BRB No. 98-1182 BLA

GILES B. SHUCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 9/23/99
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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 Denying Benefits of Lawrence Brenner, Administrative Law Judge, United States Department of Labor.

John P. Anderson, Princeton, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (89-BLA-0892) of Administrative Law Judge Lawrence Brenner with respect to 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 relevant procedural history of this case is as follows: Claimant filed an application for benefits on April 10, 1978. Director's Exhibit 1. In a Decision and Order issued on September 25, 1991, the administrative law judge accepted the parties stipulation to forty-two years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R.

Part 727. The administrative law judge determined that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). The administrative law judge also found that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3). Accordingly, the administrative law judge denied benefits under Part 727, 20 C.F.R. Part 410, Subpart D, 20 C.F.R. §410.490, and 20 C.F.R. Part 718.

Claimant filed an appeal with the Board which, in a Decision and Order issued on November 24, 1993, affirmed the administrative law judge's findings under Section 727.203(a)(2)-(4). *Shuck v. Consolidation Coal Co.*, BRB No. 92-0180 BLA (Nov. 24, 1993)(unpub.), *slip opinion at 2-3*. The Board further held, however, that the administrative law judge did not properly weigh the x-ray evidence of record under Section 727.203(a)(1), inasmuch as he accorded greater weight to the negative interpretations of the more recent x-rays. *Id.*, *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The Board further determined that the administrative law judge did not provide an adequate explanation of his findings under Section 727.203(b)(2) and (b)(3). *Id. at 3*. The Board vacated the denial of benefits, therefore, and remanded the case to the administrative law judge for reconsideration of invocation pursuant to Section 727.203(a)(1) and, if reached, rebuttal pursuant to Section 727.203(b)(2) and (b)(3). *Id*.. The Board also instructed the administrative law judge to consider entitlement under 20 C.F.R. Part 410, Subpart D, if he denied benefits pursuant to 20 C.F.R. Part 727 on remand. *Id. at 4*.

In his Decision and Order on Remand, the administrative law judge determined once again that the x-ray evidence of record was insufficient to support a finding of invocation under Section 727.203(a)(1). The administrative law judge also found, assuming that claimant was entitled to invocation of the interim presumption, that employer established rebuttal under Section 727.203(b)(3). The administrative law judge further concluded that claimant did not establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, Section 410.490, and 20 C.F.R. Part 718. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the evidence and did not adequately explain his findings under Section 727.203(a)(1) and (b)(3). Employer has responded in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Upon considering the x-ray interpretations of record pursuant to Section 727.203(a)(1), the administrative law judge determined that the readings proffered by

physicians who were dually qualified as B readers and Board-certified radiologists were entitled to greater weight. Decision and Order on Remand at 2; Director's Exhibits 66, 68; Employer's Exhibits 2, 4. The administrative law judge then concluded that inasmuch as all but one of the seven dually qualified physicians submitted a negative reading, the x-ray evidence was insufficient to establish invocation of the interim presumption. Decision and Order on Remand at 3. Claimant asserts that pursuant to the decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Whicker v. Benefits Review Board*, 733 F.2d 346, 6 BLR 2-42 (4th Cir. 1984), and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), the administrative law judge was required to treat readings of 0/1 as positive for pneumoconiosis and to discredit the opinions of the physicians who ruled out the presence of pneumoconiosis or a disabling respiratory impairment. Claimant also contends that the administrative law judge erred in ignoring the fact that Drs. Zaldivar, Chillag, Kress, and Fino - physicians retained by employer - diagnosed pneumoconiosis in their medical reports. Director's Exhibits 19, 29, 33, 40, 44, 47, 57, 59, 72; Employer's Exhibit 5. It is recommended that the Board reject these arguments.

As an initial matter, we hold that the decisions of the United States Court of Appeals for the Fourth Circuit in *Whicker* and *Grigg* do not stand for the propositions asserted by claimant. The miner's appeal in *Whicker* raised the issue of the extent to which the administrative law judge can rely upon nonqualifying objective studies in finding rebuttal established under Section 727.203(b)(2). None of the parties challenged the propriety of the administrative law judge's finding of invocation under Section 727.203(a)(1). When summarizing the evidence that the administrative law judge considered pursuant to Section 727.203(a)(1)-(4), the court indicated that the record contained three positive x-ray interpretations by B readers and several interpretations, proffered by employer, which showed "minimal impairment." *Whicker*, 733 F.2d at 348, 16 BLR at 2-44. The court then merely noted that the administrative law judge weighed the conflicting evidence and concluded that the miner established the existence of pneumoconiosis. *Id.,* 16 BLR at 2-45. The court stated that based upon this finding and the determination that the miner had more than ten years of coal mine employment, the administrative law judge properly found that the miner established invocation of the interim presumption under Section 727.203(a)(1). *Id.*. Contrary to claimant's assertion, therefore, the court did not hold that an administrative law judge is required to consider diagnoses of "minimal pneumoconiosis," *i.e.*, readings of 0/1, as evidence supportive of a finding of pneumoconiosis under Section 727.203(a)(1). Moreover, under the relevant regulations, x-ray interpretations of 0/1 do not constitute evidence of pneumoconiosis. 20 C.F.R. §§410.428(a),727.203(a)(1).

In *Grigg*, a case involving rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the United States Court of Appeals for the Fourth Circuit ruled that an opinion in which a physician based his finding of no respiratory or pulmonary impairment on the assumption that the miner did not have pneumoconiosis was entitled to little, if any, weight. The court reached this holding based upon the fact that the medical

opinions in question conflicted with the administrative law judge's determination that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 727.203(a)(1). Thus, contrary to claimant's argument, the holding in *Grigg* is relevant to an administrative law judge's consideration of whether a miner's total disability is related to pneumoconiosis, but does not apply to the consideration of whether the x-ray interpretations of record support a finding of pneumoconiosis.

Finally, a diagnosis of pneumoconiosis contained in a medical report, whether rendered by physicians who examined claimant or physicians who reviewed medical records, does not constitute x-ray evidence of pneumoconiosis unless the diagnosis represents the physician's own x-ray interpretation and is reported in the form of an ILO/UICC classification. *See* 20 C.F.R. §410.428(a); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Drs. Kress and Fino did not proffer their own x-ray interpretations. They reviewed the x-ray readings of record and concluded that there was sufficient evidence to justify a diagnosis of simple pneumoconiosis. Director's Exhibits 33, 40, 59, 72. Dr. Chillag suggested in his opinion that an x-ray obtained in conjunction with his examination of claimant was positive and that the other x-ray readings that he reviewed supported a diagnosis of pneumoconiosis. He did not, however, render any readings in accordance with the ILO/UICC system. Director's Exhibits 19, 29. Dr. Zaldivar is the only physician among those identified by claimant who proffered an x-ray reading which accords with the ILO/UICC system. Director's Exhibit 44. Inasmuch as the administrative law judge acted within his discretion in according greatest weight to the readings submitted by dually qualified physicians, however, the administrative law judge did not err in finding that the positive interpretation reading by Dr. Zaldivar, a B reader, was outweighed by the negative interpretations proffered by the dually qualified physicians. *See Vance v. Eastern Associated Coal Corp*., 8 BLR 1-68 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *see also Adkins*, *supra*. We affirm, therefore, the administrative law judge's determination that claimant did not establish invocation of the interim presumption pursuant to Section 727.203(a)(1). Because we have affirmed the administrative law judge's findings that claimant did not establish invocation of the interim presumption under Section 727.203(a)(1)-(4), we must also affirm the denial of benefits under 20 C.F.R. Part 727.[1]

Finally, in light of our affirmance of the administrative law judge's finding that claimant has not established invocation of the interim presumption pursuant to Section

[1]Inasmuch as the administrative law judge's determination that invocation was not demonstrated under 20 C.F.R. §727.203(a)(1)-(4) precludes an award of benefits under 20 C.F.R. Part 727, we decline to reach claimant's arguments concerning the administrative law judge's findings under 20 C.F.R. §727.203(b)(3), as error, if any, therein is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

727.203(a)(1)-(4), the administrative law judge's determination that entitlement to benefits under 20 C.F.R. Part 410, Subpart D is precluded is also affirmed.[2] *See* 20 C.F.R. §§410.414, 410.422, 410.424, 410.426; *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2]Although the administrative law judge was not required to consider entitlement pursuant to 20 C.F.R. Part 718, his determination that such entitlement was foreclosed based upon the lack of evidence establishing the existence of a totally disabling respiratory or pulmonary impairment is rational and supported by substantial evidence. Decision and Order at 4; 20 C.F.R. §718.204(c); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In addition, inasmuch as claimant was credited with more than ten years of coal mine employment, entitlement pursuant to 20 C.F.R. §410.490 was not available to claimant in this case. *See Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991)(*en banc*).

JAMES F. BROWN
Administrative Appeals Judge