

BRB No. 99-1095 BLA

EARL M. GEIST)
)
 Claimant-)
 Respondent)
)
 v.)
) DATE ISSUED:
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
) DECISION AND ORDER
 Petitioner

Appeal of the Decision and Order Granting Petition for Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Goldberg (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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Petition for Modification (98-BLA-0633) of Administrative Law Judge Ainsworth H. Brown 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 determined that this case involved a request for modification, pursuant to 20 C.F.R. §725.310, of the Decision and Order - Denying Benefits of Administrative Law

Judge Ralph A. Romano dated May 1, 1996, and affirmed by the Board on May 29, 1997.¹ In considering claimant's request for modification, the administrative law

¹ Claimant filed his application for benefits on January 17, 1995. Director's Exhibit 1. In a Decision and Order - Denying Benefits dated May 1, 1996, Administrative Law Judge Ralph A. Romano initially credited claimant with two years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Weighing the relevant evidence, Judge Romano found the x-ray evidence and the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). However, Judge Romano found the evidence insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, Judge Romano denied benefits. Director's Exhibit 37.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. Initially, the Board affirmed Judge Romano's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as unchallenged on appeal.

judge initially accepted the Director's concession of total disability. Weighing the relevant evidence, the administrative law judge found that the evidence of record was sufficient to establish that the miner's pneumoconiosis is due at least in part to his coal mine employment and that it was a substantially contributing cause of his total disability. The administrative law judge, therefore, found that the record supports "a change in conditions with further reflection upon the cause issues." Accordingly, the administrative law judge awarded benefits. The administrative law judge further found that the date from which benefits commence to be October 1997, the month in which claimant filed his petition for modification.

However, the Board also affirmed Judge Romano's finding that the evidence was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c). *Geist v. Director, OWCP*, BRB No. 96-1114 BLA (May 29, 1997)(2-1 opinion with McGranery, J. dissenting)(unpub.); Director's Exhibit 46.

On October 30, 1997, claimant filed his request for modification of the denial of benefits. Director's Exhibit 49.

On appeal, the Director contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's pneumoconiosis was due at least in part to his coal mine employment. In particular, the Director contends that the administrative law judge erred in accepting the opinion of Dr. Kraynak inasmuch as the record provides no grounds to accept this opinion. Claimant has not responded to this appeal.²

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 applicable 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).

² The parties do not challenge the administrative law judge's determination of October 1997 as the date of the commencement of benefits, thus, this finding is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In cases where claimant has been credited with less than ten years of coal mine employment and where the record indicates that claimant's pneumoconiosis could have arisen from conditions other than his coal mine employment, the Board has consistently held that there must be competent medical evidence to carry claimant's burden under Section 718.203(c).³ 20 C.F.R. §718.203(a), (c); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); see also *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Collura v. Director, OWCP*, 6 BLR 1-100 (1983), *aff'd mem.*, 738 F.2d 421 (3d Cir. 1984). In the case at bar, the administrative law judge found that the record contains the relevant medical opinions of two physicians, Dr. Ahluwalia and Dr. R. Kraynak. Decision and Order at 2. Within a reasonable exercise of his discretion as trier-of-fact, the administrative law judge accorded greater weight to the opinion of Dr. R. Kraynak, that claimant's pneumoconiosis was due to his coal mine employment, finding that Dr. Kraynak specifically addressed the issue of the contribution of occupational coal dust exposure versus claimant's non-occupational coal dust exposure. Decision and Order at 2-3; Claimant's Exhibit 3. In addition, the administrative law judge found this opinion supported by the medical opinions of Dr. Fierer and Dr. M. Kraynak, in which the physicians diagnosed coal workers' pneumoconiosis. Decision and Order at 3; Director's Exhibit 47; Claimant's Exhibit 6. Furthermore, the administrative law judge accorded less weight to the opinion of Dr. Ahluwalia inasmuch as the physician concluded that there was no respiratory impairment, which is contrary to the Director's concession of total respiratory

³ The record contains an undated letter, signed "Mr. & Mrs. Earl Geist," which states that there is a coal works near where they live and that there is a coal dirt pile very close to their house. In addition, the letter states that the coal dirt is blowing all the time and is worse than working in the mines. Director's Exhibit 3.

At the December 9, 1998 hearing, claimant's wife testified that she wrote the letter in question because she thought it would help her husband. Hearing Transcript at 18. In addition, claimant's wife testified that they live in a town with a breaker in it, that it is not uncommon for a town to have a breaker, and that the breaker is located one-half to three-quarters of a mile from their house. Hearing Transcript at 19. She also testified that the air in their town is no different than the air in other towns around them and that there are no clouds of coal dust in the area. Hearing Transcript at 27.

disability, but that claimant was impaired from a cardiac standpoint. Decision and Order at 2-3; Director's Exhibit 57.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). The administrative law judge considered the relevant medical evidence, in particular, the physicians' discussion of claimant's non-occupational coal dust exposure, we hold that it was not inherently unreasonable for the administrative law judge to accord greater weight to the opinion of Dr. R. Kraynak, who fully addressed this issue and opined that claimant's pneumoconiosis and total disability were due to his coal mine employment. Decision and Order at 2-3; Claimant's Exhibit 3. *Lafferty, supra*; *Kuchwara, supra*; see also *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). Inasmuch as the Director does not otherwise challenge the administrative law judge's findings, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting Petition for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge