

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 January 2015

In the Matter of
LEO STRUNK
Claimant,

v.

Case No. **2012-BLA-05516**

BLOCK MOUNTAIN MINING, INC.
Employer,

and

**DIRECTOR, OFFICE OF WORKERS’
COMPENSATION PROGRAMS**
Party-in-Interest

Joseph E. Wolfe, Esquire
For Claimant

Denise Kirk Ash, Esquire
For Employer

Donna Sonner, Esquire and Angele Gregory, Esquire
For the Director

DECISION AND ORDER
DENIAL OF CLAIM

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* Leo Strunk, (hereinafter “Claimant”), filed this claim for black lung benefits on March 28, 2011. Director’s exhibit, “DX” 4. This is a subsequent claim. Claimant filed claims on October 6, 1992 and February 6, 2010. DX 1, DX 2. The District Director issued a Proposed Decision and Order Denial of Benefits on December 15, 2011. DX 22. Block Mountain Mining, Inc., (hereinafter “Employer”), was named as the coal mine operator responsible for payment of benefits should Claimant prove entitlement. Claimant requested a hearing before the Office of Administrative Law Judges. DX 31. I was assigned the case and after the Claimant waived an oral hearing, held a telephonic hearing on June 25, 2013. DX 46. At that time, I entered DX 1- DX 27 into evidence. At that time, I granted parties an additional five (5) days to exchange all proposed exhibits. After that the record was closed. I also Ordered the parties to confer as to the issues. The parties were to submit updated evidence summaries.

The second claim, DX 2, was withdrawn and is considered as *void ab initio*, and I will not consider evidence from that application.¹

I remanded the claim to the District Director because there was a dispute whether the Department of Labor chest x-ray was readable and in order to allow for the submission of medical evidence from Drs. Cherry, Burrell, and Ahmed. DX 47. After the submission of a clarification report from the Department of Labor physician and the submission of medical reports, the claim was transferred to the Office of Administrative Law Judges on December 2, 2013. DX 55.

I held a formal telephone hearing on July 29, 2014. At that time, I entered DX 28 to DX 57 into evidence. I also entered Claimant's exhibits "CX" 1- CX 6 into evidence. I left the record open for 60 days for additional evidence. The record shows that Mr. Wolfe, for Claimant, tendered an x-ray film dated June 25, 2013 to Employer. On August 26, Claimant submitted the report of an examination by Dr. Agarwal, which I marked as CX 7, and as no objection was tendered, entered into evidence in the Interim Order. Employer submitted x-ray readings by Drs. Tarver and Meyer, which I marked as "EX" 1 and EX 2, and as no objection was tendered, entered into evidence in the Interim Order. Employer also submitted the report from Dr. Broudy, which I marked as EX 3 and entered into evidence. Employer asked for an extension of time on September 25. After an additional 90 days, I received no further exhibits. Although the Claimant filed a brief, it did not address an issue presented by Claimant during the hearing i.e. whether the Claimant is entitled to automatic payment as child of a miner in pay status under 20 CFR 209(a), and no evidence summary was submitted to permit me to know which exhibits are designated.

The Claimant testified that he worked 18 years in mining; 90% of that time was underground. Transcript, "TR" 18. The rest of the time, in above ground mining he was stationed at the "wash plant", the tipple. He was a superintendent, but had to fill in when anyone was off. Prior to that, he was a "face boss" in underground mining, duly licensed in Tennessee as a foreman. TR 25. The Claimant alleged that when he worked at the tipple, the conditions were as "bad" as when he worked underground. TR 52.

STIPULATIONS

1. Claimant last worked in Tennessee and the claim falls within the jurisdiction of the 6th Circuit Court of Appeals. TR 11-12.
2. Claimant worked 16.8 years in coal mine employment. See Employer's reply brief.

TIMELINESS

Timeliness is a jurisdictional matter that cannot be waived. 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

¹ Although the parties discuss reports and test results from Dr. Burrell, DX 47, his opinions and medical report were not designated by either party, and I do not consider them and do not consider the argument concerning them.

whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

There is no evidence to show that this claim was untimely.

BURDEN OF PROOF

“Burden of proof,” as used in this setting and under the Administrative Procedure Act² 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).

SUBSEQUENT CLAIMS

After the expiration of one year from the denial of benefits, the submission of additional material or another claim is considered a subsequent claim and adjudicated under the provisions of 20 C.F.R. § 725.309(d). That subsequent claim will be denied unless the claimant can demonstrate that at least one of the conditions of entitlement upon which the prior claim was denied (applicable condition of entitlement) has changed and is now present. 20 C.F.R. §

² 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 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. Chadbourne rev. 1981).

725.309(d)(3). If a claimant does demonstrate a change in one of the applicable conditions of entitlement, then generally findings made in the prior claim(s) are not binding on the parties. 20 C.F.R. § 725.309(d)(4). Consequently, the relevant inquiry in a subsequent claim is whether evidence developed after the prior adjudication supports a finding of a previously denied condition of entitlement.

To receive black lung disability benefits under the Act, a claimant must prove four basic conditions, or elements, related to his physical condition. First, the miner must establish the presence of pneumoconiosis.⁵ Second, if a determination has been made that a miner has pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment.⁶ Third, the miner has to demonstrate he is totally disabled. And fourth, the miner must prove the total disability is due to pneumoconiosis. Based on those four principal conditions of entitlement, the adjudication of a subsequent claim involves the identification of the condition(s) of entitlement a claimant failed to prove in the prior claim and then an evaluation of whether, through newly developed evidence, a claimant is able to now prove the condition(s) of entitlement. In this case, Claimant was unable to establish any of the medical issues in the prior claim.

CHILD OF AN AWARDED MINER

During the hearing, Claimant's counsel speculated that if the Claimant could be deemed a child of a beneficiary miner, his elderly father (20 C.F.R. § 718.208), he could be potentially entitled to an augmentation of his father's benefits. He asked the Claimant about his father. However, he did not formally submit a claim to me:

MS. SONNER:	Now, who is this person that would be drawing the augmented benefits? Is this Mr. Strunk's child or is this –
MR. WOLFE:	No, this is Leo Strunk. His father is drawing black lung.
MS. SONNER:	Well, that would be a matter for another day. It wouldn't be part of this particular claim.
MR. WOLFE:	Well, we're just putting you on notice.
MS. SONNER:	I really can't comment on it because I haven't seen it.
MR. WOLFE:	Okay. You're correct it is another claim.

(TR 35-36)

Employer argues that Claimant's father's black lung claim and resulting award of benefits, and any possible augmentation of those benefits, are totally unrelated to this pending claim and do not lie within my jurisdiction. As acknowledged by counsel for claimant and DOL counsel, any such speculative entitlement is irrelevant herein and would involve another claim. Neither the Claimant nor Director addressed this in their briefs.

I agree that the Claimant has not proven entitlement, as he bears the burden of proof on this issue.

⁵ 20 C.F.R. § 718.202.

⁶ 20 C.F.R. § 718.203(a).

RESPONSIBLE OPERATOR

The District Director designated Block Mountain Mining as the Responsible Operator based on an erroneous assumption that Block Mountain Mining was the most recent insured coal industry employer for a cumulative period of no less than one year. DX 18. On December 15, 2011, the Director issued a Proposed Decision and Order—Denial of Benefits, designating Block Mountain as the responsible operator. DX 22. In that decision, the Director concluded that, although Claimant's last coal mine employer of more than one year was Allied Coal Corporation, Allied was no longer in business, and therefore was not financially capable of accepting liability. Block Mountain, however, employed Claimant from April 6, 1987, to December 9, 1988, and was financially capable of accepting liability.

Employer argues that Claimant's testimony establishes that Block Mountain Mining was improperly named as the Responsible Operator, as the claimant did not work for the requisite duration of one calendar year for that employer. His employment for Block Mountain Mining was interrupted for a period of one year duration in 1988, due to the effects of a low back injury sustained in 1987, or early 1988. The claimant testified that he was paid by Block Mountain from April 1987, until he sustained a back injury (in 1987, or early 1988, according to his prior deposition testimony), following which he was off work for a year, and then returned to work for Block Mountain for only "maybe two weeks" in December 1988. TR 37-38.

The responsible operator shall be the "potentially liable operator" that most recently employed the miner. 20 C.F.R. § 725.495(a)(1). When there is more than one operator for whom the miner worked a cumulative total of at least one year, liability is imposed on the most recent operator meeting the requirements of 20 C.F.R. § 725.494. Section 725.494 provides that a potentially liable operator is an operator which meets each of the following five conditions:

- (a) The miner's disability or death arose at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator, or by a person with respect to which the operator may be considered a successor operator. For purposes of this section, there shall be a rebuttable presumption that the miner's disability or death arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis, or disability or death therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work caused, contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment.
- (b) The operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973.
- (c) The miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year (§ 725.101(a)(32)).
- (d) The miner's employment with the operator, or any person with respect to which the operator may be considered a successor operator, included at least one working day (§ 725.101(a)(32)) after December 31, 1969.

(e) The operator is capable of assuming its liability for the payment of continuing benefits under this part. An operator will be deemed capable of assuming its liability for a claim if one of the following three conditions is met:

(1) The operator obtained a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter that covers the claim, except that such policy shall not be considered sufficient to establish the operator's capability of assuming liability if the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed;

(2) The operator qualified as a self-insurer under section 423 of the Act and part 726 of this subchapter during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to § 726.104(b) is sufficient to secure the payment of benefits in the event the claim is awarded; or

(3) The operator possesses sufficient assets to secure the payment of benefits in the event the claim is awarded in accordance with § 725.606.

20 C.F.R. § 725.494.

The Director bears the burden of proving that the designated responsible operator is a potentially liable operator. 20 C.F.R. § 725.495(b). The designated responsible operator bears the burden of proving that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2). Where the designated responsible operator alleges that a more recent employer should have been named, it bears the burden of demonstrating that “the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with § 725.606.” 20 C.F.R. § 725.495(c)(2). Section 725.495's allocation of burdens of proof is rational and consistent with the Administrative Procedure Act. See *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002).

Director argues that Block Mountain is a potentially liable operator, as it meets the five requirements set forth in 20 C.F.R. § 725.494. First, Claimant's alleged disability is presumed to have arisen at least in part out of his employment in or around a mine that was operated by Block Mountain. The miner's CM-911a Employment History form, W-2s, FICA Itemized Statement of Earnings and Social Security Itemized Statement of Earnings demonstrate that Claimant worked for Block Mountain at an underground coal mine from April 6, 1987, to December 9, 1988, when he was laid off. Tr. 37. Claimant's CM-911a Employment History and CM-913 Description of Coal Mine Work and his deposition and hearing testimony establish that he worked for Block Mountain as a supervisor and fill-in miner during that time period and that he was exposed to coal dust during that work. The record contains no evidence rebutting the presumption that the miner's disability arose out of employment with the operator. Second, Block Mountain was an operator during a period after June 30, 1973, as it employed Claimant in 1987 and 1988. Third, because Claimant worked for Block Mountain in 1987 and 1988, it has been proven that he worked for the operator for at least one working day after December 31, 1969. Fourth, Block Mountain was insured through Security Insurance Co. of Hartford on Claimant's last day of

work. Therefore, the operator is financially responsible for assuming liability for the payment of benefits.

The remaining requirement at issue in this case is whether Claimant was employed by Block Mountain for a cumulative period of not less than one year. 20 C.F.R. § 725.494(c). The miner's CM-911a Employment History, W-2s, FICA Itemized Statement of Earnings and Social Security Itemized Statement of Earnings show that Claimant was employed by Block Mountain from April 6, 1987, to December 9, 1988. However, Claimant testified that he sustained a back injury, causing him to miss work during a portion of that time. DX 28, page 5. He testified in his 2012 deposition that he sustained the back injury during 1988 and believes he was off work for a year before returning to work. DX 28, page 5. But at the hearing, he testified that he returned to work for Block Mountain for two weeks before being laid off in December 1988. DX 28; Tr. 37. Claimant testified that, "to the best of his knowledge," he was paid by Block Mountain while he was off work due to his back injury. Tr. 38. However, in his employment questionnaire, he indicated that he received worker's compensation "best of knowledge, about a month." DX 2. Although he was off work with his back injury for a substantial period of time, Mr. Strunk's employment relationship with Block Mountain certainly continued for a period of more than one year and did not end until December 9, 1988.

In addition to that fact, however, Director argues that Claimant must have been employed for a period of at least 125 working days, meaning any day or part of a day for which a miner received pay for work as a miner. 20 C.F.R. § 725.493(b). He testified that while working for Block Mountain, he earned a salary of \$550 a week. His earnings records show that in 1987, he earned \$21,900 working for Block Mountain, and in 1988, he earned \$25,072 working for Block Mountain. At \$550 a week, he would have worked 85.4 weeks between April 6, 1987, and December 9, 1988. Assuming he worked 6 days per week for 85.4 weeks, he worked 512.4 days between 1987 and 1988. Even if his back injury kept him out of work for one year, or 312 working days, he still worked 200 days for Block Mountain during that time period. Assuming Claimant worked 5 days per week for 85.4 weeks, he worked 427 days between 1987 and 1988. Even if his back injury kept him out of work for one year, or 260 working days, he still worked 167 days for Block Mountain during that time period. I am advised that this is consistent with Claimant's hearing testimony that he sustained a back injury sometime in 1988 but then returned to work for Block Mountain several weeks before December 9, 1988. "Thus the evidence supports a finding that Mr. Strunk worked at least 125 working days for Block Mountain between 1987 and 1988, and Block Mountain was properly designated as the responsible operator." See Brief.

Director admits that is true that Claimant worked for Tri-J Coal Company from June 1991 to January 1992 and Allied Coal Corporation from November 1989 to May 1991. However, Director argues that the evidence introduced in these proceedings demonstrates that neither of those operators satisfies the criteria as a potentially liable operator. Claimant did not work for Tri J Coal Company for a cumulative period of more than one year, and Allied Coal Corporation is no longer in business and is not financially capable of assuming liability for the payment of benefits. 20 C.F.R. § 725.494(c).

I am reminded that Block Mountain has failed to introduce any evidence demonstrating either that Claimant worked for Tri-J Coal Company for more than one year or that Allied Coal Corporation is, in fact, financially capable of assuming liability for the payment of benefits.

After having been fully advised, I accept that Block Mountain was correctly named the responsible operator.

PATIENT PROTECTION AND AFFORDABLE CARE ACT

Congress enacted amendments to the Act (“PPACA”), which became effective on March 23, 2010, affecting claims filed after January 1, 2005. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis or, relevant to survivor’s claims, death due to pneumoconiosis in cases where the claimant has established that the miner had fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

I note the Employer’s objections,⁷ and deny them. I assume that these are made in the event of an appeal.

⁷ I am advised that the Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, violates the Administrative Procedure Act, and is arbitrary, capricious, an abuse of discretion and are otherwise inconsistent with law.

To the extent that the Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, requires that employer and carrier bear the burden of proving that they are not responsible for the payment of benefits, if any, those provisions impermissibly shift the burden of proof in violation of Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) and the Administrative Procedure Act.

The Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, is neither authorized by, nor complies with, the Black Lung Benefits Act or Longshore Act and is therefore invalid.

The Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, violates employer’s and carrier’s rights to a full and fair hearing before an Administrative Law Judge by precluding the consideration of relevant evidence, limiting the parties’ right to submit relevant and probative evidence, limiting the parties’ right to cross-examine adverse evidence in light of a complete record and imposing formal and technical rules of evidence and procedure.

The new eligibility criteria mandated by the Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, are arbitrary and capricious and an abuse of discretion.

The Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, relating to evidence and procedure, treat claimants and claims defendants unequally and thus violate the Administrative Procedure Act, 5 U.S. § 559.

The Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, is not enacted in keeping with the intent of 5 U.S.C. §§553, §§603-604.

The Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, deprives employer and carrier of property or rights without due process of law in violation of the Fifth Amendment to the U.S. Constitution by precluding ordinary notions of finality, by increasing the benefits or other costs owed without valid reason, by denying the right to a full and fair adjudication of claims, by impinging upon the rights of employers and carriers to enter into lawful contracts without a valid reason, by imposing civil penalties for actions that do not warrant punishment and by impairing rights under contracts lawfully entered into by the parties.

Accordingly, it is respectfully submitted that the provisions of the Patient Protection and Affordable Care Act of 2010, § 1556 of which revives the fifteen (15) year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305, should not be applicable to the pending claim.

UNDERGROUND EMPLOYMENT

The Claimant testified that in excess of 15 years his mining work was underground. TR 17, TR 30. This is not controverted. The Claimant alleged that when he worked at the tipple, the conditions were as “bad” as when he worked underground. TR 52.

Accordingly, I find that he was an underground miner for at least 15 years and that the rest is an equivalent to underground mining.

TOTAL DISABILITY

20 C.F.R. § 718.204(b)(1) provides that a miner can establish total disability “if the irrebuttable presumption described in §718.304 applies” or if “the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

- (i) From performing his or her usual coal mine work; and
- (ii) 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.”

Although one physician, Dr. Ebeo, determined that the Claimant has complicated pneumoconiosis, his opinion stands alone, and as I explain below, I do not credit this opinion.

In reviewing whether or not Claimant can return to past relevant work, I note that the Claimant was a certified foreman and a supervisor but also performed duties such as operation of a continuous miner. See TR 23. When a miner under his control was absent, he had to fill in. TR 24. I note that the Claimant did not allege that his work was “heavy” or that he could not perform as a supervisor.

A miner may establish total disability through (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence that the miner suffers from right-sided heart failure; or (4) reasoned medical opinion of a physician. 20 C.F.R. §§718.204(b)(2)(i)-(iv). Further, a “miner can establish total disability upon a mere showing of evidence that satisfies any one of the four alternative methods...” *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171 (4th Cir. 1997) citing to 20 C.F.R. §718.204(c)(1997).

(1) In reviewing the pulmonary function studies, the Claimant designated:

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume loops?	Broncho-dilator?	FEV1	FVC/MVV	Coop. and Comp. Notes?
CX 9	Agarwal	08/08/14	Y	Y	N	2.81	3.69	
DX-10	Ebeo	07/20/11	Y	Y	N	2.83	3.64	Y
DX 50	Ebeo	09/26/13	Y	Y	N	2.63	4.00	

Employer reminds me that Dr. Agarwal admitted that required “. . . flow volume loops were suboptimal.” CX 9, p. 3. Dr. Broudy confirmed the significant variability in those

results and alleged that the Claimant “compromised effort” on testing. Employer argues further that the results reflected only a mild reduction in respiratory function.

As to the Dr. Ebeo studies, Employer argues that Dr. Broudy, a Board-certified internal medicine specialist with subspecialty in pulmonary disease, invalidated the results of the DOL sponsored pulmonary function test administered by Dr. Ebeo on July 20, 2011. DX 14, p. 1. I agree that the credibility of validity of those studies is disputed and apparently they are non-qualifying anyway.

Dr. Dahhan found that Claimant’s arterial blood gases showed mild hypoxemia and his spirometry was normal.

(2) Claimant does not maintain that the blood gas studies are qualifying.

Therefore, I find that the Claimant cannot establish total disability through testing.

(3) Dr. Ebeo alleges both complicated pneumoconiosis and *cor pulmonale*. These diagnoses are not confirmed by any of the other physicians, including the Claimant’s other expert witness, Dr. Agarwal. I find that this evidence is not persuasive, and that Claimant has not met the burden of proof at this level of inquiry.

(4) Under 20 C.F.R. § 718.204(b)(4 and 5), total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner’s respiratory or pulmonary condition prevents the miner from engaging in his usual or comparable coal mine employment. 20 C.F.R. § 718.204(b)(2)(2000); 20 C.F.R. § 718.204(b)(1)(ii) (2008).

There are four opinions designated opinions as to total disability. A “documented” opinion sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient’s work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). A “reasoned” opinion is one in which the underlying documentation and data are adequate to support the physician’s conclusions. *Fields, supra*. Whether a medical report is sufficiently documented and reasoned is for the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The Claimant designated and relies on the opinions of Drs. Ebeo and Agarwal, and Employer relies on the opinions of Drs. Dahhan and Broudy, who did not examine the Claimant. In assessing total disability, I am required to compare the exertional requirements of the claimant’s usual coal mine employment with a physician’s assessment of the claimant’s respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner’s usual coal mine employment against his physical limitations); *Schetroma v. Director*,

OWCP, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). See also *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc on recon.).

Claimant alleges that I should credit Dr. Agarwal's opinion as his examination is the most recent. More weight may be accorded to the results of a recent ventilatory study over the results of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9(1993).

He reported Claimant's last employment to include work as a supervisor in the underground coal mines but that he also operated the miner, scoop, shuttle car, roof bolted, rock dusted, and hung curtains. He noted that Claimant had to lift 30-50 pounds of weight at any given time.

Dr. Agarwal reported that Claimant put forth good effort, on the pulmonary function studies, but his flow volume loops were suboptimal even with a total of 8 attempts. The physician recorded that "[o]verall pulmonary function study showed pseudo-restrictive pattern (probably due to underlying obstructive airway disease) and moderately reduced diffusing capacity." Claimant's arterial blood gases showed a resting pCO₂ of 34 and a pO₂ of 60. I am directed to:

Mr. Strunk has severe pulmonary impairment and does not retain the pulmonary capacity to work as a coal miner or perform a similar job in a dust free environment. This assessment is based on radiological abnormalities p/q with a profusion of 2/1. Pulmonary function studies showed pseudo-restrictive pattern. There is significant air trapping suggested by 152% of predicted total lung capacity. Diffusing capacity is moderately reduced. His arterial blood gas showed significantly reduced PaO₂ which is only 60 mmHg. The sum of PaO₂ is only 94 which is well below the Department of Labor accepted threshold for total disability of 100.

However, I find that although Dr. Agarwal discussed the past work, he did not specifically address the fact that the Claimant was a supervisor. As a supervisor, he may/may not have to have operated the miner, scoop, shuttle car, roof bolted, rock dusted, and hung curtains, and lift 30-50 pounds of weight at any given time. I find that the testimony was actually that he had to perform tasks only when other employees were absent, and the Claimant did not show that this was a frequent occurrence. The burden of proof is on the claimant.

Likewise, although the Claimant wants me to credit Dr. Ebeo, his opinions and diagnoses are undermined because of the controversy surrounding the validity of his testing.

Claimant also submitted medical records from Dr. Cherry who examined Claimant on April 13, 2012. DX 48 at 4-7. Dr. Cherry noted that Claimant worked in the mines for 20 years underground. Claimant told Dr. Cherry that he operated a continuous miner at the coal face and that he was also a mine superintendent. Claimant was exposed to heavy concentrations of coal dust during his employment and the physician recorded that Claimant never wore airway protection to prevent exposure to coal and rock dust. Claimant also told Dr. Cherry that the mining machines were sometimes filled with water spray dust suppression systems, but

sometimes they were not. Claimant indicated that even when the straying systems were in operation, it was still very dusty.

Dr. Cherry also recorded that Claimant complains of progressive dyspnea for the past 4-5 years, especially with exertion which occurs after walking one block or up one flight of stairs. Claimant was recorded as a lifetime nonsmoker. Claimant's pulmonary function testing showed a severe primarily obstructive impairment which improved following bronchodilators. Claimant's chest x-ray showed pneumoconiosis. He diagnosed "complex" coal workers' pneumoconiosis, obesity, and obstructive sleep apnea syndrome. Dr. Cherry noted that based on his examination results, Claimant has "reached maximum medical improvement." He advised Claimant to avoid further exposures to mineral dust including coal dust and rock dust. He also recommended overnight oximetry on room air to see if Claimant is in need of nocturnal home oxygen therapy and that he undergo regular chest x-rays to monitor his pneumoconiosis.

First Dr. Cherry's report was not designated by Claimant and therefore I attribute little weight to it. Second, he did not address whether the Claimant can work as a supervisor. Third, medical treatment records of Tennova Healthcare, and the reports of Dr. Cherry fail to establish total disability. According to his April 2012 deposition testimony, Claimant was suffering from pneumonia and other acute lung exacerbations, including partial lung collapse, a few weeks preceding Dr. Cherry's April 13, 2012 examination. Arguably, the state of acute lung condition exacerbation would essentially negate the validity of Dr. Cherry's abnormal findings.⁸

The June 2014 Tennova Healthcare records reflect that the claimant was admitted to the ER on June 17, 2014, for infectious bronchitis and sore throat for which he had been prescribed an antibiotic, Amoxicillin. Most notably, a June 17, 2014 chest x-ray was interpreted by a radiologist as follows: "Patchy linear opacities left lung base may be pneumonia or atelectasis." These are non-occupational diagnoses, known to produce x-ray changes which can be mistaken for pneumoconiosis, particularly by subsequent x-ray reviewers who are unaware of the claimant's medical history.

It very well may be that the hospitalizations might indicate total disability, but Claimant has not offered a well-reasoned report to substantiate this and it is his burden to do so. As stated above, I find that the reports of Dr. Ebeo and Agarwal fail to address Claimant's actual work history. Moreover, and more importantly, even Dr. Agarwal admitted that the pulmonary function studies that he evaluated were faulty. I find that that this defect undermines his credibility. Even if I accept the remainder of his observations on testing, he did not establish a totally restricted functional capacity.⁹

I also note that the testing by Dr. Dahhan is essentially negative. The Claimant does not explain why I should overlook this evidence. I note that Dr. Agarwal submitted the most recent testing, but again, it is admittedly defective. I do not necessarily credit Dr. Brody's assertions

⁸ There is no evidence that Claimant heeded the 2012 recommendation for overnight oximetry on room air to see if he was in need of nocturnal home oxygen therapy and that he undergo regular chest x-rays to monitor his pneumoconiosis.

⁹ In some instances when a claimant is precluded from heavy work, it is conceivable that a mild restriction can preclude work. This is not true in this case.

about the validity of Dr. Ebeo's testing, but Dr. Agarwal admitted that Dr. Broudy is correct that his findings are skewed. Claimant failed to rehabilitate this evidence.

Accordingly, I find that Claimant failed to establish total disability.

CONCLUSION

Total disability is crucial to this claim. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP, supra*. As he cannot establish total respiratory disability, the Claimant cannot prevail.

In an abundance of caution, I will discuss pneumoconiosis. "Pneumoconiosis" is defined as including both clinical and legal pneumoconiosis:

(a) 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 both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis, or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a 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.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201. The existence of pneumoconiosis may be established by (1) chest x-ray, (2) autopsy or biopsy, (3) by presumption, or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a).

I find, based on the rationale set forth above, that testing by Drs. Ebeo and Agarwal was invalid, and as their opinions are based in large part on faulty logic, therefore I find that they fail to set forth “reasoned” opinions. 20 C.F.R. § 718.202(a)(4). There is no pathology evidence. 20 C.F.R. § 718.202(a)(2).

As to x-ray evidence, I am presented with readings from four x-rays:

1. Dr. Ebeo interpreted Claimant’s Department of Labor sponsored chest x-ray dated July 20, 2011 as positive for simple and complicated coal workers’ pneumoconiosis with q/r opacities in two zones, with a 2/1 profusion and large size “A” opacities. DX10. Dr. Ebeo is not a dually certified reader. Dr. Alexander, a Board Certified radiologist and NIOSH certified B-reader interpreted the film for Claimant as positive for simple pneumoconiosis with p/p opacities in all zones and a 1/0 profusion. CX-01. Employer submitted a rebuttal reading by Dr. Meyer, who read the film negative. DX-12. I agree with Claimant that this evidence is in equipoise.

I must note, however, that I attribute little weight to the opinions of Dr. Ebeo. Dr. Ebeo, determined that the Claimant has complicated pneumoconiosis, his opinion stands alone, and he is the least qualified reader. Therefore, I do not credit this opinion.

2. Employer submitted two negative readings of the film dated September 23, 2011 by Drs. Dahhan and Broudy. DX-11, 13. These physicians are not Board certified radiologists. Employer also submitted a negative reading of this film by Dr. Tarver. EX 1. Claimant submitted two rebuttal readings of this film by Drs. Crum and Alexander who are dually certified readers. CX-02, 03. Dr. Crum read p/t opacities in all zones in a 1/1 profusion. CX-02. Dr. Alexander read p/p opacities in all zones with a 1/1 profusion. CX 3. Claimant argues that his readings should be afforded more weight than Employer’s readings, as they come from dually certified radiologists. Claimant avers that although Dr. Tarver is a dually certified physician, his reading is outweighed by Drs. Crum and Alexander. However, I find that the evidence is at equipoise.
3. Claimant submitted a reading of the film dated June 25, 2013 by Dr. DePonte, also a board certified and NIOSH certified B-reader. CX 04. Dr. DePonte read this film positive for simple pneumoconiosis with p/q opacities in all zones and a 1/0 profusion. CX-04. Dr. Meyer read this film negative for pneumoconiosis. EX 2. At a minimum, this film is in equipoise.
4. Claimant also submitted a positive chest x-ray reading of the film dated August 8, 2014 from Dr. Crum. CX 6. Dr. Crum interpreted p/q opacities in all zones with a 2/1 profusion. This film is also positive for pneumoconiosis.

I note that Employer did not address the August 8, 2014 x-ray. This is the most recent by more than a year. In this case, it is appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from older evidence. *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). I left the record open to permit the Employer a chance to produce more evidence.

I find, after weighing all of the evidence as to pneumoconiosis together, that the Claimant has established pneumoconiosis as of August 8, 2014.

The Claimant has established at least one of the conditions of entitlement upon which the prior claim was denied (applicable condition of entitlement) has changed and is now present. 20 C.F.R. § 725.309(d)(3). If a claimant does demonstrate a change in one of the applicable conditions of entitlement, then generally findings made in the prior claim(s) are not binding on the parties. 20 C.F.R. § 725.309(d)(4).

However, after a review of the record, I find that the failure to establish total disability precludes an award of benefits. Moreover, the Claimant is not entitled to recover attorney's fees.

ORDER

The Claim for benefits is **DENIED**.

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 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 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).