U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 12 February 2004

In the matter of

Curtis P. Bledsoe
Claimant

v. Case No. 2002-BLA-05493

T&M Fuels, Incorporated
Employer

and

Director, Office of
Workers' Compensation Programs
Party in Interest

DECISION AND ORDER[1]

AWARD OF BENEFITS

Jurisdiction and Claim History

This case comes on a request for hearing pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901 *et seq.* (the Act) (DE 17)[2], dated June 17, 2002.[3]

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[1] 20 CFR § 725.477, 5 CFR § 554-7 (Administrative Procedure Act), and also 20 CFR § 725.479 Finality of decisions and orders.
(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see §§ 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see §§ 725.481).
(b) Any party may, within 30 days after the filing of a decision and order under §§ 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.
(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the new decision and order or affirmance of the original decision and order.

[2] References to "DE" and "Cx" refer to the exhibits of the Director and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

[3] And the regulations at 20 C.F.R. Ch. VI, Subch. B (the Regulations).

A hearing was held September 9, 2003, in Abingdon, Virginia. The claimant is represented by Sidney Douglas, Esquire of Harlan, Kentucky. T&M Fuels, Incorporated (hereinafter "Employer") is represented by Gregory Allen, Esquire, Riley and Allen, Prestonsburg, Kentucky. An appearance was entered for the Director, OWCP, who did not attend the hearing. The Claimant appeared and testified. Subsequent to hearing, the Claimant submitted a closing brief.

The current claim seeking black lung benefits was filed in 2001. After review by the District Director, that claim was granted. The Employer contested the award and, on June 17, 2002, requested a hearing before an administrative law judge. The claim was referred to this office on September 11, 2002.

As Mr. Bledsoe's most recent coal mine employment, between 1993 and 1996, was with T&M Fuels, Incorporated at a mine in Kentucky, the rulings of the U.S. Court of Appeals for the Sixth Circuit control this case. *See* ***Kopp v. Director, OWCP***, 877 F.2d 307 (4th Cir. 1989).

Mr. Bledsoe testified that he last worked on April 25, 1996 (Tr 28). He began coal mine employment in 1983 and worked for numerous companies until his last employment with the Employer in 1996. He worked in 26-30-inch seams, primarily as a jack setter and operating a roof bolting machine (Tr 12-16). His most recent work was running a roof bolter, which required him to use a torque wrench and to install the proper size roof bolts (DE 5; Tr 16). Claimant testified that all his coal mine employment exposed him to heavy coal mine dust and that he quit mining because of his difficulty breathing and the sensation of smothering while sleeping (Tr 17). He has experienced shortness of breath since 1996 and difficulty sleeping, sometimes having to sleep on two pillows (Tr 19). He sometimes coughs at night and is on the inhaler Albuterol. He treats with Dr. VanZee for his breathing problems, visiting him every three months for the last two years (Tr 18). He now experiences shortness of breath with walking or climbing five to six stairs (Tr 20). Claimant testified that he does nothing around the house and is unable to drive because of vision problems (Tr 23, 24). He also suffers from high blood pressure and back pain due to disc problems that began in 1998 (Tr 19, 23). Mr. Bledsoe takes Darvocet, Flexeril, and Vioxx for his back (Tr 26).

Mr. Bledsoe applied for and received Kentucky benefits for black lung (DE 8). His award, dated August 1997, awarded him $129.75 per week for the length of his disability, with benefits being reduced ten percent each year from age 65 to 71.

The claimant testified that he smoked about one pack of cigarettes a day for seven to eight years, quitting two months before the hearing (Tr 29).

This claim was filed after March 31, 1980. For this reason, the Regulations at 20 CFR Part 718 apply. 20 CFR § 718.2 (2002). In order to establish entitlement to benefits under Part 718, Claimant must establish that the Miner suffered from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis was totally disabling. 20 CFR §§ 718.1, 718.202, 718.203 and 718.204 (2002).

"Burden of proof," as used in the this setting and under the Administrative Procedure Act[4] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)[5]. The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).[6]

A claimant has the general burden of establishing entitlement *and* the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.[7] Therefore, the claimant cannot rely on the Director to gather evidence.[8] A claimant, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985).

Issues

1. Whether the medical evidence establishes that the Miner suffers from pneumoconiosis pursuant to 20 CFR § 718.202(a);
2. Whether the pneumoconiosis arose, at least in part, out of coal mine employment;
3. Whether the claimant is totally disabled; and
4. Whether total disability is caused by pneumoconiosis pursuant to § 718.204.

Stipulations

Pursuant to 20 CFR § 725.461 (a), which sets forth in part pertinent, "...stipulations shall be considered the evidence of record in the case and the decision shall be based upon such evidence," the parties have agreed to the following:

1. The timeliness of filing of the claim,
2. That the claimant was a miner,
3. Mr. Bledsoe worked 11.33 years in coal mine employment.
4. The responsible operator in this case is T&M Fuels, Incorporated.
5. The claimant's wife, Rita, and daughter Amy are "dependents" for augmentation

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[4] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

[5] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP*** [*Sainz*], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

[6] Also known as the risk of nonpersuasion, see 9 J. Wigmore, ***Evidence*** § 2486 (J. Chadbourn rev.1981).

[7] ***Id.***, *also see* ***White v. Director, OWCP***, 6 BLR 1-368 (1983)

[8] ***Id***.

purposes. See Tr 38-41.

Subsequently, the parties agreed that the following is an accurate description of the medical record:

X-RAY INTERPRETATIONS

DATE OF X-RAY	DATE OF READING	EXH.	PHYSICIAN/ QUALIFICATIONS[9]	INTERPRETATION
05/02/96	06/04/97	DE 16, 22	Broudy, B	0/1; p//s; 6 zones
04/22/97	04/22/97	DE 16, 22	Broudy, B	0/1;q/t; 2 zones
06/21/01	06/21/01	DE 14	Paranthaman, B	2/1; q/q; 6 zones
06/21/01	07/19/03	Cx 2	Alexander, B, BCR	2/2; q/p; 6 zones

PULMONARY FUNCTION STUDIES

DATE	EXH.	PHYSICIAN	FVC	FEV_1	MVV	QUALITYING?	Ht/Age
03/31/97	DE 17	Lieber/Burki	4.65	3.53	---	NO	70”/39
04/22/97	DE 16, 22	Broudy	4.98	3.80	80	NO	71”/40
01/02/02	Cx 3	VanZee	3.90	2.97	91	NO	70”/44

ARTERIAL BLOOD GAS STUDIES[10]

DATE	EXH.	PHYSICIAN		pCO_2	PO_2	QUALIFYING
04/22/97	DE 22	Broudy	R	36.3	79.7	NO
06/21/01	DE 14	Paranthaman	R	35	65	YES

Medical Evidence

Dr. Bruce C. Broudy, who is board certified in internal medicine and pulmonary disease, was requested by the Employer to perform an examination to determine the presence or absence of coal workers’ pneumoconiosis. Dr. Broudy elicited a coal mine employment history of 13 years and 9 months, lastly as a roof bolter, a medical history, and a history of smoking one pack of cigarettes a day for 11-12 years until November 1996 when he cut down to one-third pack per day. He noted complaints of smothering, choking, and problems sleeping. Mr. Bledsoe listed

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9 "B" signifies B-reader
"BCR" signifies board certified radiologist

10 "R" - signifies resting test
"E" - signifies exercise test

symptoms of dyspnea on exertion, trouble sleeping, and wheezing. Dr. Broudy had a chest x-ray taken and administered ventilatory and blood gas studies. He performed a physical examination that revealed expiratory rhonchi. He concluded the miner does not suffer from coal workers' pneumoconiosis. He relied on two x-ray reports, both of which he read as negative for the disease (DE 16, 22). Based on the normal results elicited from the pulmonary function study and blood gas study, he opined that the claimant's dyspnea is non-pulmonary in origin *Id*. He found no significant pulmonary disease or respiratory impairment which arose from coal mine employment and averred that Mr. Bledsoe retains the respiratory capacity to perform underground coal mine work.

Dr. Broudy was deposed on January 11, 2002 (DE 22). He provided his credentials and reviewed the results of his examination of the Claimant. Dr. Broudy testified that he found nothing consistent with pneumoconiosis and that the pulmonary function study he administered was valid. He reviewed Dr. Paranthaman's report and the results of his pulmonary function studies and blood gas study. He felt the first ventilatory test was invalid but the second was within normal limits. Dr. Broudy opined that Mr. Bledsoe's dyspnea could be due to obesity and reaffirmed that it is not pulmonary in nature. He again stated that from a respiratory standpoint the Claimant could return to the coal mine work he last performed.

At the request of the OWCP, Dr. S.K. Paranthaman examined the claimant on June 21, 2001 (DE 14). Dr. Paranthaman elicited various histories, including a history of smoking one pack of filtered cigarettes a day for 15 years, then reducing to one-half pack per day for the last five years, and 13 years of underground coal mine employment. Mr. Bledsoe provided a medical history of wheezing and arthritis. His chief complaints were wheezing, dyspnea with exertion, and a dry cough, and he assessed that he could climb ten steps at one time, lift 50 pounds at one time, and carry 25 pounds for one block. Dr. Paranthaman had a chest x-ray taken and administered ventilatory and blood gas studies, and an EKG. Physical examination revealed clear lungs with no wheezing or rales. Dr. Paranthaman diagnosed simple coal workers' pneumoconiosis and uncontrolled hypertension. He relied upon his x-ray interpretation of category 2/1 pneumoconiosis, and this film was read by Dr. Alexander, a board-certified radiologist and B-reader, as category 2/2 (DE 14; CE 2). In Dr. Paranthaman's opinion, the miner's pneumoconiosis is related to his 13 years of coal mine dust exposure but the hypertension is not. Relying on a pO2 of 65 and a pCO2 of 35, Dr. Paranthaman opined that Mr. Bledsoe's respiratory impairment was moderate (DE 14). He added that these values qualified for total disability under the Black Lung Act. He felt that the hypertension caused no significant impairment but that the miner's obesity and degenerative disc disease appeared to cause significant impairment that would prevent him from performing heavy manual labor. Dr. Paranthaman is board certified in internal medicine, pulmonary medicine, and critical care medicine (Id.).

The record reflects that claimant's attorney propounded questions to the claimant's physician, Dr. Art VanZee, who answered them on August 18, 2003 (CX 3). Dr. Van Zee indicated that he has been treating Mr. Bledsoe since February 5, 2002 for hypertension, hypercholesterolemia, chronic obstruction pulmonary disease, coal workers' pneumoconiosis, and arthritis. He opined that the claimant suffers mild to moderate chronic obstruction pulmonary disease that prevents him from performing the normal manual labor of coal mining, including setting jacks and

operating a roof bolter. Dr. VanZee added that he believes Mr. Bledsoe's 13 ½ years of coal mine employment is a significant contributing factor to the miner's chronic obstructive pulmonary disease and respiratory disability.

Burden of Proof

"Burden of proof," as used in this setting and under the Administrative Procedure Act[11] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)[12]. The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).[13]

A claimant has the general burden of establishing entitlement *and* the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.[14] Therefore, the claimant cannot rely on the Director to gather evidence.[15] A claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985).

Pneumoconiosis

Under the Act, to receive benefits, a claimant must prove several facts by a preponderance of the evidence. First, the coal miner must establish the presence of pneumoconiosis.[16] Pneumoconiosis under the Act is defined as both clinical pneumoconiosis and/or any respiratory or pulmonary condition significantly related to or significantly aggravated by coal dust exposure:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive

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[11] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

[12] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP*** [*Sainz*], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

[13] Also known as the risk of nonpersuasion, see 9 J. Wigmore, ***Evidence*** § 2486 (J. Chadbourn rev.1981).

[14] ***Id***, *also see* ***White v. Director, OWCP***, 6 BLR 1-368 (1983)

[15] ***Id***.

[16] 20 C.F.R. §718.201.

> pulmonary fibrosis, progressive massive fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §§ 718.201.

Note that the definition appears to combine the first two elements of entitlement, pneumoconiosis and cause of pneumoconiosis. However, the claimant bears the burden of establishing both that he or she has pneumoconiosis and that the pneumoconiosis arose out of coal mine employment.

There are four methods for determining the existence of pneumoconiosis.

> (1) Under 20 CFR § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence.
> (2) Under §§ 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.
> (3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of §§ 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; §§ 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of §§ 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.
> (4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:
>
> > A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §§ 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

First, with respect to proof of x-ray testing under § 718.202 (a)(1), frequently, there are conflicting interpretations of chest x-rays by physicians presented in black lung claims. Such is the case in this matter. There are four interpretations of three separate x-rays. The first x-ray, taken May 2, 1996, was read as negative by Dr. Broudy, a B-reader. It was not reread. The April 22, 1997 x-ray was also read as negative by Dr. Broudy and not reread. The next x-ray was taken four years later and interpreted by Dr. Paranthaman, a B-reader, as positive (category 2/1) for pneumoconiosis. It was also read as positive (category 2/2) by Dr. Alexander, who is

both a B-reader and a board-certified radiologist.

Second, under § 718.202 (a)(2), there is no biopsy evidence in the record. Accordingly, the Claimant can not establish the existence of pneumoconiosis under this section.

Third, none of the enumerated presumptions apply in this case under § 718.202(a)(3).

Fourth, under § 718.202(a)(4), "the Judge must consider and weigh all relevant medical evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence . . . ." ***Perry v. Director,*** *OWCP*, 9 B.L.R. 1-1, 1-2 (1986). There are three physicians' opinions under 718.202 (a)(4). While Dr. Broudy did not diagnose pneumoconiosis, both Dr. Paranthaman and Dr. VanZee did. Where the medical opinions are in conflict, the Judge must discuss the conflicting evidence and provide a rationale for choosing one physician's opinion over another. ***McGinnis v. Freeman United Coal Mining Co.***, 10 B.L.R. 1-4 (1987).[17]

Dr. Broudy is board certified in pulmonary disease, and these superior qualifications entitle his opinion to great weight. ***Scott v. Mason Coal Co.***, 14 BLR 1-38 (1990). Although his opinion is consistent with his own x-ray interpretations, it is belied by the more recent x-ray evidence. Dr. Broudy reviewed Dr. Paranthaman's report but was not asked whether Dr. Paranthaman's positive x-ray reading affected his opinion regarding the existence of the disease. Because the most recent x-ray evidence is positive for pneumoconiosis and Dr. Broudy either did not have the opportunity to, or failed to, address that evidence, I place less weight on his opinion.

Dr. Paranthaman shares qualifications equivalent to Dr. Broudy's, and, as a result, his opinion is also entitled to greater weight because of his expertise. ***Id***. Dr. Paranthaman's report is well documented and well reasoned. ***Perry v. Director, OWCP***, 9 BLR 1-1 (1986). More importantly, his opinion is supported by the most recent x-ray evidence, including a reading by Dr. Alexander, a dually Certified reader. Finally, because Dr. Paranthaman was hired by the OWCP, there can be no question of bias on his part. For these reasons, I place greater weight on Dr. Paranthaman's opinion.

I note that Mr. Bledsoe regularly visited Dr. VanZee (every three months according to the Claimant (Tr 18)) since February 2002, but I do not attribute controlling weight to his opinion on this issue. *See* § 718.104(d) (2001). However, I do give the opinion as to pneumoconiosis some weight.

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[17] All the evidence relevant to the existence of pneumoconiosis must be considered and weighed. Thus, in ***Mabe v. Bishop Coal Co.***, 9 B.L.R. 1-67 (1986), the Board upheld a finding that the claimant had not established the existence of pneumoconiosis even where the x-ray evidence of record was positive. The Board concluded that the "Judge's assignment of less weight to the record's positive x-rays was rational and based on substantial evidence," where "the weight of other medical evidence indicat[ed] that claimant's impairment was due to interstitial fibrosis of unknown etiology." *Id*. at 1-68. Positive x-rays may form the basis of a finding of the existence of pneumoconiosis; however, they must be considered in light of all the relevant evidence.

I place more weight on the readings of the most recent x-ray of evidence because pneumoconiosis can be a latent and progressive disease. ***National Mining Ass'n v. Dep't of Labor***, 292 F.3d 849, 869 (D.C. Cir. 2002); ***Crace v. Kentland-Elkhorn Coal Corp.***, 109 F.3d 1163 (6th Cir. 1997); ***Woodward v. Director, OWCP***, 991 F.3d 314 (6th Cir. 1993). While the opinions of Drs. Broudy and Paranthaman are entitled to equal weight, given their status as B-readers, Dr. Alexander's opinion merits even greater weight because he is also a board-certified radiologist. ***Scheckler v. Clinchfield Coal Co.***, 7 BLR 1-128 (1984). Accordingly, I find Dr. Alexander's reading to be the most probative because of his credentials, the recency of the x-ray he interpreted, and because his reading is also supported by Dr. Paranthaman's. Consequently, I find that the x-ray evidence under § 718.202(a)(1) tends to support a finding of the existence of pneumoconiosis by a preponderance of the evidence.

After considering the three medical opinions, I place most weight on Dr. Paranthaman's opinion. Accordingly, I find that the medical opinion evidence pursuant to § 718.202(a)(4) tends to establish the existence of pneumoconiosis.

Consideration of all the evidence under § 718.202(a) shows that both the x-ray evidence and medical opinion evidence established, by a preponderance of the evidence, the existence of pneumoconiosis.

Causal Relationship
Between Pneumoconiosis and Coal Mine Employment

The Act and the Regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for ten or more years. 30 U.S.C. § 921(c)(1); 20 CFR § 718.203(b) (2002). Mr. Bledsoe was employed as a miner for over eleven years, and therefore is entitled to the presumption.

Total Disability

Again, a claimant has the burden of proving every element of entitlement, by a preponderance of the evidence. See ***Director, OWCP v. Greenwich Collieries***, supra; ***Oggero,*** *supra*; ***Gee v. W.G. Moore and Sons***, *supra*; ***Wike v. Bethlehem Mines Corporation***, *supra;* ***Tenney v. Badger Coal Company***, *supra* ; ***DeFelice v. Consolidation Coal Company,*** *supra*.

Section 718.204(b) defines "total disability" as follows:

> A miner shall be considered totally disabled if ... pneumoconiosis as defined in § 718.201 prevents or prevented the miner:
>
> > (1) From performing his or her usual coal mine work; and
> > (2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

The regulations at §§ 718.204(b) provide the following five methods to establish total disability:

(1) pulmonary function (ventilatory) studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinions; and (5) lay testimony. 20 C.F.R. §§ 718.204(b). The claimant carries the burden of proof to establish the necessary element of a change in condition (§ 725.309) as well as the elements of disease (§ 718.202), disease causation (§ 718.203), disability (§ 718.204(c)), and disability causation (§ 718.204(b)).

All three pulmonary function studies are within normal limits (DE 17, 16, 14; Cx 3). Therefore, total disability cannot be established pursuant to § 718.204(b)(2)(i). There is also no evidence of cor pulmonale. Therefore, § 718.204(b)(2)(iii) is also not available to the claimant.

A blood gas study is designed to measure the ability of the lung to oxygenate blood. The initial indication of a miner's impairment will most likely manifest itself in the clogging of alveoli, as opposed to airway passages, thus rendering the blood gas study a valuable tool in the assessment of disability. Alveoli are air sacs which line the lungs in a honeycomb pattern. Oxygen passes through the alveoli into the bloodstream on inspiration and carbon dioxide is released from the bloodstream on expiration. A lower level of oxygen compared to carbon dioxide in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled. In performing the study, a blood sample is taken from the miner at rest and, if possible, after exercise. As with the pulmonary function study, the requirement that the miner exercise may be painful, and the miner may not complete the test due to shortness of breath and coughing. A blood sample taken after exercise, however, is very helpful in the diagnosis because exercise requires that the body be able to oxygenate blood more quickly. Consequently, an insufficiency in gas transfers may be noted after exercise before they are evident at rest. The blood sample is analyzed for the percentage of oxygen (PO2) and the percentage of carbon dioxide (PCO2) in the blood. Tables are provided in the regulations for determining whether the study yields qualifying values, thus lending support for a finding that the miner is totally disabled.

Two blood gas studies were submitted into evidence. The April 22, 1997 study, conducted by Dr. Broudy and submitted by the Employer, did not yield qualifying values (DE 16, DE 22). The June 21, 2001 test, conducted by Dr. Paranthaman on behalf of the OWCP and submitted by the claimant, produced qualifying values (DE 14). He stated: "These values qualify for total disability under Black Lung Act." Id. The regulations require that for a pCO2 value of 35, the corresponding pO2 value must be 65 or less. In this test, Mr. Bledsoe's pCO2 was 35 and his pO2 was 65. Therefore, it was qualifying under the Department standards. Because I can consider only these two blood gas studies, I find the test that is more recent by four years to be more probative of Mr. Bledsoe's pulmonary ability today. There is no indication that the study conducted by Dr. Paranthaman was not valid. Accordingly, I find that the blood gas study evidence under § 718.204(b)(2)(ii) establishes total disability.

The record shows that John A. Michos, M.D., reviewed Dr. Paranthaman's testing and found it to be technically acceptable. DE 14. Dr. Michos is a board certified internist. Id. I recognize that all blood gas study evidence of record must be weighed. ***Sturnick v. Consolidation Coal Co***., 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise and a decision must provide a rationale for according greater probative value to the results of one study over those of another. ***Coen v. Director, OWCP***, 7 B.L.R. 1-30 (1984); ***Lesser v. C.F. & I. Steel Corp***., 3 B.L.R. 1-63 (1981). Of the three physicians providing opinions on the issue of

disability, only Dr. Broudy opined that the claimant is not totally disabled and retains the respiratory capacity to perform the work of an underground coal miner. Dr. Paranthaman's blood gas study produced results that are qualifying for total disability under the Act. Dr. VanZee opined that Mr. Bledsoe is prevented from performing his last coal mining job because of his chronic obstructive pulmonary disease due significantly to coal mine employment.

Dr. Broudy's examination took place in April, 1997. DE 22, DE 16. I note that he has superior credentials. However, his testing is not current. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-Robbins Coal Co***., 12 B.L.R. 1-149 (1989)(en banc); ***Casella v. Kaiser Steel Corp.***, 9 B.L.R. 1-131 (1986). More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. ***Schretroma v. Director, OWCP***, 18 B.L.R. 1-17 (1993). See also ***Milburn Colliery Co. v. Director, OWCP [Hicks]***, 138 F.3d 524 (4th Cir. 1998).

Dr. Broudy was aware that the miner's last coal mining job was as a roof bolter, but testified that from a respiratory standpoint, he could continue in that capacity. However, Dr. Broudy's underlying premise is that there is no evidence of pneumoconiosis, which is contrary to the full weight of this decision.

Dr. Paranthaman's opinion also contains an alternative opinion as to the degree of severity of the Claimant's impairment, particularly in terms of his ability to perform his last mining job. He stated that the miner's hypertension probably did not cause any significant impairment, while his obesity and degenerative disc disease significantly impaired his ability to do heavy manual labor. When considered as a whole, I interpret Dr. Paranthaman's statements to mean that, while the blood gas studies technically established total disability under the Act, even if they were not, the respiratory problem due to pneumoconiosis is restricting.

Moreover, I accept the Claimant's testimony that he was a roof bolter, and that he had to lift fifty (50) pounds frequently on that job. Tr., 14 - 16. A review of Mr. Bledsoe's testimony shows that he has difficulty breathing and the sensation of smothering while sleeping (Tr 17). He sometimes sleeps on two pillows (Tr 19). His wife has noticed that he sometimes coughs at night. He experiences shortness of breath with walking or climbing five to six stairs (Tr 20).

Dr. VanZee stated that Mr. Bledsoe's coal mine employment-induced chronic obstructive pulmonary disease prevented him from operating a as roof bolter.

I find that Mr. Bledsoe is credible that he cannot return to the roof bolter position. I find that the Claimant's testimony that he can not return to the roof bolter position is corroborated by the reports of Dr. Paranthaman and the records and opinion of Dr. VanZee. CX 1 and CX 3. According to the United States Department of Labor, ***Dictionary of Occupational Titles***, Fourth Edition, Revised 1991, Section 930.683-026. The job description is as follows:

> Roof Bolter (mine & quarry) alternate titles: bolting-machine operator; raise driller
> Operates self-propelled machine to install roof-support bolts in underground mine:
> Positions safety jack to support roof until bolts can be installed. Drives machine into

position, inserts bit in drill chuck, and starts drill. Moves lever to advance bit into roof at specified distance from rib or adjacent bolt. Removes bit from chuck and replaces with bolt. Starts hydraulic action which forces bolt into hole. Starts rotation of truck to turn bolt and open expansion head to exert pressure upon rock formation. Tests bolt for specified tension, using torque wrench. May install truss bolts traversing entire ceiling span and tighten ends of anchored truss bolts, using turnbuckle.
GOE: 05.11.02 STRENGTH: M GED: R3 M1 L1 SVP: 4 DLU: 77

http://www.oalj.dol.gov/libdot.htm. The Strength, "M" is "medium". Medium work requires exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

I accept that the Claimant's exertional capacity due to pneumoconiosis would limit him in his capacity to lift, walk, push and pull to the extent that he is precluded from "medium" exertion.

Therefore, I accept that the Claimant has presented evidence that the blood gas study performed in June, 2001 (DE 14) is reliable and qualifying. 20 C.F.R. § 718.204(b)(2)(ii). I reject Dr. Broudy's opinions and find that the Employer failed to provide any evidence that another condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. ***Vivian v. Director, OWCP***, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); ***Cardwell v. Circle B Coal Co***., 6 B.L.R. 1-788 (1984) (miner was intoxicated). I reject the opinion that the Claimant's exertional problems are solely as a result of obesity.

I discount Dr. Broudy's opinions because:

1. His conclusions are reliant on testing taken in 1997, which I find are less reliable than those performed in 2001. He failed to address that pneumoconiosis is a progressive disease and account for positive findings on more current testing.
2. He failed to diagnose pneumoconiosis and in reviewing his opinion as to total disability, I find that it rests upon a diagnosis that is contrary to my finding that the Claimant has established pneumoconiosis.[18]
3. He failed to rationally disclaim why the Claimant displayed qualifying blood gas studies in June, 2001.
4. Alternatively, his opinions are not as logical as those of Dr. VanZee as to total disability.

Alternatively, I accept that even if the testing were not found to have been qualifying, the Claimant has met his burden to show total disability based on the credible opinion of Dr. VanZee, who advises that the Claimant can not be a roof bolter, due to effects from his pneumoconiosis. 20 C.F.R. § 718.204(b)(2)(iv)

Total Disability Causation

The Claimant must also establish that his total disability is due, at least in part, to pneumoconiosis. Under 20 CFR § 718.203(c) (2001), a miner is considered totally disabled due to pneumoconiosis if the disease is a substantially contributing cause of his totally disabling

[18] See ***Scott v. Mason Coal Co***., 289 F.3d 263 (4th Cir. 2002).

respiratory or pulmonary impairment, that is, it must have a material adverse effect on the miner's respiratory or pulmonary condition.

I credit Dr. VanZee's opinion that Mr. Bledsoe's coal mine employment was a significant contributing factor to his respiratory disability.

I discount Dr. Broudy's opinion on this issue because he asserts that the Claimant has not proven pneumoconiosis, and therefore he relies on a faulty assumption to render a conclusion in this matter. ***Toler v. Eastern Assoc. Coal Co***., 43 F.3d 109 (4th Cir. 1995) and ***Grigg v. Director, OWCP***, 28 F.3d 416 (4th Cir. 1994).

Therefore, I accept that the Claimant has proved causation. 20 CFR § 718.203(c).

Onset

On February 8, 2001, the Claimant filed his intent to file for benefits under the Black Lung Benefits Act. Once a claimant proves entitlement to benefits, benefits should be paid commencing at the date of onset. 20 C.F.R. § 725.503(b):

> In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed, or the month during which the claimant elected review under Part 727 of this subchapter.

The miner cannot receive benefits for any month during which he or she was not entitled. ***Lykins v. Director, OWCP***, 12 B.L.R. 1-181, 1-183 (1989).

The claimant bears the burden of proof in establishing the date of onset of total disability. See, e.g., ***Johnson v. Director, OWCP***, 1 B.L.R. 1-600 (1978). In determining the onset date, the administrative law judge must consider all relevant evidence of record and assess the credibility of that evidence. ***Lykins***, 12 B.L.R. at 1-183. I need not restate all of the evidence.

After a review of the entire record, I find that the Claimant has established that was totally disabled as of the date of his application on February 8, 2001. In reviewing the record, I accept that the testing performed in June, 2001 by Dr.Paranthaman shows that the Claimant was totally disabled by pneumoconiosis. I accept that as of the date of Dr. Broudy's examination in 1997, the record showed otherwise. However, I also accept that pneumoconiosis is a progressive disease, and that by the date of application the Claimant's credible position, elicited through testimony, has been substantiated by the testing.

Conclusion

Curtis P. Bledsoe has proved that he is afflicted by pneumoconiosis arising out of coal mine employment, that he is totally disabled, and that total disability is caused by pneumoconiosis. Accordingly, the claim filed by Curtis P. Bledsoe seeking federal black lung benefits is approved.

Attorney's Fees

No award of attorney's fees for services to Claimant is made herein because no fee application has been received. Thirty (30) days is hereby allowed Claimant's counsel for the submission of a fee application which must conform to §§ 725.365 and 725.366 of the regulations. A service sheet showing that service has been made upon all parties including the claimant must accompany the application. Parties have ten (10) days following receipt of any such application within which to file any objection. The Act prohibits the charging of a fee in the absence of an approved application

ORDER

IT IS ORDERED that the claim for benefits filed by CURTIS P. BLEDSOE is **GRANTED.** The Employer, T&M FUELS, INCORPORATED shall:

1. Pay to the Claimant, and to his wife, Rita, and daughter Amy as "dependents" for augmentation purposes, all benefits to which they are entitled, under the Black Lung Benefits Act, commencing as of February1, 2001, the month in which the Miner became entitled. (33 U.S.C. §§ 906(a); 20 C.F.R. § 725.503. (b).
2. Pay to the Secretary of Labor reimbursement for any payment the Secretary has made to CURTIS P. BLEDSOE under the Act, and to deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraph 1 above;
3. Pay to the Secretary of Labor interest as provided by law under Section 6621 of the Internal Revenue Code of 1954. Interest is to accrue thirty (30) days from the date of the initial determination of entitlement to benefits. 20 C.F.R. §§ 725.608.
4. Claimant's attorney is granted thirty (30) days to submit an application for fees conforming to the requirements of 20 C.F.R. §§ 725.365 and §§ 725.366.

SO ORDERED.

A

DANIEL F. SOLOMON
Administrative Law Judge

Notice of Appeal Rights: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision if filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. §725.478 and §725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, NW, Washington, DC 20210.