BRB No. 99-0153 BLA

JAMES HERBERT MYERS Claimant-Respondent	)	
v.	)	
EL DORADO CHEMICAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
Petitioner	)	DECISION and ORDER

Appeal of the Decision on Employer's Motion For Further Reconsideration of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr. (Clifford, Mann & Swisher, P.L.L.C.), Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision on Employer's Motion For Further Reconsideration (96-BLA-1440) of Administrative Law Judge Gerald M. Tierney dismissing El Dorado Chemical Company as the operator responsible for benefits payable 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). Claimant,[1] was awarded benefits, payable by the Black Lung Disability Trust Fund (the Trust Fund), by the administrative law judge in a Decision and Order issued on June 16, 1998. In response to the Director's request for reconsideration, the administrative law judge issued a Decision and Order on Reconsideration on August 5, 1998, reinstating the named employer as the operator responsible for payment of benefits herein. Employer thereupon filed a motion for further reconsideration, in response to which the administrative law judge issued a Decision and Order on September 23, 1998, finding that the named employer was not properly designated as the operator potentially liable for payment of benefits herein, and again transferred liability for payment of the instant claim to the Black Lung Disability Trust Fund.

On appeal, the Director argues that the administrative law judge erred in finding that employer established rebuttal of the presumption contained at 20 C.F.R. §725.492(c), and thus, erred by finding that employer was not the operator responsible for payment of the present claim. Claimant and employer respond urging affirmance of the transfer of liability to the Trust Fund.

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

The Director contends that the administrative law judge erred in finding that

[1]Claimant is the miner, James Herbert Myers, who filed an application for benefits on September 6, 1989, which claim was denied on October 29, 1989. Director's Exhibit 44. Claimant filed the present duplicate claim on January 11, 1994. Director's Exhibit 1.

rebuttal of the presumption contained at Section 725.492(c) was established. In determining whether an employer is a responsible operator pursuant to Section 725.492(c), there is a rebuttable presumption that during the course of an individual's employment with an employer, such individual was regularly and continuously exposed to coal dust. This presumption, which is applicable to all miners, may be rebutted if employer can establish the absence of significant periods of dust exposure, *i.e.,* the frequency of such exposure must be so slight as to preclude its contribution to the development of a dust-related disease. Proof of significant periods of non-exposure is not sufficient to establish rebuttal of this presumption. *See* 20 C.F.R. §725.492(c); *see also Garrett v. Cowin & Company, Inc.,* 16 BLR 1-77 (1990); *Rowan v. Lewis Coal and Coke Co.,* 12 BLR 1-31 (1988); *Rickard v. C & K Coal Co.,* 7 BLR 1-372 (1984); *Harriger v. B & G Construction Co.,* 4 BLR 1-542 (1982), *aff'd,* 760 F.2d 555 (3d Cir. 1985). The Director contends that the administrative law judge erred by finding that claimant's exposure was "intermittent" and "not significant when considered in the context of exposure of those working underground or around the actual mining activity at strip mines." Decision and Order at 3.

The record evidence relevant to this issue includes the depositions of claimant and David Howerton, his supervisor at the Red Warrior strip mine. Both of the depositions indicate that claimant was employed as a blaster by El Dorado Chemical Company. He was required to supervise a crew who would place and fire charges to remove the overburden, consisting of primarily sandstone and shale, from the underlying beds of coal. Claimant's primary duty was to fill previously drilled holes with explosives. Claimant then left the blast area, to a distance which varied from hundreds to thousands of feet away, while the blasting took place. Claimant indicated that he was exposed to large amounts of rock dust at times, but was only exposed to coal dust a few times per month. Deposition at 11, 12, 14. Mr. Howerton, testified that the amount of dust generated by the blasting varied depending on the wind conditions and moisture levels at the time of each blast, but that it was company policy to keep its personnel out of the dust by staying upwind. He further stated that it was very unusual for someone to be affected by dust from the blasting since wind direction was always considered. Deposition at 10-13.

The administrative law judge credited Mr. Howerton's testimony as establishing rebuttal of the Section 725.492(c) presumption. The administrative law judge rationally found that the dust exposure claimant experienced constituted exposure to a substance arising from the extraction or preparation of coal, but that this exposure was intermittent and insignificant. The administrative law judge further found that claimant's exposure "was in no way similar to conditions faced by miners the Act is intended to cover." Decision and Order at 3. Thus, the administrative law

judge found that the presumption was rebutted and transferred liability for payment of this claim to the Trust Fund. We find no error in this determination as the administrative law judge properly noted that rebuttal of the presumption is not limited to establishing the lack of exposure to coal dust alone, as the Board has held that coal dust and coal mine dust are equivalent terms and include any dust arising from the extraction or preparation of coal. *George v. Williamson Shaft Contracting Co.,* 8 BLR 1-91 (1985); *see also Ray v. Williamson Shaft Contracting Co.,* 14 BLR 1-105 (1990). Moreover, it was within the administrative law judge's discretion to credit Mr. Howerton's testimony and find that claimant's dust exposure was so insignificant as to preclude its contribution to claimant's dust related disease. *Garret, supra.* Thus, we find no merit in the Director's contention that the administrative law judge found rebuttal based on periods of non-exposure in violation of the holding in *Garrett,* or that the administrative law judge's finding that claimant's exposure was insignificant compared to that experienced by underground miners or strip miners was reversible error. As the administrative law judge has provided a rational basis for his findings, we conclude that substantial evidence supports the administrative law judge's determination on this issue.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *see Maypray v. Island Creek Coal Co.,* 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that employer established rebuttal of the Section 725.492(c) presumption as it is supported by substantial evidence, and in accordance with law.

Accordingly, the Decision and Order of the administrative law judge transferring liability for the payment of this claim to the Black Lung Disability Trust Fund is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge