BRB No. 98-1206 BLA

JAMES L. PICKENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COWIN & COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

William H. Howe and Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-1028) of Administrative Law Judge Clement J. Kichuk (the administrative law judge) on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Sheldon R. Lipson credited claimant with slightly more than ten years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Lipson found

the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[1] Judge Lipson also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b). Judge Lipson further found the evidence sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, Judge Lipson awarded benefits. In response to employer's appeal, the Board affirmed Judge Lipson's findings at 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(b), (c). However, the Board vacated Judge Lipson's finding that claimant worked slightly more than ten years in coal mine employment, and remanded the case for further consideration of the evidence. In addition, the Board vacated Judge Lipson's findings that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309, and sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and remanded the case for further consideration of the evidence. *Pickens v. Cowin & Company, Inc.*, BRB No. 97-0256 BLA (Oct. 23, 1997)(unpub.).

[1]Claimant filed his initial claim on October 17, 1983. Director's Exhibit 38. This claim was denied by the Department of Labor on June 29, 1984 because the evidence was insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment and that claimant suffered from a totally disabling respiratory impairment due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on April 18, 1993. Director's Exhibit 1.

On remand, the administrative law judge credited claimant with 3,643 days of coal mine employment,[2] and found the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge also found the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge miscalculated claimant's length of coal mine employment. Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.[3] Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon

---

[2]The administrative law judge stated that claimant "falls a mere seven days or one week short of the requisite 3,650 days which comprise, of course, ten years." Decision and Order on Remand at 12.

[3]Employer noted that the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 comports with the Board's prior decision.

[4]Inasmuch as the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. We disagree. The administrative law judge considered the opinions of Drs. Fino, Wheeler and Russakoff.[5] Whereas Dr. Russakoff opined that claimant's pneumoconiosis is related to coal dust exposure,[6] Director's Exhibit 13, Drs. Fino and Wheeler opined that claimant does not suffer from pneumoconiosis related to coal dust exposure, Employer's Exhibits 1, 28, 30. The administrative law judge properly accorded determinative weight to the opinion of Dr. Russakoff over the contrary opinions of Drs. Fino and Wheeler because he found Dr. Russakoff's opinion to be better reasoned.[7] *See Clark v. Karst-Robbins*

---

[5]Employer did not raise the administrative law judge's failure to consider the opinions of Drs. Hasson and Risman with respect to his weighing of the conflicting medical opinions at 20 C.F.R. §718.203. Dr. Hasson diagnosed a restrictive lung disease and chronic bronchitis by history. Director's Exhibit 12. Dr. Risman opined that he was unable to conclude that there is a significant bronchopulmonary disease occurring in claimant that might be attributable to exposure to industrial coal dust. Director's Exhibit 38.

[6]Inasmuch as the administrative law judge, within a proper exercise of his discretion, relied on Dr. Russakoff's opinion to find that "[t]here is competent evidence sufficient to establish that [claimant's] pneumoconiosis arose out of his coal mine employment without reliance upon conjecture or biased inference," Decision and Order on Remand at 15, we reject employer's assertion that the administrative law judge erred by failing to discredit Dr. Russakoff's opinion as equivocal, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

[7]The administrative law judge stated that "Dr. Russakoff's opinion as a pulmonologist that [claimant's] pneumoconiosis arose out of his coal mine employment is the most well reasoned opinion." Decision and Order on Remand at 15. The administrative law judge observed that "[i]n his report, Dr. Russakoff directly supports this opinion as he explains regarding the Claimant's impairment that 'this impairment is a result of his previous exposures as a driller and blaster both inside and outside coal mines.'" *Id*. at 13. The administrative law judge further observed that Dr. Russakoff's opinion "is supported by the great weight of relevant documentary evidence in the record." *Id*. at 14. In contrast, the administrative law

Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject employer's assertions that the administrative law judge erred in according greater weight to Dr. Russakoff's opinion, and that the administrative law judge erred by mischaracterizing Dr. Russakoff's opinion.[8]

---

judge stated that the opinions of Drs. Fino and Wheeler "do not reveal the etiology of the Claimant's pneumoconiosis as they focus upon finding no occupational impairment is present." *Id*. at 15. The administrative law judge observed that "Dr. Wheeler did not feel that the Claimant had pneumoconiosis since he did not have it when he left the coal mines in 1983." *Id*. at 14. Further, the administrative law judge observed that although "Dr. Wheeler stated that in order for [claimant] to develop silicosis or pneumoconiosis in that interval would take an unprotected high dose of dust exposure which 'should' be very rare in modern coal mines...[,] Dr. Wheeler does not indicate having any knowledge that Claimant was not exposed to a high dose." *Id*.

[8]Employer asserts that the administrative law judge erred by placing the burden of rebutting the fact that claimant had pneumoconiosis on it since the administrative law judge discredited the opinions of Drs. Fino and Wheeler because they did not rebut the fact that claimant has pneumoconiosis. Contrary to

employer's assertion, the administrative law judge did not place the burden of rebutting the fact that claimant had pneumoconiosis on it. Rather, the administrative law judge stated that "Drs. Fino and Wheeler state opinions attempting to rebut that fact" as opposed to addressing the etiology of claimant's pneumoconiosis. Decision and Order on Remand at 15.

Employer also asserts that the administrative law judge erred by discounting the opinions of Drs. Fino and Wheeler because they are contradicted by physicians who read the June 8, 1993 x-ray as positive for pneumoconiosis. The administrative law judge discounted the opinions of Drs. Fino and Wheeler because he found them to be "contradicted by eight physicians, six of whom are B readers and Board Certified Radiologists, one of whom is a B reader and one is a Board Certified Radiologist but not a B reader." Decision and Order on Remand at 14. The administrative law judge also discounted Dr. Wheeler's July 1, 1994 opinion because he found it to be inconsistent with Dr. Wheeler's prior positive x-ray interpretation.[9] As employer asserts, since the positive x-ray interpretations of record relied upon by the administrative law judge do not relate claimant's pneumoconiosis to coal dust exposure during coal mine employment, the x-ray interpretations are not relevant to the issue of the cause of claimant's pneumoconiosis at 20 C.F.R. §718.203. *See generally Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986). Nonetheless, since the administrative law judge provided a valid alternate basis for according greater weight to the opinion of Dr. Russakoff than to the contrary opinions of Drs. Fino and Wheeler, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he accorded greater weight to Dr. Russakoff's

[9]The administrative law judge stated that "[o]ne of the opinions that the Claimant had pneumoconiosis emanated from Dr. Wheeler himself." Decision and Order on Remand at 14. The administrative law judge observed that "[w]hen [Dr. Wheeler] initially reviewed the x-ray of June 8, 1993, Dr. Wheeler classified the film as 1/1 in addition to his above mentioned theory." *Id*. The administrative law judge also observed that "[w]hen [Dr. Wheeler] drafted his report on July 1, 1994 he did not totally rule out pneumoconiosis but felt 'quite sure' that it was not coal workers' pneumoconiosis." *Id*.

opinion because he found it to be better reasoned, *see Clark, supra*; *Fields, supra*; *Fuller, supra*, we hold that any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Moreover, we hold that substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.[10] Therefore, we affirm the administrative law judge's award of benefits on remand.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[10]In view of our affirmance of the administrative law judge's finding on the merits at 20 C.F.R. §718.203, we decline to address employer's contention with regard to the administrative law judge's length of coal mine employment finding.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge