BRB Nos. 11-0289 BLA
and 11-0289 BLA-A

HELEN WARD (Daughter of DALLAS CRUM, o/b/o the Estate of DALLAS CRUM)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
WOLF CREEK COLLIERIES	)	DATE ISSUED: 01/31/2012
Employer-Petitioner Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Paul L. Edenfield (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant[1] cross-appeals, the Decision and Order Award of Benefits in a Subsequent Claim (2007-BLA-5898) of Administrative Law Judge Larry S. Merck rendered on a claim filed on November 1, 2004, 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).[2] The administrative law judge found that employer was the properly designated responsible operator and that the miner's widow was his only dependent for augmentation purposes. The administrative law judge adjudicated the subsequent claim pursuant to 20 C.F.R. Part 718, and credited the miner with at least 10.25 years of coal mine employment. The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Upon weighing all of the evidence of record, the administrative law judge found that, although the miner did not have clinical pneumoconiosis, the evidence was sufficient to establish that he had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits, commencing in November 2004, the month in which the miner filed this claim for benefits.

On appeal, employer contends that the administrative law judge erred in finding a change in an applicable condition of entitlement, based upon Dr. Baker's newly submitted opinion. Employer further argues that the administrative law judge did not properly weigh the opinions of Drs. Dahhan and Fino at Sections 718.202(a)(4) and 718.204(c). Employer also alleges that the administrative law judge erred in finding it is capable of assuming liability for the payment of benefits and requests that the Board transfer liability for the payment of benefits to the Black Lung Disability Trust Fund

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[1] Clamant is the daughter of Dallas Crum, the miner. The miner died on February 7, 2007, while his fourth claim was pending before the district director. The miner's daughter is now pursuing the claim on behalf of the miner's estate. Relevant to the present appeal, the miner's third claim was denied by the district director because the miner failed to establish any element of entitlement. Director's Exhibit 2 at 18-19. The procedural history of the miner's first two claims is set forth in *Crum v. Wolf Creek Collieries*, BRB No. 00-0738 BLA, slip op. at 2 n.2 (Apr. 12, 2001)(unpub.).

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the miner's claim because his initial and subsequent claims were filed prior to January 1, 2005. Director's Exhibits 1, 2, 4.

(Trust Fund). In response, claimant urges the Board to affirm the administrative law judge's award of benefits. Claimant has also filed a cross-appeal, contending that the administrative law judge erred in finding only 10.25 years of coal mine employment and in admitting the negative readings of the December 13, 2004 x-ray by Drs. Miller and Alexander as rebuttal evidence. Employer has not responded to claimant's cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), has responded and urges the Board to affirm the administrative law judge's determination that employer was correctly named the responsible operator and states that he will not address the substantive issues raised in either appeal, unless specifically requested to do so by the Board.[3]

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.[4] 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).

I. Legal Pneumoconiosis and Total Disability Causation

Employer argues that the administrative law judge erred in determining that Dr. Baker's newly submitted opinion was entitled to greater weight than the opinions of Drs. Dahhan and Fino under Sections 718.202(a)(4) and 718.204(c). Employer maintains that the administrative law judge's finding was contradictory because he gave little weight to Dr. Baker's diagnosis of chronic bronchitis and hypoxemia, but relied on his diagnosis of chronic obstructive pulmonary disease (COPD) to find legal pneumoconiosis,[5] and a

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that the miner's wife is his only dependent for purpose of augmentation, that the evidence was insufficient to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *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 23, 28.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 4-5; Director's Exhibits 4, 5.

[5] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

change in an applicable condition of entitlement, established. This contention is without merit.

Dr. Baker examined the miner on December 13, 2004, at the request of the Department of Labor. Director's Exhibit 16. Dr. Baker recorded a coal mine employment history of nineteen years and obtained an x-ray, a pulmonary function study, a blood gas study and an EKG. *Id*. In Dr. Baker's report, he set forth diagnoses of COPD, hypoxemia, chronic bronchitis and ischemic heart disease. *Id*. Dr. Baker indicated that the miner's respiratory conditions were attributable "primarily to coal dust exposure." *Id*. At his subsequent deposition, Dr. Baker stated that if the miner had only ten years of coal mine employment, it would not significantly affect his conclusions. Claimant's Exhibit 3 at 6.

Although the administrative law judge discounted portions of Dr. Baker's opinion,[6] he acted within his discretion as fact-finder in concluding that Dr. Baker's diagnosis of COPD constituted a reasoned and documented diagnosis of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Contrary to employer's assertion, the administrative law judge rationally determined that Dr. Baker's opinion was well documented as, subsequent to his examination of claimant, and prior to his deposition, Dr. Baker reviewed additional medical evidence and discussed how this evidence supported his diagnoses.[7] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 13 n.7; Claimant's Exhibit 3.

The administrative law judge also rationally found that Dr. Baker's diagnosis of legal pneumoconiosis was supported by the valid, qualifying pulmonary function study

[6] The administrative law judge found that Dr. Baker's diagnosis of chronic bronchitis due to coal dust exposure was unreasoned, as Dr. Baker relied solely on the miner's history of symptoms and did not identify any objective data to support his conclusion. Decision and Order at 14. Similarly, the administrative law judge determined that Dr. Baker's diagnosis of hypoxemia due to coal dust exposure was insufficient to establish the existence of legal pneumoconiosis because he did not state whether the hypoxemia was a chronic disease or impairment. *Id.*

[7] The administrative law judge noted that Dr. Baker reviewed rereadings of the x-ray that he obtained on December 13, 2004, the medical reports of Drs. Dahhan and Fino, Dr. Repsher's invalidation of the December 13, 2004 pulmonary function study, and records from Dr. Nelson, the miner's treating physician. Decision and Order at 13 n.7.

that he obtained after the study that he performed during his examination of the miner was found to be invalid. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 14; Director's Exhibit 16. Moreover, the administrative law judge acted within his discretion in crediting Dr. Baker's deposition testimony, that if the miner had ten years of coal mine employment, rather than the nineteen years that he reported to Dr. Baker, it would not have a significant effect on his opinion. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); Decision and Order at 13 n.8; Claimant's Exhibit 3 at 6. In addition, the administrative law judge's weighing of Dr. Baker's opinion is supported by his notation of Dr. Baker's testimony, that ten years of coal dust exposure is sufficient to cause significant pulmonary disease in a susceptible individual, and that the miner's medical history was inconsistent with a diagnosis of asthma. Decision and Order at 13-14; Claimant's Exhibit 3 at 7-8, 10, 14, 22. The administrative law judge acted within his discretion, therefore, in finding that Dr. Baker's diagnosis of legal pneumoconiosis was entitled to "full probative weight." *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Employer next argues that the administrative law judge erred in according little weight to the opinions of Drs. Dahhan and Fino. Employer maintains that, contrary to the administrative law judge's finding, Dr. Dahhan explained that coal dust did not contribute to the miner's respiratory impairment because his response to bronchodilators was inconsistent with the permanent adverse effects of coal dust exposure. Employer further contends that Dr. Dahhan testified that the significant change in the degree of airway obstruction, based on the miner's measured FEV1, and his treatment with bronchodilators, suggest that his obstruction was a non-fixed defect, such as bronchial asthma. Employer also argues that the administrative law judge impermissibly substituted his expertise for that of Dr. Dahhan. Employer similarly contends that the administrative law judge erred in discrediting Dr. Fino's opinion, that asthma was the likely cause of miner's moderate obstructive abnormality, as ten years of coal dust exposure would not cause clinically significant obstruction. Employer maintains that even if the administrative law judge properly discredited Dr. Fino's opinion on this basis, he should have discredited Dr. Baker's opinion for the same reason. Finally, employer asserts that the administrative law judge shifted the burden to employer to rule out a diagnosis of legal pneumoconiosis and applied a more rigorous level of scrutiny to the opinions of Drs. Dahhan and Fino than he applied to Dr. Baker's opinion. These allegations of error are without merit.

In his October 22, 2007 medical report, Dr. Dahhan stated that the miner suffered from:

> [S]ignificant obstructive ventilatory impairment and was treated with multiple bronchodilator agents by his family physician [Dr. Nelson],

> indicating that he believed his condition was responsive to such measures[,] a finding that is inconsistent with the permanent adverse effects of coal dust on the respiratory system, leading me to conclude that this patient's airway obstruction was not related to the inhalation of coal dust or coal workers' pneumoconiosis.

Employer's Exhibit 2. At his November 30, 2009 deposition, Dr. Dahhan stated that Dr. Nelson "felt" that the miner's airway obstruction was reversible and not fixed. *Id.* Dr. Dahhan opined that the fact that the miner's "airway obstruction changed significantly when treated with bronchodilator suggests that it is due to a non-fixed defect," like bronchial asthma. Employer's Exhibit 6 at 15. The administrative law judge summarized the miner's medical records from July 2002 to September 2006, and Dr. Nelson's consultation report, dated August 25, 2000, and accurately indicated that these documents did not contain a diagnosis of asthma. Decision and Order at 20; Claimant's Exhibit 4. The administrative law judge also correctly found that Dr. Nelson noted, with respect to a pulmonary function study obtained on September 20, 2002, that "[t]here is *some* improvement in *some* parameters after bronchodilator consistent with a component of obstructive disease." Decision and Order at 20; Claimant's Exhibit 4 (emphasis added). Consistent with the record, the administrative law judge rationally found that Dr. Dahhan's opinion, that the miner's response to bronchodilators ruled out a diagnosis of a chronic coal dust-related lung disease, did not contain an adequate explanation of why coal dust exposure could not be a contributing cause of the miner's obstructive lung disease. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 17, 20. Accordingly, we affirm the administrative law judge's decision to accord little probative weight to Dr. Dahhan's opinion.

With respect to Dr. Fino's opinion, the administrative law judge found that his consultative report included a review of objective evidence, medical records from 1992 to September 2006, and medical reports authored by himself, and Drs. Anderson, Lane, Broudy, Chandler, Sundaram, Nelson, Baker and Dahhan. Decision and Order at 17; Employer's Exhibit 7. Contrary to employer's allegation, the administrative law judge fully addressed Dr. Fino's opinion and rationally accorded it little weight, because Dr. Fino's conclusion, that ten years of coal mine employment could not cause clinically significant obstruction, was inadequately explained and was contrary to the medical literature upon which the Department of Labor relied in promulgating the amended definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2). Decision and Order at 19, 22, *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

In light of our affirmance of the administrative law judge's permissible credibility findings regarding the opinions of Drs. Dahhan and Fino, we reject employer's assertion

that the administrative law judge shifted the burden to employer to establish that the miner's COPD was not related to coal mine dust exposure. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483. Accordingly, we affirm his finding that the newly submitted evidence, and the evidence as a whole, is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[8] *See Cornett*, 227 F.3d 569, 22 BLR 2-107. We also affirm, therefore, the administrative law judge's determination that claimant established a change in an applicable condition of entitlement at Section 725.309(d). *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

Because we have affirmed the administrative law judge's credibility determinations on the issue of legal pneumoconiosis, and the administrative law judge relied upon them to conclude that claimant established that the miner's total disability was due to pneumoconiosis, we also affirm his finding at Section 718.204(c) and the award of benefits. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483, 23 BLR 2-44, 70 (6th Cir. 2003); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 185 (6th Cir. 1997).

II. Responsible Operator

Employer argues that the administrative law judge erred in finding that it is capable of assuming liability for any award of benefits. Employer argues that, because it was acquired by Horizon Natural Resources (Horizon), which was later liquidated in bankruptcy, the evidence establishes that it is unable to pay benefits. Employer therefore requests transfer of liability to the Trust Fund.

The Director urges the Board to reject employer's arguments and affirm the administrative law judge's determination that employer is the properly named responsible operator. The Director asserts that employer does not dispute that it was the miner's last employer for at least one calendar year, and that it is a self-insured responsible operator pursuant to 20 C.F.R. §§725.494 and 725.495. The Director further argues that, contrary to employer's contention, employer bears the burden of proving that it is not capable of paying benefits and that the administrative law judge properly found that employer failed to rebut the presumption of ability to pay, set forth in Sections 725.494(e) and

[8] Because we affirmed the administrative law judge's finding of legal pneumoconiosis, and the administrative law judge properly recognized that his finding of legal pneumoconiosis necessarily subsumed the inquiry of whether the miner's pneumoconiosis arose out of his coal mine employment, we reject employer's challenge at 20 C.F.R. §718.203(b). *See* 20 C.F.R. §§718.201(a)(2), 718.203; *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

725.495(b). The Director argues that it is undisputed that a surety was provided on behalf of employer, in accordance with its self-insured status, and that any questions as to whether the surety bonds are valid or enforceable are left to enforcement proceedings in the federal district court. We agree with the Director.

As an initial matter, we affirm, as unchallenged on appeal, the administrative law judge's findings that employer is the last coal mine operator to employ the miner for a cumulative period of at least one year, pursuant to Section 725.494(c) and that employer was an authorized self-insurer during the period in which it last employed the miner, pursuant to Sections 725.494(e), 725.495(b). *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 5-8. Furthermore, we hold that there is no merit to employer's allegation that the district director named Horizon as the responsible operator, as employer has consistently been identified as the responsible operator in all four claims. Director's Exhibit 1 at 2, 74, 152, 269, 481, 923; Director's Exhibit 2 at 18; Director's Exhibit 49 at 3; Administrative Law Judge's Exhibits 1, 2. We also hold that the administrative law judge properly found that, once the Director has named a potentially liable operator that meets the criteria of Section 725.494, the burden shifts to the potentially liable operator to prove that it is not capable of paying benefits. *See* 20 C.F.R. §725.495(b), (c); *Gilbert v. Williamson Coal Co., Inc.*, 7 BLR 1-289, 1-294 (1984); Decision and Order at 8.

In this case, the Director asserts, and employer concedes, that employer posted a surety bond when it was authorized to self-insure pursuant to 20 C.F.R. §726.104(b). In addition, employer does not contest the administrative law judge's adoption of Administrative Law Judge Pamela Lakes Wood's findings that Utica Bond SU27615 covered employer when it was authorized to self-insure and that the Utica Bond was replaced by Travelers' Bond 103587448.[9] Administrative Law Judge's Exhibits 1, 2. Moreover, the administrative law judge properly held that employer merely alleges an inability to pay, which is insufficient to rebut the presumption that employer is capable of assuming liability for the payment of benefits. 20 C.F.R. §§725.494(e) and 725.495(b); *Borders v. A.G.P. Coal Co.*, 9 BLR 1-32 (1986); Decision and Order at 8. The administrative law judge also determined correctly that the issue of whether employer's surety bond is valid or enforceable must be decided in federal district court. *See* 28

[9] After this claim was referred to the Office of Administrative Law Judges for a formal hearing, Administrative Law Judge Pamela Lakes Wood issued an Order Dismissing Utica Mutual Insurance Company and Order of Continuance and allowed the Director, Office of Workers' Compensation Programs, additional time to provide notice to the current bondholder or surety. Administrative Law Judge's Exhibit 1. Judge Wood also rejected employer's request to dismiss it from the claim. *Id*. Subsequently, Administrative Law Judge Donald W. Mosser issued an Order denying employer's motion for reconsideration. Administrative Law Judge's Exhibit 2.

U.S.C. §§1342, 1345; 30 U.S.C. §934. We, therefore, affirm the administrative law judge's findings that employer did not establish that it is incapable of paying benefits at Sections 725.494(e) and 725.495(b), and that employer is the properly named responsible operator.[10] *See Gilbert*, 7 BLR at 1-294.

Accordingly, the administrative law judge's Decision and Order Award of Benefits in a Subsequent Claim is 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

[10] In light of our disposition of employer's appeal, we need not reach claimant's arguments on cross-appeal.