BRB No. 09-0849 BLA

TAYLOR FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AUSTIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 09/24/2010
	)	
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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (05-BLA-6212) of Administrative Law Judge Donald W. Mosser rendered on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921 (c)(4) and 932(*l*)) (the Act).[1] In his initial decision, the administrative law judge credited the miner with at least fifteen years of qualifying coal mine employment, and adjudicated this claim, filed on September 26, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator herein, and that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings on the merits of entitlement, and affirmed his award of benefits. However, the Board vacated the administrative law judge's finding that the Director, Office of Workers' Compensation Programs (the Director), had met his burden of establishing that claimant was employed by employer for a period of not less than one year, and had therefore properly designated employer as the responsible operator in this claim pursuant to 20 C.F.R. §§725.494, 725.495, 725.101(a)(32). Noting that the administrative law judge based his finding on employer's payroll records, showing that the miner worked for employer from September 24, 2003 through July 24, 2004, and a pay stub indicating fifty hours of work from October 10-16, 2004, along with the miner's testimony that he last worked for employer on "October 28 or 29 of 2004," the Board held that the administrative law judge's conclusion, that employer had not provided evidence to contradict claimant's testimony, was contrary to the regulatory requirement that the Director, and not employer, bears the initial burden of proof on the responsible operator issue pursuant to 20 C.F.R. §725.495(b). The administrative law judge was instructed, on remand, to address and weigh all of the relevant evidence of record, in order to determine whether the Director had met his burden of proof in this case, by establishing that claimant's employment with employer was continuous from September 2003 through October 2004. *T.F.* [*Fields*] *v. Austin Coal Co., Inc.*, BRB No. 07-0945 BLA (Aug. 22, 2008)(unpub.).

[1] By Order dated June 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Black Lung Benefits Act with respect to the entitlement criteria for certain claims. *Fields v. Austin Coal Co*., BRB No. 09-0849 BLA (June 29, 2010) (unpub. Order). All parties have responded in agreement that the amendments are not applicable to this claim, because it was filed on September 26, 2003.

On remand, the administrative law judge again found that the Director had met his burden of proof to establish that employer is the potentially responsible operator in this case. Specifically, the administrative law judge found that the evidence of record demonstrates that employer employed the miner for at least one continuous year, and that, consequently, employer is the properly designated responsible operator liable for the payment of benefits to claimant. 20 C.F.R §§725.494, 725.495(b).

In the present appeal, employer alleges that the administrative law judge "is still in effect charging employer with the initial burden of proof of disproving responsible operator status based on a period of continuous employment for one cumulative year." Employer's Brief at 3. *Inter alia*, employer maintains that the administrative law judge made an "impermissible inference," that pay stubs from October 10, 2004 through October 16, 2004 indicated that claimant had been employed by employer from July 2004 through October of 2004. *Id*. at 5, 7. Employer argues that the administrative law judge "could have equally resolved the only clear-cut documentary evidence of earnings with employer against the Director and/or miner." *Id*. Employer also asserts that, contrary to the administrative law judge's finding, it submitted evidence that it did not employ the miner for a "continuous year," and that the documentary evidence does not establish a cumulative one-year period of employment. *Id*. at 5. According to employer, therefore, since the documentary evidence failed to demonstrate the cumulative one-year period, and claimant's testimony was inconsistent, "the Director did not satisfy [his] initial burden of proof in establishing responsible operator status for employer." *Id.* at 6. Claimant has not filed a response brief in this appeal.

Urging affirmance, the Director denies that the administrative law judge's analysis "shift[ed] the burden of proof that is properly imposed on the Director in the first instance." Director's Response Brief at 5-6. Rather, the Director asserts that the administrative law judge logically inferred, from a proper examination of all of the relevant evidence, that clamant worked for employer for one continuous year. In doing so, the Director submits, the administrative law judge "correctly observed that the record contained no evidence to contradict [his] conclusion. The fact that [employer] produced no evidence on the issue merely bolstered [the administrative law judge's] initial determination that the evidence was sufficient to establish the inference of continuous employment." *Id*. at 5. The Director contends that substantial evidence supports the administrative law judge's determination that employer was properly identified by the Director as the responsible operator.

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 administrative law judge began his analysis by acknowledging that the Director, not the employer, bears the initial burden of showing that the operator initially found liable for payment of benefits meets the criteria as a "potentially liable operator," pursuant to 20 C.F.R. §725.495(b). Decision and Order on Remand at 3. Next, he acknowledged the Board's remand instructions, that:

> In addition to payroll records, claimant's October 2004 pay stub, and claimant's testimony that he last worked for employer on October 28, 2004, the administrative law judge should address all other relevant evidence, including claimant's testimony that he "worked two years and two or three months for employer," and Dr. Rosenberg's September 1, 2004 letter referencing his August 12, 2004 examination of claimant, in which he stated that, "[claimant] is a 43 year old gentleman *formerly employed* in the coal mine industry." In the same letter, Dr. Rosenberg also stated that, "[Claimant] currently was a welder on a strip job," and that "He was continuing to work on the strip job doing welding."

Id., citing *Fields*, slip op. at 3 n.5 (emphasis in original); Employer's Exhibit 1.

The administrative law judge reviewed the miner's hearing testimony that, beginning in September of 2002, he worked for employer for "two years and two or three months," five or six days per week, and that his last day of work for employer was either October 28th or 29th of 2004. *Id*. at 3. The administrative law judge also acknowledged the miner's 2003 W2 wage and tax earning statement, and his deposition testimony that he began working for employer in September of 2003. *Id*. The administrative law judge next considered documents showing that the miner's work training by employer ended on September 22, 2003, and that the miner actually began working for employer on September 24, 2003. Characterizing the miner's hearing testimony as "somewhat inconsistent with the other evidence," the administrative law judge observed that he mistakenly designated 2002, rather than 2003, as the year he began working for employer. *Id*. at 4 n.3. Altogether, however, the administrative law judge found that the miner's calculation of his working dates was "reasonably accurate" in view of the concrete evidence, and that his "testimony is not so incredible that it cannot be persuasive on this issue." *Id*.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

Next, the administrative law judge addressed the cardinal question in this matter, namely: "whether the claimant was employed by employer for the time between July of 2004 and October 2004." *Id*. at 4. He found that, while payroll records established continuous payment to the miner for "at least ten months," until July 24, 2004, the miner testified that he last worked for employer on October 28 or October 29, 2004. *Id*. The administrative law judge found that the pay stub for October 10, 2004 through October 16, 2004 indicated that the miner worked during at least part of October 2004, and therefore bolstered his testimony that he ceased working for employer in October of 2004. *Id*. Turning to the medical documentation, the administrative law judge noted that, although Dr. Rosenberg initially referred to the miner as "formerly" employed in coal mining, the evaluative portion of his September 1, 2004 medical report also included two notations indicating that the miner was still working as a welder on a strip job at the time of his physical examination on August 12, 2004. *Id*. at 4-5. In sum, the administrative law judge characterized Dr. Rosenberg's evidence as "most probative," and assigned his medical report "significant weight." *Id*. Finally, the administrative law judge observed:

> Equally persuasive is the absence of any evidence establishing that the miner ceased working for employer prior to October of 2004. There is no evidence that the employment relationship between claimant and employer ended in July of 2004. Only the employer's payroll records indicate such a fact; however, these records are clearly incomplete as they [were submitted in November of 2004 to the Director but] do not contain any notations of the fifty hours of work the miner performed during October 10 through 16. As previously stated, the physician's report supports a finding that the miner was employed at least through August. Moreover, the record is devoid of any evidence that the miner was terminated or laid off by employer and then recalled prior to October 10, 2004. I believe that if the employer did not employ the miner for a continuous year it would have produced such evidence, either to the Director or at the hearing, demonstrating as such.

Id. at 5. Considering the relevant evidence as a whole, the administrative law judge concluded that the weight of the evidence showed that employer employed the miner for at least one continuous year, beginning in September of 2003, and ending in October of 2004. *Id*. Accordingly, he found that the Director met his burden of establishing that employer was properly designated as the responsible operator.

Pursuant to 20 C.F.R. §§725.494(c), 725.495(a)(1), the responsible operator is the party that has most recently employed the miner for a cumulative period of not less than one year, which is defined as "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'." 20 C.F.R. §725.101(a)(32); *see Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986); *Gration v.*

Westmoreland Coal Co., 7 BLR 1-90 (1984). The dates and length of coal mine employment may be established by any credible evidence including, but not limited to, company records, pension records, earnings statements, coworkers' affidavits and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Employer's argument has merit. We agree with employer that the administrative law judge erred in determining that employer is the properly designated responsible operator herein. While payroll records substantiate that the miner was continuously employed by employer from September of 2003 through July 24, 2004, and the October 10-16, 2004 pay stub substantiates an additional six days of employment with employer, the administrative law judge erred in finding that Dr. Rosenberg's report is sufficient to establish that the miner was continuously employed by employer for the period between July 24, 2004 and October 10, 2004. Despite the notation in Dr. Rosenberg's report of examination on August 12, 2004, that the miner was "previously employed [in coal mining]," the administrative law judge went on to find that subsequent notations in the report indicated that the miner was "currently working" for employer on that date. Decision and Order on Remand at 3-5. Additionally, the administrative law judge concluded that employer's payroll records were incomplete because they documented employment only until July 2004, and did not reflect the week of employment in October 2004, represented by the miner's pay stub. *Id*. at 5. Having determined that the documentary evidence was incomplete, the administrative law judge inferred that the miner's work for employer did not end in July of 2004, but was continuous through October of 2004, as documented by Dr. Rosenberg's medical examination in August of 2004 and the miner's pay stub.

We agree with employer that the administrative law judge's analysis is improper and cannot be sustained. First, the administrative law judge's reliance on the "*absence of any evidence* establishing that the miner ceased working for the employer prior to October of 2004," *id*. at 4 (italics added), is impermissible because it is inconsistent with the regulatory assignment of the burden of proof to the Director under Section 725.495(b). To the contrary, where there is an absence of evidence, the Director has not met his burden to show that an employer is the responsible operator for payment of benefits. Moreover, the administrative law judge's inference, that the miner's employment continued during the undocumented time period from July through October of 2004, effectively shifted the burden of proof to employer. While Dr. Rosenberg's report of his August 12, 2004 examination indicates both that the miner was formerly employed as a miner and that he currently was employed as a welder on a strip job, the report does not indicate that the miner's then-current employment was with employer. Substantial evidence therefore fails to support the administrative law judge's finding the miner's October 2004 pay stub, in conjunction with Dr. Rosenberg's report, demonstrated that the miner's employment with employer had been continuous. *See generally Director, OWCP v. Gardner*, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989). In so holding, we

specifically reject the Director's view that the administrative law judge properly relied on a lack of evidence demonstrating that the miner ceased working for employer at any time between July 24, 2004, when employer's "incomplete" payroll records ended, and October 10, 2004, as documented by the miner's pay stub for work performed from October 10-16, 2004. *Id*. at 5; *see* Director's Response Brief at 5. Such an inference is neither warranted by the evidence, nor permissible as a matter of discretion for the administrative law judge as fact-finder, because it conflicts with the regulatory assignment of the burden of proof. *See* 20 C.F.R. §725.495(b). Rather, the administrative law judge's analysis was faulty, precisely because it was improperly premised on an absence of evidence in the record showing that the miner's work for employer did not continue during the period of time unsubstantiated by the record evidence. Since substantial evidence in the record establishes only that the miner worked for employer from September 24, 2003 through July 24, 2004, and again from October 10, 2004 through October 16, 2004, the Director did not demonstrate that the miner was continuously employed for a period of not less than one cumulative year pursuant to 20 C.F.R. §§725.494, 725.495, 725.101(a)(32); *see Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348 (1985); *Sisko v. Helen Mining Co.*, 8 BLR 1-272 (1985). The Director therefore failed to carry his burden of proof in designating employer as the responsible operator in this case, and thus, the Black Lung Disability Trust Fund is liable for the payment of benefits. Consequently, we reverse the administrative law judge's finding that employer was properly designated the responsible operator herein, pursuant to 20 C.F.R. §§725.494(c), 725.495.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my esteemed colleagues' decision to reverse the administrative law judge's Decision and Order on Remand. The majority believes that the administrative law judge shifted the burden of proof in his determination that employer was properly designated as the responsible operator, and that his ultimate conclusion was not supported by substantial evidence. To the contrary, I find no error in the administrative law judge's determination that employer was properly designated as the responsible operator in this case pursuant to 20 C.F.R. §§725.494(c), 725.495, 725.101(a)(32), and would affirm the decision in all respects.

My objection to the majority opinion is two-fold. First, the controlling regulation at 20 C.F.R. §725.101(a)(32)(ii) provides that the dates and length of employment may be established by "any credible evidence *including* (but not limited to) company records…earnings statements…and sworn testimony" (emphasis added). Evidence of a single type therefore need not be dispositive; rather, the administrative law judge's appreciation of either a particular item of evidence or, indeed, the totality of the evidence, may prove compelling. Having presided at the administrative hearing, the administrative law judge was able to observe the miner and reflect on his testimony. Having done so, he chose to reconcile the oral evidence together with the documentary evidence of record, and accorded considerable weight to the miner's own words. Moreover, the administrative law judge's decision reflects that he took considerable pains to identify the items of evidence considered, and carefully explained his reasoning. While we, as judges, validly examine the nature and extent of the fact-finder's analysis, it is surely no part of our duty to reassess his credibility determinations, save pursuant to an abuse of discretion standard. This is especially so in instances of witness testimony. Such traditional deference is shrewdly grounded in legislative conviction that the prudence, discernment and common sense of the presiding judge should not be overturned in matters requiring observation of a witness's demeanor. In my opinion, the majority's analysis of the decision concentrates unduly on the dates represented by the documentary evidence of record, to the exclusion of claimant's testimony, which the administrative law judge chose to credit. This approach effectively, and I believe improperly, usurped the administrative law judge's prerogative to assign weight to the sworn testimony of record. To my mind, the administrative law judge's determination that claimant's testimony was worthy of credibility was entirely within his discretion as fact-finder, and legitimately informed his consideration of the remaining evidence.

Second, my review indicates that the administrative law judge fully complied with the Board's instructions on remand to consider all of the relevant evidence respecting the responsible operator issue, and properly evaluated the evidence of record as to its completeness and accuracy, in order to assess its reliability. Moreover, albeit party pleadings are not evidence, *see Barcamerica Int'l Trust v. Tylfield Importers, Inc.*, 289

F.3d 589, 593 n.4 (9th Cir. 2002); *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 252 (3d Cir. 1999), I have scrutinized employer's arguments on appeal, and assume that they are honestly, yet artfully, drawn. At no point does employer refute the administrative law judge's finding that the miner's employment records were incomplete, nor does employer deny the validity of the pay stub demonstrating that the miner was paid by employer for work performed over a six-day period in October 2004; rather, employer contends that the administrative law judge should have concluded either that the miner's employment ended in July of 2004, and commenced again for a six-day period in October of 2004, or that his length of employment with employer could not be ascertained. To this end, employer argues that the administrative law judge impermissibly filled in the "gap in payroll records," and should have determined that the miner could "have submitted payroll stubs for the period from July of 2004 through October 9, 2004, if same exist[ed]." Employer's Brief at 3, 6.

Contrary to employer's arguments, however, the administrative law judge reasonably found that claimant was currently employed by employer as of Dr. Rosenberg's August 12, 2004 medical report, and substantial evidence supports this inference. Moreover, since the submitted employment records did not include the six-day work period represented by claimant's October 2004 pay stub, those records were demonstrably incomplete. Having logically so determined, the administrative law judge was not precluded from also observing that the record contained no evidence indicating that the substantiated employment relationship, ongoing as of August 12, 2004, had terminated at some point and then resumed before October 10, 2004. It was fully within the bounds of his discretion as fact-finder to infer, based on claimant's credible testimony, the existing documentation, and the evidence of record as a whole, that claimant's employment was indeed continuous through October of 2004. Further, the administrative law judge's additional observation, that employer would, if possible, have produced evidence establishing that it did not employ the miner for a continuous year, does not denote an improper shifting of the burden of proof. Simply, the Director's maintenance of the regulatory burden of proof throughout does not bar the administrative law judge from coming to the conclusion, quite reasonably, that the miner's work for employer extended continuously from his starting date in September 2003 until October of 2004.

The administrative law judge enjoys wide discretion to evaluate the evidence of record; his inferences and deductions must be sustained unless irrational or unsupported by the record. *See generally Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Here, the administrative law judge performed a searching scrutiny of the evidence, and I am persuaded that his inferences were logical and permissibly drawn, and in no way contravened the Director's burden of proof in this matter. Substantial evidence in the record as a whole supports his ultimate determination that employer was properly designated as the responsible operator in this claim, pursuant to the regulations. 20 C.F.R. §§725.101(a)(32)(ii), 725.494(c), 725.495(c)(2). In my view, therefore, the

majority has substituted its own assessment of the evidence for that of the administrative law judge. I, for one, am unwilling to allow a re-creation of the fact-finder's evaluative process. Therefore, I decline to endorse the majority's reversal of the administrative law judge's determination that the Director properly designated employer as the responsible operator for payment of benefits in this claim.

I would affirm the Decision and Order on Remand.

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BETTY JEAN HALL
Administrative Appeals Judge