BRB No. 97-1297 BLA

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| WILLARD L. EARL | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: |
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| 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 of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

George P. Surmaitis (Crandall, Pyles & Haviland), Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-0773) of Administrative Law Judge Frederick D. Neusner awarding benefits on a miner's 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. Initially, the administrative law judge, applying the regulations at 20 C.F.R. Part 718, credited the miner with thirty-seven years of coal mine employment and found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Decision and Order at 2, 8. The administrative law judge also found total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 11-12. Accordingly, benefits were awarded,

commencing April 1994. Decision and Order at 13.

In response to employer's appeal, the Board affirmed the administrative law judge's finding that claimant[1] established a material change in conditions pursuant to Section 725.309(d). *See Earl v. Consolidation Coal Co.*, BRB No. 96-0859 BLA (Sept. 26, 1996) (unpub.). However, the Board vacated the administrative law judge's findings at Sections 718.202(a)(1), 718.204(b), (c).[2] *See Earl, supra*.

On remand, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and found the evidence sufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204. Decision and Order on Remand at 5-7. Accordingly, benefits were awarded, commencing April 1994.

On appeal, employer contends that the administrative law judge erred in weighing the medical opinions pursuant to Section 718.202(a)(4) and 718.204(b). Employer's brief at 6-18. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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[1] Claimant is Willard Earl, the miner, who filed his present claimant for benefits on April 6, 1994. Director's Exhibit 1. The miner filed two previous claims on May 10, 1977 and July 24, 1989 which were finally denied on December 12, 1979 and January 12, 1990, respectively. Director's Exhibits 31, 32.

[2] The Board also affirmed as unchallenged the administrative law judge's length of coal mine employment finding. *See Earl, supra.*

[3] We affirm the administrative law judge's findings regarding the onset date of

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates*, Inc., 380 U.S. 359 (1965).

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total disability and pursuant to Sections 718.202(a)(1), 718.203(b), and 718.204(c) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Considering the medical opinions pursuant to Sections 718.202(a)(4) and 718.204(b), the administrative law judge credited the opinions of Drs. Devabhaktuni and Rasmussen, both finding total disability due to lung disease caused by coal mine employment. Decision and Order on Remand at 4-5, 7. The administrative law judge referred to the reasons set forth in his 1996 Decision and Order for according greater weight to the opinions of Drs. Devabhaktuni and Rasmussen over the contrary opinions of Drs. Renn, Belotte, Morgan, and Hippensteel, Decision and Order at 4-8. Decision and Order on Remand at 4. The administrative law judge added that he also considered the other medical reports and depositions contained in the record and found the opinions of Drs. Devabhaktuni and Rasmussen to be the "most probative." Decision and Order on Remand at 5. The administrative law judge found these opinions to be more probative because they are more consistent with claimant's shortness of breath, coal mine employment history, and abnormal pulmonary function and blood gas studies.[4] Decision and Order at 5.

In reviewing the contrary medical opinions, the administrative law judge permissibly discredited the opinions of Drs. Renn, Morgan, and Hippensteel because the facts they relied on regarding the duration and extent of claimant's exposure to coal dust was inconsistent with claimant's sworn testimony, Decision and Order at 5-6. *See Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984); *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Moreover, the administrative law judge noted that Dr. Renn's statement that claimant's bronchitis and emphysema could not be aggravated by coal dust because the "dust that is usually found in coal

[4] Employer alleges that the administrative law judge's reasons, *i.e.,* shortness of breath, coal mine employment history, and objective studies, for finding the opinions of Drs. Devabhaktuni and Rasmussen to be more probative is not supported by the evidence of record. Employer's Brief at 7-11. To justify this assertion, employer contends that the contrary opinions refute the administrative law judge's finding that these factors support a determination that claimant's impairment is due to a coal dust induced disease rather than a cigarette smoking induced disease. *Id.* The administrative law judge's decision to credit one opinion over another regarding these factors involves credibility determinations within the discretion of the administrative law judge which the Board will not overturn unless they are deemed to be inherently incredible or patently unreasonable. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983); *see also Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

mines is basically inert as far as causing an inflammatory response" to be inconsistent with the Act and regulations, Employer's Exhibit 20 at 46-47. *See* 20 C.F.R. §718.201; *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991).

Additionally, the administrative law judge rationally accorded less weight to Dr. Bellotte's opinion because he found it to be equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). The administrative law judge based his finding on the fact that in 1989 Dr. Belotte found simple pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis and stated that he could not exclude the possibility that some x-ray markings are due to coal mine employment. Director's Exhibit 32. In 1995, Dr. Belotte found no coal workers' pneumoconiosis and the etiology of claimant's pulmonary fibrosis to be unclear and idiopathic. Employer's Exhibits 8, 18 at 10, 21.

Further, we reject employer's assertion that the administrative law judge erred in finding Dr. Piccirillo's opinion to be less persuasive because he examined claimant in 1979. Employer's Brief at 15. It was reasonable, *see Tackett, supra; Calfee, supra*, for the administrative law judge to find Dr. Picirillo's opinion to be less persuasive based on the fact that Dr. Piccirillo examined claimant in 1979 and he continued to work until 1991, *see generally Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982).

Therefore, contrary to employer's contentions, the administrative law judge permissibly found the opinions of Drs. Devabhaktuni and Rasmussen to be better reasoned and better documented, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), than the contrary opinions in the record and rendered this finding in accordance with the Administrative Procedure Act, *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Thus, we affirm the administrative law judge's finding that claimant has established clinical or statutory pneumoconiosis as defined in the Act and the regulations, 20 C.F.R. §718.201; *see Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987); *see also Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992), and total respiratory disability due to pneumoconiosis, *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990), citing *Robinson v. Pickands*

*Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge