BRB No. 10-0239 BLA

CLYDE SMITH, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRANHAM & BAKER UNDERGROUND CORPORATION	)	DATE ISSUED: 12/22/2010
	)	
Employer-Petitioner	)	
	)	
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 - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Randy G. Clark (Clark & Johnson Law Offices), Pikeville, Kentucky, for claimant.

Paul E. Jones and James W. Herald III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Matthew Bernt (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 - Award of Benefits (2007-BLA-5815) of Administrative Law Judge Daniel F. Solomon 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). This case is before the Board for the second time. In his Decision and Order dated July 2, 2008, the administrative law judge found the claim to be timely filed, and further found employer to be the properly designated responsible operator herein. Upon a stipulation of the parties, the administrative law judge credited claimant with fourteen years of coal mine employment, and adjudicated the claim, filed on August 23, 2006, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's length of coal mine employment determination, as well as his findings that the claim was timely filed, and that total respiratory disability was established pursuant to 20 C.F.R.§718.204(b). However, the Board vacated the administrative law judge's finding that employer was the properly designated responsible operator, as the administrative law judge failed to assess the evidence of record and make a finding that the Director, Office of Workers' Compensation Programs (the Director), had met his initial burden of establishing that employer was the successor operator to Kiah Creek Mining (Kiah Creek).[1] *See* 20 C.F.R. §§725.495(b), 725.494. As the Director also acknowledged that he entered no evidence into the record to establish a successor relationship, but that such evidence was publicly available via the internet on the Mine Safety and Health Administration Data Retrieval System, the Board instructed the administrative law judge to reassess the evidence of record, noting that the administrative law judge may, in his discretion, reopen the record or take judicial notice of the relevant evidence necessary to make his determination. On the merits of the case, the Board vacated the administrative law judge's findings of legal pneumoconiosis and disability causation at Sections 718.202(a)(4) and 718.204(c), respectively. The administrative law judge was instructed to consider and weigh Dr. Baker's supplemental opinion, and to reevaluate and weigh the medical opinion evidence of record, giving consideration to the qualifications of the physicians, in determining whether the weight of the evidence as a whole establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and whether pneumoconiosis was a substantially contributing cause of claimant's disability pursuant to Section 718.204(c), if

[1] As support for the district director's designation of employer as the liable responsible operator in the Schedule for Submission of Additional Evidence, the district director stated that, "[employer] purchased Kiah Creek on June 1, 1997." No documentation was entered into evidence to support this assertion.

reached. *C.E.S., Jr.* [*Smith*] *v. Branham & Baker Underground Corp.*, BRB No. 08-0759 BLA (July 27, 2009) (unpub.).

On remand, the administrative law judge opened the record for comments and reviewed the briefs submitted by employer and the Director. The administrative law judge found that, although no documentary evidence was provided, claimant's credible testimony established that employer was the properly designated responsible operator in this case. On the merits of the case, the administrative law judge found that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Consequently, the administrative law judge awarded benefits.

In the present appeal, employer again challenges its designation as responsible operator, as well as the administrative law judge's findings that the evidence was sufficient to establish the existence of legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director has filed a limited response, urging affirmance of the administrative law judge's finding that employer is the responsible operator. The Director maintains that claimant's uncontradicted testimony is sufficient to establish a successor relationship between employer and Kiah Creek, and that employer failed to produce evidence to contradict its designation 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).

Employer first contends that the administrative law judge erred in finding it to be the properly designated responsible operator herein, as the Director "advanced no evidence" before the administrative law judge to establish that Kiah Creek and employer are the same entities. Employer thus asserts that the Director failed to meet his initial burden of proving either a successor relationship between employer and Kiah Creek, or that employer was the last coal mine operator to have employed claimant for a cumulative period of at least one year. Employer further alleges that the administrative law judge avoided an explicit finding that the Director met his initial burden of proof, by merely concluding that "[i]f Director proved the initial burden, employer did not meet the

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant 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.

shifting burden." Decision and Order on Remand at 3. Lastly, employer maintains that it produced evidence sufficient to rebut the administrative law judge's determination that it was properly identified as the responsible operator. Employer's Brief at 5-7. Some of employer's arguments have merit.

The administrative law judge determined that Social Security Administration records reflected that claimant worked for Kiah Creek in 1996 and 1997, earning $13,816.02 in 1996 and $11,447.60 in 1997, and that claimant worked for employer in 1997 and 1998, earning $9,689.88 in 1997 and $5,729.64 through April 1998. Director's Exhibits 7, 23-10, 25; Decision and Order on Remand at 2. The administrative law judge also noted that "although the record remained open, I was not asked to correct the record as to any relationship between Kiah Creek and [employer]." Decision and Order on Remand at 3. In finding that the Director provided "preponderant evidence" that employer is the successor operator to Kiah Creek, the administrative law judge credited claimant's "credible assertion" that he worked for both companies for more than one year and that employer bought out Kiah Creek on June 1, 1997.[3] Director's Exhibits 23-11, 25-2; Decision and Order at 2, 3. "After a review of all the evidence," the administrative law judge found that employer was, therefore, the responsible operator in this case. Decision and Order at 3.

As we noted in our prior Decision and Order, the Director bears the initial burden of proving that the designated responsible operator initially found liable for the payment of benefits pursuant to 20 C.F.R. §725.410 is a potentially liable operator. *See* 20 C.F.R. §725.495(b). To be considered a potentially liable operator, the Director must establish, *inter alia*, that employer was the last coal mine operator to have employed claimant for a period of at least one year, during which claimant must have worked at least 125 days as a coal miner. *See* 20 C.F.R. §725.494. Contrary to the Director's contention, claimant's testimony, that employer bought out Kiah Creek; that he "worked for both companies for more than one year;" and that he worked "between both mines, close to two years," is not sufficiently specific to meet the Director's burden to establish a successor relationship between the two companies,[4] nor is claimant's general testimony, that he worked for

[3] A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492. Additionally, Section 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

[4] Claimant testified at the hearing that he had no idea about the corporate structure of Kiah Creek or employer. Hearing Transcript at 29.

employer for one year, sufficient to meet the Director's burden to establish that the miner's employment lasted for one calendar year or partial periods totaling a 365-day period, during which the miner worked in or around a coal mine for at least 125 working days. 20 C.F.R. §§725.101(a)(32), 725.492, 725.495(b); *see Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986); *Gration v. Westmoreland Coal Co.*, 7 BLR 1-90 (1984); Director's Exhibit 23-11; Hearing Transcript at 22. The Director, therefore, failed to carry his initial burden of proof when designating employer as the responsible operator in this case. 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, 725.495.

Regarding the merits of entitlement, employer challenges the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4) and his reliance on the diagnosis of legal pneumoconiosis by Dr. Forehand, as bolstered by the opinion of Dr. Baker, over the contrary opinions of Drs. Fino and Rosenberg. In this regard, employer argues that Dr. Baker's supplemental report does little to bolster the opinion of Dr. Forehand, as Dr. Baker indicated that a legal pneumoconiosis diagnosis was "borderline." Employer also asserts that the administrative law judge continued to improperly credit Dr. Forehand with credentials in pulmonology, when he is, in fact, the least qualified physician, while Drs. Fino and Rosenberg are "the most highly qualified physicians." Employer's Brief at 7-18. Employer's arguments lack merit.

Dr. Forehand diagnosed claimant with a severe respiratory impairment consistent with chronic obstructive pulmonary disease (COPD) stemming from centrilobular emphysema, due to claimant's twenty pack-year smoking history and his fourteen years of coal dust exposure. Dr. Forehand opined that claimant had a totally and permanently disabling respiratory impairment due to the combined effects of smoking and inhaling coal mine dust and silica particles. Claimant's Exhibit 1. Based on histories of twenty-six years of coal mine employment and twenty pack-years of smoking, Dr. Baker initially diagnosed COPD with severe obstructive defect, mild resting hypoxemia and chronic bronchitis, caused nearly equally by coal dust exposure and smoking. Director's Exhibit 17. When he was presented with claimant's accurate coal mine employment history of fourteen years, Dr. Baker indicated in a supplemental opinion that "legal pneumoconiosis would be borderline but also could work synergistically with the smoking or in an additive fashion to cause a worsened lung condition than if claimant had either a smoking or coal dust exposure alone." Director's Exhibit 20. By contrast, Dr. Rosenberg opined that claimant does not have either clinical or legal pneumoconiosis, but has a respiratory disability attributable to smoking-related emphysema. Dr. Rosenberg explained that, absent documentation that claimant has some form of nodular coal workers' pneumoconiosis, any emphysema that claimant has is not coal dust-related. Director's Exhibit 22; Employer's Exhibit 4. Dr. Fino also diagnosed severe pulmonary

emphysema due to cigarette smoking. Dr. Fino opined that, while there is no doubt that coal dust inhalation causes emphysema, and that there is good evidence that coal miners have more pathological emphysema than non-coal miners, studies do not show that coal dust-induced emphysema results in a clinically significant impairment or disability in all patients. Employer's Exhibits 1, 2.

In evaluating the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge acknowledged that Dr. Forehand is Board-certified in allergy and immunology as well as pediatrics, while Drs. Baker, Fino, and Rosenberg are all Board-certified in internal medicine and pulmonary diseases, and Dr. Rosenberg is additionally Board-certified in occupational medicine.[5] Decision and Order on Remand at 4. Noting that he was not required to accord greater weight to the opinions of physicians with superior qualifications, the administrative law judge continued to find that Dr. Rosenberg's rationale, that centrilobular emphysema would not be related to coal dust exposure in the absence of nodular coal workers' pneumoconiosis, was not supported by the studies relied upon by the Department of Labor (DOL) in amending the regulations, and that the Attfield and Hodus study cited by Dr. Rosenberg supported Dr. Forehand's rationale. Decision and Order on Remand at 5; *see* 65 Fed. Reg. 79,941 (Dec. 20, 2000); 20 C.F.R. §718.201(a)(2); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). He further determined that neither Dr. Rosenberg nor Dr. Fino considered the potential combined effects of coal dust exposure and smoking, or addressed whether coal dust exposure was an aggravating factor in claimant's emphysema. *Id*. Consequently, after considering the entirety of the medical opinion evidence, the administrative law judge permissibly accorded determinative weight to Dr. Forehand's opinion, as he found that Dr. Forehand provided "the most cogent rationale in this case," and that his opinion was consistent with the regulatory scheme adopted by DOL in defining legal pneumoconiosis. Decision and Order on Remand at 4. While the administrative law judge found that Dr. Baker's supplemental opinion was "less enthusiastic" than his original opinion, the administrative law judge acted within his discretion in finding that it still substantiated Dr. Forehand's conclusions. Decision and Order on Remand at 4-5; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

[5] The administrative law judge, when discussing the opinions of Drs. Baker, Forehand, and Fino on the issue of disability causation, stated that "I note that all are Board certified pulmonologists." Decision and Order on Remand at 6. We consider this statement to be a clerical error in light of the administrative law judge's earlier acknowledgment that "I stand corrected as to Dr. Forehand's credentials." Decision and Order on Remand at 4.

Regarding the issue of disability causation at Section 718.204(c), the administrative law judge properly accorded greater weight to the opinions of Drs. Baker and Forehand, which he found to be well-reasoned and documented, and less weight to the opinions of the physicians who did not diagnose pneumoconiosis, in direct contradiction to the administrative law judge's findings on remand. Decision and Order at 6; *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts. *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984). It is also within the administrative law judge's discretion to determine whether an opinion is documented and reasoned. *See Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the weight of the evidence of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a), and disability causation at Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is reversed on the issue of the responsible operator, and affirmed on the merits of entitlement.

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, concurring and dissenting:

I respectfully dissent from the majority's decision to reverse the administrative law judge's finding that employer is the responsible operator in this case. In my opinion,

the Director met his initial burden of proof, and employer's designation as the responsible operator should be affirmed.

I agree with the Director's position, that claimant's testimony, even in the absence of documentary evidence, is sufficient to fulfill the Director's initial burden of proving a successor relationship between employer and Kiah Creek. The administrative law judge permissibly credited claimant's credible and uncontradicted testimony, as supported by claimant's Social Security Administration earnings records, that employer bought out Kiah Creek; that "it was still the same company;" and that he worked for both companies for at least a year. Hearing Transcript at 21-22; Director's Exhibit 23-11; Decision and Order on Remand at 2-3. Accordingly, I would hold that the Director met his initial burden of proof pursuant to 20 C.F.R. §725.495(b), and that employer failed in its burden of proving "[t]hat it is not the potentially liable operator that most recently employed the miner." 20 C.F.R §725.495(c)(2). In all other respects, I concur in the decision of the majority.

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BETTY JEAN HALL
Administrative Appeals Judge