BRB No. 99-1075 BLA

WILLARD C. WILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COONEY BROTHERS COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
and	)	
	)	
W.W. COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
INSERVCO INSURANCE SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg,

Pennsylvania, for claimant.

Christopher L. Wildfire (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer, Cooney Brothers Coal Company.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer, W.W. Coal Company, Incorporated.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer, W.W. Coal Company, Incorporated (W.W. Coal), appeals the Decision and Order (98-BLA-692) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge determined that claimant established 18.38 years of qualifying coal mine employment. Decision and Order at 3. In considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge found, and the parties stipulated to, the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[1] Decision and Order at 2; Hearing Transcript at 5, 25. The administrative law judge further concluded that the pneumoconiosis arose out of claimant's coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 3. Accordingly, benefits were awarded beginning November 1990, the date of the first evidence of complicated pneumoconiosis. Decision and Order at 7. In addressing the responsible operator issue, the administrative law judge dismissed Cooney Brothers Coal Company (Cooney Brothers) as the evidence of record established that claimant suffered from complicated

[1]Claimant, Willard C. Will, filed his claim for benefits on May 29, 1996. Director's Exhibit 1.

pneumoconiosis prior to his employment with this company and consequently concluded that W.W. Coal was the proper responsible operator. Decision and Order at 7.

On appeal, W.W. Coal contends that the administrative law judge erred in determining that it was the responsible operator based on the November 8, 1990 x-ray diagnosing complicated pneumoconiosis. W. W. Coal asserts that the November 1990 x-ray does not meet the quality standards, and is not available for review and therefore should be excluded from the record. Employer further asserts that the Black Lung Disability Trust Fund (Trust Fund) is liable, as the Director did not make a timely designation of employer as a potential responsible operator and the administrative law judge erred in not setting aside the state workers' compensation agreement between Cooney Brothers and claimant.[2] Claimant, Cooney Brothers and the Director, Office of Workers' Compensation Programs (the Director), respond asserting that the administrative law judge's decision is supported by substantial evidence.[3]

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 the 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).

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.304 and 718.203(b) and the award of benefits in this claim, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]The Director has filed a response brief accompanied by a motion to accept the pleading although filed out of time. The Board grants the Director's motion and accepts the response brief as part of the record. 20 C.F.R. §§802.213, 802.217.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein.[4] Initially, employer's contention that the administrative law judge erred in admitting the November 8, 1990 x-ray interpretation by Dr. Patterson is without merit. The administrative law judge, in the instant case, noted that Dr. Patterson's original x-ray film was no longer available for review but found that the physician's testimony concerning the x-ray interpretation was most persuasive.[5] Decision and Order at 4-5. Under the facts of this case, the administrative law judge did not err in relying upon this evidence to find W.W. Coal was the responsible operator. Employer, W.W. Coal, stipulated that claimant suffered from complicated pneumoconiosis and conceded on appeal that the only issue in contention is the designation of the appropriate responsible operator.[6] Decision and Order at 2-3; Hearing Transcript at 5, 25; Employer's Brief at 7. Section 413(b) of the Act, 30 U.S.C. §923(b), mandates that "all relevant evidence shall be considered." In the instant case, the administrative law judge fully considered the report and testimony of Dr. Patterson and rationally determined that it was sufficient to establish that claimant suffered from complicated pneumoconiosis prior to his employment with Cooney Brothers and therefore properly held that W.W. Coal was the employer responsible for the payment of benefits. *See* 20 C.F.R. §§725.492(c), 725.493(a)(6); *Swanson v. R.G. Johnson Co.*, 15 BLR 1-49 (1991); *Rowan v. Lewis Coal and Coke Co.*, 12 BLR 1-31 (1988); *Hendrick v. Sterling Smokeless Coal Co.*, 6 BLR 1-1029 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1984); *Truitt v. North American Coal Co.*, 2 BLR 1-199 (1979), *appeal dismissed, sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Further, employer's due process rights were protected in the instant case. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), states that "[A] party is

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[4]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]The administrative law judge properly found that Dr. Patterson was a board-certified radiologist and a B reader at the time of the 1990 x-ray interpretation. Decision and Order at 4; Employer's Exhibit Cooney Brothers 3.

[6]The record indicates that the evidence developed after March 1996, unequivocally establishes that claimant is suffering from complicated pneumoconiosis. *See* Director's Exhibits 17-19, 30, 37, 48.

entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d). Although the November 8, 1990 x-ray film was unavailable for employer, W.W. Coal, to have it reviewed by a physician of its choosing, employer was provided the opportunity to cross-examine Dr. Patterson and to submit rebuttal evidence. Under the facts in this case, the administrative law judge, within his discretion as fact-finder, permissibly considered the November 1990 x-ray interpretation. *See* Employer's Exhibit Cooney Brothers 3; Director's Exhibits 35, 56; *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985).

Employer further contends that as claimant's complicated pneumoconiosis began after his exposure to non-coal mine employment, the Trust Fund should be responsible for the payment of benefits. The record indicates that claimant worked for employer, W.W. Coal, from 1970 to 1986 and with Cooney Brothers from 1993 to 1996 in qualifying coal mine employment. Director's Exhibits 2, 4-10, 41; Decision and Order at 3. Employer asserts that as claimant ended his employment with W.W. Coal in 1986 and the first evidence establishing complicated pneumoconiosis appeared in 1990, then the disease could have developed in the three years that he was engaged in non-coal mine employment. Contrary to employer's contention, the November 8, 1990 x-ray does not necessarily establish the date that claimant contracted complicated pneumoconiosis but rather indicates that claimant suffered from the disease at some time prior to that date. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985). Moreover, the administrative law judge fully considered this contention and properly found that claimant worked for over ten years at W.W. Coal, which claimant believed was his "dustiest" job. Decision and Order at 6; Claimant's Exhibit 1. The administrative law judge rationally rejected employer's contention as employer failed to submit any medical evidence that specifically linked claimant's complicated pneumoconiosis to non-coal mine employment.[7] *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989);

[7]We also reject employer's assertion that the Trust Fund should be liable for the payment of benefits due to the delay in naming W.W. Coal as a possible responsible operator. As the administrative law judge properly found, the record indicates that employer was provided notice of its potential liability and given a full and fair opportunity to prepare its case in a timely fashion as soon as the evidence was found indicating that claimant had complicated pneumoconiosis as early as 1990. *See Venicassa v. Consolidation Coal Co.*, 137 F. 3d 197, 21 BLR 2-277 (3d Cir. 1998); *England v. Island Creek Coal Co.* 17 BLR 1-141 (1993); *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991); *Beckett v. Raven Smokeless Coal Co.*, 14 BLR 1-43 (1990); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1984).

Fagg v. Amax Coal Co., 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra.* It is the administrative law judge's function to weigh the evidence of record and draw conclusions and inferences and resolve the conflicts in the evidence, *see Lafferty, supra*; *Fagg, supra*; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that W.W. Coal is the proper responsible operator as it is supported by substantial evidence and in accordance with law.[8]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[8]Contrary to employer's contention, the administrative law judge properly found that he was without jurisdiction to set aside the settlement agreement reached by claimant and Cooney Brothers in the state occupational disease claim brought under the Pennsylvania Workers' Compensation Act. Decision and Order at 6-7; *Gilbert v. Williamson Coal Co., Inc.*, 7 BLR 1-289 (1984).