BRB No. 00-0186 BLA

NOAH HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky), Prestonsburg, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and Nelson, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order Awarding Benefits (99-BLA-0424) of

[1] Claimant is Noah Hall, the miner, who filed his first application for benefits on June

Administrative Law Judge Thomas F. Phalen, Jr. on a duplicate 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). The administrative law judge, adjudicating this claim pursuant to 20 C.F.R. Part 718, initially designated Kentland Elkhorn Coal Corporation as the responsible operator and credited claimant with fifteen years of qualifying coal mine employment. Next, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) because the newly submitted evidence demonstrated total disability pursuant to 20 C.F.R. §718.204(c), an element that was previously adjudicated against claimant. Addressing the merits of entitlement, the administrative law judge found that claimant affirmatively established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)

5, 1978 and a duplicate application on February 17, 1978. Director's Exhibit 39. These claims were merged and administratively closed as abandoned on March 4, 1980. Director's Exhibit 39. Subsequently, claimant filed a third application on January 17, 1984, which was denied in a Decision and Order rendered by Administrative Law Judge Robert L. Hillyard on June 18, 1993. Director's Exhibit 39. Claimant appealed the denial to the Board. The Board, however, dismissed the appeal as abandoned on May 11, 1994, based on claimant's failure to file a Petition for Review and Brief. Director's Exhibit 39. Claimant, thereafter, filed a petition for modification and supporting medical evidence, which the district director denied on October 13, 1995. Director's Exhibit 39. Claimant did not pursue this denial, but rather, filed a fourth application for benefits on September 15, 1997, which is the subject of the case *sub judice*.

and 718.203(b) and, total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, the administrative law judge awarded benefits, commencing as of September 15, 1997, the date claimant filed this claim.

On appeal, employer argues that the administrative law judge erroneously found that it was the responsible operator and impermissibly failed to conduct a thorough review of the evidence of record regarding total disability. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, responds only to the responsible operator issue, urging affirmance of the administrative law judge's responsible operator determination.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially argues that the administrative law judge improperly found that it was the responsible operator inasmuch as claimant worked for two other coal mine operators, Desperado Fuels Company and Coleman & Coleman Mining Company, subsequent to his employment with employer. Specifically, employer alleges that Desperado Fuels Company is the proper responsible operator because this company most recently employed claimant for one cumulative year, including time claimant was receiving total disability payments for a work injury. We disagree.

[2] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a), 718.203(b), 718.204(c)(1)-(3), and 725.309(d) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 11-13.

The administrative law judge properly found that the evidence of record failed to demonstrate that the more recent coal mine operators employed claimant for a "*cumulative one year period*." *See* 20 C.F.R. §725.493(a); Decision and Order at 4 [emphasis in original]. Rather, the administrative law judge found that claimant worked for Desperado Fuels Company from March 6, 1989 to July 7, 1989 until he suffered a work-related back injury, at which time Kentucky Workers' Compensation paid claimant disability benefits from July 8, 1989 to June 12, 1990. Director's Exhibit 39. Thus, contrary to employer's argument, the administrative law judge, within a permissible exercise of his discretion, found that the time during which claimant was receiving disability payments did not constitute time towards the requisite one cumulative year period inasmuch as claimant ceased working for Desperado Fuels Company after he was injured and was not retained on the company's payroll for the requisite 125 working days.[3] *See Thomas v. Bethenergy Mines Inc.*, 21 BLR 1-12, 1-17 (1997)(on recon.); *Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348 (1985); Decision and Order at 4-5. Accordingly, we affirm the administrative law judge's determination that Desperado Fuels Company did not employ claimant for one cumulative year, and as such, was not the responsible operator. *See Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Director, OWCP v. Gardner*, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989); Decision and Order at 4-5.

Employer additionally contends that Grassy Creek Energies is the responsible operator because Grassy Creek Energies is the successor operator to Coleman & Coleman Mining Company, and that combined, claimant worked more than one year for these companies. Specifically, employer asserts that claimant worked for Coleman & Coleman Mining Company from September 8, 1980 to July 27, 1981 and continued to work for Grassy Creek Energies at the same address from July 27, 1981 to July 22, 1982. Employer's argument lacks merit.

The administrative law judge reasonably found that because the evidence of record failed to demonstrate a mine acquisition or transfer of assets, the record is devoid of evidence establishing a predecessor or successor coal mine relationship between Coleman & Coleman Mining Company and Grassy Creek Energies. *See* 20 C.F.R. §725.493(a)(2)-(4); *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 507, 19 BLR 2-290, 2-300 (4th Cir. 1995); Decision and Order at 5. Hence, we affirm the administrative law judge's designation of Kentland Elkhorn Coal Corporation as the proper responsible operator with whom

[3] Section 725.493(b) provides, in pertinent part, "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 by such operator or employer for the purposes of paragraph (a) of this section." 20 C.F.R. §725.493(b).

claimant was last employed for one cumulative year inasmuch as this finding is rational and supported by substantial evidence. *See* 20 C.F.R. §725.493(a)(1); *Pickup, supra*; *Thomas, supra*; Decision and Order at 4.

Pursuant to Section 725.309, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, articulated the standard for adjudicating duplicate claims, holding that "to assess whether a material change in condition is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-18 (6th Cir. 1994). In this case, the previous denial was based on claimant's failure to establish the existence of pneumoconiosis and total respiratory disability. *See* Director's Exhibit 39.

Employer argues that, after finding that claimant demonstrated a material change in conditions under Section 725.309(d), the administrative law judge failed to conduct a thorough review of all of the evidence of record. Specifically, employer asserts that the administrative law judge erred in according less weight to Dr. Fino's June 29, 1998 opinion, that claimant's obstructive impairment was due to cigarette smoking and not coal workers' pneumoconiosis, as vague inasmuch as Dr. Fino was merely reiterating an opinion which he had expressed in previous reports and the pulmonary function studies and blood gas studies reported by him were nonqualifying.

The administrative law judge, within a proper exercise of his discretion, found that the diagnostic tests and medical opinions submitted with claimant's prior claims filed in 1975, 1978, and 1984 were "not persuasive in determining whether [claimant] is *currently* disabled," inasmuch as they were based on claimant's respiratory condition from 1982 to 1992. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988) (claimant's entitlement to benefits is measured by his physical condition at time of hearing); Decision and Order at 13[emphasis in original]. Moreover, contrary to employer's argument, the administrative law judge rationally found Dr. Fino's June 29, 1998 opinion vague and equivocal because while Dr. Fino opined that the degree of claimant's ventilatory obstruction was indeterminable due to the invalid pulmonary function study, he nevertheless concluded that the evidence was insufficient to show that the obstruction was severe enough to establish total disability. Decision and Order at 11; Director's Exhibit 30. Likewise, the administrative law judge reasonably determined that Dr. Fino's opinion was equivocal and vague because while Dr. Fino did not find claimant totally disabled, he did not provide a strong opinion that claimant was able to perform his previous coal mine work. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 11; Director's Exhibit 30. Furthermore, the administrative law judge

rationally found that Dr. Fino's opinion was insufficiently supported by medical evidence inasmuch as it was unclear upon what objective evidence Dr. Fino relied in reaching his conclusion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11. Hence, we reject employer's arguments that the administrative law judge did not thoroughly review the evidence and we affirm the administrative law judge's reliance on the opinion of Dr. Younes and the opinion of Dr. Sikder, claimant's treating physician, which he found to be well-reasoned, that claimant was totally disabled. *See Clark*, *supra*. The administrative law judge's determination that total disability was established pursuant to Section 718.204(c) is, therefore, affirmed. Decision and Order at 13; Director's Exhibits 10, 29.

Employer argues further that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis because the evidence of record demonstrates that claimant's obstructive defect is due to his cigarette smoking history. Employer, however, fails to delineate how the administrative law judge erred in his analysis of the medical opinion evidence relevant to Section 718.204(b). Because employer fails to state with specificity how the administrative law judge's conclusion is contrary to law, there is no basis upon which the Board can review the administrative law judge's determination. *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Inasmuch as employer offers no legal or factual challenge to the administrative law judge's rationale, we affirm the administrative law judge's Section 718.204(b) finding.

Consequently, we affirm the administrative law judge's determination that claimant affirmatively satisfied his burden of establishing all requisite elements of entitlement in this Part 718 case inasmuch as his findings are rational, contain no reversible error, and are supported by substantial evidence. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Additionally, we note that the administrative law judge was unable to determine the month of onset of total disability, and therefore, awarded benefits payable commencing as of the date claimant filed his claim, September 15, 1997. Decision and Order at 15. However, it is well established, "If the evidence fails to establish the month of onset of total disability, payment of benefits begins on the first day of the month in which the claim was filed." *Shupink v. LTV Steel Co.*, 17 BLR 1-24, 1-30 (1992); *Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-757 (1985). Consequently, we modify the administrative law judge's Decision and Order to reflect September 1, 1997 as the date for commencement of benefits.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and modified in part as noted herein.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge