BRB No. 02-0727 BLA

ERNEST WORKMAN, JR. Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/19/2004 DECISION AND ORDER ON RECONSIDERATION *EN BANC*

Appeal of the Decision and Order on Remand - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

Sarah M. Hurley (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.

James Patrick McFadden (Catholic Medical Students Association of the University of Illinois at Chicago College of Medicine), Chicago, Illinois, as *amicus curiae*, in support of claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), for the Association of Bituminous Contractors, Inc., Washington, D.C., as *amicus curiae*, in support of employer.

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

PER CURIAM:

Employer has filed a timely Motion for Reconsideration requesting the Board to reconsider its Decision and Order of July 31, 2003, in the above-captioned case which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] In that decision, the Board affirmed the administrative law judge's finding that the weight of the new evidence submitted in support of modification of the prior denials in this case, considered in conjunction with the earlier evidence of record, was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), thus establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the Board affirmed the administrative law judge's award of benefits. Employer presently contends that the Board erred in affirming the administrative law judge's findings of the existence of pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), arguing that the decision does not comply with intervening or other controlling authority. Claimant and the Director, Office of Workers' Compensation Programs (the Director), did not respond initially to employer's motion for reconsideration. The Board, by Order dated March 8, 2004, scheduled oral argument in this case, and claimant and the Director subsequently filed briefs in support of their positions.[2] Oral argument was held in Charleston, West Virginia on April 13, 2004.[3]

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The issue for oral argument was whether, in light of the amended provisions at 20 C.F.R. §718.201(c) and the scientific proof contained in the rulemaking record, it was proper for the administrative law judge to rely on the progressive and latent nature of pneumoconiosis to credit the more recent medical evidence and thus find the existence of pneumoconiosis. Administrative Appeals Judge Judith S. Boggs did not participate in this decision.

[3] Following oral argument, employer filed a motion to reject the *amicus curiae* brief of the Catholic Medical Students Association (CMSA), arguing that the brief was untimely filed; that it was not responsive to the issue set for oral argument; and that the rules of the

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 contends that the administrative law judge erred in relying on the most recent medical opinion evidence to find the existence of pneumoconiosis and disability causation established at Sections 718.202(a)(4) and 718.204(c), arguing that the administrative law judge applied a presumption that pneumoconiosis is always progressive, which employer asserts does not comply with controlling authority. Employer maintains that the amended provisions at 20 C.F.R. §718.201(c), recognizing pneumoconiosis as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure, were upheld by the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. U.S. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002)(*NMA*), with the narrowing construction that the disease *can* be latent and progressive, but is not in the majority of cases.[4] Employer concedes that complicated pneumoconiosis

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Board require more information than that provided by Mr. McFadden in his Motion for Leave to File Brief *Instanter*, such as whether he was authorized to file a brief on CMSA's behalf and received assistance from an attorney. Employer's arguments lack merit. The Board invited parties-in-interest to file an *amicus curiae* brief within 20 days from receipt of the Board's Order issued on March 8, 2004, and Mr. McFadden indicated that he received the Order on March 11, 2004. Thus, CMSA's brief was timely filed on March 31, 2004. The brief is clearly responsive to the issue set for oral argument: It asserts that there is substantial evidence in the rulemaking record to establish that both legal and clinical pneumoconiosis are latent and progressive, and that it is rational for administrative law judges, upon review of the record, to give greater weight to more recent evidence when determining whether a miner has lung disease caused or aggravated by his coal mine employment. Mr. McFadden submitted the brief with the consent and support of claimant, and CMSA has not challenged Mr. McFadden's authority to file a brief on its behalf. Further, Mr. McFadden provided his name, address, telephone number, general education, special training, his relationship to the organization being represented, and the organization's interest in the oral argument issue. Thus, the requirements of 20 C.F.R. §802.202(d) were satisfied. We therefore deny employer's motion and admit CMSA's brief.

[4] In his supplemental brief filed in response to the Board's inquiry at oral argument, the Director clarified the meaning of the terms "latent" and "progressive" as used in 20 C.F.R. §718.201(c), noting that the regulation recognizes that both clinical and legal

and silicosis are latent and progressive diseases, but asserts that the rulemaking record is devoid of proof that legal pneumoconiosis possesses these characteristics in the absence of further coal dust exposure and in the face of continued cigarette smoking. Employer thus contends that the administrative law judge's reliance on the more recent medical evidence to find legal pneumoconiosis and disability causation established creates, in effect, a one-size-fits-all irrebuttable presumption of latency and progressivity which does not comport with *NMA*; instead, employer contends, claimant must prove by a preponderance of the evidence that he suffers from one of the rare forms of the disease that could, and in fact did, progress. Employer's arguments are without merit.

In amending Section 718.201, after full notice-and-comment procedures, the Department of Labor (DOL) reviewed the medical literature in the rulemaking record, consulted with the National Institute for Occupational Safety and Health (NIOSH), which was created by Congress as a source of expertise in the analysis of occupational disease research and which concurred in the proposed changes, and concluded that the scientific evidence showed that chronic dust diseases of the lung and its sequelae arising out of coal mine employment *may* be latent and progressive, albeit in a minority of cases. *See* 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is *never* latent and progressive. 20 C.F.R. §718.201(c); *see NMA*, 292 F.3d

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pneumoconiosis may be latent and progressive. The Director asserts that by defining pneumoconiosis as a latent disease, the Secretary of Labor means that pneumoconiosis may not become manifest until after exposure to coal dust has ceased. Thus, a miner who is unable to prove even the existence of the disease in his initial claim is not barred from filing a later claim since the disease may not have progressed to the point of clinical manifestation when he filed the earlier application. *See* 62 Fed. Reg. 3344 (Jan. 22, 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *see also* 3 J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder*, L-46 (2003)(defining "latent" as "potential, present but not active; existing in a hidden, inactive, or undeveloped form, not visible or manifest"). The Director maintains that by defining pneumoconiosis as a progressive disease, the Secretary of Labor means that pneumoconiosis is a disease that may cause progressive deterioration of the lung even after the miner has ceased inhaling coal dust, and that this propensity also justifies allowing miners to file subsequent claims. *See* 62 Fed. Reg. 3343-44 (Jan. 22, 1997); *see also Shendock v. Director, OWCP*, 893 F.2d 1458, 13 BLR 2-242 (3d Cir. 1990)(*en banc*), *cert. denied*, 498 U.S. 826 (1990); *Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); 5 J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder*, P-456 (2003)(defining "progressive" as "spreading, extending, increasing in severity, worsening").

at 863. The *NMA* court upheld the validity of Section 718.201 as amended, finding that it was supported by its underlying medical and scientific literature, *NMA*, 292 F.3d at 863, 869; *see also Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); employer in the present case has not produced the type and quality of medical evidence that would invalidate the regulation.

The amendments to Section 718.201 did not alter claimant's burden of proving that he suffers from pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity. *See* 65 Fed. Reg. 79972 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). The regulations and the *NMA* decision do not require, however, that a miner separately prove he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. 20 C.F.R. §§718.201, 718.202, 718.203; *NMA*, 292 F.3d 849; *see Shores*, 358 F.3d 486, 23 BLR 2-18. Because the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature.

In the present case, we agree with the position taken by claimant and the Director that the administrative law judge engaged in a proper evidentiary analysis and applied no presumption of progressivity in finding the existence of legal pneumoconiosis and disability causation established. The administrative law judge examined the evidence submitted both before and after claimant's request for modification, and found that the earlier evidence did not establish the existence of pneumoconiosis. Decision and Order on Remand at 5-6. The administrative law judge, however, reasonably focused primarily on the more recent evidence in determining whether claimant established a change in his condition, and also noted that some of the physicians who had issued earlier reports submitted supplemental reports based on additional medical data. Decision and Order on Remand at 6; *see* 20 C.F.R. §718.201(c); *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). The administrative law judge considered the qualifications of the physicians, the explanations of their medical opinions and the underlying documentation, and, in a proper exercise of his discretion, found that Dr. Rasmussen's opinion, that claimant had a totally disabling respiratory insufficiency arising out of coal mine employment, was entitled to determinative weight as it was better reasoned and more persuasive than the contrary medical opinions. Decision and Order on Remand at 12; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We previously rejected employer's arguments and affirmed the administrative law judge's findings under

Sections 718.202 and 718.204, as supported by substantial evidence and in accordance with prior case law of the Board and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. We now additionally hold that the administrative law judge's weighing of the medical opinion evidence was fully consistent with *NMA* and the regulations: the later positive evidence credited by the administrative law judge constitutes proof that *claimant's* occupational disease had progressed.

Lastly, employer reiterates its argument that the administrative law judge provided invalid reasons for crediting the opinion of Dr. Rasmussen over the opinions of employer's experts, and maintains that claimant's disabling back condition precludes him from entitlement to benefits. Employer's assertions merely represent contentions previously raised and rejected when this case was initially before the Board. There have been no changes in Board or circuit court laws that would affect the Board's previous disposition of employer's contentions. We therefore adhere to our previous affirmance of the administrative law judge's findings and decline to address employer's contentions.

Accordingly, we reject the arguments made by employer and reaffirm the holdings in the Board's previous Decision and Order.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge