BRB No. 91-0348 BLA

JOHN STANKO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONRAIL	)	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 of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Michael J. Foley (Foley, McLane, Nealon, Foley & McDonald), Scranton, Pennsylvania, for claimant.

J. Lawson Johnston, John T. Pion and Diane J. Christel (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (88-BLA-01611) of Administrative Law Judge Frank D. Marden 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). After crediting claimant with six years and four months of qualifying coal mine employment, the administrative law judge found that employer was properly designated the responsible operator herein

pursuant to 20 C.F.R. §§725.491, 725.492 and 725.493.[1] The administrative law judge determined that the evidence was sufficient to establish modification pursuant

[1] Conrail and Erie Lackawanna, Inc. were both named as putative responsible operators herein, but by Order issued on October 9, 1985, Erie Lackawanna, Inc. was dismissed as a party to this action. Administrative Law Judge Exhibit 15.

to 20 C.F.R. §725.310 based on a mistake in fact and a change in conditions, and properly reviewed this claim, filed on July 30, 1984, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(c), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. On appeal, employer challenges the administrative law judge's findings that claimant performed post-1969 work as a "miner," that employer is the responsible operator herein, and that the evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to Sections 718.202(a)(4), 718.203(c), and 718.204(b). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[2]

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 law. 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 first contends that the administrative law judge erred in finding that claimant, a transportation worker, was employed as a "miner" after 1969. The United States Court of Appeals for the Third Circuit, wherein appellate jurisdiction of this case lies, has outlined a two-pronged "situs and function" test for determining whether a transportation worker qualifies as a miner. *Stroh v. Director, OWCP,* 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987). In order to satisfy both prongs, a claimant must have performed work in or around a coal mine or preparation facility and have been exposed to coal dust as a result thereof, and the work must be integral to the extraction or preparation of coal. *Stroh, supra.*

[2] The administrative law judge's findings pursuant to Section 725.310, and his finding that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Employer maintains that claimant's post-1969 employment did not satisfy the "situs" test because claimant did not spend a significant portion of his working days at the mine site; and that claimant's duties did not satisfy the "function" test since they were ancillary to the commercial delivery and use of processed coal, rather than integral to the coal production process. Contrary to employer's arguments, however, the administrative law judge permissibly found that claimant satisfied the "situs" test, as approximately twenty percent of claimant's work time between 1968 and 1978 was spent at coal preparation facilities, where he was regularly exposed to coal dust while spotting railroad cars at the breakers during the loading process. Decision and Order at 4-6; *see generally Etzweiler v. Cleveland Brothers Equipment Co.,* 16 BLR 1-38 (1992); *Ray v. Williamson Shaft Contracting Co.,* 14 BLR 1-105 (1990). The administrative law judge further reasonably found that claimant's work satisfied the "function" test, as it was a necessary final step in preparing the coal for movement into the stream of commerce, comparable to that found qualifying by the United States Court of Appeals for the Third Circuit in *Hanna v. Director, OWCP,* 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988).[3] Decision and Order at 5. Claimant testified that he was required to spot empty railroad cars under the breaker, and the administrative law judge found that at least part of the time, claimant rode the cars down from the yard and placed them under the breaker. Decision and Order at 4. Claimant further testified that his duties included setting the hand brakes to keep cars from rolling during the loading process by mine personnel, and standing and waiting at the breaker for signals from mine personnel to move the loaded cars out and place more empty cars into position. *See* Hearing Transcript at 40-42, 57, 68, 69, 71-73, 77. Claimant's duties at the breaker had to be coordinated with the functions of the mine employees, were integral to the loading process, and therefore constitute qualifying coal mine employment. *Hanna, supra; Stroh, supra; see generally Norfolk & Western Railway Co. v. Roberson,* 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990), *aff'g* 13 BLR 1-6 (1989). Consequently, we affirm the administrative law judge's finding that claimant performed post-1969 work as a "miner," as supported by substantial evidence.

Employer next contends that the administrative law judge erred in designating

[3] The administrative law judge additionally credited claimant's testimony, corroborated by the deposition testimony of Jack Kithcart, that he transported raw coal in the early 1970s to the Moffatt breaker. Decision and Order at 5; Hearing Transcript at 40; Employer's Exhibit 4 at 12, 13.

employer the responsible operator herein, since it did not employ claimant as a "miner" for a cumulative period of not less than one year. Employer further maintains that substantial evidence does not support a finding that employer qualifies as a successor operator to Erie Lackawanna, Inc. Employer's arguments are without merit. The administrative law judge credited claimant with two years of qualifying coal mine employment over a ten-year period between 1968 and 1978 while working for employer and its predecessor companies, *i.e.*, Erie Lackawanna, Inc., which was formed by the merger of the Delaware, Lackawanna and Western Railroad Co. and the Erie Railroad. *See* Decision and Order at 4; Director's Exhibits 4, 8, 12, 29, 40. The unrefuted testimony of claimant and witnesses appearing on behalf of both claimant and employer supports a finding that in 1976, employer became the successor operator to Erie Lackawanna, Inc., whereas employer neither presented evidence in support of its position nor objected to the dismissal of Erie Lackawanna, Inc. as a party to this action. *See* Hearing Transcript at 40, 42, 48, 54, 80, 126, 142; Employer's Exhibit 3 at 5; Employer's Exhibit 4 at 5-7; Administrative Law Judge Exhibit 15. We therefore affirm the administrative law judge's finding that employer was properly designated the responsible operator herein pursuant to Sections 725.491, 725.492 and 725.493, as supported by substantial evidence.

Turning to the merits, employer contends that the administrative law judge erred in finding that the weight of the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(c). Specifically, employer asserts that the administrative law judge erroneously ignored the March 11, 1981 report of Dr. Cacciamani, and failed to provide a valid reason for discounting the opinion of Dr. Levinson.

In evaluating the medical opinions of record, the administrative law judge accurately reviewed Dr. Levinson's 1984 and 1987 reports and his deposition testimony, and noted that the physician found no pneumoconiosis based on claimant's negative x-ray and work history, but diagnosed totally disabling chronic obstructive pulmonary disease and emphysema, offered no etiology for these conditions, and conceded that it was possible to have pneumoconiosis without a positive x-ray and with a work history such as claimant's. Decision and Order at 7-9; Director's Exhibits 19, 44; Employer's Exhibit 2. The administrative law judge then acted within his discretion as trier-of-fact in according determinative weight to Dr. Wandalowski's 1987 opinion that claimant suffered from significant chronic obstructive pulmonary disease and that a great deal of claimant's disability was related to coal mine employment exposure, as it was based upon his observation of claimant's pulmonary condition, over a period of several years, in his capacity as claimant's treating physician since 1980. Decision and Order at 8, 9; Claimant's Exhibit 1; *see generally Schaaf v. Matthews,* 574 F.2d 157 (3d Cir. 1978); *Berta v.*

Peabody Coal Co., 16 BLR 1-69 (1992); *Gorzalka v. Big Horn Coal Co.,* 16 BLR 1-48 (1990); *Revnack v. Director, OWCP,* 7 BLR 1-771 (1985). While we agree that the administrative law judge should properly have addressed Dr. Cacciamani's 1981 diagnosis of emphysema unrelated to coal mine employment exposure, *see* Director's Exhibit 18, his failure to do so constitutes harmless error inasmuch as the administrative law judge credited, as reasoned and documented, the contrary and significantly more recent opinion of claimant's treating physician. *See generally Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Accordingly, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.203(c), as supported by substantial evidence.

Lastly, employer contends that the administrative law judge erred in failing to separately determine whether claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Inasmuch as the administrative law judge reasonably relied upon the opinion of Dr. Wandalowski to support entitlement, however, and said opinion satisfies the standard articulated by the United States Court of Appeals for the Third Circuit that claimant's pneumoconiosis must be a substantial contributor to his disability, *see Bonessa v. United States Steel Corp.,* 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), we affirm the award of benefits herein.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge