BRB Nos. 05-0993 BLA
and 01-0875 BLA

CLYDE GABBARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 11/29/2006
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor, and the Decisions and Orders – Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis & Lewis Law Offices), Hazard, Kentucky, for employer.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (97-BLA-0719) of Administrative Law Judge Paul H. Teitler, and the Decisions and Orders – Award of Benefits (00-BLA-0706 and 03-BLA-0118) of Administrative Law Judge Daniel J. Roketenetz with respect to 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).[1] Claimant was awarded benefits on a duplicate claim filed on January 10, 1995. In a Decision and Order issued October 9, 1997, after crediting claimant with twenty years of coal mine employment, Judge Teitler found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2] The administrative law judge also found that claimant was entitled to the

[1] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on January 18, 1974. Director's Exhibit 27 at 220. In a Decision and Order dated July 30, 1990, Administrative Law Judge Charles W. Campbell found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Judge Campbell also found that claimant was not entitled to benefits pursuant to 20 C.F.R. Part 718. Accordingly, Judge Campbell denied benefits and, in light of the denial, did not resolve the issue of the responsible carrier. In a Decision and Order dated January 13, 1993, the Board affirmed Judge Campbell's denial of benefits. *Gabbard v. Mountain Clay, Inc.*, BRB No. 90-2112 BLA (Jan. 13, 1993)(unpub.).

Claimant filed a second claim on July 15, 1993, which was treated as a request for modification since it was filed within one year of the prior denial. Director's Exhibit 27 at 239. The district director denied the claim on September 1, 1993. There is no indication that claimant took any further action in regard to his 1974 claim.

Claimant filed the instant claim on January 9, 1995. Director's Exhibit 1.

[2] In finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge relied upon the newly submitted evidence of record. Although he found that the x-ray evidence was in equipoise, the administrative law judge found that the medical opinion evidence established the existence of pneumoconiosis, notwithstanding the x-ray evidence. Consequently, the administrative law judge found a material change in conditions since the date upon which claimant's prior 1974 claim became final. 20 C.F.R. §725.309 (2000). The administrative law judge, therefore, reviewed all of the evidence of record in considering claimant's 1995 claim on the merits.

presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000)[3] and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, Judge Teitler awarded benefits.

Employer filed a Motion to Remand the case to the district director on October 29, 1997, and shortly thereafter filed a Motion for Reconsideration by the administrative law judge on November 3, 1997, raising issues regarding the merits as well as the issue of whether the correct responsible carrier was named. On November 21, 1997, Judge Teitler issued an Order Granting Motion for Reconsideration, Denying Motion to Remand, and Order to Show Cause Why a Hearing is Necessary on the Responsible Carrier Issue.

On February 19, 1998, in light of the administrative law judge's decision on reconsideration which left the award of benefits intact, but prior to the resolution of the responsible carrier issue raised in the motion, employer filed an appeal of Judge Teitler's October 29, 1997 Decision and Order – Awarding Benefits and his November 21, 1997 Order Granting Motion for Reconsideration, Denying Motion to Remand, and Order to Show Cause Why a Hearing is Necessary on the Responsible Carrier Issue with the Board. The Director, Office of Workers' Compensation Programs, (the Director), responded by filing a motion to dismiss the appeal on the grounds that although the administrative law judge had granted the motion for reconsideration, the record had been reopened for the submission of evidence on the responsible carrier issue and, as such, the decision on the merits being appealed was not final.

On April 29, 1998, in response to the motion to dismiss by the Director to the Board, the Board dismissed employer's appeal as premature and remanded the case to the administrative law judge for further disposition. *Gabbard v. Mountain Clay, Inc.*, BRB No. 98-0421 BLA (Apr. 29, 1998)(Order).

Judge Teitler, upon determining that a hearing was inappropriate since there was insufficient evidence in the record regarding the potential liability of the named responsible operators and responsible carriers, issued an Order of Remand on June 30, 1999, returning the case to the district director for a determination of the identity of the responsible operator and carrier. The district director initially named Liberty Mutual Insurance Company and Argonaut Insurance Company as potentially liable responsible

[3] The regulatory provisions regarding total disability and total disability due to pneumoconiosis formerly set forth at 20 C.F.R. §718.204(b), (c)(1)-(4)(2000) are now set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv), (c).

carriers. Following submission of evidence by the parties, on April 17, 2000, the district director named Mountain Clay, Inc. as the primary responsible operator and Liberty Mutual Insurance Company as the responsible insurance carrier based on claimant's last date of exposure. The parties disputed the determination and the case was forwarded to the Office of Administrative Law Judges for resolution, where it was assigned to Judge Roketenetz.

A hearing was held on November 30, 2000, in which the parties addressed the issue of whether the date of claimant's last exposure to coal mine dust or, alternatively, the date of filing of his claim for benefits, was determinative of responsibility for coverage. Liberty Mutual Insurance Company was the insurer on the last day of exposure and Argonaut Insurance Company was the insurer on the date the claim was filed. In a Decision and Order issued on July 18, 2001, Judge Roketenetz reviewed the evidence on the issue of the responsible operator and carrier and found that Interstate Coal Company d/b/a Mountain Clay, Incorporated, as insured by Liberty Mutual Insurance Company, was properly designated as the responsible operator and carrier and liable for the payment of benefits. Judge Roketenetz dismissed Argonaut Insurance Company as a party to the claim and, noting that since Judge Teitler had previously awarded benefits against the correctly designated responsible operator and carrier, determined that a discussion of the medical evidence and merits was rendered moot.

Employer subsequently appealed the award of benefits to the Board and, after submission of briefs by the parties, but prior to the issuance of a decision by the Board, on July 9, 2002, employer filed a timely request for modification with the district director. Consequently, by Order dated July 24, 2002, the Board dismissed employer's appeal without prejudice and remanded the case to the district director for modification proceedings. *Gabbard v. Mountain Clay, Inc.*, BRB No. 01-0875 BLA (Jul. 24, 2002)(Order).

The district director denied modification on October 11, 2002, upon finding that the evidence failed to establish that a mistake was made in a determination of fact. The case was subsequently referred to the Office of Administrative Law Judges for a hearing. Administrative Law Judge Rudolf Jansen presided over the hearing at which he made rulings on the admission of newly submitted medical evidence and numerous motions. The case was subsequently assigned to Judge Roketenetz for resolution. In a Decision and Order issued on August 10, 2005, Judge Roketenetz considered the newly submitted evidence pursuant to 20 C.F.R. §725.310 and determined that the evidence of record did not establish a change in condition or a mistake in a determination of fact in the prior determination that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment. Accordingly, benefits were awarded. The present appeal followed.

On appeal, employer initially requested reinstatement of his appeal of Judge Teitler's 1997 Decision and Order awarding benefits, which the Board granted. In the reinstated appeal, employer argues that the administrative law judge did not properly weigh the medical opinions of Drs. Baker, Vaezy, Vuskovich, Wright, Fino, and Dahhan in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established. In its appeal of Judge Roketenetz's 2005 Decision and Order denying modification, employer contends that the administrative law judge erred in denying employer's request to have claimant travel to Dr. Dahhan's office for an examination and in excluding Dr. Dahhan's report from the record because it was untimely submitted. Employer also contends that the administrative law judge erred in finding that employer did not have the option of establishing a change in conditions in a modification proceeding and in finding that the prior decisions contained no mistake in a determination of fact. Employer further alleges that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (a)(4), and 718.204(c) and erred in his designation of the responsible carrier. Claimant has not filed a brief in this appeal. The Director has submitted a limited response contending that the administrative law judge properly determined that Liberty Mutual Insurance Company is the proper responsible carrier.[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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

With respect to Judge Roketenetz's determination that Liberty Mutual is the responsible carrier, employer argues that the administrative law judge erred in finding that the date of last exposure instead of the date of filing a claim controls the designation of the responsible carrier. Contrary to employer's assertion, under Section 726.203(a), the last day of exposure, not the filing date, determines the responsible carrier. *See*

[4] We affirm as unchallenged on appeal Judge Teitler's finding that claimant has 20 years of coal mine employment, and his findings at 20 C.F.R. §§718.202(a)(2)-(a)(3) and 718.204(b)(2)(i), (iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Director, OWCP v. Trace Fork Coal Co. [*Matney*], 67 F.3d 503, 505 n.4, 19 BLR 2-290, 2-297 n.4 (4th Cir. 1995). We therefore affirm Judge Roketenetz's finding that Liberty Mutual Insurance Company, the carrier at the time of claimant's last day of exposure to coal dust, is the responsible carrier.

Regarding the administrative law judge's procedural and evidentiary rulings, employer also contends that Judge Roketenetz erred in denying its request to compel claimant to travel to Dr. Dahhan's office for an examination and also in subsequently excluding Dr. Dahhan's medical report, based upon a physical examination of claimant done in claimant's residence, from the record upon finding that it was untimely filed. The hearing was scheduled for April 28, 2004. On April 20, 2004, employer requested additional time to obtain a medical report from Dr. Dahhan in response to Dr. Baker's report, which claimant had recently submitted. On April 26, 2004, while the employer's motion was pending, the administrative law judge issued an Order indicating that the case would be decided on the record. On May 27, 2004, the administrative law judge found that employer's request was reasonable and granted, over claimant's objection, employer's request for additional time to file the medical report, indicating that the record would be closed on June 28, 2004. On June 1, 2004, employer filed a motion to compel claimant to submit to a medical examination.

On June 3, 2004, the administrative law judge issued an order to show cause why the motion should not be granted and in response claimant stated that he was unable to travel to Dr. Dahhan's office due to his medical condition and the distance involved. The administrative law judge ordered claimant to provide proof of his inability to undergo an examination and also suspended the briefing schedule. On November 17, 2004 the administrative law judge issued an order instructing employer to make arrangements to have claimant examined within twenty-five miles of his residence, but after two and one-half months having passed without a response from either party, on February 1, 2005, the administrative law judge requested status reports. Employer requested additional time in which to have claimant examined. The administrative law judge granted employer's request and indicated the record would be held open until April 8, 2005.

On April 25, 2005, employer requested additional time in which to have claimant examined and upon finding good cause shown, the administrative law judge granted employer's request for additional time and indicated the record would be held open until June 8, 2005. In a Motion dated June 16, 2005, employer sought leave to submit reports by Dr. Dahhan dated April 11, 2005, April 25, 2005 and May 2, 2005, to which claimant objected on the basis that the request was untimely, employer's reasons for missing the deadline set by the administrative law judge were inadequate and claimant's health was failing. By Order dated June 24, 2005, the administrative law judge denied employer's request as untimely. Employer filed a timely request for reconsideration. In an Order dated July 13, 2005, the administrative law judge denied reconsideration.

We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). With respect to employer's request that the administrative law judge order claimant to appear at Dr. Dahhan's office, the administrative law judge acted within his discretion in declining to compel claimant to travel more than twenty-five miles for an examination because he rationally determined that it was too burdensome for claimant to travel. *See* 20 C.F.R. §725.414(a)(3)(i); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Bertz v. Consolidation Coal Co.*, 6 BLR 1-820 (1984). The administrative law judge acted within his discretion in rejecting employer's arguments that it had encountered difficulty in scheduling an examination of claimant, that there was no hearing in the case, that claimant was in a pay status and that a continuance of only twelve days was sought.

Pursuant to Section 725.456(b)(3), the burden of proof is on employer to establish good cause for the untimely submission of Dr. Dahhan's report. *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992); *Clark*, 12 BLR at 1-153; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985). In this case, the administrative law judge acted within his discretion in determining that employer failed to satisfy its burden, as employer did not file a motion for an extension of time to file the submissions within the requisite deadline and the administrative law judge had already granted two previous continuances.

We will now address employer's allegations of error regarding Judge Roketenetz's 2005 Decision and Order denying employer's request for modification. Employer contends that the administrative law judge erred in finding that the newly submitted x-ray evidence established the existence of pneumoconiosis and, therefore, erred in finding that there was no mistake in a determination of fact in the prior denial. Employer's Brief at 27. In the prior decision, Judge Teitler found the thirteen readings of four x-rays submitted in that claim to be equally divided between positive and negative readings, and thus equivocal. 1997 Decision and Order at 5-6. Judge Teitler, however, found that the existence of pneumoconiosis was established at Section 718.202(a)(4). 1997 Decision and Order at 6-9. On modification, Judge Roketenetz found that of the two recent x-rays, the July 10, 2004, x-ray was positive, based on the single reading by Dr. Baker, and that the October 3, 2003, x-ray was in equipoise, based on the conflicting readings by Drs. Jarboe and Baker. 2005 Decision and Order at 8-9. He then stated that in comparing the new and old evidence, there was no mistake of fact since the evidence supported a finding of pneumoconiosis at Section 718.202(a)(1). 2005 Decision and Order at 9. However, the existence of pneumoconiosis was previously found to be established at Section 718.202(a)(4), not Section 718.202(a)(1). *See* 1997 Decision and Order at 6, 9. Judge Teitler relied on the medical opinion evidence to find the existence of pneumoconiosis established after determining that because two x-rays were positive for pneumoconiosis and two x-rays were negative, the x-ray evidence was equivocal. *Id*. On

modification, however, the administrative law judge never discussed the newly submitted medical opinion evidence regarding the existence of pneumoconiosis at Section 718.202(a)(4), but instead, upon finding that the newly submitted x-ray evidence supported a finding of the existence of pneumoconiosis at Section 718.202(a)(1), then considered whether total disability was established after finding pneumoconiosis by x-ray. 2005 Decision and Order at 9.

We agree with employer that the administrative law judge "appears to have been under the mistaken impression that Judge Teitler found the existence of pneumoconiosis established pursuant to Section 718.202(a)(1)." Employer's Brief at 27. We cannot say that the error was harmless, as the administrative law judge's approach led him to conclude that since the newly submitted x-ray evidence was positive for pneumoconiosis, there was no mistake of fact in the prior decision. This conclusion was based on the administrative law judge's apparent incorrect determination that the x-ray evidence in the previous decision was found to be positive. As such, the administrative law judge did not determine whether the actual basis upon which Judge Teitler found the existence of pneumoconiosis established, i.e., the medical opinions at Section 718.202(a)(4), was correct. Thus, we vacate the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1) and 725.310 (2000) and remand the case for further consideration.

Employer also contends that it was also error for the administrative law judge to find the existence of clinical pneumoconiosis established by x-ray, arguing that the preponderance of the evidence is "overwhelmingly negative" since "[f]ifty[-]three of the sixty[-]one x-ray interpretations of record were negative for pneumoconiosis." Employer's Brief at 27. It is not necessary to address employer's contention since we have vacated the administrative law judge's finding at Section 718.202(a)(1), but we note that the issue of whether the existence of pneumoconiosis can be established by the newly submitted x-ray evidence, considered in conjunction with the previously submitted x-ray evidence of record, is for the administrative law judge, as trier-of-fact to determine.

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in failing to consider the evidence thereunder on modification. In addition, employer contends that the previous administrative law judge erred in his weighing of the medical opinion evidence. With respect to the 1997 decision, employer contends that the administrative law judge "erred by relying upon the opinions of Drs. Baker, Vuskovich, Vaezy and Wright, since each of these physicians relied only upon their positive x-ray interpretations to diagnose pneumoconiosis." Employer's Brief at 27. Employer also asserts that the administrative law judge erred in rejecting the opinions of Drs. Fino and Dahhan because they were nonexamining physicians. We agree with employer's contention that the administrative law judge did not adequately explain his reasons for finding the opinions of Drs. Baker, Vaezy, Vuskovich, and Wright more persuasive than the contrary opinions of Drs. Dahhan and Fino, which found that claimant does not have

pneumoconiosis. 1997 Decision and Order at 6-9. Although the administrative law judge stated that the opinions of Drs. Baker, Vaezy, Vuskovich, and Wright were all well-reasoned and well-documented because their diagnoses were consistent with their examinations and objective testing, employer's assertion that "these physicians did not explain their findings of pneumoconiosis on the basis of any other objective evidence of record because they were based solely on a positive x-ray" has merit since the administrative law judge did not examine the reasoning by which these physicians reached their conclusions that claimant had pneumoconiosis, other than their own positive x-ray interpretations. 1997 Decision and Order at 6-9. In addition, the administrative law judge gave little weight to the opinion of Dr. Fino, because he did not examine claimant, and to Dr. Dahhan, because he last examined claimant in November 1982. 1997 Decision and Order at 9. The administrative law judge should not have rejected the opinions of nonexamining physicians on that basis alone. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2- 261 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also rejected Dr. Dahhan's opinion because it was contrary to the determination that pneumoconiosis is progressive. Decision and Order at 9. Dr. Dahhan does not state that pneumoconiosis is not progressive, but based his diagnosis of no pneumoconiosis upon consideration of his examination, a records review and his x-ray interpretation, and the administrative law judge should have considered these factors. *Jones v. Kaiser Steel Corp.*, 8 BLR 1-339 (1985).

On the issue of total disability due to pneumoconiosis pursuant to Section 718.204(c), the administrative law judge accorded little weight to the opinions by Drs. Dahhan and Fino because they opined that claimant does not have pneumoconiosis, and credited Dr. Baker's opinion that pneumoconiosis substantially contributes to claimant's disability. 1997 Decision and Order at 16-17.

Because the administrative law judge must reevaluate whether the x-ray evidence is sufficient to establish the existence of pneumoconiosis, an analysis that could affect

his weighing of the medical opinions on the issues of pneumoconiosis and disability causation, we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(c).

Accordingly, the 2001 Decision and Order – Award of Benefits of Administrative Law Judge Daniel J. Roketenetz is affirmed in part, the 1997 Decision and Order – Awarding Benefits of Administrative Law Judge Paul H. Teitler is vacated in part, and the 2005 Decision and Order – Award of Benefits of Administrative Law Judge Daniel J. Roketenetz is vacated and the case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge