BRB No. 00-0108 BLA

HERMAN SUMMERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING 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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Karin T. O'Connell (Gould & Ratner), Chicago, Illinois, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0649) of Administrative Law Judge Thomas M. Burke (the administrative law judge) 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). The administrative law judge credited claimant with twenty-three and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish invocation of the presumption of total disability

due to pneumoconiosis pursuant to 20 C.F.R. §718.305(a). The administrative law judge also found the evidence insufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §718.305(a). Accordingly, the administrative law judge found the evidence sufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and thus, he awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the presumption at 20 C.F.R. §718.305(a). Employer also challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305(a). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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[1]Claimant filed a claim on October 9, 1980. Director's Exhibit 1. Although the Department of Labor found that claimant was entitled to benefits, Director's Exhibit 24, Administrative Law Judge George A. Fath issued a Decision and Order denying benefits on January 7, 1987, Director's Exhibit 35, which the Board affirmed in part and vacated in part, and remanded for further consideration. *Summers v. Freeman United Coal Co.*, BRB No. 87-0155 BLA (Feb. 12, 1991)(unpub.). On June 6, 1991, Judge Fath issued a Decision and Order on Remand denying benefits, Director's Exhibit 37, which the Board affirmed, *Summers v. Freeman United Coal Mining Co.*, BRB No. 91-1562 BLA (Nov. 25, 1992)(unpub.). Judge Fath's denial was based on his finding that the evidence was sufficient to establish rebuttal of the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305. Director's Exhibit 37. Following claimant's appeal of the Board's Decision and Order, the United States Court of Appeals for the Seventh Circuit affirmed the Board's Decision and Order. *See Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994). Claimant filed a request for modification on November 16, 1994. Director's Exhibit 40. On May 16, 1996, Administrative Law Judge Charles P. Rippey issued an Order denying claimant's request for modification. Director's Exhibit 50. Claimant filed a request for a *de novo* hearing on May 7, 1991, Director's Exhibit 51, which Judge Rippey construed as a request for modification because it was misdirected within the Office of Administrative Law Judges and did not reach him until June 20, 1996, Director's Exhibit 52. On June 20, 1996, Judge Rippey issued an Order denying claimant's request for modification. *Id*. Claimant appealed Judge Rippey's denial to the Board on June 28, 1996. Director's Exhibit 53. The Board dismissed claimant's appeal and remanded the case to the district director for consideration of a request for modification. *Summers v. Freeman United Coal Mining Co.*, BRB No. 96-1296 BLA (Order)(Dec. 4, 1996)(unpub.). Claimant filed his most recent request for modification on December 3, 1997. Director's Exhibit 55.

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 initially contends that the administrative law judge erred in finding that the evidence is sufficient to establish invocation of the presumption at 20 C.F.R. §718.305(a). We disagree. The administrative law judge stated, "[a]s found in Administrative Law Judge [George A.] Fath's previous denials[,] the medical opinion evidence clearly supports a determination that claimant is totally disabled from his pulmonary and respiratory condition." Decision and Order at 13. The administrative law judge observed that "Dr. McGowan, Dr. Lyle, Dr. Getty, Dr. Wells, Dr. Ruben, Dr. Cohen, Dr. Hinkamp and Dr. Fino all conclude that claimant is totally disabled from his respiratory/pulmonary impairment." *Id*. The administrative law judge also stated that "[t]he medical opinion evidence is supported by the pulmonary function and blood gas evidence, a preponderance of which shows a disability under the regulatory criteria." *Id*. The pertinent regulation provides that "[i]f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's...claim and it is interpreted as negative with respect to the requirements of §718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.305(a). The pertinent regulation also provides that "[t]he Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine." *Id*.

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[2]Administrative Law Judge Thomas M. Burke (the administrative law judge) stated that "[t]here is no medical opinion which concludes that claimant could perform his usual coal mine employment from a respiratory standpoint." Decision and Order at 13.

[3]The administrative law judge observed that "Dr. Beechler did not specifically address total disability but found claimant to be suffering from a moderately severe chronic obstructive pulmonary disease which was probably chronic bronchitis with a significant asthmatic component." Decision and Order at 13. The administrative law judge additionally observed that "Dr. Sanjabi also failed to address disability but noted that claimant became progressively short of breath during pulmonary function testing during his examination in 1981." *Id*.

Employer asserts that the administrative law judge erroneously found that claimant worked in circumstances "substantially similar" to an underground coal miner for at least fifteen years. As previously noted, the administrative law judge credited claimant with twenty-three and one-half years of coal mine employment. However, the administrative law judge stated that "only about 2 and 1/2 years between May, 1948 and November, 1950, and three months in 1975 were actually spent working continuously underground." Decision and Order at 12. Nonetheless, the administrative law judge observed that "[b]etween 1950 and 1965 claimant worked primarily in a one story repair shop with a low ceiling, which was very dusty and located within 50 feet of the tipple." *Id*. The administrative law judge also observed that claimant "spent at least one hour per day in the hoist room which was also very dusty." *Id*. Further, the administrative law judge observed that "claimant testified that several periods of employment between 1975 and 1980 were spent either underground or at the coal preparation plant which he testified exposed him to a similar amount of dust as in the underground mine." *Id*. at 13. The administrative law judge therefore stated, "[b]ased on claimant's testimony which I find to be credible, it is determined that this employment was in dust conditions substantially similar to an underground mine." *Id*. at 12-13. Inasmuch as the administrative law judge rationally found that "claimant's coal mine employment included at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine," *id*. at 13, we reject employer's assertion that claimant did not work in one or more underground coal mines or in circumstances "substantially similar" to an underground coal miner for at least fifteen years. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Luker v. Old Ben Coal Co.*, 2 BLR 1-304 (1979). Moreover, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish invocation of the presumption at 20 C.F.R. §718.305(a).

Next, employer contends that the administrative law judge applied an erroneous rebuttal standard at 20 C.F.R. §718.305(a). Citing to *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990), and *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990), employer specifically asserts that the administrative law judge erred in relying on the opinion of Dr. Cohen to establish rebuttal of the presumption at 20 C.F.R.

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[4]The administrative law judge stated that "[c]laimant has submitted an affidavit and testimony in support of his coal mine employment." Decision and Order at 12. The administrative law judge observed that "[s]tatements in these documents are specific in regard to dates of employment and jobs performed, and address the amount of dust exposure in claimant's various jobs." *Id*.

§718.305(a) since Dr. Cohen's opinion does not support the administrative law judge's conclusion that coal mining was a necessary cause of claimant's disability. The administrative law judge stated, "it is determined that the [e]mployer has failed to rebut the §718.305 presumption by showing that claimant does not have pneumoconiosis or that his coal induced obstructive lung disease did not significantly contribute to his respiratory or pulmonary disability." Decision and Order at 18. In *Hawkins* and *Shelton*, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, held that in order to establish total disability due to pneumoconiosis *at 20 C.F.R. §718.204(b)*, claimant must prove by a preponderance of the evidence that his pneumoconiosis is a contributing cause of his total disability, such that his pneumoconiosis must be a necessary, but need not be a sufficient condition of his total disability. However, with regard to rebuttal under 20 C.F.R. §718.305, the specific etiology of the totally disabling respiratory impairment need not be established. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). The burden of proof is not on claimant to disprove rebuttal at 20 C.F.R. §718.305. *See generally Mitchell v. Director, OWCP*, 25 F.3d 500, 18 BLR 2-257 (7th Cir. 1994). To the contrary, the party opposing entitlement must establish that the miner does not or did not have pneumoconiosis or that the miner's impairment did not arise out of or in connection with coal mine employment. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988); *DeFore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Tanner, supra*.

In *Blakley*, the Seventh Circuit held that in order to satisfy its burden that the evidence is sufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305(a), the party opposing entitlement must prove by a preponderance of the evidence that coal dust exposure was not a contributing cause of the miner's disability. The Seventh Circuit indicated that the "contributing cause" language has been read to mean that mining must be a necessary, but need not be a sufficient, condition of the miner's disability. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-204. In the instant case, the administrative law judge cited to *Blakley* and rationally found that "[e]mployer has not shown that the miner would have been disabled notwithstanding any complications arising from his exposure to coal mine dust." Decision and Order at 18. Thus, we reject employer's assertion that the administrative law judge applied an erroneous rebuttal standard at 20 C.F.R. §718.305. *See Blakley, supra*.

Additionally, employer asserts that the administrative law judge erred in

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[5]Employer does not challenge the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305(a) by showing that claimant does not have pneumoconiosis.

crediting Dr. Cohen's opinion to the exclusion of the contrary opinions of record. The administrative law judge considered the medical reports of Drs. Beechler, Cohen, Fino, Getty, Hinkamp, Lyle, McGowan, Ruben and Sanjabi. Dr. Sanjaba diagnosed atopic asthma not related to coal dust exposure. Director's Exhibit 11. Dr. Lyle diagnosed asthma and chronic bronchitis and opined that claimant is unable to work because of his severe obstructive and restrictive ventilatory dysfunction. Director's Exhibit 14. Dr. McGowan opined that claimant is totally disabled from his asthmatic lung disease. Director's Exhibit 15. Dr. Getty diagnosed asthmatic bronchitis and chronic obstructive pulmonary disease, and opined that claimant is totally incapacitated because of his pulmonary disease which is not the result of his coal mining experience. Director's Exhibit 28. Dr. Getty stated that "[t]here may be evidence of aggravation of his pulmonary problem from the coal dust, but I do not believe this is the primary cause of his ailment." *Id*. Dr. Wells diagnosed severe asthma and chronic obstructive airways disease, and opined that claimant is disabled due to obstructive and restrictive pulmonary disease. Director's Exhibit 32. Dr. Rubin opined that coal workers' pneumoconiosis and chronic obstructive pulmonary disease contributed to claimant's totally disabling respiratory impairment. Director's Exhibit 40. Dr. Beechler diagnosed asthma and chronic bronchitis and opined that he would not support a diagnosis of disability due to coal workers' pneumoconiosis. Director's Exhibit 48. Dr. Hinkamp opined that claimant's respiratory impairment and disability are caused by coal dust exposure. Director's Exhibit 55. Dr. Cohen opined that claimant is "unable to perform his last coal mine job due to obstructive lung disease." Director's Exhibit 56. Dr. Cohen stated that "[i]t is not possible to sort out with any precision what percentages of his totally disabling respiratory impairment are caused by adult onset asthma, coal dust-induced obstruction, or cigarette-induced obstruction." *Id*. However, the administrative law judge stated that "[i]t is...more likely than not that occupational coal dust exposure significantly contributes to [claimant's] impairment." *Id*. In addition to his opinion that claimant does not suffer from pneumoconiosis, Dr. Fino opined that claimant's disabling respiratory impairment results from asthma, which is unrelated to the inhalation of coal mine dust. Employer's Exhibit 1. Dr. Fino stated that claimant "would be as disabled as I find him now had he never stepped foot in the mines." *Id*.

The administrative law judge properly accorded greater weight to the opinion of Dr. Cohen than to the contrary opinions of Drs. Beechler, Fino, Getty, Lyle, McGowan, Sanjabi and Wells because of Dr. Cohen's superior

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[6]The administrative law judge stated, "I...give little weight to the opinion of Dr. Rubin who did not consider claimant's history of asthma and allergies." Decision and Order at 16.

qualifications. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, the administrative law judge properly accorded greater weight to Dr. Cohen's opinion because he found it to be supported by Dr. Hinkamp's opinion. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). In addition, the administrative law judge properly accorded greater weight to Dr. Cohen's opinion than to the contrary opinions of Drs. Fino and Sanjabi because he found it to be better reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR

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[7]The administrative law judge stated, "I find Dr. Cohen to be the most qualified expert to give an opinion in this case." Decision and Order at 17. The administrative law judge observed that Dr. Cohen "is Board Certified in Internal Medicine and Pulmonary Diseases." *Id*. at 15. The administrative law judge also observed that "Dr. Cohen is the Director of the Black Lung Clinics Program at Cook County Hospital in Chicago and is also a Medical Advisor to the National Coalition of Black Lung and Respiratory Disease Clinics." *Id*. at 17. The administrative law judge stated, "[i]n this capacity [Dr. Cohen] not only oversees the treatment of black lung patients but testified that he has visited black lung clinics all over the country as an advisor." *Id*. Hence, the administrative law judge found "Dr. Cohen's level of qualification and accomplishment in the area of pulmonary research and treatment of coal miners, to be very significant." *Id*. at 16. The administrative law judge also observed that Dr. Fino "is Board Certified in Internal Medicine and Pulmonary Diseases." *Id*. at 16. Nonetheless, the administrative law judge stated that "[a]lthough Dr. Fino is a pulmonary expert I find that he does not have the same level of expertise in the area of treating and researching coal dust induced lung diseases as does Dr. Cohen." *Id*. at 17; *see generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The record also indicates that Dr. Beechler is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 48. However, the record does not indicate that Dr. Beechler holds a position similar to that of Dr. Cohen's position as the Director of the Black Lung Clinics Program at Cook County Hospital in Chicago or Dr. Cohen's position as a Medical Advisor to the National Coalition of Black Lung and Respiratory Disease Clinics. The record does not contain the credentials of Drs. Getty, Lyles, McGowan, Sanjabi and Wells.

[8]The administrative law judge stated that Dr. Cohen's "opinion is supported by that of Dr. Hinkamp who is Board Certified in Occupational Medicine." Decision and Order at 17.

[9]The administrative law judge stated that Dr. Cohen's "report is well reasoned, discusses the pertinent medical records and shows a great level of knowledge regarding the medical literature as it pertains to coal induced lung disease."

1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject employer's assertion that the administrative law judge erred in crediting Dr. Cohen's opinion to the exclusion of the contrary opinions of record. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305(a). Furthermore, we hold that substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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

SO ORDERED.

BETTY JEAN HALL, Chief

Decision and Order at 17. The administrative law judge observed that "Dr. Cohen elaborated on these opinions during deposition testimony in a well reasoned and knowledgeable manner." *Id*. In contrast, the administrative law judge stated that "Dr. Sanjabi...only diagnosed asthma but his report is brief and did not elaborate on the basis for his opinion or level of disability." *Id*. at 16. Moreover, the administrative law judge observed that "Dr. Cohen creditably addresses these points and other arguments of Dr. Fino in Dr. Cohen's supplemental report dated January 20, 1999 and in his deposition testimony." *Id*. at 17.

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge