BRB Nos. 04-0599 BLA
and 04-0599 BLA-A

STEVE N. NONACK, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES CORPORATION	)	
	)	DATE ISSUED: 03/24/2005
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denying Benefits (03-BLA-0056) of Administrative Law Judge Michael P. Lesniak rendered 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 filed this application for benefits on November 13, 1978. Director's Exhibit 1. His claim, which is now pending on claimant's fourth request for modification pursuant to 20 C.F.R. §725.310 (2000), has been before the Board previously. The Board's prior decision in *Nonack v. BethEnergy Mines, Inc*., BRB Nos. 98-0503 BLA, 98-0503 BLA-A (Feb. 26, 1999)(unpub.), contains a full procedural history of this case from its inception. We now address the procedural aspects relevant to the administrative law judge's decision to deny claimant's current request for modification.

In a Decision and Order Denying Benefits issued on July 23, 1997, Administrative Law Judge George P. Morin credited claimant with thirty-six years of coal mine employment[1] and found that he timely requested modification of a prior denial of his claim by filing a new claim form within one year of the denial. Judge Morin found that claimant established invocation of the interim presumption of total disability due to pneumoconiosis by means of x-ray evidence pursuant to 20 C.F.R. §727.203(a)(1), but concluded that employer rebutted the presumption pursuant to 20 C.F.R. §727.203(b)(3) by ruling out any connection between claimant's total disability and his coal mine employment. Judge Morin also found that claimant did not establish entitlement under 20 C.F.R. Part 718. Accordingly, Judge Morin found no basis for modification and denied benefits.

Upon consideration of claimant's appeal and employer's cross-appeal, the Board rejected employer's argument that Judge Morin erred in treating claimant's new claim as a request for modification to be decided under the Part 727 regulations. [1999] *Nonack*, slip op. at 4-5. On the merits, the Board affirmed Judge Morin's denials of benefits under both Part 727 and Part 718. [1999] *Nonack*, slip op. at 3 n.1, 5-8.

Upon review of claimant's appeal and employer's cross-appeal, the United States Court of Appeals for the Third Circuit rejected employer's argument that Judge Morin erred in treating claimant's 1993 claim as a modification request. *Nonack v. BethEnergy Mines, Inc*., Nos. 99-5715 and 99-5799 (3d Cir. July 27, 2000); Director's Exhibit 145. The court agreed that the prior denial of claimant's Part 727 claim did not become final for purposes of starting the one-year modification period until the Board dismissed

[1] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

claimant's appeal on September 24, 1992. [2000] *Nonack*, slip op. at 2 n.1. Thus, the court held, claimant's August 27, 1993 claim was properly treated as a modification request that kept claimant's Part 727 claim alive. *Id*. On the merits, the court affirmed the denial of benefits pursuant to 20 C.F.R. §727.203(b)(3). *Nonack*, slip op. at 11-15.

On June 20, 2001, claimant filed a request for modification with the district director and submitted additional evidence. Director's Exhibit 147.

In the Decision and Order - Denying Benefits that is the subject of the current appeals, Administrative Law Judge Michael P. Lesniak rejected employer's renewed argument that the Part 727 regulations did not apply because claimant's 1993 claim was not a modification request. The administrative law judge noted that claimant had previously established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but concluded that employer again rebutted the presumption pursuant to 20 C.F.R. §727.203(b)(3). The administrative law judge also found that claimant did not establish entitlement under Part 718 because he did not prove that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Finding that a *de novo* review of the record established neither a mistake in a determination of fact nor a change in conditions under 20 C.F.R. §725.310 (2000), the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence pursuant to 20 C.F.R. §727.203(b)(3). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer argues that claimant's 1993 claim filing was not a modification request and that the administrative law judge therefore erred in applying the Part 727 regulations. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal. However, the Director responds to employer's cross-appeal. The Director argues that the Third Circuit court's holding that claimant timely requested modification in 1993 and kept his Part 727 claim pending is the law of the case.[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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

[2] On appeal, claimant does not challenge the administrative law judge's finding that claimant did not establish that he is totally disabled under 20 C.F.R. §718.204(b)(2). That finding is therefore affirmed. *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Employer contends that claimant did not request modification when he filed a new claim form in 1993, and that therefore, claimant's Part 727 claim is no longer pending. Employer raises the same procedural argument it pursued unsuccessfully in the prior round of litigation. We reject employer's repeated assertion for the reasons given in the Third Circuit court's decision and in our prior decision.[3] [2000] *Nonack*, slip op. at 2 n.1; [1999] *Nonack*, slip op. at 4-5.

It is undisputed that claimant established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1). Employer may rebut this presumption pursuant to 20 C.F.R. §727.203(b)(3) by establishing that the total disability "did not arise in whole or in part out of coal mine employment." 20 C.F.R. §727.203(b)(3). To meet this rebuttal burden, "the party opposing the award of benefits must *rule out* a possible causal connection between a miner's disability and his coal mine employment." *Plesh v. Director, OWCP*, 71 F.3d 103, 113, 20 BLR 2-30, 2-49 (3d Cir. 1995)(emphasis in original, internal quotation marks and citation omitted).

The administrative law judge determined that employer met its rebuttal burden because the opinions of Drs. Kaplan, Branscomb, and Fino were "credible, persuasive, and sufficient to 'rule out' pneumoconiosis or coal mine employment-related dust exposure as a cause of Claimant's disability." Decision and Order at 16, 17. In so finding, the administrative law judge explained that he gave greater weight to these opinions than to that of Dr. Jaworski, claimant's treating physician.

Claimant contends that the administrative law judge failed to place the burden of proof on employer. This contention lacks merit. The administrative law judge required "Employer [to] rule out the causal relationship between the miner's total disability and his coal mine employment." Decision and Order at 15.

Claimant argues that Dr. Kaplan's opinion is not sufficient to establish rebuttal under subsection (b)(3) because it does not affirmatively rule out that claimant's coal mine employment contributes to his disability. Based upon examination and testing of

[3] On March 1, 2005, the Board ordered employer to show cause why its cross-appeal should not be dismissed for failure to file a petition for review. On March 11, 2005, employer responded that it had included its argument in support of its cross-appeal in its January 21, 2005 response brief. The Director recognized and responded to employer's cross-appeal on February 22, 2005. No response to employer's cross-appeal has been received from claimant. Because we address employer's cross-appeal herein, the Board's March 1, 2005 order is moot.

claimant on May 24, 2002, and subsequent reviews of claimant's medical records, Dr. Kaplan opined that claimant has no respiratory or pulmonary disability but is totally disabled by coronary artery disease, aging, and hip problems. Director's Exhibits 165, 168; Employer's Exhibits 1, 7. Dr. Kaplan specifically ruled out pneumoconiosis as a factor contributing in any way to claimant's disability or respiratory symptoms. Employer's Exhibit 1 at 31. Thus, contrary to claimant's contention, Dr. Kaplan's opinion constitutes substantial evidence supporting the administrative law judge's rebuttal finding pursuant to 20 C.F.R. §727.203(b)(3). *See Plesh*, 71 F.3d at 113, 20 BLR at 2-49.

Claimant asserts that the administrative law judge substituted his opinion for that of claimant's treating physician, Dr. Jaworski, and erred by giving greater weight to Dr. Kaplan's opinion than to that of Dr. Jaworski.[4] The administrative law judge considered Dr. Jaworski's credentials and his "unique position" as claimant's treating physician, Decision and Order at 16, but explained that he gave Dr. Jaworski's opinion less weight because Dr. Jaworski acknowledged that claimant's pulmonary function and blood gas values are normal for his age, and because Dr. Jaworski expressed uncertainty as to whether claimant's shortness of breath is of pulmonary or cardiac origin. The administrative law judge also found that Dr. Jaworski did not clarify whether the decline in claimant's pulmonary function over time reflects disease or the effects of aging, obesity, or deconditioning. By contrast, the administrative law judge found that Dr. Kaplan persuasively explained why, "based on his evaluations," he was able to rule out pneumoconiosis as a factor in claimant's disability or symptoms. Decision and Order at 16.

[4] As summarized by the administrative law judge, Decision and Order at 8-10, Dr. Jaworski stated that claimant has mild airway obstruction but his pulmonary function values are virtually normal for his age. Director's Exhibit 153 at 16, 29-31. Dr. Jaworski also indicated that claimant has a mild gas exchange abnormality that could contribute to his dyspnea or his ability to perform his coal mine employment. Director's Exhibit 153 at 11. Dr. Jaworski noted, however, that claimant's blood gas values are normal for his age and that the etiology of claimant's mild diffusion abnormality is uncertain. Director's Exhibit 153 at 30; Employer's Exhibit 6 at 1. Dr. Jaworski also noted that the decline in claimant's pulmonary function studies is the type that can occur naturally with aging and that Dr. Jaworski would have to calculate whether that was the case. Director's Exhibit 153 at 31-32. Dr. Jaworski indicated that cardiac dysfunction can cause shortness of breath, and recorded in his treatment notes that claimant could have a component of cardiac dyspnea. Director's Exhibit 153 at 34 and Deposition Exhibit 3; Director's Exhibit 147 at 3; Employer's Exhibit 6 at 3.

We hold that the administrative law judge did not err in his analysis of Dr. Jaworski's opinion. Although the Third Circuit court has indicated that "treating physicians' opinions are assumed to be more valuable than those of non-treating physicians," *Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004)(Roth, J., dissenting), the administrative law judge reasonably explained why Dr. Jaworski's treating opinion was not found compelling on this record. *See Mancia v. Director, OWCP*, 130 F.3d 579, 591, 21 BLR 2-215, 2-239 (3d Cir. 1997)(noting that a non-treating physician's opinion may be sufficient to support a conclusion contrary to that of a treating physician). In view of the administrative law judge's broad discretion to assess a medical opinion, he did not err in finding Dr. Kaplan's opinion better reasoned and more persuasive than that of Dr. Jaworski in this case. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Consequently, we reject claimant's allegation of error.

Claimant next contends that because Drs. Branscomb and Fino did not examine claimant, their opinions could constitute substantial evidence only if they were based on the observations of examining physicians. The record reflects that Drs. Branscomb and Fino reviewed medical records generated by claimant's treating and examining physicians in reaching their opinions ruling out any connection between claimant's disability and his coal mine employment. Employer's Exhibits 2, 3, 5, 8. Their opinions were consistent with that of Dr. Kaplan who, the administrative law judge noted, had examined claimant twice. Decision and Order at 10, 16. Consequently, the administrative law judge properly relied on the opinions of Drs. Branscomb and Fino. *See Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1027-28, 9 BLR 2-10, 2-20-21 (3d Cir. 1986).

Finally, claimant asserts that the administrative law judge failed to comment on a May 23, 2001 resting arterial blood gas study administered by Dr. Jaworski. Contrary to claimant's contention, the administrative law judge specifically considered Dr. Jaworski's testimony that claimant's "resting arterial blood gases were normal for Claimant's age . . . ." Decision and Order at 9, 16, discussing Director's Exhibit 153 at 30.

Based on the foregoing, we affirm the administrative law judge's finding that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). We therefore affirm the administrative law judge's denial of modification pursuant to 20 C.F.R. §725.310 (2000) and his denial of benefits.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge