BRB Nos. 11-0840 BLA
and 11-0840 BLA-A

MEARL MOLLETTE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/14/2012
	)	
MARTIN COUNTY COAL CORPORATION	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order-Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly, PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (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.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Denial of Benefits (09-BLA-5363) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim filed on March 20, 2008, 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 administrative law judge credited claimant with nine years and four months of coal mine employment.[1] Further, based on claimant's hearing testimony, the administrative law judge found that after claimant stopped working for employer, he worked for a different coal mine operator for at least one year. The administrative law judge, however, found that employer did not prove that the more recent coal mine operator was financially capable of paying benefits. The administrative law judge therefore determined that employer was correctly designated as the responsible operator.

Turning to the merits of the claim, the administrative law judge found that the x-ray evidence was inconclusive as to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but that the medical opinion evidence established the existence of clinical pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that the medical opinion evidence did not establish the existence of legal pneumoconiosis.[3] Additionally, the administrative law judge found that claimant did not establish that his clinical pneumoconiosis arose out of coal mine

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[2] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[3] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

employment pursuant to 20 C.F.R. §718.203(c). Accordingly, the administrative law judge denied benefits.[4]

On appeal, claimant contends that the administrative law judge erred in his length of coal mine employment determination. Claimant further asserts that the administrative law judge erred in his analysis of the x-ray evidence in determining that clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1), erred in his analysis of the medical opinion evidence in determining that the existence of legal pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), and erred in finding that claimant's clinical pneumoconiosis did not arise out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Additionally, claimant argues that the administrative law judge erred in finding that employer is the responsible operator. In a combined response brief and brief in support of its cross-appeal, employer urges affirmance of the denial of benefits. If the denial of benefits is not affirmed, employer argues that the administrative law judge erred in finding that employer is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), has filed separate responses to claimant's appeal and employer's cross-appeal. The Director responds that claimant lacks standing to challenge employer's designation as the responsible operator. In response to employer's cross-appeal, the Director argues that, because employer failed to identify claimant as a potential witness regarding employer's liability while the claim was before the district director, as required by 20 C.F.R. §725.457(c)(1),[5] employer waived the right to use claimant's hearing testimony to challenge its liability for benefits. The Director argues that, therefore, the administrative law judge erred in relying on claimant's testimony to find that another coal mine operator more recently employed claimant for one year.[6]

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[4] The administrative law judge found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 21-23.

[5] Section 725.457(c)(1) provides that, "In the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director." 20 C.F.R. §725.457(c)(1).

[6] The Director, Office of Workers' Compensation Programs (the Director), agrees with employer that the administrative law judge erred in requiring employer to prove that the more recent operator was financially capable of assuming liability for benefits. Director's Brief at 4 n.3, *citing* 20 C.F.R. §725.495(d).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement 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).

As will be discussed below, substantial evidence supports the administrative law judge's determination that claimant did not establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Therefore, we affirm the denial of benefits. Accordingly, it is unnecessary to address employer's cross-appeal challenging its designation as the responsible operator.

Initially, claimant contends that the administrative law judge erred in crediting him with nine years and four months of coal mine employment.[7] Specifically, claimant contends that the administrative law judge erred in failing to credit, in full, his testimony that he had additional periods of employment with Amber Coal Company (Amber Coal) and H&N Coal Company (H&N Coal).[8]

Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Mills v. Director, OWCP,* 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Croucher v. Director, OWCP,* 20 BLR 1-67, 1-72 (1996)(en banc). In considering the evidence submitted, the administrative law judge may use any reasonable method of computation. *See Dawson v. Old Ben Coal Co.,* 11 BLR 1-58 (1988).

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[7] Claimant does not specify the total number of years of coal mine employment he believes should have been found established. Claimant's Brief at 11-13. As noted by the administrative law judge, claimant alleged approximately fourteen years of coal mine employment. Director's Exhibit 3.

[8] Claimant does not challenge the administrative law judge's findings that he had approximately seven years and eight months of coal mine employment with different coal mine operators between 1972 and 1980, and three months of coal mine employment with Pontiki Coal, in 1982. Those findings are therefore affirmed. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983).

The administrative law judge credited claimant with sixteen months of coal mine employment with Amber Coal, finding ten months established by Amber Coal's employment records, and another six months established by claimant's testimony. With respect to H&N Coal, the administrative law judge found that claimant was able to prove one month of coal mine employment, when his testimony was viewed in light of the other evidence of record.

Upon review, we conclude that substantial evidence supports the administrative law judge's findings. As the administrative law judge noted, employment and Social Security earnings records indicated that claimant worked for Amber Coal for ten months, from January 31, 1981, to November 28, 1981. Director's Exhibits 7, 8. As further summarized by the administrative law judge, claimant "testified that he continued to work for Amber Coal through 'I think it was like 1982 or 1983,' off the books for 'up to six months,' for a period of about three years." Decision and Order at 5. In evaluating claimant's testimony, the administrative law judge also considered documentary evidence of record containing differing accounts of claimant's employment with Amber Coal. Specifically, the administrative law judge considered coal mine employment histories and answers to interrogatories in which claimant stated (1) that he worked for Amber Coal from 1981 to 1983; (2) from 1979 to 1981; (3) for one year; and (4) that he could not recall the dates of his employment with Amber Coal. Director's Exhibits 3, 15. Additionally, the administrative law judge found that Social Security earnings records indicated that claimant worked for Pontiki Coal for three months in 1982, "less than a year after Amber Coal indicates he left their employment at the end of November 1981. . . ." Decision and Order at 5; Director's Exhibit 8.

Considering the foregoing evidence, the administrative law judge reasonably found that, because of the "variations in [claimant's] recollections," and because the record documented claimant's employment with Pontiki Coal in 1982, claimant's testimony established an additional six months of employment with Amber Coal, from December 1981 into 1982. *See Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). In arguing that the administrative law judge erred in so finding, claimant essentially requests the Board to reweigh the evidence, which we are not authorized to do.[9] *Anderson*, 12 BLR at 1-113.

Similarly, the administrative law judge considered claimant's testimony regarding his coal mine employment with H&N Coal, and made a reasonable credibility

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[9] Claimant argues that the administrative law judge erred in his credibility determination because claimant's testimony was "not inconsistent" with the Social Security earnings records, and there was no evidence that he did not return to work with Amber Coal after he worked for Pontiki Coal in 1982. Claimant's Brief at 12.

determination. *See Anderson*, 12 BLR at 1-113; *Miller*, 7 BLR at 1-694. Specifically, the administrative law judge considered claimant's testimony that "he last worked as a coal miner off the books for H&N Coal . . . from 1989 to 'probably' 1991," along with claimant's later testimony that he thought "he stopped working in coal mines in 1989 . . . and has not worked since 1989." Decision and Order at 5, citing Tr. at 13-30. The administrative law judge further considered documentary evidence in which claimant (1) listed no employment with H&N Coal; (2) stated that he worked for H&N Coal for one year; (3) stated that he worked for H&N Coal for nine months; and (4) stated that he could not recall the dates that he worked for H&N Coal. Director's Exhibits 3, 15. Finally, the administrative law judge considered a settled state black lung claim against H&N Coal, listing November 16, 1989 as the date of injury. Based on his evaluation of the conflicting evidence, the administrative law judge found, as was within his discretion, that the evidence established one month of employment with H & N Coal, in November 1989. *See Dawson,* 11 BLR at 1-60.

Substantial evidence supports the administrative law judge's finding that claimant established nine years and four months of coal mine employment. *See Dawson,* 11 BLR at 1-60. Therefore, we affirm the administrative law judge's length of coal mine employment determination.[10]

Claimant next contends that the administrative law judge erred in his analysis of the x-ray evidence when he found that it did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant has not explained how any error by the administrative law judge prejudiced his case. Although the administrative law judge found that the x-ray evidence, considered in light of the readers' radiological credentials, was inconclusive as to the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), he determined that the weight of the medical opinion evidence established clinical pneumoconiosis under 20 C.F.R. §718.202(a)(4). The United States Court of Appeals for the Sixth Circuit has held that 20 C.F.R. §718.202(a) provides alternative methods of establishing the existence of pneumoconiosis. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-226-27 (2002) (en banc). As claimant established clinical pneumoconiosis under 20 C.F.R. §718.202(a)(4), and alleges no prejudice resulting from the administrative law judge's finding as to the x-ray evidence under 20 C.F.R. §718.202(a)(1), any error by the administrative law judge would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-

[10] Because claimant established fewer than fifteen years of coal mine employment, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

1276, 1278 (1984). Therefore, we need not address claimant's allegation of error at 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Castle, and Dahhan. Regarding the existence of clinical pneumoconiosis, the administrative law judge found that the opinions of Drs. Rasmussen and Dahhan, "that [claimant] has radiographic clinical pneumoconiosis[,] [were] more probative than the inconclusive chest x-ray readings and Dr. Castle's contrary opinion."[11] Decision and Order at 18. With respect to whether claimant has legal pneumoconiosis, the administrative law judge considered Dr. Rasmussen's opinion that "legal pneumoconiosis could be considered," because claimant has diffuse interstitial fibrosis with an impairment in blood oxygenation, and "his coal mine dust exposure could contribute at least minimally to his disabling lung disease." Director's Exhibit 11; Employer's Exhibit 4. The administrative law judge also took into account Dr. Rasmussen's statement that his etiology opinion was "speculative" because claimant's coal mine dust exposure was of limited duration and, thus, the contribution from coal mine dust exposure "may not even be significant . . . it may be minimal." Employer's Exhibit 4 at 52. In contrast, Drs. Castle and Dahhan concluded that claimant's diffuse interstitial fibrosis constitutes idiopathic pulmonary fibrosis, or usual interstitial pneumonitis, unrelated to coal mine dust exposure. Director's Exhibit 30; Employer's Exhibits 1-3.

Initially, the administrative law judge declined claimant's request to accord the greatest weight to Dr. Rasmussen's opinion based on his qualifications. The administrative law judge explained that he found that Drs. Castle and Dahhan were also well-qualified, and that he considered the physicians' reasoning for their conclusions to be more important in determining the weight to accord their opinions "[i]n this particular case." Decision and Order at 18. In evaluating the physicians' reasoning, the administrative law judge found that Dr. Rasmussen's opinion had "diminished probative value," because it was equivocal and speculative. The administrative law judge noted that Dr. Rasmussen indicated that his etiology determination was "speculative and that he was not sure what caused [claimant's] pulmonary abnormalities. . . ." Decision and Order at 19. The administrative law judge therefore discounted Dr. Rasmussen's conclusion that it "could be considered" that claimant's coal mine dust exposure may be a "minimal contributing factor" in his lung disease and associated impairment. The administrative law judge found that, in contrast, Drs. Castle and Dahhan stated "with

[11] The administrative law judge explained that "this case presents a unique situation where all the physicians and radiologists essentially see the same radiographic abnormalities" on claimant's "chest x-rays but disagree on [whether the] ILO classification" should be positive for pneumoconiosis. Decision and Order at 18.

much greater certainty" that claimant's impairment is due to pulmonary fibrosis unrelated to coal mine dust exposure, and he concluded that their opinions were "documented, reasoned, and probative determinations that claimant does not have legal pneumoconiosis." *Id*.

Claimant contends that the administrative law judge erred because he should have found Dr. Rasmussen to be the best qualified to render an opinion on the cause of claimant's pulmonary disease. Claimant's Brief at 19-22. Contrary to claimant's contention, the administrative law judge acted within his discretion as the fact-finder in determining the weight to accord the physicians' opinions based on their comparative credentials. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149, 1-155 (1989)(en banc).

Moreover, the administrative law judge found the physicians' "rationale for their conclusions regarding [claimant's] pulmonary condition a more significant probative value consideration than the physicians' general expertise in the area of black lung disease." Decision and Order at 18 n.28. On that issue, the administrative law judge permissibly determined that Dr. Rasmussen's opinion, that it "could be considered" that coal mine dust exposure was a "minimal" contributing factor in claimant's impairment, was equivocal and, therefore, had "diminished probative value." Decision and Order at 19; *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 (1988). Claimant argues that Dr. Rasmussen's opinion was well-documented and reasoned and, therefore, merited greater weight. Claimant's Brief at 22-26. Whether an opinion is adequately reasoned is committed to the administrative law judge's discretion, and the Board is not empowered to reweigh the evidence. *See Director, OWCP v. Rowe,* 719 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, we reject claimant's allegation of error, and affirm the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.203(c), the administrative law judge found that, "due to equivocal reasoning, Dr. Rasmussen's opinion about the cause of [claimant's] radiographic [clinical] pneumoconiosis has diminished probative value."[12] Decision and Order at 21. As the only other medical opinions stated that claimant's clinical pneumoconiosis did not arise out of coal mine employment, the administrative law judge

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[12] The administrative law judge noted that, in addition to stating that his opinion on the cause of claimant's pneumoconiosis was speculative, Dr. Rasmussen "identified several alternative and viable etiologies for the radiographic pulmonary abnormalities, including cigarette smoking in combination with inorganic dust, silica exposure from [claimant's] ceramic tile work, and an unknown cause that can occur in the general population." Decision and Order at 20.

found that claimant failed to establish that his pneumoconiosis arose, at least in part, out of his coal mine employment.

Claimant contends that the administrative law judge erred, because he should have found claimant entitled to the rebuttable presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), based on a finding of at least ten years of coal mine employment. Claimant's Brief at 26. As we have affirmed the administrative law judge's finding that claimant established nine years and four months of coal mine employment, we reject claimant's contention. Claimant argues further that, for the same reasons the administrative law judge erred in failing to find legal pneumoconiosis established based upon Dr. Rasmussen's opinion, he erred in failing to find that claimant's clinical pneumoconiosis arose out of his coal mine employment. *Id*. As we discussed above, the administrative law judge provided valid reasons for the weight he accorded Dr. Rasmussen's opinion regarding the etiology of claimant's lung disease. We therefore reject claimant's argument. Thus, we affirm the administrative law judge's finding that claimant did not establish that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c).

Because claimant failed to establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. Therefore, as noted above, we need not address employer's cross-appeal challenging its designation as the responsible operator.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

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