BRB No. 97-0423 BLA

EUGENE JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREENLEAF TRUCKING COMPANY	)	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 On Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole & Anderson, PSC), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand (85-BLA-2341) of Administrative Law Judge Alexander Karst 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 before the Board for the second time. On original consideration, Administrative Law Judge Aaron Silverman found that claimant established eleven years of coal mine employment and that employer was the responsible operator. Considering the merits of the claim, Judge Silverman found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3) and (a)(4) and that employer failed to establish rebuttal of the presumption under 20 C.F.R. §727.203(b). Accordingly, benefits were awarded with a commencement

of benefits date of April 1, 1979. The Director, Office of Workers' Compensation Programs (the Director) filed a Motion for Reconsideration, asserting that the evidence established rebuttal and assigning error to Judge Silverman's onset date. On June 6, 1989, Judge Silverman denied the Director's Motion for Reconsideration. He indicated, however, that in accordance with the Director's contention, an amended order would issue regarding the date for the commencement of benefits. Ruling Denying Motion for Reconsideration dated June 6, 1989. On June 2, 1989, Judge Silverman issued an Errata, amending his award of benefits to commence October 1, 1980, the month and year of claimant's last coal mine employment. Employer also filed a Motion for Reconsideration, and argued that Judge Silverman erred in finding that liability for benefits in the instant case does not transfer from employer to the Black Lung Disability Trust Fund. Judge Silverman summarily denied employer's motion for reconsideration by order dated August 14, 1989. Employer appealed to the Board.

The Board, in *Jackson v. Greenleaf Trucking Co.*, BRB No. 92-2693 BLA (Nov. 30, 1994)(unpub.), held that the provisions for the transfer of liability from employer to the Black Lung Disability Trust Fund in Section 205 of the Act are inapplicable. The Board further agreed with employer's contention that Judge Silverman failed to address all the record evidence and the conflicts contained therein, in finding that claimant established eleven years of coal mine employment. The Board further agreed that Judge Silverman erred in finding invocation of the interim presumption at Section 727.203(a)(3) and (a)(4), and in finding no rebuttal at Section 727.203(b)(3) and (b)(4). In part, the Board noted that Judge Silverman's mischaracterization of Dr. Broudy's report at Section 727.203(a)(4) tainted his finding thereunder as well as his finding of no rebuttal at Section 727.203(b)(3). The Board further held that Judge Silverman failed to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), in considering the evidence on rebuttal at Section 727.203(b)(3) and (b)(4). The Board also affirmed Judge Silverman's finding of no rebuttal at Section 727.203(b)(2). Accordingly, the Board vacated Judge Silverman's findings regarding the length of claimant's coal mine employment, invocation of the interim presumption under Section 727.203(a)(3) and (a)(4) and rebuttal under Section 727.203(b)(3) and (b)(4), and remanded the case for further consideration. By Decision and Order on Reconsideration *En Banc* and Order Awarding Attorney Fees dated September 6, 1995, the Board granted employer's Motion for Reconsideration and Suggestion for Reconsideration *En Banc*, but denied the relief requested. The Board also awarded claimant's counsel an attorney's fee contingent upon an award of benefits.

In his Decision and Order On Remand, which is the subject of the instant appeal, Administrative Law Judge Alexander Karst (hereinafter "the administrative law judge"), found that the evidence establishes ten years of coal mine employment, that claimant established invocation of the interim presumption under Section 727.203(a)(4), and that employer failed to establish rebuttal at Section 727.203(b)(3) and (b)(4). Accordingly, the administrative law judge awarded benefits, commencing April 18, 1974, the date upon which claimant filed the instant claim, *see* Director's Exhibit 1.

On appeal, employer contends that the administrative law judge's finding of ten years of coal mine employment is not adequately explained and is erroneous. Employer further alleges error in the administrative law judge's finding of invocation at Section 727.203(a)(4) and of no rebuttal at Section 727.203(b)(3) and (b)(4). Employer also contends that the administrative law judge committed reversible error in awarding benefits commencing April 18, 1974 because claimant is not entitled to benefits until after he left coal mine employment in October 1980.[1] Claimant responds, and seeks affirmance of the award of benefits. The Director has not filed a brief in the 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 contends that the administrative law judge's finding that claimant engaged in ten years of coal mine employment cannot be affirmed. The administrative law judge discussed the Board's decision to vacate Judge Silverman's finding of eleven years of coal mine employment, and acknowledged the fact, as noted by the Board, that many discrepancies exist between claimant's testimony, Social Security Administration (SSA) work records, witness affidavits, and claimant's application for workers' compensation benefits. The administrative law judge found that nonetheless, sufficient evidence exists to satisfy claimant's burden of proof to establish that he engaged in at least ten years of coal mine employment, such as is required for consideration of his claim under 20 C.F.R. §727.203(a). The administrative law judge next discussed claimant's testimony that he engaged in coal mine work from 1949-1951, 1956-1961, 1965-1969, 1974-1977, and 1978-1980, and the supporting and/or conflicting evidence of record relevant to these periods. Based on his weighing of this evidence and resolution of certain conflicts contained therein, the administrative law judge credited claimant with two years of coal mine employment for the period from 1956 to 1961, three years for the period from 1965 to 1969, and five years for the period from 1974 to 1980. Accordingly, he found that claimant established ten years of coal mine employment.

Employer challenges the administrative law judge's finding of two years of coal mine employment in the period from 1956 to 1961 and his finding of three years in the period from 1965 to 1969. Employer's contentions lack merit. First, insofar as employer generally contends that the administrative law judge's findings are not adequately explained,

[1]Employer also objects to the Board's determination that liability for the payment of benefits does not transfer from employer to the Black Lung Disability Trust Fund. Employer seeks to preserve this issue for purposes of appeal.

employer's arguments are rejected. The record shows that the administrative law judge considered claimant's testimony and application for workers' compensation benefits, affidavits of record, payroll records, and SSA records. APA, *supra*.

In regard to claimant's coal mine employment from 1956 to 1961, the administrative law judge properly relied on one affidavit in which the affiant attests that claimant worked at T & E Coal Company from 1956 to 1958, Director's Exhibit 5, and on two affidavits attesting that claimant worked at Hacker Coal Company from 1959 to 1961, *Id.* The administrative law judge further properly found that although claimant's application for workers' compensation benefits indicates that he worked at T & E Coal Company from 1957 to 1959, Director's Exhibit 43, instead of from 1956 to 1958 as attested to in the affidavit, claimant credibly testified that the application form was erroneously completed by a third party. *Garrett v. Cowin & Company, Inc.*, 16 BLR 1-77 (1990). The administrative law judge further recognized that SSA records indicate that claimant engaged in non-coal mine employment for extensive periods in 1956, 1959, 1960, and 1961. Director's Exhibit 4. Consequently, the administrative law judge indicated that he credited claimant with two years of coal mine employment for the years 1957 and 1958, relying on claimant's testimony and the supporting affidavits of record. Further, SSA records show that claimant earned $32 in non-coal mine employment in the first quarter of 1958. While this evidence may diminish the administrative law judge's specific finding that "claimant was engaged in two years of coal mine employment (1957 and 1958)," Decision and Order On Remand at 3, it does not *per se* conflict with the administrative law judge's ultimate crediting of two years of coal mine employment for the years from 1956 to 1961.

With regard to claimant's testimony that he worked in coal mine employment from 1965 to 1969, employer concedes that SSA records reflect claimant's employment with Round Mountain Coal Company (Round Mountain) and Tennessee-Virginia Mining Corporation (Tennessee-Virginia), *see* Director's Exhibit 4, but argues that the more specific payroll records indicate that the miner did not work a full year in 1968. In this regard, employer relies on the cover letter of G.B. Williams, the Office Manager for Round Mountain, which indicates that claimant worked at Tennessee-Virginia from January 16, 1968 to April 15, 1968 and at Round Mountain from December 1, 1968 to December 15, 1968. Employer thus asserts that claimant is entitled, at best, to credit for part of 1968. Employer also argues that the administrative law judge appears to find documentation for two years of coal mine employment while crediting claimant with three.

Contrary to employer's contention, the administrative law judge's findings are fully explained inasmuch as they are based on his consideration of supporting affidavits of record, SSA records, and employers' payroll records. Specifically, the administrative law judge credited two affidavits in which the affiants attest that claimant worked for Round Mountain from 1965 to 1969, Director's Exhibit 5. Further, SSA records show that claimant worked for Round Mountain for all 4 quarters in 1967 and for the first and fourth quarters of 1968, and for Tennessee-Virginia for the first and second quarters in 1968, Director's Exhibit 4. SSA records thus reflect coal mine employment for both of these companies during the first quarter of 1968, for Tennessee-Virginia in the second, and for Round

Mountain in the fourth quarter of 1968; they do not show earnings for the third quarter of 1968 with either company. While the SSA records do not show coal mine employment for each quarter of 1968, the administrative law judge relied on other evidence, namely the affidavits of record, which constitute substantial evidence in support of his crediting the miner with a full year of coal mine employment in 1968. *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). We, therefore, reject employer's argument that the administrative law judge erred in this regard.[2] Accordingly, we affirm the administrative law judge's finding of ten years of coal mine employment as it is supported by substantial evidence in the record and contains no reversible error. *See generally Dawson v. Old Ben Coal Co.,* 11 BLR 1-58, n.1 (1988)(*en banc*).

Employer alleges error in the administrative law judge's finding of invocation of the interim presumption at Section 727.203(a)(4). Employer argues that the administrative law judge therein failed to explain why he discounted Dr. Broudy's opinion that claimant has the respiratory functional capacity to perform the work of an underground miner, Director's Exhibits 36, 38, in favor of the opinions of Drs. Ausmus and Baker. Drs. Ausmus and Baker opined that claimant is totally disabled due to pneumoconiosis. *See* Director's Exhibits 13, 15, 34, Claimant's Exhibit 1. Employer further argues that the opinions of Drs. Ausmus and Baker are not reasoned and documented. Specifically, employer argues, *inter alia*, that the administrative law judge failed to explain how Dr. Ausmus' 1972 and 1975 reports could be credited as evidence of claimant's functional disability inasmuch as claimant continued to work until 1980, long after Dr. Ausmus wrote his reports. Employer thus argues that the administrative law judge's reliance on the opinions of Drs. Ausmus and Baker in finding invocation of the interim presumption at Section 727.203(a)(4) cannot stand.

Employer's contentions lack merit. As an initial matter, it is within the discretion of the administrative law judge to determine the weight and credibility of the medical opinion evidence, *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The Board is not empowered to weigh the evidence and insofar as several of employer's arguments amount to a request that the Board weigh the evidence, those arguments are rejected. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In the instant case, the administrative law judge reviewed the medical opinion evidence, and properly found that the reports provided by Drs. Ausmus and Baker are documented and well reasoned and satisfy claimant's burden of establishing a totally disabling respiratory or pulmonary impairment pursuant to

[2]We note that the administrative law judge's decision to credit the miner with coal mine employment in 1969 is not inconsistent with the cover letter of G.B. Williams, Office Manager for Round Mountain Coal Company, which indicates, *inter alia*, "Final payroll for Round Mountain Coal Co. was Dec. 31, 1972." Director's Exhibit 45.

Section 727.203(a)(4). *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). The administrative law judge noted that Dr. Ausmus examined claimant twice, in 1972 and 1975, and that Dr. Baker examined claimant six years later in 1981. He properly found that Dr. Ausmus' opinion that claimant suffers from a permanent and total disability is supported by Dr. Baker's opinion, as expressed in Claimant's Exhibit 1, that claimant has a pulmonary impairment which would prevent him from performing his former coal mine work or comparable work. *See Worley, supra*. Contrary to employer's contention, the mere fact that claimant continued to work past the time he was examined by Dr. Ausmus does not conclusively establish that he was not, or is not, totally disabled. *See* 30 U.S.C. §902(f)(1)(B); *Marsalla v. Starvaggi Industries, Inc.*, 2 BLR 1-286, 1-289 (1979).

Further, with regard to Dr. Broudy's opinion that claimant has the respiratory functional capacity to perform the work of an underground miner, the administrative law judge did not discredit Dr. Broudy's opinion, as employer asserts, but rather, apparently gave full credit to the opinion and found that it was, nonetheless, outweighed by the contrary opinions of Drs. Ausmus and Baker. The administrative law judge thus properly found that claimant met his burden of proof at Section 727.203(a)(4) based on a preponderance of the medical opinion evidence. *See generally Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We hold, therefore, that substantial evidence supports the administrative law judge's finding that claimant established invocation of the interim presumption at Section 727.203(a)(4), and, accordingly, we affirm that finding.

Employer next contends that in finding that employer failed to establish rebuttal at Section 727.203(b)(3) and (b)(4), the administrative law judge summarily discounted Dr. Broudy's opinion. Dr. Broudy diagnosed *inter alia* chronic bronchitis due to smoking, and opined that claimant does not have pneumoconiosis and has the respiratory functional capacity to perform the work of an underground miner, Director's Exhibits 36, 38. Employer further argues that the administrative law judge's placing of greater weight on the opinions of Drs. Ausmus and Baker is not supported by any rational explanation and does not meet with the requirements of the APA. Employer also contends that the administrative law judge failed to adequately explain his finding that the opinions of Drs. Ausmus and Baker, that claimant's disability is related to his pneumoconiosis or coal dust exposure, are documented and reasoned; employer asserts that these opinions are actually unexplained and "would not appear to be documented and reasoned judgments." Employer's Brief at 17. Employer further contends that the administrative law judge failed to explain his basis for crediting the diagnoses of pneumoconiosis rendered by Drs. Ausmus, Jones, O'Neill and Baker. Specifically, employer notes that Judge Silverman found the x-ray evidence to be insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Employer argues that insofar as Drs. Ausmus, Jones, O'Neill and Baker based their diagnoses of pneumoconiosis on positive x-ray evidence, their diagnoses must be discounted. Employer further argues that, in contrast, Dr. Broudy's opinion that claimant does not have pneumoconiosis is consistent with the credible x-ray evidence.

Employer's contentions lack merit. As an initial matter, we reject employer's arguments requesting a weighing of the evidence, which is beyond the Board's scope of review. *See Consolidation Coal Co. v. McMahon,* 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996); *Welch v. Benefits Review Board,* 808 F.2d 443, 445 (6th Cir. 1990)(*per curiam*); *Anderson, supra*. *Anderson, supra*. In finding that employer failed to establish rebuttal at Section 727.203(b)(3), the administrative law judge, within his discretion, accorded greater weight to the opinions of Drs. Ausmus and Baker that claimant's disability is related to his pneumoconiosis and coal mine employment, over the contrary opinion of Dr. Broudy because although Drs. Broudy and Ausmus are pulmonary specialists and highly qualified physicians, Dr. Ausmus' conclusion that claimant suffers from pneumoconiosis is supported by the opinions of Drs. O'Neill, Jones, and Baker. *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge further found that Dr. Baker agrees with Dr. Ausmus that claimant is totally disabled due to pneumoconiosis. *Id.* The administrative law judge also properly determined, within his discretion, that Dr. Broudy's contrary opinion "does not invalidate the conclusions of these physicians, nor does it outweigh the evidence establishing total disability as a result of coal dust exposure." Decision and Order On Remand at 7; *Worley, supra*. The administrative law judge thus properly determined that employer failed to establish, by a preponderance of the evidence, that claimant's disability did not arise in whole or in part out of his coal mine employment. 20 C.F.R. §727.203(b)(3).

Similarly, in finding that employer failed to establish rebuttal at Section 727.203(b)(4), the administrative law judge properly found that Dr. Broudy's medical opinion is employer's "strongest evidence" that claimant does not have pneumoconiosis, but that Dr. Broudy's view is contradicted by the majority of the medical evidence submitted in the instant case. Decision and Order On Remand at 7. Specifically, the administrative law judge noted that four physicians, on separate occasions and through independent examinations, diagnosed the existence of pneumoconiosis and that two of those physicians opined that claimant was totally disabled by the disease. *See King, supra*. On this basis, the administrative law judge credited these physicians' opinions and thereby reflected, contrary to employer's suggestion, his consideration of the relevant evidence as a whole. We thus reject employer's challenge to the administrative law judge's findings of no rebuttal at Section 727.203(b)(3) and (b)(4), and affirm those findings as they are supported by substantial evidence. Consequently, we affirm the administrative law judge's award of benefits in the instant case.

Employer next contends that the administrative law judge's award of benefits commencing April 18, 1974, is incorrect, and asserts that, "The administrative law judge earlier in his decision and order, conceded that claimant last worked in the mines in October 1980." Employer's Brief at 19. In this regard, employer argues that pursuant to 20 C.F.R. §725.503A, claimant is not entitled to benefits until after he left coal mine employment in October 1980. Claimant contends that the administrative law judge properly awarded benefits commencing April 18, 1974, and asserts that the 1972 and 1975 reports of Dr. Ausmus establish his permanent disability.

The record shows that Judge Silverman, at the urging of the Director, amended his award of benefits to commence October 1980, the month and year in which claimant stopped working. Employer's brief to the Board in the first appeal reflects its agreement with October 1980 as the appropriate date for the commencement of benefits. Claimant did not appeal from Judge Silverman's amended order. Claimant is not entitled to receive benefits during periods of coal mine employment or comparable and gainful employment. 20 C.F.R. §725.503A. In the instant case, the date of October 1980, as determined by Judge Silverman, was not challenged before Judge Silverman nor was this issue raised before the Board in the first appeal. Accordingly, we modify Judge Karst's award of benefits to commence October 1, 1980.

Accordingly, the administrative law judge's Decision and Order On Remand is affirmed and the award of benefits is modified to commence October 1, 1980.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge