

BRB No. 98-1114 BLA

DONALD HENLEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
COWAN AND COMPANY,)	DATE ISSUED:
INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION AND ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

William H. Howe and Patricia T. Gonsalves (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Edward Waldman (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 BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:
Employer appeals the Decision and Order on Remand (95-BLA-0025) of

Administrative Law Judge Clement J. Kichuk 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 on appeal before the Board for a second time. By Decision and Order issued on September 4, 1996, Administrative Law Judge Christine McKenna found that employer was not the responsible operator herein because it rebutted the presumption at 20 C.F.R. §725.492(c) that claimant was regularly exposed to coal dust in its employ. Judge McKenna then adjudicated this claim, filed on July 23, 1993, pursuant to the provisions at 20 C.F.R. Part 718, and found that although claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c), the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or disability causation pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, the Board reversed Judge McKenna's finding of rebuttal at Section 725.492(c) and reinstated employer as the responsible operator herein. The Board affirmed her finding that while claimant established total respiratory disability at Section 718.204(c), he failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3). The Board vacated her findings at Section 718.202(a)(4), however, and remanded this case for Judge McKenna to determine whether the medical opinions of record established the existence of pneumoconiosis as defined at 20 C.F.R. §718.201. If, on remand, Judge McKenna found pneumoconiosis established, she was instructed to calculate the length of the miner's qualifying coal mine employment and determine whether his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and whether pneumoconiosis was a substantial contributing factor in the causation of claimant's total disability at Section 718.204(b). *Henley v. Cowin & Co., Inc.*, BRB Nos. 96-1170 BLA and 96-1170 BLA-A (Sept. 29, 1997)(unpublished).

On remand, this case was assigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge). In a Decision and Order issued on April 30, 1998, the administrative law judge credited claimant with seventeen years of qualifying coal mine employment, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to Section 718.204(b). Consequently, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.203(b), and 718.204(b). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation

Programs (the Director), has filed a limited response, taking no position on the merits, but agreeing with employer's argument that episodic, impermanent aggravation of a non-coal mine related pulmonary condition does not constitute "legal" pneumoconiosis.

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 maintains, and the Director agrees, that a transient aggravation of a non-occupational pulmonary condition is insufficient to establish pneumoconiosis as defined at Section 718.201. Employer and the Director thus contend that the administrative law judge did not apply the proper legal standard in evaluating the evidence at Section 718.202(a)(4), inasmuch as medical opinions which diagnose only a temporary worsening of pulmonary symptoms upon exposure to coal dust, but no permanent effect, cannot support a finding of pneumoconiosis. Claimant counters that because coal dust aggravated his pulmonary condition of sarcoidosis to the point that he became disabled, the regulatory definition of pneumoconiosis, which includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201, has been satisfied.¹

It is well-established that courts must defer to an agency's consistent interpretation of its own regulation unless it is "plainly erroneous or inconsistent with

¹ In support of his argument, claimant cites to *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). That case, however, involved a claim adjudicated pursuant to the provisions at 20 C.F.R. Part 727. Thus, the *Massey* court relied upon the legislative history underlying the promulgation of 20 C.F.R. §727.202 in interpreting the term "aggravation."

the regulation.” *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). The Director’s position that the aggravation of a pulmonary condition by dust exposure in coal mine employment must be “significant and permanent” in order to constitute pneumoconiosis finds support in the comments accompanying the promulgation of 20 C.F.R. §718.201:

It is a commonly agreed-upon principle of workers’ compensation law that an employer takes an employee with whatever underlying conditions the employee has. Accordingly, aggravation of a preexisting condition to the point of disability is considered a proper basis for awarding benefits under many compensation laws including the Longshoremen’s and Harbor Workers’ Compensation Act and is consistent with the amended statutory definition of pneumoconiosis. It is intended by this regulation that the significant and permanent aggravation of a preexisting condition by coal dust exposure should be considered a basis for eligibility where all other requirements have been met.

45 Fed. Reg. 13,685 (Feb. 29, 1980).

The interpretation of the Director, as the administrator of the Black Lung Benefits Program, is neither plainly erroneous nor inconsistent with the regulation, and thus is entitled to deference. See *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997). Consequently, we vacate the administrative law judge’s findings at Sections 718.202(a)(4), 718.203(b), and remand this case for reevaluation of the conflicting evidence pursuant to the appropriate standard. If, on remand, the administrative law judge finds pneumoconiosis, as defined at Section 718.201, established, he need not separately determine the etiology thereof at Section 718.203(b), as his findings at Section 718.202(a)(4) will necessarily subsume that inquiry. We must also vacate the administrative law judge’s findings at Section 718.204(b), however, for reevaluation of the relevant evidence thereunder and a determination of whether the weight of the evidence establishes that pneumoconiosis was a substantial contributing factor in the causation of claimant’s total pulmonary disability. See *Lollar, supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

**Deskbook Sections: Part II.D. - Pneumoconiosis
& Part VII.B.5. - Section 718.202(a)(4): Medical Reports**

The aggravation of a pulmonary condition by dust exposure in coal mine employment must be significant and permanent in order to constitute “legal” pneumoconiosis as defined at 20 C.F.R. §718.201. Thus, medical opinions which diagnose only a temporary worsening of pulmonary symptoms upon exposure to coal dust, but no permanent effect, cannot support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Henley v. Cowan & Co., Inc.*, BLR (May 11, 1999).