BRB No. 09-0197 BLA

JOSEPH F. YURICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
P.T. MINE SERVICES, INCORPORATED	)	DATE ISSUED: 11/30/2009
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Employer's Motion for Summary Judgment and the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Edward K. Dixon and Ryan M. Krescanko (Zimmer Kunz, P.L.L.C.), Pittsburgh, Pennsylvania, for employer/carrier.

Emily Goldberg-Kraft (Deborah Greenfield, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Employer's Motion for Summary Judgment and the Decision and Order – Awarding Benefits (2004-BLA-6459) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered 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). Claimant filed his application for benefits on June 13, 2003. Director's Exhibit 1. After the district director issued a Proposed Decision and Order Awarding Benefits, the case was transferred to the Office of Administrative Law Judges at employer's request and was assigned to the administrative law judge for hearing. Director's Exhibits 23, 27. Subsequently, employer filed a motion requesting that the administrative law judge dismiss it as the potentially liable responsible operator. The administrative law judge denied employer's motion and conducted a hearing which, by agreement of the parties, was limited to a discussion of the responsible operator issue. The administrative law judge then issued an order in which he held that employer was the properly designated responsible operator. Employer filed an appeal with the Board, which was dismissed on the ground that it was interlocutory. *Yurick v. P.T. Mine Services, Inc.*, BRB No. 06-0388 BLA (Sept. 19, 2006) (unpub. Order).

After remand of the case, the administrative law judge conducted a hearing on the merits of entitlement. In his subsequent Decision and Order, the administrative law judge credited claimant with 16.63 years of coal mine employment, in accordance with a stipulation by the parties, and considered the claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and based upon a weighing of all of the evidence relevant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant established that his pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), and that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge erred in determining that it is the operator responsible for the payment of benefits to claimant. In support of its position, employer maintains that, pursuant to 20 C.F.R. §725.494, Apolo Construction Company (ACC) was the operator that most recently employed claimant for a cumulative period of at least one year. With respect to the merits of entitlement, employer contends that the administrative law judge erred in admitting x-ray readings in claimant's treatment records and in failing to give weight to Dr. Fino's negative reading of a digital x-ray. Claimant responds and urges affirmance of the award of benefits, but concurs with employer's position that it is not the properly designated responsible operator. The Director, Office of Workers' Compensation Programs (the Director), also responds and

requests that the Board affirm the administrative law judge's determination that employer is the operator responsible for the payment of benefits.[1]

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.[2] 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).

The Responsible Operator

The parties do not dispute that claimant was employed by ACC from October 2, 2000 through August 15, 2001, and from September 16, 2001 through October 5, 2001.[3] Hearing Transcript (Nov. 2, 2005) at 23-27; *see also* Director's Exhibit 3. The parties also agree that claimant was laid off by ACC and received unemployment benefits for the period from August 16, 2001 through September 15, 2001. Hearing Transcript (Nov. 2, 2005) at 25-26; Employer's Brief at [2] (unpaginated); Claimant's Response Brief at 1; Director's Response Brief at 2. In addition, it is undisputed that while laid off, claimant did not lose his seniority, his entitlement to health insurance, or his participation in ACC's 401K plan, nor did ACC require claimant to reapply for his job when the layoff ended. Hearing Transcript (Nov. 2, 2005) at 23-25.

The administrative law judge determined that because claimant was not actually employed by ACC during the one-month layoff period, he did not work for ACC for a cumulative period of at least one year and, therefore, ACC was not a potentially liable operator pursuant to Section 725.494(c). Order Denying Employer's Motion for Summary Judgment at 2-3. Employer argues that the administrative law judge erred in

[1] We affirm the administrative law judge's finding of 16.63 years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3); that claimant established that his pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b); and that claimant established that he is totally disabled under 20 C.F.R. §718.204(b)(2), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last year of coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[3] Employer acknowledges that claimant worked for it from 1996 to 2000. Employer's Brief at [2] (unpaginated).

subtracting the one month layoff period from the time that claimant worked for ACC. The Director contends, in response, that the administrative law judge's determination, that the layoff period did not constitute employment with ACC, is consistent with the regulations governing the identification of the responsible operator.

Upon review of the pertinent facts, the administrative law judge's Decision and Order, the parties' arguments on appeal and the applicable regulations, we agree with the Director that the administrative law judge's permissibly found that ACC is not the properly designated responsible operator. Section 725.494(c) provides that a potentially liable operator is one that employed the miner "for a cumulative period of not less than one year[.]" 20 C.F.R. §725.494(c). Pursuant to 20 C.F.R. §725.101(a)(32):

> *Year* means a period of one calendar year (365 days or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. §725.101(a)(32) (emphasis in original). When the Department of Labor (DOL) first proposed the current version of Section 725.101(a)(32), it recognized that, in contrast to absences resulting from a strike or layoff, "the employer/employee relationship is uninterrupted" during absences resulting from approved vacation or sick leave. 62 Fed. Reg. 3349 (Jan. 22, 1997). In the comments to the final revised version of Section 725.101(a)(32), DOL indicated that the regulatory definition of a year "contemplates an *employment relationship* totaling 365 days, within which 125 days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave." 65 Fed. Reg. 79959 (Dec. 20, 2000) (emphasis added). "Employment relationship" is defined in 20 C.F.R. §725.493(a)(1) as "any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner." 20 C.F.R. §725.493(a)(1).

In the present case, the administrative law judge's finding that the one month layoff period did not constitute employment with ACC is consistent with the applicable regulations. The administrative law judge determined correctly that claimant's layoff from ACC severed the employment relationship between the two parties because ACC did not retain "the right to direct, control, or supervise the work performed by

[claimant]," as required by Section 725.493(a)(1). Order Denying Employer's Motion for Summary Judgment at 2. The administrative law judge's finding is supported by substantial evidence, as claimant provided undisputed testimony that he was not paid by ACC while he was laid off; that he received unemployment benefits; and that he was free to seek other employment. Hearing Transcript (Nov. 2, 2005) at 23-27.

Having properly found that no employment relationship existed between claimant and ACC during the layoff period, the administrative law judge rationally determined that this period could not be included in calculating the length of claimant's tenure with ACC. 20 C.F.R. §§725.493(a)(1), 725.494(c); *see Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*); *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986). Thus, the administrative law judge acted within his discretion as fact-finder in subtracting the one-month layoff period from the period between October 2, 2000 and October 6, 2001, that claimant worked for ACC. We affirm, therefore, the administrative law judge's determination that ACC was not the employer that most recently employed claimant for a cumulative period of at least one year. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); *Armco, Inc. v. Martin*, 277 BLR 468, 22 BLR 2-334 (4th Cir. 2002). Accordingly, we also affirm the administrative law judge's finding that employer is the properly designated responsible operator.

The Merits of Entitlement

In order to establish entitlement to benefits under 20 C.F.R. Part 718, 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*).

Employer alleges that the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) cannot be affirmed, as the administrative law judge erred in admitting x-rays contained in claimant's treatment records and in "giving no consideration" to Dr. Fino's negative reading of a digital x-ray. Employer also asserts that the administrative law judge failed to address Dr. Fino's reading of an analog x-ray.

Regarding our review of the administrative law judge's evidentiary rulings, employer must establish that the administrative law judge abused the broad discretion granted him in resolving procedural issues. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). When considering whether the

evidence of record, as a whole, supported a finding of pneumoconiosis under Section 718.202(a), the administrative law judge addressed two x-ray readings included in claimant's treatment records. Decision and Order at 12; Claimant's Exhibit 6. Dr. Gohel, a Board-certified radiologist and B reader, interpreted films dated August 9, 2005 and October 11, 2006, as positive for pneumoconiosis. Claimant's Exhibit 6. The administrative law judge determined that "[t]hese x-ray interpretations[,] which are the most recent of record[,] do support a determination of pneumoconiosis." Decision and Order at 12.

We hold that the administrative law judge acted within his discretion in admitting and considering Dr. Gohel's x-ray readings. Pursuant to 20 C.F.R. §725.414(a)(4), "[n]otwithstanding the limitations" set forth in 20 C.F.R. §725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). In the present case, employer does not assert, and the record does not suggest, that the x-rays at issue were procured for the purpose of litigation, rather than claimant's treatment for a pulmonary disease.[4] *See* Claimant's Exhibit 6. The administrative law judge properly applied Section 725.414(a)(4), therefore, to Dr. Gohel's readings of the x-rays dated August 9, 2004 and October 11, 2006.[5] *See Dempsey*, 23 BLR at 1-51. Accordingly, we affirm the administrative law judge's admission of these x-ray interpretations. *See Clark*, 12 BLR at 1-151; *Morgan*, 8 BLR at 1-493.

The administrative law judge also acted within his discretion in finding that, due to the "lack of established guidelines in reading and comparing digital x-rays in regard to a

[4] Claimant's treatment records are from an occupational lung disease clinic called Lungs At Work. Hearing Transcript (Oct. 30, 2007) at 12; Claimant's Exhibit 6

[5] Contrary to employer's argument, the administrative law judge's admission and consideration of Dr. Gohel's x-ray interpretations is consistent with the Board's holding in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). In *Dempsey*, the Board vacated the administrative law judge's finding that, as employer had already submitted the number of objective studies permitted under 20 C.F.R. §725.414(a)(3), the pulmonary function tests and blood gas studies in the treatment records proffered by employer were not admissible. Because there was a factual dispute as to whether the objective studies that employer sought to admit were treatment records pursuant to 20 C.F.R. §725.414(a)(4), the Board instructed the administrative law judge to make a specific finding as to the admissibility of each set of records. In this case, there is no dispute regarding whether Dr. Gohel's x-ray readings constitute treatment records under Section 725.414(a)(4).

diagnosis of pneumoconiosis," Dr. Fino's negative reading of a digital x-ray dated January 27, 2005, was of limited probative value. Decision and Order at 11; Employer's Exhibit 7. In *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery & Hall, J.J., concurring and dissenting), the Board held that digital x-rays constitute "other medical evidence" pursuant to 20 C.F.R. §718.107(a). The Board further held that when a party seeks to admit a digital x-ray, the administrative law judge must consider whether that party has established, pursuant to Section 718.107(b), that the digital x-ray is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). In this case, the administrative law judge rationally determined that Section 718.107(b) was not satisfied, based upon Dr. Cohen's uncontradicted testimony, that there are no standards for interpreting digital x-rays for pneumoconiosis. 20 C.F.R. §718.107(b); *Harris*, 23 BLR at 108-09. We affirm, therefore, the administrative law judge's finding that Dr. Fino's digital x-ray reading was entitled to less weight than the analog x-ray readings of record.

Finally, we reject employer's allegation that the administrative law judge erred in failing to admit and consider the negative reading of the analog x-ray obtained by Dr. Renn on July 26, 2004, that Dr. Fino made at his deposition.[6] Employer's Exhibits 6, 8 at 12. Even assuming that the administrative law judge allowed employer to procure an analog x-ray reading from Dr. Fino, the administrative law judge's omission of this evidence from consideration does not constitute an error requiring remand. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-

[6] Employer maintains that the administrative law judge "directed the [e]mployer to instruct Dr. Fino to re-interpret an analog chest x-ray," at his deposition. Employer's Brief at [11]. This is not a completely accurate characterization of the exchange between the administrative law judge and employer's counsel, which occurred at the initial hearing in this case, held on November 2, 2005. At that time, the parties discussed the need to gather more information concerning the interpretation of digital x-rays. The administrative law judge granted employer's request to depose Dr. Fino on this subject and stated:

> Depose him and then you can cross-examine him and we'll try to get to the bottom of this and I'll have to rule on it, okay? And really, Dr. Fino – if all it involves is a digital x-ray and that's what's holding everything up, *maybe* he could read, or look at, or base his opinion on somebody else's x-ray.

Hearing Transcript (Nov. 2, 2005) (emphasis added) at 12-13. Employer renewed its request to depose Dr. Fino at the second hearing and the administrative law judge granted the request without elaboration. Hearing Transcript (Oct. 30, 2007) at 7-8, 24-25.

1276 (1984). In light of the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), inclusion of Dr. Fino's negative reading would not alter this result. Decision and Order at 4.

Admitting Dr. Fino's negative analog reading also would not alter the administrative law judge's finding that the medical opinion of Dr. Cohen, as supported by the opinion of Dr. Celko, was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) and overall. Decision and Order at 11-12. The administrative law judge acted within his discretion in determining that Dr. Cohen's diagnoses of both legal and clinical pneumoconiosis were entitled to greatest weight, based upon Dr. Cohen's "particularly high level of knowledge and expertise in the area of black lung disease."[7] *Id*.; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Lastly, the inclusion of the negative analog reading made by Dr. Fino, a B reader, and the two interpretations by Dr. Gohel, a Board-certified radiologist and B reader, would result in a preponderance of positive readings by doctors who are qualified as

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[7] The administrative law judge acknowledged that Drs. Cohen, Renn and Fino were all Board-certified pulmonologists and stated:

> Although Dr. Renn and Dr. Fino are both highly qualified pulmonary specialists, both physicians admitted during their depositions that they had never done research in the specific area of pneumoconiosis nor published any peer review articles on the topic of pneumoconiosis. Dr. Cohen, on the other hand, stated during deposition testimony that he has worked on several research projects concerning respiratory diseases which have included Ukrainian coal miners, and other types of pneumoconiosis. He has also published articles in peer review journals on pneumoconiosis, testified at the Department of Labor hearings, and has given comments regarding the 2000 amendments to the black lung regulations. He is also the Medical Director of the federally funded black lung studies program at Cook County Hospital in Chicago as well as the Medical Director of the National Coalition of Black Lung and Respiratory Disease Clinics. He also has the opportunity to examine and treat coal miners on a regular basis.

Decision and Order at 11. We affirm the administrative law judge's determination that Dr. Cohen's qualifications are superior to those of Drs. Renn and Fino, as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

Board-certified radiologists and/or B readers. Director's Exhibit 17; Claimant's Exhibits 1-3, 6; Employer's Exhibits 1, 6, 8 at 12. Thus, it would not alter, in a manner that benefits employer, the administrative law judge's determination regarding the extent to which the respective medical opinions were documented and reasoned. Because employer has not raised any meritorious allegations of error with respect to the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a), we affirm that finding. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). We also affirm the administrative law judge's determination that claimant established that he is totally disabled due to pneumoconiosis at Section 718.204(c), as the administrative law judge relied upon the credibility determinations that we have affirmed at Section 718.202(a). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

Accordingly, the administrative law judge's Order Denying Employer's Motion for Summary Judgment and Decision and Order – Awarding Benefits are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge