BRB No. 98-0943 BLA

ALFRED BELCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONTRACTING ENTERPRISES,	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order on Third Remand of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington, Schelin & Herrell, P.C.), Bristol, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Third Remand (88-BLA-0326) of Administrative Law Judge Frederick D. Neusner awarding benefits on a 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 on appeal before the Board for a fourth time. In the initial Decision and Order issued on May 23, 1990, Administrative Law Judge Jeffrey Tureck credited claimant with eleven years of qualifying coal mine employment, and found that entitlement to benefits was

established pursuant to 20 C.F.R. §410.490.

On appeal, the Board affirmed the administrative law judge's findings regarding the length of coal mine employment, but vacated his findings at Section 410.490 and remanded this case for adjudication of the claim, filed on December 17, 1979, pursuant to the provisions at 20 C.F.R. §727.203. *Belcher v. Contracting Enterprises*, BRB No. 90-1727 BLA (July 27, 1992)(unpublished).

On remand, this case was assigned to Administrative Law Judge Frederick D. Neusner. In a Decision and Order issued on August 2, 1995, the administrative law judge found that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a)(2), and that employer established rebuttal of that presumption at 20 C.F.R. §727.203(b)(3), (4). Accordingly, benefits were denied.

On the second appeal, the Board instructed the administrative law judge to determine whether the weight of the x-ray evidence was sufficient to establish invocation pursuant to Section 727.203(a)(1) in light of *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The Board affirmed the administrative law judge's findings pursuant to Section 727.203(a)(2), (b)(1)-(2), but vacated his findings pursuant to Section 727.203(b)(3)-(4) and remanded the case for reconsideration of the evidence thereunder. *Belcher v. Contracting Enterprises*, BRB No. 95-2073 BLA (Apr. 16, 1996)(unpublished).

In his Decision and Order After Second Remand issued on September 27, 1996, the administrative law judge found that the weight of the evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1), but that invocation was previously established pursuant to Section 727.203(a)(2), and that employer failed to establish rebuttal at Section 727.203(b)(3)-(4).

On the third appeal, the Board agreed with employer's arguments that the administrative law judge provided invalid reasons for finding the opinions of Drs. Kress, Sargent and Fino insufficient to establish rebuttal pursuant to Section 727.203(b)(3)-(4). The Board affirmed, as either supported by substantial evidence or unchallenged on appeal, the administrative law judge's findings with regard to the remaining medical opinions of record, but remanded the case for reconsideration of the opinions of Drs. Kress, Sargent and Fino, and a reweighing of the evidence pursuant to Section 727.203(b)(3)-(4). *Belcher v. Contracting Enterprises*, BRB No. 97-0294 BLA (Oct. 24, 1997)(unpublished).

In his Decision and Order on Third Remand issued on February 20, 1998, the administrative law judge again found the evidence of record insufficient to establish rebuttal pursuant to Section 727.203(b)(3)-(4). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Section 727.203(b)(3)-(4). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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

Employer initially contends that the administrative law judge, in finding that rebuttal was not established at Section 727.203(b)(3), provided an invalid reason for discounting the opinions of Drs. Fino and Kress that claimant's disability was caused entirely by smoking and not by coal workers' pneumoconiosis. We disagree. The administrative law judge accurately determined that Drs. Fino and Kress based their conclusions in part on their belief that a respiratory impairment caused by pneumoconiosis is static once coal dust inhalation ceases. Decision and Order at 4-5. Dr. Kress recognized that dust exposure in coal mine employment can result in an obstructive ventilatory impairment or industrial bronchitis, but felt that since claimant retired in 1978, if claimant's obstructive impairment was related to his environmental exposures, "this should have cleared long since....one would expect to see a significant improvement in his productive cough and dyspnea if, indeed, these were related to his work environment." Director's Exhibit 39. Similarly, Dr. Fino noted a progression of claimant's pulmonary function abnormalities between 1980 and 1984, and stated that although cessation of smoking does not significantly affect progression of obstruction once it is established, "[i]t has been shown that the respiratory impairment induced by coal workers' pneumoconiosis is static once coal dust inhalation ceases." Employer's Exhibit 26. In light of the progressive and irreversible nature of pneumoconiosis, the administrative law judge reasonably concluded that the opinions of Drs. Fino and Kress relied on a premise fundamentally at odds with the statutory and regulatory scheme, and thus were inconsistent with the Act. Decision and Order at 4-5. We reject employer's argument that the administrative law judge, by citing no basis for his assumption that pneumoconiosis is progressive while rejecting Dr. Fino's reliance on literature and studies by Dr. Leroy Lapp, substituted his layman's view for that of qualified experts.

It has long been recognized that pneumoconiosis is a progressive and irreversible disease. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Moreover, while Dr. Fino stated that Dr. Lapp has "shown that the respiratory impairment induced by coal workers' pneumoconiosis is static once coal dust exposure ceases," Employer's Exhibit 26, Dr. Fino provided no documentation in support of this assertion. The administrative law judge, as trier-of-fact, is not bound to accept the opinion or theory of any medical expert, but must evaluate the evidence, weight it, and draw his own conclusions. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Although employer maintains that the opinions of Drs. Fino and Kress are not hostile to the Act, the administrative law judge permissibly concluded that these opinions were undermined by the erroneous assumption that pneumoconiosis is not progressive once coal dust exposure ceases. Decision and Order at 4-5; *see generally Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993)*; see also Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998). The administrative law judge's findings pursuant to Section 727.203(b)(3) are supported by substantial evidence, within his discretion, and thus are affirmed.

Employer next contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal at Section 727.203(b)(4). Specifically, employer asserts that the opinions of Drs. Schmidt and Sargent rule out both clinical and legal pneumoconiosis and should have been credited. Employer also argues that the administrative law judge mechanically discounted the opinions of Drs. Kress and Fino solely because they were non-examining physicians. Employer's arguments are without merit. The Board previously affirmed the administrative law judge's finding that Dr. Schmidt's opinion was insufficient to establish rebuttal pursuant to Section 727.203(b)(4), and we decline to revisit this issue, inasmuch as no exception to the law of the case doctrine has been demonstrated. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Further, because Dr. Sargent did not address the statutory definition of pneumoconiosis or the impact of claimant's coal dust exposure on his various respiratory impairments, the administrative law judge permissibly found that his report did not constitute a reasoned medical opinion that establishes both the absence of clinical pneumoconiosis and the absence of statutory pneumoconiosis as required under the Act.[1] Decision and Order at 5-7;

[1]Contrary to employer's arguments, Dr. Sargent did not address whether any of claimant's respiratory conditions were aggravated by dust exposure in coal mine employment. Rather, Dr. Sargent opined that claimant's obstructive impairment was

see Barber v. Director, OWCP, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995). In evaluating the remaining medical opinions of record, the administrative law judge accurately reviewed the bases for the physicians' opinions, and determined that Drs. Suwanasri, Buddington, Baxter and Robinette diagnosed pneumoconiosis after adminstering comprehensive physical examinations. The administrative law judge acted within his discretion in according less weight to the contrary opinions of Drs. Fino and Kress because they were non-examining physicians who did not have first-hand knowledge of the miner's pulmonary impairment. Decision and Order at 6-7; *see generally Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge's findings pursuant to Section 727.203(b)(4) are supported by substantial evidence, and therefore are affirmed. Consequently, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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due to smoking and that claimant did not have coal workers' pneumoconiosis because his x-rays were negative and he had no evidence of a restrictive impairment on pulmonary function study testing, specifically, claimant's total lung capacity was normal and his residual volume elevated. Employer's Exhibit 37.