 1999 Decision and Order at 5. On appeal to the Board, counsel for employer argued that the administrative law judge could not find that claimant contracted pneumoconiosis arising out of coal mine employment without first determining claimant's years of coal mine employment and dust exposure. 1999 Brief for Employer, Director's Exhibit 52 at 16-17. Employer also asserted the administrative law judge had not properly weighed the evidence of complicated pneumoconiosis against the contrary evidence. The Board remanded the case for reconsideration of that part of the x-ray evidence showing only simple pneumoconiosis, and Dr. Navani's opinion diagnosing simple pneumoconiosis and ruling out complicated pneumoconiosis. *Mitchell*, 22 BLR at 1-78.

In a brief to Judge Levin on remand, employer pointed to evidence of tuberculosis in the record. Judge Levin found that although claimant had undergone repeated testing for tuberculosis he had never been diagnosed with the disease. 2000 Decision and Order, Director's Exhibit 65 at 4. Judge Levin explained that he assigned greater weight to the most recent x-rays and that thirteen of the fifteen readings of these x-rays by B readers showed complicated pneumoconiosis. *Id.* at 6. Finally, Judge Levin considered Dr. Navani's interpretation of a CT scan stating that it showed coal workers' pneumoconiosis with a strong tendency for coalescence but it had not yet become a size A opacity; Dr. Navani had also stated that he had not had the benefit of an x-ray at the time of his interpretation. The administrative law judge observed that Dr. Navani's CT scan interpretation had been disputed by an equally qualified radiologist; accordingly the

administrative law judge concluded the CT scan evidence did not rule out the presence of complicated pneumoconiosis which had been established by x-ray. *Id*. at 7.

Counsel for employer appealed Judge Levin's decision but withdrew that appeal after petitioning for modification. Employer submitted additional evidence regarding claimant's coal mine employment history, including a revised calculation of the number of hours worked between 1979 and 1986 (the earlier calculation was 670 hours, the later calculation was 832.5 hours); employer also submitted six medical reports. Thereafter, a hearing on employer's modification petition was held by Administrative Law Judge Linda S. Chapman (the administrative law judge). The administrative law judge held that employer's evidence was insufficient "to establish that the claimant had no significant periods of coal dust exposure, or that the frequency of his coal dust exposure was so slight that it could not have caused pneumoconiosis." 2002 Decision and Order at 12. She stated:

> [A]s Judge Levin noted, the testimony of the Claimant and Mr. Knight showed that the claimant was exposed to coal dust when he worked at the tipples. This is also consistent with the Claimant's testimony in his recent deposition. The regulations provided that there is a rebuttable presumption that during the course of an individual's employment, he was regularly and continuously exposed to coal dust. 20 C.F.R. Section 725.492(c). In order to rebut this presumption, the Employer must establish that there were no significant periods of coal dust exposure. *Conley v. Roberts & Schaefer Coal Co*., 7 BLR 1-309 (1984). The frequency of exposure must be so slight that employment with the Employer could not have caused pneumoconiosis. *Richard v. C & K Coal Co.,* 7 BLR 1-372 (1984).

2002 Decision and Order at 11-12. The administrative law judge observed that "even assuming the accuracy of [employer's] . . . calculations of 670 hours" between 1979 and 1986, the records did not provide a clear account for the remaining fifteen years during which claimant was employed as a miner with employer. Hence, the administrative law judge concluded employer failed to prove that claimant's coal dust exposure was too slight to have caused pneumoconiosis.

In making this determination, the administrative law judge also considered the medical opinions employer had submitted on modification. It is the function of the administrative law judge to weigh the medical opinions, to make credibility determinations, and to draw his or her own conclusions. *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). She found that Drs. Fino, Meyer, Wiot, Spitz, and Zaldivar acknowledged that the abnormalities shown on claimant's x-rays and CT scans make both simple and complicated pneumoconiosis at least a "consideration." 2002 Decision and Order at 11. These doctors had concluded,

however, that the abnormalities shown must be something other than pneumoconiosis because employer had advised them that claimant had had only one hundred and thirty days of coal dust exposure over a fifteen year period, which they deemed insufficient to develop simple or complicated pneumoconiosis. *Id.* The administrative law judge held that these opinions did not prove that claimant's abnormalities are not pneumoconiosis because employer's records, as Judge Levin had correctly found, showed at least six hundred and seventy hours; furthermore, the records did not account for the periods of 1966 through 1978 and 1987 through 1988 when claimant had coal mine employment, which is established by claimant's credible testimony and Social Security records. *Id.* at 12; Hearing Transcript at 67-68. She reasoned that because the evidence which employer chose to rely upon was premised on a history of coal dust exposure which is less than claimant's, it could not undermine the credibility of the x-ray readings of complicated pneumoconiosis. Moreover, because an erroneous coal mine employment history was the basis on which these doctors excluded a finding of complicated pneumoconiosis, the administrative law judge considered that their opinions can be seen as "support [for] a finding not only that the abnormalities on the Claimant's x-ray qualify as complicated pneumoconiosis, but that the Claimant, who had no exposure to coal dust or silica in any other employment, was regularly and continuously exposed to coal dust." *Id.*; *see Underwood*, 105 F.3d at 949, 22 BLR at 2-28. Finally, the administrative law judge rejected employer's last medical opinion, from Dr. Branscomb, because he had not explained his "bald conclusion" that even if claimant had had sufficient coal dust exposure, the objective evidence would not justify a diagnosis of pneumoconiosis or any coal dust related disorder. 2002 Decision and Order at 12; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997)(holding that an administrative law judge should consider "the explanation of [the] opinions"). Thus, the administrative law judge concluded that there was no mistake in fact in Judge Levin's determination that claimant had established the existence of complicated pneumoconiosis by x-ray evidence. 2002 Decision and Order at 13.

Employer appealed the administrative law judge's decision denying modification and sought reinstatement of its appeal of Judge Levin's 2000 Decision and Order. The Board granted employer's request but rejected employer's arguments that Judge Levin had erred in his consideration of the medical opinion evidence. Specifically, the Board held that Judge Levin had correctly found that the presence of tuberculosis had never been confirmed and that none of the x-rays had been interpreted as showing tuberculosis. The Board also found that Judge Levin did not err in his consideration of the evidence by failing to evaluate the "credibility of the x-ray readings 'in light of the minimal exposure to coal dust documented in this case.'" Employer's 2001 Petition for Review and Brief at 6; Board 2004 Decision and Order at 5. The Board observed:

> [E]mployer fails to recognize that Judge Levin did not find a "minimal exposure" history. Judge Levin found that employer's evidence

> established "at least 670 hours at the tipples" and that employer did not address the approximately thirteen years of previous coal mine employment. 1999 Decision and Order at 2. Furthermore, employer's argument would require prescience of Judge Levin since none of the diagnoses in the record at that time was set forth in terms of the effect that a different coal dust exposure history would have on the interpretations. (citations omitted).

Id. Accordingly, the award of benefits was affirmed.

The Board held that employer's allegation of error in the administrative law judge's denial of modification of the award of benefits similarly had no merit. On appeal, employer argued that regardless of whether employer's calculation of claimant's work history was correct or whether its representation of claimant's work history to the doctors was correct, the administrative law judge had erred in denying modification because she did not calculate the total number of hours claimant worked:

> Daniels Company's witness originally calculated 670 hours (DE 42), then later calculated 832.5 hours between 1979 and 1986 (DE 83; EE 1, exh. A); other calculations may result in more hours. [footnote omitted] Even if the hours stated by Ms. Hager are not accepted, or the 130 days conceded by the Director for medical purposes is not accepted, by a trier-of-fact, the uncontroverted evidence in this case demonstrates that the Claimant's coal dust exposure was so substantially less than twelve years that all of the ruling regarding miner, years, responsible operator, and complicated pneumoconiosis, must be overturned or vacated.

2003 Brief for Employer at 7-8. Essentially, employer argued: "Regardless of what figure is assumed by physicians, the uncontroverted evidence submitted on modification demonstrates that the Claimant's exposure, whatever it really was, was insufficient to cause complicated pneumoconiosis." *Id.* at 13. The Board rejected employer's contention. Because the administrative law judge had rationally determined that employer's doctors based their opinions that claimant did not have complicated pneumoconiosis on the false assumption that claimant had only six hundred and seventy hours of coal dust exposure, their opinions did not undermine the thirteen (of fifteen) B reader interpretations of the most recent x-rays as positive for complicated pneumoconiosis, including the interpretation by Dr. Alexander, a B reader and board-certified radiologist who noted "classic findings of complicated coal workers' pneumoconiosis" Director's Exhibit 39 at 4. The administrative law judge evaluates and weighs the medical evidence. *Underwood*, 105 F.3d at 949, 22 BLR at 2-28. Thus, the administrative law judge rejected the opinions of employer's doctors because they were based on an employment history of only six hundred and seventy hours. She did not

reject them, as employer argues on appeal, because the doctors had not based their assessment on twelve years of coal mine employment. Her decision should be upheld. It is axiomatic that the court must defer to the administrative law judge's evaluation of the proper weight to accord conflicting medical opinions. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342, 20 BLR 2-246, 2-257 (4th Cir. 1996). In sum, review of the administrative law judge's decision reveals that the stipulation form reflecting twelve years of coal mine employment had no bearing on her decision; she relied upon the evidence in the record to find that the abnormalities shown on x-ray were complicated pneumoconiosis arising out of coal mine employment. Accordingly, the Board affirmed the administrative law judge's decision denying modification of Judge Levin's decision awarding benefits.

However, the Board agreed with employer's contention that it was error for the administrative law judge in the modification proceeding to apply the law of the case doctrine to the prior determinations that employer was bound by the stipulations. The Board remanded the case to determine whether the stipulations had been freely entered into and if not, whether the record establishes that employer was properly named the responsible operator. The Board made clear that even if the administrative law judge were to determine on remand that the stipulations were not valid, that determination would not impact the award of benefits which was supported by substantial evidence. That determination was properly affirmed in our prior decision. 2004 Decision and Order at 9. As we discussed *supra*, the determination that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment was made without benefit or application of the ten year presumption at Section 718.203(b). Accordingly, we need not address whether the administrative law judge on remand erred in finding that the record supported a finding of twelve years of coal mine employment. In sum, since both administrative law judges analyzed the evidence of record to find that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment, the award of benefits is not tainted by findings regarding the years of coal mine employment.

Second, employer contends that the administrative law judge erred on remand in holding it liable as the responsible operator pursuant to 20 C.F.R. §725.493(2000). The responsible operator is "the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year," 20 C.F.R. §725.493(a)(1)(2000), "during which the miner was regularly employed in or around a coal mine by the operator or other employer." 20 C.F.R. §725.493(b)(2000).[5] In the case

[5] The revised regulations governing the identification of the responsible operator, 20 C.F.R. §§725.491-725.495, apply prospectively only and thus do not apply to this claim. *See* 20 C.F.R. §725.2(c). Consequently, the prior version of 20 C.F.R. §725.493 applies to this case.

at bar, employer does not contend that it did not employ the miner for at least one year. Employer alleges that the administrative law judge erred in determining that employer regularly employed the miner.

Section 725.493(b)(2000) provides that, "if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year . . . ." 20 C.F.R. §725.493(b)(2000). Applying a formula set forth at revised 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge found that "Claimant worked well over 200 days in or around the coal mines."[6] Decision and Order at 15. Consequently, she found that employer did not prove that the miner was not employed by it for at least 125 working days.

Employer does not allege that the administrative law judge's calculation of 200 working days using this formula is inaccurate. Rather, employer contends that reversal or remand is required because the administrative law judge retroactively applied the formula in revised 20 C.F.R. §725.101(a)(32)(iii) when, in this claim, the former regulations at 20 C.F.R. §725.491-95 (2000) govern the identification of the responsible operator. Although employer is correct that the administrative law judge retroactively applied revised 20 C.F.R. §725.101(a)(32)(iii), that application was permissible; employer identifies no reversible error by the administrative law judge.[7]

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[6] Revised Section 725.101(a)(32)(iii) provides as follows:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(iii).

[7] The revised responsible operator regulation at 20 C.F.R. §725.494(c),(d) cross-references the definition of "year" at revised 20 C.F.R. §725.101(a)(32). However, 20 C.F.R. §725.2(c) specifies that the new responsible operator regulations at 20 C.F.R. §§725.491-95 do not apply to cases that were pending on January 19, 2001.

In determining the length of a miner's coal mine employment for the purpose of identifying the responsible operator, the administrative law judge may apply any reasonable method of calculation. *Clark v. Barnwell Coal Co*. 22 BLR 1-275, 1-280-81 (2003)(McGranery, J., concurring). The applicable regulation, Section 725.493(2000), provides no suggested method of calculation. We agree with the Director that here, the administrative law judge used the suggested formula in revised Section 725.101(a)(32)(iii) as a reasonable guide to calculating the miner's working days. Decision and Order at 14 (finding "this method reasonable under the circumstances of the case at bar"); *see Clark*, 22 BLR at 1-280-81. In resorting to this formula, the administrative law judge explained that she found employer's proposed calculation of only 121 working days to be based on "undocumented and unsupported assumptions," including an "arbitrary hourly rate" and "an arbitrary workday made up of 10 hours."[8] Decision and Order at 15. Under these circumstances, the administrative law judge reasonably consulted the suggested formula in Section 725.101(a)(32)(iii) for guidance. *Clark*, 22 BLR at 1-280-81.

Additionally, we reject employer's contentions that a remand is required both because the administrative law judge did not adequately explain her calculations and she did not provide a copy in the record of the Bureau of Labor Statistics average daily earnings table as required by Section 725.101(a)(32)(iii). Review of employer's brief reflects that employer calculates over 217 working days using the same method as did the administrative law judge. Employer's Brief at 22. Consequently, any error by the administrative law judge in this regard was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Based on the foregoing, we affirm the administrative law judge's finding that employer did not prove that the miner was not employed by it for at least 125 working days pursuant to Section 725.493(b)(2000). For the same reasons, we also affirm the administrative law judge's related finding that, based on a finding of over 200 working days, employer did not rebut the presumption of Section 725.492(c)(2000) that the miner was regularly and continuously exposed to coal dust during his employment. *See* 20 C.F.R. §725.492(c)(2000)(requiring proof that the miner "was not exposed to coal dust for significant periods during such employment"). We therefore affirm the administrative law judge's finding that the record establishes that employer is the responsible operator.

Consequently, we affirm the administrative law judge's finding pursuant to Section 725.310 (2000) that no mistake in a determination of fact occurred in the prior determination that employer is the responsible operator.

[8] On appeal, employer no longer alleges that the miner had only 121 working days.

We disagree with our dissenting colleague's opinion that the case should be remanded for the administrative law judge to determine the length of claimant's coal mine employment pursuant to 20 C.F.R. §725.101(a)(32)(iii) and to reconsider discrete sentences in some of the medical reports, opining that the anomalies shown on claimant's x-rays could not be pneumoconiosis because these anomalies could not have been caused by: even two years of coal mine employment; less than ten years of coal mine employment; or even fifteen years of coal mine employment. Employer's Exhibit 4 at 1; Employer's Exhibit 6 at 2; Employer's Exhibit 8 at 23; Employer's Exhibit 9 at 25-26; Employer's Exhibit 2 at 14. The false premise of all of these opinions is that claimant's only injurious dust exposure was in coal mine employment. These opinions cannot undermine the credibility of claimant's evidence of complicated pneumoconiosis because, as the Director argued to the Board in the prior appeal, employer's doctors did not have a correct understanding of claimant's dust exposure. Although claimant worked for employer in coal mine employment only at the Mesa facility, the majority of his time was spent in sandblasting at the repair shop. When sandblasting, claimant used "Black Beauty," which contains silicon.[9] It is now established in medical science that the inhalation of silica can cause silicosis, a type of pneumoconiosis. *See* deposition of Dr. Wiot at 12 (explaining that the ILO standards include silicosis). As the Director correctly argued, unless employer's doctors had had a clear understanding of claimant's exposure to silica dust as a sandblaster and unless they had demonstrated a comprehensive understanding of the effects of silica on the lungs, their interpretations of the x-rays as not showing pneumoconiosis would not be credible. Director's 2003 Letter to the Board at 4.

It is noteworthy that one of employer's experts, Dr. Meyer, stated it should be determined whether claimant had had silica exposure. Employer's Exhibit 6 at 2. Yet it appears that employer did not provide its experts with the relevant information even though employer had been on notice from the beginning of this case that claimant's treating physician, Dr. Jabour, who is Board-certified in pulmonary and internal medicine, attributed claimant's condition to both coal dust and silica exposure. Director's Exhibit 25. Judge Levin had credited that report. 1999 Decision and Order at

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[9] The Director pointed out:

> The market description of "Black Beauty" can be found at http://www.reade.com/Products/Abrasives/black_beauty.html ; *see also* Occupational Safety and Health (OSHA) notice at http://www.osha.gov/SLC/silicacrystalline/roznowskiei/exposure.html.

Director's 2003 Letter to the Board at 3.

2. Similarly, a hospital report indicated claimant's breathing problems were due to coal mine employment and sandblasting. Director's Exhibit 14 at 10, 11.

Thus, even if it were possible to accurately determine the length of claimant's coal dust exposure, which is by no means clear, the medical opinions which our dissenting colleague wants reconsidered could not be credited to establish claimant does not have complicated pneumoconiosis, because the doctors presumed the only injurious exposure was coal dust; they were unaware of claimant's history of silica dust exposure.[10] Hence, there is no need to remand the case for reconsideration of the medical opinions insisting claimant cannot have complicated pneumoconiosis since, as the Director argued, those opinions could not be credited.

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[10] The Director further explained:

> The fact that Claimant's silica dust exposure did not occur around a coal mine is of no relevance to determining whether the opacities on X-ray show complicated pneumoconiosis. The fact finder must first determine if complicated pneumoconiosis is established. *See* 20 C.F.R. §718.202(a)(1), which does not require a causation inquiry. Only after complicated pneumoconiosis is established must the fact finder consider whether the condition is due to coal mine employment. *See generally Cranor v Peabody Coal Co.*, 22 BLR 1-1 (1999)(holding that existence of clinical pneumoconiosis under section 718.202(a)(1) and the cause of the disease under section 718.203 are separate inquiries). To be "due to" coal mine employment, the complicated pneumoconiosis need only have arisen in part out of that employment. 30 U.S.C. §901(a); 20 C.F.R. §718.203(a) (2002).

Director's 2003 Letter to the Board at 4 n.3.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur in the holdings that the administrative law judge's discussion of modification did not affect her decision, that the stipulations issued by the district director lack effect, and that substantial evidence supports the finding that employer regularly employed the miner and is thus the responsible operator. I respectfully dissent, however, from the conclusion that we need not address employer's argument that the administrative law judge erroneously found twelve years of coal mine employment established. Finding merit in employer's argument, I would remand this case for a redetermination of the years of coal mine employment, and reconsideration of the medical evidence on the merits of entitlement in light of the new finding as to the length of the miner's coal mine employment.

The applicable regulation directs that "the length of the miner's coal mine work history must be computed as provided by 20 C.F.R. 725.101(a)(32)." 20 C.F.R. §718.301. In this case, the length of the miner's coal mine work history and the number of his working days are essentially the same, since the record documents that the miner's coal mine employment occurred when he was sent to coal mine tipples to install equipment manufactured by his employer, not during the bulk of his time that he spent working in his employer's fabrication shop building that equipment.[11] Director's

[11] In uncontradicted testimony, the miner's supervisor stated that the fabrication shop was fifty miles from the nearest coal mine. Hearing Transcript at 39.

Exhibits 4-7, 26, 36, 42, 83; Employer's Exhibit 1; *see* 30 U.S.C. §902(d)(providing that a construction worker who works "in or around a coal mine" is a miner "to the extent such individual was exposed to coal dust as a result of such employment"); *see also Tressler v. Allen & Garcia Co.*, 8 BLR 1-365, 1-368 (1985)(holding that the administrative law judge properly totaled discrete periods of coal mine dust exposure resulting from construction work to determine the length of coal mine employment). The record contains payroll registers listing the specific dates on which the miner was dispatched to the coal mine tipples, his hours, and his pay. Director's Exhibits 6, 83. Thus, employer validly argues that the administrative law judge should have determined the length of the miner's coal mine employment by using the same formula from Section 725.101(a)(32) that she employed to calculate the miner's working days.

Using the formula in Section 725.101(a)(32)(iii), the administrative law judge determined that the miner worked "well over 200 days in or around the coal mines." Decision and Order on Remand at 15. Yet when she determined the length of the miner's coal mine employment, she merely referenced his Social Security earnings records to find twelve years of coal mine employment.

In contrast to the administrative law judge's approach, employer notes that the formula in Section 725.101(a)(32)(iii) would have yielded approximately 1.75 years of coal mine employment. Employer's Brief at 22. The Director has not registered any disagreement with employer's calculation. Director's Brief at 3 n.4. Whatever the exact length of the miner's coal mine employment, it would certainly appear to have been less than twelve or even ten years.

Thus, the administrative law judge took an overinclusive approach to the length of coal mine employment determination, perpetuating an inaccurate finding that has led the administrative law judges in this case to dismiss relevant evidence. As the majority notes, several medical opinions and x-ray readings stating that the miner did not have complicated pneumoconiosis were discredited as based on an inaccurate coal mine employment history. These opinions were discounted because they assumed histories of 130 days or 670 hours. But several of the opinions rejected were not wholly dependent on this view of the miner's coal mine employment. To the contrary, they were also based on estimates that were close to, if not greater than, the likely total years of coal mine employment. Employer's Exhibits 4 and 6 (observing that two years of coal mine employment would not produce the x-ray changes seen); Employer's Exhibit 8 at 23, 24, 34-39 and Employer's Exhibit 9 at 25-27, 32-33 (explaining that fewer than ten years of coal mine employment would not cause the x-ray abnormalities seen); Employer's Exhibit 2 at 15 (explaining that a miner with less than fifteen years of coal mine employment would not be expected to have the x-ray changes seen).

Furthermore, with less than ten years of coal mine employment, the miner would have had to prove that his complicated pneumoconiosis, if present, arose out of coal mine employment. *See* 20 C.F.R. §718.203(b), (c). The miner's exposure to silica dust in work that was not coal mine employment, noted by the majority, supports remanding this case for the administrative law judge to carefully determine the length of the miner's coal mine employment and to then determine whether the miner's complicated pneumoconiosis, if present, arose out of coal mine employment. *See* 20 C.F.R. §718.203(c). In reviewing the various administrative law judges' decisions over the course of the claim proceedings, I am not convinced that the miner was made to prove that his complicated pneumoconiosis arose out of coal mine employment.

Therefore, I would remand this case for the administrative law judge to carefully determine the length of the miner's coal mine employment, and to consider all relevant evidence as to both the existence and causation of pneumoconiosis, *see* 20 C.F.R. §§718.202(a), 718.304, 718.203, in light of the revised length of coal mine employment finding.

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JUDITH S. BOGGS
Administrative Appeals Judge