BRB Nos. 95-1833 BLA
and 95-1833 BLA-A

MICHAEL EVOSEVICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (91-BLA-2165) of Administrative Law Judge Thomas M. Burke denying benefits on a claim filed

[1] Claimant is Michael Evosevich, the miner, whose first claim for benefits was filed on March 2, 1979. Director's Exhibit 35.

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 third time. Claimant's initial application for benefits was denied in a Decision and Order issued on September 29, 1982, which was affirmed by the Board in *Evosevich v. Consolidation Coal Co*., BRB No. 82-2060 BLA (July 27, 1985)(unpub.), and by the United States Court of Appeals for the Third Circuit in *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986).

Subsequently, claimant filed a request for modification, Director's Exhibit 1, which was denied in a Decision and Order issued on October 20, 1992 and on reconsideration. The Board vacated the denial of modification and remanded the case for the administrative law judge to make modification findings pursuant to 20 C.F.R. §725.310 and in accord with *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). *Evosevich v. Consolidation Coal Co*., BRB. Nos. 93-1480 BLA/BLA-A (Nov. 30, 1994)(unpub.).

On remand, the administrative law judge considered all the evidence and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(2) but rebuttal established pursuant to 20 C.F.R. §727.203(b)(4). The administrative law judge also found that the evidence failed to establish entitlement under Part 718. Accordingly, he denied modification.

On appeal, claimant contends that the administrative law judge erred in his weighing of the evidence and asserts that the medical opinions credited are legally insufficient to establish rebuttal pursuant to Section 727.203(b)(4). Claimant's Brief at 2-4. Employer responds, urging affirmance.[2] The Director, Office of Workers'

[2] Employer filed a notice of cross-appeal with the Board but did not submit a petition for review and brief. Instead, in its response brief employer repeated the

Compensation Programs (the Director), has declined to participate in this appeal.[3]

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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge should have accorded determinative weight to Dr. Cander's opinion that claimant was totally disabled due to pneumoconiosis because he was the only physician "without any particular partiality to any party" and because his credentials were "impeccable." Claimant's Brief at 2. Contrary to claimant's contention, the administrative law judge could not have accorded Dr. Cander's opinion greater weight on the grounds that he was impartial absent a finding, based on evidence in the record, that the other physicians were biased and that Dr. Cander was independent. *See Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(*en banc*). The administrative law judge made no such finding, and claimant points to no evidence of physician bias. Furthermore, the

---

argument, already rejected by the Board, that claimant's second claim for benefits does not constitute a valid request for modification, and indicated that it would not formally brief the issue on cross-appeal. Employer's Brief at 3, n.1 and 2; [1994] *Evosevich*, slip op. at 3. The Director has filed a motion to dismiss employer's cross-appeal for failure to file a petition for review. In light of our disposition of this case, however, we need not address employer's cross-appeal and thus we deny Director's motion. *See* discussion, *infra*.

[3] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(2) and 20 C.F.R. Part 718. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

administrative law judge was not required to accord greatest weight to Dr. Cander's opinion based on his credentials, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and in fact permissibly determined that his opinion was due less weight than the opinions of other medical experts of record. *See* discussion, *infra*. Therefore, we reject claimant's contention.

Claimant asserts that the administrative law judge erred by discrediting Dr. Cander's opinion because it was based on less information than that relied upon by the other physicians. Claimant's Brief at 2. The administrative law judge noted that Dr. Cander's opinion was based on a review of Dr. Bobak's opinion, one pulmonary function study, and an x-ray, while Drs. Renn, Fino, Morgan, and Kress had the benefit of reviewing claimant's entire medical file. Decision and Order on Remand at 8-9. The administrative law judge thus acted within his discretion in finding Dr. Cander's opinion "questionable because of the minimal amount of information he had available to him" concerning claimant's condition. *See Scott*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Therefore, we reject claimant's contention.

Claimant next contends that the administrative law judge failed to consider the positive x-ray readings rendered by Drs. Fisher and Brandon. Claimant's Brief at 3. We reject this contention, as the administrative law judge considered these readings. Decision and Order on Remand at 4; Decision and Order at 4-6. Furthermore, the administrative law judge was not required to credit Dr. Levine's opinion that claimant suffered from pneumoconiosis merely because the positive x-ray reading upon which it was based was rendered by Dr. Fisher, a Board-certified radiologist and B-reader. *See Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Claimant asserts that the administrative law judge discredited the opinions of Drs. Bobak, Levine, Silverman, and T. Morgan merely because they relied on positive x-rays. Claimant's Brief at 2-3. We agree that the administrative law judge impermissibly discredited the above opinions on this basis. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); Decision and Order on Remand at 8. His error is harmless, however, inasmuch as he provided valid alternative reasons for his weighing of the medical opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co*., 6 BLR 1-378 (1983)(Miller, J., dissenting).

Specifically, the administrative law judge accorded diminished weight to Dr. Bobak's opinion because he had displayed a lack of expertise relating to the

diagnosis of pneumoconiosis and therefore was less qualified than the Board-certified pulmonologists to render an opinion on the existence of pneumoconiosis.[4] *See Scott*, *supra*; *Clark*, *supra*. In addition, the administrative law judge permissibly accorded less weight to Dr. Levine's opinion that claimant's respiratory impairment was related to coal dust exposure because the physician's statement that claimant did not have significant heart problems was inconsistent with the medical evidence.[5] *See Hall v. Director, OWCP*, 8 BLR 1-193 (1985); Decision and Order on Remand at 9.

Finally, the administrative law judge accorded determinative weight to the opinions of Drs. Fino and Renn based on their superior qualifications, *Scott*, *supra*; *Clark*, *supra*; Decision and Order on Remand at 9, and the record contains no special credentials for Drs. Silverman and T. Morgan. Therefore, we reject claimant's contention regarding the administrative law judge's weighing of the

[4] The administrative law judge cited Dr. Bobak's testimony that the 0/1 interpretation of claimant's x-ray constituted a positive reading for "moderate pneumoconiosis." Decision and Order on Remand at 8; Director's Exhibit 45 at 16; *cf*. 20 C.F.R. §718.102(b).

[5] Dr. Levine opined that claimant's respiratory impairment was related to coal dust exposure in part because he believed that claimant's cigarette smoking and atrial fibrillation would not produce the types of symptoms claimant suffered. Claimant's Exhibit 2. Dr. Levine concluded that "it is not clear that the patient has any significant heart problem other than the irregular rhythm." *Id*. The administrative law judge, however, noted that several medical opinions expressed concern over claimant's advanced heart disease. Decision and Order on Remand at 9; Director's Exhibits 40, 44, 49; Employer's Exhibit 1.

medical opinions.

Claimant lastly contends that the opinions credited by the administrative law judge are legally insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4). Claimant's Brief at 3-4. The United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, has held that, pursuant to Section 727.203(b)(4), the party opposing entitlement must prove that
claimant is not suffering from pneumoconiosis as defined by the Act and regulations. *Kline v. Director, OWCP*, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

The administrative law judge credited five opinions in finding rebuttal established pursuant to Section 727.203(b)(4). Of these, the opinions of Drs. Renn, Fino, and W.K.C. Morgan state that claimant does not have statutory pneumoconiosis. Director's Exhibits 40, 44; Employer's Exhibits 1, 3b. Drs. Kress and Anderson, on the other hand, do not affirmatively diagnose conditions inconsistent with statutory pneumoconiosis. *See Kline*, *supra*; *Pavesi*, *supra*; Director's Exhibit 35. We affirm the administrative law judge's finding, however, because he permissibly accorded determinative weight to the opinions of Drs. Renn and Fino based on their qualifications, *see* discussion, *supra*, and found Dr. W.K.C. Morgan's opinion corroborative of theirs. Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 727.203(b)(4).

Accordingly, the administrative law judge's Decision and Order on Remand denying modification is affirmed. *See Keating v. Director, OWCP*, 71 F.3d 1118, BLR (3d Cir. 1995).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge