BRB No. 02-0281 BLA

WILLIAM H. CARSON	)
	)
Claimant-Respondent	)
	)
v.	)
WESTMORELAND COAL 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-Awarding Benefits of Edward Terhune Miller, United States Department of Labor.

Mary Z. Natkin (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

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

Mary Forrest-Doyle (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (00-BLA-0236) of Administrative Law Judge Edward Terhune Miller 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).[1] The administrative law judge concluded that the instant claim

[1] The Department of Labor has amended the regulations implementing the Federal

constituted a duplicate claim, and credited claimant with a coal mine employment history of thirty-one years. Decision and Order at 1-4.[2] Reviewing the evidence submitted in support

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant initially filed a claim for benefits on July 25, 1979. This claim was denied by Administrative Law Judge John C. Holmes on January 27, 1984, who found that employer established rebuttal of the interim presumption of totally disabling coal workers' pneumoconiosis at 20 C.F.R. §727.203(b)(3). Director's Exhibit 44. The Board affirmed that denial of benefits. *Carson v. Westmoreland Coal Co.*, BRB No. 84-350 BLA (Aug. 27, 1986)(unpub.). On August 25, 1987, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, affirmed the denial of benefits in an unpublished decision. *Carson v. Westmoreland Coal Co.*, No. 86-2612 (4th Cir. Aug. 25, 1987).

of the duplicate claim, the administrative law concluded that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis because the evidence did not establish the existence of complicated pneumoconiosis, but the administrative law judge found that the evidence did establish the presence of a totally disabling respiratory impairment due to pneumoconiosis, the element of entitlement previously adjudicated against him, and that claimant had, therefore, established a material change in conditions. Decision and Order at 17-34. Accordingly, benefits were awarded.

Claimant filed a second claim for benefits on December 29, 1988. This claim was denied by Administrative Law Judge Martin J. Dolan, Jr., on October 6, 1992, who found the existence of pneumoconiosis and total disability established, but concluded that any respiratory disability did not arise out of pneumoconiosis. Director's Exhibit 43. On November 24, 1994, the Board affirmed that denial in *Carson v. Westmoreland Coal Co.*, 19 BLR 1-21 (1994), and reaffirmed the denial on reconsideration. *Carson v. Westmoreland Coal Co.*, BRB No 93-0459 BLA (Aug. 26, 1996)(Decision and Order on Reconsideration). No further action was taken on this claim.

On November 24, 1998, claimant filed a third claim, the duplicate claim before us now. Director's Exhibit 1.

On appeal, employer contends that the administrative law judge improperly accorded the greatest weight to those physicians diagnosing totally disabling pneumoconiosis when the contrary opinions of other physicians were more credible. Employer further contends that the administrative law judge improperly applied the newly amended regulations to the instant case as they were promulgated after the instant claim was filed and thus deprive employer of due process of law. Claimant responds, urging that the award of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief for the limited purpose of challenging employer's assertion that application of the newly revised regulations is impermissibly retroactive and violates employer's due process rights.[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 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).

Employer asserts that the administrative law judge's reliance upon comments adopted by the Department of Labor in promulgating the new regulations was improper. Employer contends that the new regulatory definition of pneumoconiosis as a "latent and progressive" disease is contrary to established precedent in cases arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Employer thus argues that the revised definition of pneumoconiosis constitutes a "significant" change in the law and the retroactive application of this change denies employer due process. Employer's Brief at 6. Employer asserts that the newly adopted regulations are not mere "clarifications" or interpretations of existing rules, but alter the established rules in such a way as to require remand. Employer's Brief at 6.

We reject employer's assertions pertaining to the administrative law judge's application of the newly revised regulations. We agree with the Director that the revised

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[3] We affirm, as unchallenged on appeal, the administrative law judge's finding on length of coal mine employment, and his finding that claimant was not entitled to the irrebuttable presumption of totally disabling coal workers' pneumoconiosis because the evidence did not establish the existence of complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984).

regulation explicitly stating that pneumoconiosis is a latent and progressive disease is not impermissibly retroactive and does not deny employer due process as it merely codifies and clarifies existing case law. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *see also National Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001). Accordingly, we reject employer's assertion that the administrative law judge improperly applied the newly amended regulations to the instant case.

Employer next contends that the administrative law judge erred in concluding that claimant established disability causation, *i.e.*, that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Employer argues that the administrative law judge erred in according greater weight to the opinions of Drs. Koenig, Rasmussen and Cohen, Director's Exhibits 11, 21; Claimant's Exhibits 1-3, because their opinions were "consistent with the objective evidence" inasmuch as the opinions of Drs. Zaldivar, Castle, Morgan, Fino, Stewart and Spagnolo, Director's Exhibits 31, 32, 35, 39, 40; Employer's Exhibits 3, 4, 7, 9, 11, 12, 16-18, also provided full analyses of the objective studies, including the important and determinative changes occurring over the years. Employer also asserts that the administrative law judge erred in according greater weight to Dr. Koenig's opinion because the fact that he could not "rule out" coal dust as a factor in claimant's impairment did not constitute affirmative proof of causation. Further, employer asserts that the administrative law judge impermissibly substituted his judgment for Dr. Zaldivar's and erred in rejecting the opinions of Drs. Zaldivar and Castle as being based on a "constrained" or improperly limited definition of pneumoconiosis. Likewise, employer contends that the administrative law judge erred in rejecting Dr. Chillag's opinion for the same reason and because Dr. Chillag did not consider claimant's employment history.

In order to establish disability causation, claimant must prove by a preponderance of the evidence that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. 20 C.F.R. §718.204(c).[4]

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[4] Pneumoconiosis is a "substantially contributing cause" of . . . disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure

unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

In the instant case, the administrative law judge engaged in a thorough review of all the evidence of record and concluded that the most persuasive evidence established that claimant's pneumoconiosis at least substantially contributed to his totally disabling respiratory impairment. While the administrative law judge concluded that all of the physicians' opinions merited substantial weight based on their credentials, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), he concluded that the opinions of Drs. Koenig, Rasmussen and Cohen were most persuasive and entitled to predominant weight as they "accounted for every aspect of [c]laimant's physical condition before and after his 1981 stroke, documented and explained their reasoning, and supported their conclusions with science explicitly subsumed in the applicable regulations." Decision and Order at 34. This was rational. *See Hicks*, *supra*; *Akers*, *supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Further, contrary to employer's assertion, the administrative law judge rationally concluded that Dr. Koenig's opinion was not equivocal, but merely an acknowledgment of the limitations of medical conclusions. Thus, the administrative law judge acted well within his discretion in concluding that Dr. Koenig's opinion supported a finding of causation. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *see also Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). We, therefore, affirm the administrative law judge's decision to accord superior weight to the opinion of Dr. Koenig.

Further, we reject employer's contentions that the contrary opinions, *i.e.*, those opinions which concluded that claimant's pneumoconiosis did not cause his totally disabling respiratory impairment, are entitled to dispositive weight since such contentions are tantamount to a request that the Board reweigh the evidence of record. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Contrary to employer's assertions, the administrative law judge concluded that while these opinions were generally well-reasoned, they were not entitled to the greatest weight as they failed to account fully for claimant's medical background and thus failed to present an accurate picture of the miner's health. This was rational. *See Hicks*, *supra*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Accordingly, the administrative law judge's weighing of the evidence relevant to disability causation was within a permissible exercise of his discretion as the trier-of-fact, *see Kuchwara*, *supra*, and we affirm his finding on disability causation as supported by substantial evidence. *See* Section 718.204(c). We, therefore, affirm the administrative law judge's determination that claimant established a material change in conditions, *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th

Cir. 1995),[5] and we affirm the award of benefits.

Accordingly, the Decision and Order-Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[5] Although the administrative law judge's finding of causation does not include a specific discussion of the relevant evidence submitted in support of the prior denied claims, *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), we nevertheless conclude that substantial evidence supports the administrative law judge's finding of causation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).