BRB No. 12-0201 BLA

HAROLD T. TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH HOPKINS COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/29/2013
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Randel E. Taylor, Lehigh Acres, Florida, lay representative, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-05735) of Administrative Law Judge Joseph E. Kane, rendered on a subsequent claim filed on August 11, 2008,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with thirty-five years of underground coal mine employment and considered this claim under the regulations at 20 C.F.R. Part 718. Because the administrative law judge determined that the newly submitted evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2), he found that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that, because claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, claimant was entitled to the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to rebut the presumption by establishing either that claimant does not have pneumoconiosis or that his disability does not arise out of, or in connection with, coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment for invocation of the amended Section 411(c)(4) presumption. Employer contends that the administrative law judge applied an incorrect legal standard pursuant to 20 C.F.R. §725.309. Employer further asserts that the administrative law judge's reliance on the preamble as a criterion for evaluating the medical opinion evidence is contrary to law.

[1] Claimant filed claims for benefits on October 17, 1986 and June 18, 1998, each of which was denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibits, 1 2. Claimant filed a third claim for benefits on January 21, 2004, which was denied by the district director on June 2, 2004, by reason of abandonment. Director's Exhibit 3. Claimant took no further action until he filed the current subsequent claim.

[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Additionally, employer argues that the administrative law judge erred in his consideration of the medical opinions of Drs. Repsher and Tutuer and applied the wrong legal standard in determining disability causation.[3] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."[5] 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant abandoned his prior claim. Director's Exhibit 3. Under the regulations, a denial "by reason of abandonment" is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Thus, claimant had to establish, based on the newly submitted evidence, at least one of the requisite elements of entitlement in order to satisfy his burden of proof at 20 C.F.R. §725.309(d), and obtain a review of his claim on the merits

[3] Employer's request to hold this case in abeyance pending resolution of the legal challenges to Public Law No. 111-148 is denied. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); Employer's Brief in Support of Petition for Review at 12.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

of entitlement. *See White*, 23 BLR at 1-3.

I. Invocation of the Amended Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment for invocation of the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). We disagree.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three newly submitted pulmonary function tests, dated September 24, 2008, January 13, 2009, and July 17, 2009. Director's Exhibits 21, 42; Claimant's Exhibit 6. The administrative law judge found that each test was qualifying for total disability under the regulations,[6] although the January 13, 2009 and July 17, 2009 tests were invalidated. Decision and Order at 16-17. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that none of the arterial blood gas studies was qualifying for total disabilty.[7] *Id*. at 17-18. Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge found that the "evidence of cor pulmonale [is] inconclusive." *Id*. at 18. Additionally, under 20 C.F. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Repsher, and Tuteur. He found that "all of the physicians have given credible opinions that [c]laimant is totally disabled from a respiratory standpoint." *Id*. at 20. Weighing all the newly submitted evidence together at 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge found that claimant established a totally disabling respiratory or pulmonary impairment. *Id*. Thus, the administrative law judge found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and was entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *Id*.

Employer contends that the administrative law judge did not properly determine whether claimant is totally disabled by a respiratory or pulmonary impairment standing alone. Employer's Brief in Support of Petition for Review at 13. Employer asserts that the opinions of Drs. Repsher and Tuteur do not support claimant's burden of proof, and

[6] A "qualifying" pulmonary function test yields results that are equal to, or less than, the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. Specifically, the FEV1 and either the MVV, FVC or the FEV1/FVC values must qualify. A "non-qualifying" test yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] A "non-qualifying" arterial blood gas study yields values that exceed the requisite table values at Appendix C of 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(ii).

that the administrative law judge erred in relying on Dr. Baker's "conclusory" opinion. *Id.* Employer's arguments are without merit.

The administrative law judge determined that claimant's last coal mine employment was as a mine foreman, which required him to stand for nine hours, sit for twenty minutes and lift "fifty pounds twenty-five or thirty times per day."[8] Decision and Order at 19. Contrary to employer's contention, the administrative law judge properly found that Dr. Tuteur's opinion supports a finding of total disability since Dr. Tuteur specifically opined that claimant was totally disabled from a respiratory standpoint from performing the work of a mine foreman.[9] Employer's Exhibit 13 at 32-34; *see Cornett v. Benham Coal Co.*, 277 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996).

With respect to Dr. Baker, the administrative law judge found that he diagnosed a severe respiratory impairment and opined that claimant could not work as a " fire-boss," which Dr. Baker described as requiring claimant to carry thirty pounds of equipment all day long and to walk 1.5 miles per shift. *Id.* The administrative law judge found that "[a]lthough Dr. Baker did not consider the job requirements of a mine foreman, it is reasonable to conclude that if Dr. Baker opined that [c]laimant could not do the work of a fire-boss, he would have the same opinion with respect to the job of a mine foreman." *Id.* We see no error in the administrative law judge's inference, given the similar exertional requirements of claimant's jobs as a foreman and fireboss. *See Wolf Creek Collieries v.*

[8] The administrative law judge noted that claimant also worked as a fire-boss and as a night watchman, but the administrative law judge specifically determined that these jobs "did not qualify as coal mine employment." Decision and Order at 3-4, 18. Thus, he considered the medical opinion evidence in conjunction with the exertional requirements of claimant's job as a mine foreman.

[9] Dr. Tuteur testified in a deposition on June 22, 2010. Employer's Exhibit 13. Dr. Tuteur noted that claimant "worked initially as a shuttle car operator and rose through the ranks of *foreman* and supervisor," and that claimant "served as a night watchman" in the last year of his employment. *Id.* at 32 (emphasis added). Dr. Tuteur further testified that the position of night watchman was the "least energy-requiring," but that the other jobs that claimant worked "ranged from heavy labor to moderate labor." *Id.* at 33. When asked what jobs claimant would be able to perform from a respiratory or pulmonary perspective, Dr. Tuteur stated that claimant could perform the work of a night watchman, but that claimant "would be unable to do . . . all the other more strenuous jobs, all the way from shuttle car operator to supervisor." *Id.* at 33-34.

Director, OWCP [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP, v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10]

As an additional matter, we reject employer's contention that the administrative law judge did not apply the correct analysis at 20 C.F.R. §725.309, to determine whether there has been an "actual change" in claimant's condition since the denial of his prior claim.[11] Employer's Brief in Support of Petition for Review at 14, *citing Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a comparative analysis is not required under the revised version of 20 C.F.R. §725.309(d), which is applicable to claims, such as this one, filed after January 19, 2001:

> We construe the term "change" to mean disproof of the continuing validity of the original denial . . . rather than the actual difference between the bodies of evidence presented at different times. Under this definition, the [administrative law judge] need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present.

Cumberland River Coal Co. v. Banks, 690 F.3d 477, 486, 25 BLR 2-135, 2-147 (6th Cir. 2012) (internal quotation marks and citations omitted). In this case, because the administrative law judge properly determined, based on the newly submitted evidence, that claimant established total disability, we affirm the administrative law judge's finding

[10] In his medical report, Dr. Repsher did not address the issue of total disability. Director's Exhibit 42. During a June 21, 2010 deposition, Dr. Repsher identified several medical conditions, respiratory and non-respiratory, that he opined would interfere with claimant's ability to work as a fire-boss. Since Dr. Repsher diagnosed severe chronic obstructive pulmonary disease (COPD), and has not indicated that claimant can work from a respiratory standpoint, Dr. Repsher's opinion does not constitute contrary evidence to be weighed against the opinions of Drs. Tuteur or Baker.

[11] Employer maintains that, to make a determination pursuant to 20 C.F.R. §725.309, the administrative law judge should compare Dr. Simpao's opinion, developed in the prior claim, with the newly submitted evidence, relevant to whether claimant established a change in his condition.

that claimant satisfied his burden to establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See White*, 23 BLR at 1-3. Because employer does not challenge the administrative law judge's finding of at least fifteen years of qualifying coal mine employment, s*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), we also affirm the administrative law judge's determination that claimant is entitled to the presumption at amended Section 411(c)(4). 30 U.S.C. §921(c)(4).

II. Rebuttal of the Amended Section 411(c)(4) Presumption

In order to rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), employer was required to affirmatively establish either that claimant does not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis.[12] Decision and Order at 28. In considering the issue of the existence of legal pneumoconiosis,[13] the administrative law judge weighed the opinions of Drs. Repsher and Tuteur, relevant to the etiology of claimant's chronic obstructive pulmonary disease (COPD). *Id*. at 31-33. The administrative law judge determined that their opinions, that claimant's COPD was not due to coal dust exposure, were not credible in light of the reasoning they provided.[14] *Id*. at 33. The administrative law judge further found that employer was unable to

[12] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(1). This 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. *Id*.

[13] "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." 20 C.F.R. §718.201(a)(2).

[14] The administrative law judge also rejected the opinion of Dr. Simpao, who diagnosed legal pneumoconiosis, because his opinion was unsupported and unreasoned, while crediting Dr. Baker's diagnosis of legal pneumoconiosis as reasoned and documented. Decision and Order at 29-31. The administrative law judge correctly noted that neither physician's opinion supports rebuttal. *Id*. at 31.

disprove a causal connection between claimant's disability and his legal pneumoconiosis, as neither physician believed that claimant suffered from legal pneumoconiosis, contrary to his finding. *Id*. at 35. Thus, the administrative law judge concluded that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). *Id*.

Employer contends that the administrative law judge erred in evaluating the credibility of its medical experts, based on the preamble to the regulations. Employer's Brief in Support of Petition for Review at 14-20. Contrary to employer's assertion, however, the administrative law judge acted within his discretion in consulting the preamble to the regulations as an authoritative statement of medical principles accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive respiratory or pulmonary impairments arising out of coal mine employment. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Banks*, 690 F.3d at 488-89, 25 BLR at 151-52; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). In addition, there is no merit to employer's assertion that it did not receive proper notice of the administrative law judge's intent to rely on the preamble, as the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990).

We also reject employer's arguments that the administrative law judge mischaracterized the opinions of Drs. Repsher and Tuteur, in light of the preamble. Specifically, the administrative law judge observed correctly that one of the bases provided by Dr. Repsher for excluding coal dust exposure as a causative factor in claimant's COPD was Dr. Repsher's reliance on "studies showing that smoking is a more common and powerful cause of COPD than coal dust." Decision and Order at 31-32. The administrative law judge permissibly determined that Dr. Repsher's opinion was of little probative value since it was based on "generalities and not the specifics of claimant's condition" and did not adequately explain how any of the cited studies proved that claimant's COPD was not caused by coal dust exposure. *Id*. at 32; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-51 (1985); *see also Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983).

Similarly, the administrative law judge properly found that Dr. Tuteur based his opinion, that claimant's COPD was unrelated to coal dust exposure, largely on statistical data "comparing a "[twenty percent] risk of tobacco smoke to produce clinically

meaningful [COPD]" to a "[one percent] risk associated with coal mine dust exposure[.]" Decision and Order at 12, *quoting* Employer's Exhibit 9. We affirm the administrative law judge's determination to give Dr. Tuteur's opinion "little weight" since it was premised on scientific evidence that conflicts with the scientific evidence relied upon by DOL, as showing that smoking and non-smoking miners are equally at risk for developing COPD.[15] Decision and Order at 33; *see* 65 Fed Reg. 79,920, 79,939 (Dec. 20, 2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

Because the administrative law judge has discretion in determining the credibility of the evidence, we affirm his finding that the opinions of Drs. Repsher and Tuteur are insufficient to disprove that the miner had legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). In reaching our holding, we specifically reject employer's argument that the administrative law judge erred in failing to consider all of the explanations provided by Drs. Repsher and Tuteur for their opinions, as the administrative law judge provided a valid reason for discrediting each physician's opinion.[16] *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378 (1983). We, therefore, affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

Additionally, we reject employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Tuteur, relevant to the cause of claimant's respiratory disability. The administrative law judge permissibly decided to treat, "as 'less significant,'" the opinions of Drs. Repsher and Tuteur regarding the etiology of claimant's respiratory disability, because neither physician diagnosed legal pneumoconiosis. Decision and Order at 35, *quoting Skukan v. Consolidation Coal Coal*

[15] We reject employer's assertion that the administrative law judge erred in citing to unpublished decisions in reaching his credibility findings. *See Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929 (6th Cir. 2000) (holding that the court is permitted to consider the persuasive reasoning of unpublished opinions).

[16] Although the sufficiency of employer's evidence was at issue on rebuttal, the administrative law judge made an additional finding that Dr. Baker provided a reasoned and documented opinion explaining why the miner's disabling COPD was due to pneumoconiosis. The administrative law judge determined that Dr. Baker's opinion was entitled to controlling weight. Decision and Order at 33; Director's Exhibit 21. Employer does not specifically challenge the weight accorded Dr. Baker's opinion relevant to the existence of legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Co. 993 F.2d 1228, 1233 (6th Cir. 1993); *see also Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Thus, we affirm the administrative law judge's finding that employer failed to rebut the presumption by establishing that claimant's respiratory disability did not arise out of, or in connection, with coal mine employment. We, therefore, affirm the administrative law judge's finding that claimant is entitled to benefits.[17]

[17] Employer argues that the administrative law judge did not properly consider whether claimant "would have been disabled to the same degree and by the same time in his life if he had never been a miner," based on a pre-existing disability or coexisting non-respiratory impairments, which include "extensive muscoskeletal problems and coronary artery disease," Employer's Brief in Support of Petition for Review at 25-27, *citing Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). Contrary to employer's argument, outside of the jurisdiction of the United States Court of Appeals for the Seventh Circuit, a pre-existing disability never defeated entitlement if the claimant could establish total disability due to pneumoconiosis. *See e.g., Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 20 BLR 2-362 (6th Cir. 1996). Moreover, in claims filed after January 19, 2001, a nonpulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see Ward*, 93 F.3d at 211, 20 BLR at 2-362; *Gulley v. Director, OWCP*, 397 F.3d 535, 538-39, 23 BLR 2-242, 2-248-49 (7th Cir. 2005).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge