U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 November 2006*In the Matter of*

R.F.
Claimant

Case No. 2004-BLA-06414

v.

RAMBLIN COAL CO., INC..
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
Joseph Wolfe, Esquire
Claimant
Lois Kitts, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER
AWARD OF BENEFITS

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Claimant March 15, 2004. Director's Exhibit ("DX") 36.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

The Claimant filed this application on August 27, 2002. DX 2. A hearing was held in Abingdon Virginia on September 21, 2005. 45 Director's Exhibits (DX 1-DX 45) were admitted into the record for identification. Two Claimant's Exhibits ("CX" 1- CX 2) and ten

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

Employer's exhibits ("EX" 1 – EX 10) were also admitted. Post hearing, as CX 2 had been late filed, the Employer was given an opportunity to provide rebuttal, and a telephone hearing was held November 10, 2005 to permit substitution of EX 4. Subsequently, the record remained open for briefs which were submitted by both the Claimant and Employer.

The Claimant testified that he was a "shooter," in that he drilled holes into coal seams, laded them with a blasting cap and dynamite and blew the coal for extrusion. Transcript ("TR") 10-15. He also did roof bolting in the dustiest part of the mine. Id. 15. He filed a claim for state benefits in 1995, and received an award at that time. He now receives workers' compensation and Social Security disability benefits. Id. 23.

The Claimant testified that he can not return to mining work. He has breathing problems, and now takes prescribed Singulair and Albuterol and uses an Aerobic inhaler. Id. 21, 25. He gets short of breath when climbing stairs. Id. 22. He smoked cigarettes at one time, but quit in 2001. Id. 18, 22.

The Claimant testified that he last worked for Ramblin as a mobile press operator, starting in the 1980's, for about 12 years. Id. 19 - 20. He left work when his back was injured. He testified that no one has told him that he has black lung disease. Id. 21.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989). This claim is governed by the law of the United States Court of Appeals for the Fourth Circuit, because the Claimant was last employed in the coal industry in the Commonwealth of Virginia within the territorial jurisdiction of that court. ***Shupe v. Director*, OWCP**, 12 B.L.R. 1-200 (1989) (en banc). (DX 5)

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

ISSUES

1. Whether the claim was timely filed.
2. Whether the miner suffers from pneumoconiois.
3. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
4. Whether the miner is totally disabled.
5. If so, whether the miner's disability is due to pneumoconiosis.

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. During the hearing, the parties agreed the Claimant is a "miner" as defined by the Act and performed coal mine employment after 1969. TR 31.
2. The Claimant has one dependent. TR 31.
3. The Claimant has 24 years of coal mine employment. DX 43.

I have reviewed all of the evidence in the record and I accept the stipulations as they are consistent with the evidence.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] 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. § 556(d).[3] 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, 18 B.L.R. 2A-1 (1994).[4]

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. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

TIMELINESS

30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later". During the hearing, the Employer maintained that timeliness was an issue. Under 20 C.F.R. § 725.308 (c) there shall be a rebuttable presumption that every claim for benefits is timely filed. I directed the Employer to advise me in detail what was the basis for any objection. I have searched the record and do not find any reason to overcome the presumption.

RESPONSIBLE OPERATOR

The Claimant testified that he worked 12 years for the Employer. TR 20. The Employer was his last. TR19. Under the amended regulations, a claim is referred to this Office from the district director with only one operator designated as potentially responsible for the payment of benefits. 20 C.F.R. §725.418(d) (2001). The regulatory amendments at 20 C.F.R. §725.495(c)(2) (2001) shift the burden to require that the designated responsible operator establish "[t]hat it is not the potentially liable operator that most recently employed the miner."

The Employer advised me at hearing that the matter would be briefed, but did not do so.

The Employer has not met its burden.

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[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors 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).

[3] 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 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 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.

[4] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

MEDICAL EVIDENCE SUMMARY

X-rays

Exhibit No.	Physician	BCR/BR	Date of film	Reading
DX 10	Kendall	B/BCR	10/22/02	0,0[5]
DX 15	Wiot	B/BCR	"	0,0[6]
CX 1	Patel	B/BCR	12/11/03	1,1
EX 6	Halbert	B/BCR	''	no pneumoconiosis
EX 1	Fino	B	4/25/03	0,0
EX 4	Broudy	B	8/2/05	no pneumoconiosis

Pulmonary function studies

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume loop?	Broncho-dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
DX 10	Amisetty	10/22/02	yes	yes	no	1.42	3.17 1.41	good
CX 1	Rasmussen	12/11/03	Yes	Yes	Yes	1.71 2.04	3.26 3.54	good
EX 1	Fino	4/25/03	Yes	Yes	No Yes	1.68 2.03	3.28 3.83	good
EX 4	Broudy	8/2/05	Yes	Yes	No Yes	1.78 2.03	3.70/76 3.98/97	good

Blood gas studies

Exhibit No.	Physician	Date of Study	Altitude	Resting (R) Exercise (E)	PCO2	PO2	Comments
DX 10	Ammisetty	10/22/02			R38.3 E29.8	86.9 110.06	
EX 1	Fino	4/25/03	0-2999	R	41.0	75.9	Emphysema
CX 1	Rasmussen	12/11/03	"		R38 E40	74 69	Non qualifying
EX 4	Broudy	8/2/05	"		R38.1 E37.7	83.9 80.1	Normal

Medical Reports

Dr. Sriniva M. Ammisetty

Dr. Ammisetty performed the OWCP examination on October 22, 2002. DX 10. He noted complaints of wheezing, production of sputum and shortness of breath. An x-ray was read as negative for pneumoconiosis. Pulmonary Function studies showed moderate obstruction.

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[5] I note that Dr. Barrett reviewed the film quality of this x-ray for the Department of Labor, but the parties did not identify it for evaluation. DX 11.

[6] Although during the hearing I noted that this reading was surplusage, the Benefits Review Board has determined that a party my use another record as "rebuttal" of the Director's examination. ***Sprague v. Freeman United Coal Mining Co***., BRB No. 05-1020 BLA (Aug. 31, 2006). Therefore, I am using this reading.

Arterial Blood gas showed no hypoxemia at rest and after exercise. The Claimant had no acute respiratory distress. Dr. Ammisetty diagnosed chronic obstructive pulmonary disease (COPD), chronic bronchitis and listed the etiology as smoking and coal dust exposure without further explanation. According to the report, the Claimant is permanently disabled and has an occupational lung disease caused by his coal mine employment. The basis for the diagnosis is his cough, productive sputum, shortness of breath and DOE. He categorized his impairment as moderate to severe. DX 10.

Dr. Donald L. Rasmussen

Dr. Rasmussen, board-certified in internal medicine, and a B-reader, evaluated the Claimant on December 11, 2003 at the request of claimant's counsel. He prepared a report dated January 28, 2004 (CX-1) and provided a later follow up. (CX-2) Dr. Rasmussen stated that Claimant exhibited partial reversibility of his airway disease with an FEV1 increasing some 1.71 to 2.04 liters or 330 ml, representing a significant degree of reversibility of airway obstruction. This can occur as a consequence of bronchial asthma as well as chronic obstructive lung disease including bronchitis. Still, the doctor stated that Claimant could have an element of bronchial asthma, while claiming bronchial asthma is not the major cause of Claimant impaired lung function. He clearly has evidence of parenchymal lung tissue destruction as reflected by his reduced diffusing capacity. The latter is the consequence of both his cigarette smoking and his coal mine dust exposure. Claimant' coal mine dust exposure remains a major contributing factor to his disabling lung disease.

Dr. Gregory J. Fino

Dr. Fino is board-certified in pulmonary and internal medicine and is a B-reader. He examined the Claimant on April 25, 2003. EX 1. He also conducted a review of medical records and prepared an addendum on August 18, 2005. EX 2. In addition, Dr. Fino testified regarding his findings and opinions on March 8, 2004. EX 3.

According to the report, the examination yielded insufficient objective medical evidence to justify a diagnosis of clinical or legal coal workers' pneumoconiosis in the miner. The x-ray and CT scan were negative. As to legal pneumoconiosis, the doctor readily acknowledged that obstructive lung disease can occur in coal miners. Yet, he explained that there are not sufficient factors based on the evaluation that would show that coal mine dust inhalation was a significant contributing factor to his underlying disabling obstruction. From a respiratory standpoint, the doctor reported that there is a disabling respiratory impairment present. Dr. Fino diagnosed chronic obstructive bronchitis, reversible airways disease and bullous emphysema. The Claimant is disabled from returning to his last mining job or a job requiring similar effort, from a respiratory standpoint. However, Dr. Fino stated even if he assumed this man has coal workers' pneumoconiosis, it has not contributed to his disability. After a review of additional records, Dr. Fino stated the information does not cause him to change any of his original opinions that the miner does not have pneumoconiosis or associated impairment.

Dr. Bruce C. Broudy

Dr. Broudy is a pulmonary specialist and B-reader. EX 9. He performed a physical examination on August 2, 2005. EX 4. The evaluation consisted of a pertinent history, physical examination, spirometry, arterial blood gas study, chest x-ray and CAT scan of the chest. Physical examination of the chest revealed unlabored respirations. The chest expansion was diminished and the lungs had decreased aeration with marked expiratory delay. Spirometry revealed moderately

severe obstructive airways disease with significant improvement after bronchodilation. In fact, the results after dilation just exceed the minimum federal criteria for disability in coal workers. Lung volumes show significant air trapping and hyperinflation and the diffusing capacity was moderately reduced. Blood gases were normal on room air test and there was no desaturation or significant abnormality of blood gases. The miner stopped exercise because of dyspnea and weakness in his legs. Dr. Broudy read an x-ray as Category 0,0. He diagnosed chronic obstructive airways disease with some responsiveness to bronchodilation. On August 2, 2005 Dr. Broudy prepared an addendum to his report after a review of additional medical evidence. He stated this review confirms the findings that the miner does not have medical or legal pneumoconiosis or a related disabling pulmonary impairment. EX 5

"Other" Medical Evidence

Exhibit No.	Physician	Date of Medical Report	Type of Procedure	Comments
EX 1, EX 2, EX 3	Fino	5/17/03	CT	No pneumoconiosis. Bulbous emphysema.
EX 7	Wiot	4/25/03	CT	No pneumoconiosis. Severe bulbous emphysema.
EX 8	Wiot	8/15/02	CT	No pneumoconiosis. Severe bulbous emphysema.
EX 8	Wiot	11/02/02	CT	No pneumoconiosis. Severe bulbous emphysema.

FINDINGS OF FACT

Total Disability

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

The record does not contain sufficient evidence that Claimant has complicated pneumoconiosis and there is no evidence of cor pulmonale with right sided congestive heart failure. As a result, the Claimant must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

I accept that Claimant has established total respiratory disability. Although this is disputed by the Employer, all of the reviewing physicians concluded that Claimant does not have the pulmonary capacity to perform his usual coal mining work or comparable work requiring similar exertion.

I credit the opinions to that extent and find that the evidence is overwhelming.

Therefore, I find that the Claimant has established one of the criteria under 20 CFR § 725.309, total disability.

Pneumoconiosis

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[7] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[8] The regulation further indicates that a lung disease arising out of coal mine employment includes 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). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The record I consider under the rules for limitations on evidence involves six readings of four x-rays. A treatment record contains 6 readings, but I choose not to rely upon them, as the parties did not designate them as x-rays or as medical records or "other evidence". The Claimant relies on the one reading by a board certified B reader, Dr. Patel. CX 1. The Employer relies on five readings by B readers, three of whom are dually qualified.

Biopsy and Presumption

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> 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 Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, 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.

The Claimant offers medical reports by Drs. Rasmussen and Ammisetty, both of whom diagnose coal workers' pneumoconiosis. The Employer relies on the reports of Drs. Fino and Broudy, who do not.

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[7] 20 C.F.R § 718.201(a).

[8] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

Four CT scans were identified for evaluation. I note that there was a reading by Dr. Halbert in DX 12, but I choose not to use it as it was not designated for evaluation under 20 CFR § 725.414.

Rationale

I have reviewed all of the evidence relating to pneumoconiosis together, and I find that the Claimant has now also established pneumoconiosis.

The weight I must attribute to the x-rays submitted for evaluation with the current application are in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that the preponderance of the readers do not find pneumoconiosis.

In reading the reports of Dr. Ammisetty and Rasmussen, Dr. Ammisetty relies on the examination and the testing to diagnose legal pneumoconiosis while Dr. Rasmussen relies in part on the reading performed by Dr. Patel as well as describes legal pneumoconiosis. "Legal pneumoconiosis is a much broader category of disease" than medical pneumoconiosis, which is "a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray." ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 at 210 (4th Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease "arising out of coal mine employment" is one that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576 (6th Cir. 2000).

Dr. Rasmussen determined that both cigarette smoking and coal mining exposure contributed to the lung disease. I note that all of the experts who examined the Claimant agree that he has totally disabling lung disease. Dr. Fino discounts Dr. Rasmussen's opinion by advising that there are insufficient factors to show that exposure to coal dust would lead to total disability. I note that Dr. Rasmussen identified symptoms commonly associated with pneumoconiosis.

There are three fatal flaws in this reasoning as follows. First, I find Dr, Fino's explanation is not rational based on the symptoms noted in the Claimant's testimony, and in the reports of Drs. Ammisetty and Rasmussen are those generally consistent with pneumoconiosis. Second, because he failed to state what symptoms or findings would be required to prove legal pneumoconiosis. I find that Dr. Fino's logic is an example of *ipse dixit,* something that is asserted but unproved. Third, I also find that Dr. Fino's rationale actually goes to whether total disability was caused by pneumoconiosis rather than whether pneumoconiosis exists in this record, given that 24 years of exposure is accepted.

Dr. Ammisetty diagnosed chronic obstructive pulmonary disease (COPD), chronic bronchitis. Dr. Rasmussen states that a reduced diffusing capacity exhibited on testing is important to show that coal dust had an impact, which may indicate restrictive airway disease, but he also found COPD. Although Dr. Broudy emphasized only restrictive airway disease, even Dr. Fino found chronic obstructive pulmonary disease.[9] The record substantiates that the Claimant is medicated with bronchodilators and inhalers. The preponderance of the evidence

[9] Dr. Fino diagnosed chronic obstructive bronchitis, reversible airways disease and bullous emphysema.

supports Dr. Rasmussen's diagnosis of both restrictive and obstructive disease. Therefore, I accord less weight to Dr. Broudy's opinions.

Dr. Rasmussen refers to learned studies to substantiate his findings. His report refers to a chronic cough, sometimes with short coughing spells and production of white, yellow or greenish phlegm. In his deposition, Dr. Fino testified that he relied on the readings of the CT scans to conclude that the Claimant has bullous emphysema, which will not occur as a result of coal dust. EX 3, at 16. I note that Employer relies on the four CT Scan readings. Dr. Fino described them as the "better test" in this record. EX 3 at 16. They do show severe bulbous emphysema. The party submitting CTs must provide evidence to support a finding under § 718.107(b) that the test or procedure is medically acceptable and relevant to entitlement. ***Webber v. Peabody Coal Co***, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring). Even if the CT scans in this record are "acceptable", they go only to clinical pneumoconiosis and not to legal pneumoconiosis. Therefore, I find that Dr. Fino's logic is flawed and discount his opinion.

I further note that aggravation by coal dust of existing bulbous emphysema, whether initiated by smoking or by another cause was not addressed. Dr. Fino had to admit that the Claimant's occupation as a driller "ranks up very, very high and in my personal experience" as to the correlation for a finding of pneumoconiosis. EX 3, at 17. He also had to admit that his reliance in his report on the loss on FEV_1 as a basis for rendering an opinion against legal pneumoconiosis is, at best, problematic. Id 14- 16.

I note that Drs. Broudy and Fino are board certified in internal medicine and in respiratory medicine and Dr. Rasmussen is not. However, Dr. Rasmussen also is "an acknowledged expert in the field of pulmonary impairments of coal miners." 1972 U.S. Code Cong. Adm. News 2305, 2314. As the Sixth Circuit Court of Appeals more recently stated, "Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis." ***Martin v. Ligon Preparation Co***., 400 Fed. Sup. 302 (6th Cir. 2005). Moreover, in an unpublished decision in ***Bethenergy Mines, Inc. v. Director, OWCP*** [Rowan], Case No. 01-2148 (4th Cir. Sept. 4, 2002) (unpub.), the Fourth Circuit held that it was proper to accord greater weight to Dr. Rasmussen's opinion that the miner's centrilobular emphysema was caused by, or aggravated by, coal dust exposure. See ***Tennessee Consolidated Coal Co. v. Director, OWCP*** [Kirk], 264 F.3d 602 (6th Cir. 2001). As in this case, Dr. Rasmussen offered extensive research to support his opinion. Dr. Rasmussen cited to articles from medical journals and epidemiologic studies to support his position. No other research is offered. I also find that Dr. Ammisetty is competent to diagnose legal pneumoconiosis. I do not accept that Drs. Broudy or Fino are better qualified to render an opinion as to legal pneumoconiosis.

After a review of the evidence, I find that Dr. Rasmussen's report is well documented and the best reasoned of the other reports. I also find that Dr. Ammisetty's report is well document and well reasoned. I accept that although Dr. Rasmussen relied in part on the positive x-ray, which I discredit, and I do not accept that clinical pneumoconiosis has been proved. But the evidence shows to a reasonable degree of certainty that the Claimant has proved the existence of legal pneumoconiosis.

CAUSATION

A miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 CFR 718.203(b). I have discounted the opinions of Drs

Broudy and Fino, who do not accept a diagnosis of pneumoconiosis, which is contrary to the full weight of the evidence. ***Howard v. Martin County Coal Corp.***, 89 Fed.Appx. 487 (6th Cir., 2003, unpbl.). ["ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most." ***Scott v. Mason Coal Co***., 289 F.3d 263 (4th Cir. 2002)]. The record establishes 24 years of coal mine employment. I credit the opinions of Drs. Rasmussen and Ammisetty on this point. Therefore, I find that the miner's pneumoconiosis arose at least in part out of coal mine employment.

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Claimant needs to establish that pneumoconiosis is a "substantially contributing cause" to his disability. A "substantially contributing cause" is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1). The Benefits Review Board has held that §718.204 places the burden on the claimant to establish total disability due to pneumoconiosis by a preponderance of the evidence. ***Baumgardner v. Director, OWCP***, 11 B.L.R. 1-135 (1986).

I credit Drs. Rasmussen's and Ammesetty's reports that establish causation. Again, I discount Drs. Fino's and Broudy's opinions as poorly reasoned, as their opinions are contrary to my finding on pneumoconiosis. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, 576 (6th Cir. 2000).

The Claimant's physicians note that both smoking and pneumoconiosis significantly contributed to total disability. Based on reasons more fully set forth above in the discussion of pneumoconiosis and total disability, I accept this premise.

Therefore, I find that pneumoconiosis was a substantial contributing cause to the miner's disability. 20 C.F.R. §718.204(c)(1).

ENTITLEMENT

I find that Claimant has established entitlement to benefits. Pursuant to 20 CFR §725.503, benefits are payable as of the month of onset of total disability and if the evidence does not establish the month of onset, benefits are payable beginning with the month during which the claim was filed.

The Claimant was evaluated by Dr. Ammisetty in October, 2002. DX 10. I accept the determination that the Claimant was totally disabled due to pneumoconiosis at that time, and it is reasonable to expect that he had the same symptoms when he applied August 27, 2002.

Therefore, I find that benefits are payable as of the month during which Claimant filed the claim, August, 2002.

Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. ***Bankes v. Director***, 8 BLR 2-l (l985). The application must conform to 20 C.F.R. 725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such

application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

The claim for benefits filed by **R.F.** is hereby **GRANTED**. Augmentation benefits for one dependent is also granted.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).