BRB No. 95-0516 BLA

HOWARD L. CHURCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED:
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Upon Remand of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp (Browning, Morefield, Lamie & Sharp, P.C.), Grundy, Virginia, for claimant.

Janine F. Goodman (Arter & Hadden), Washington, D.C., for employer.

Jeffrey S. Goldberg (Thomas S. Williamson, Jr., 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:

Employer appeals the Decision and Order Upon Remand (91-BLA-1893) of Administrative Law Judge Eric Feirtag awarding benefits 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).[1] This is the second time that this case has been before the Board. In

[1]The relevant procedural history of this case is as follows: Claimant filed a claim for benefits on June 2, 1983. Director's Exhibit 24. This claim was finally denied by the district director on August 10, 1984, on the ground that claimant did not establish that he is totally disabled due to pneumoconiosis arising out of his coal mine employment. *Ibid.*. Claimant filed a second claim for benefits on December 19, 1985. Director's Exhibit 1. The district director denied this claim based upon claimant's failure to establish the presence of pneumoconiosis. Director's Exhibit 13. Claimant requested an administrative hearing. Prior to the hearing, Administrative Law Judge Giles McCarthy remanded the case to the district director for a determination of whether claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 33. Despite the fact that the administrative law judge rescinded his remand order, the district director issued an order in which it was determined that claimant failed to establish a material change in conditions. Director's Exhibit 36. The case was forwarded to the Office of Administrative Law Judges for an administrative hearing before Administrative Law Judge Eric Feirtag. The administrative law judge found the second claim to be a new claim based upon his determination at the hearing that claimant had submitted new evidence which established a material change in conditions under Section 725.309. The administrative law judge also

Church v. Eastern Associated Coal Corp., BRB No. 92-1308 BLA (Mar. 10, 1994)(unpublished), the Board affirmed the administrative law judge's finding that claimant established a material change in conditions under 20 C.F.R. §725.309 and that pneumoconiosis is a contributing cause of his totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The Board vacated the administrative law judge's finding under 20 C.F.R. §718.202(a)(1), however, on the ground that the administrative law judge did not properly apply the true doubt rule. The Board also vacated the administrative law judge's determination regarding the date of onset of total disability. The Board remanded the case to the administrative law judge with instructions to reconsider the relevant evidence under Section 718.202(a) and his finding regarding the date of onset of total disability.

On remand, the administrative law judge determined that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the evidence. The administrative law judge further found, however, that the medical opinions of record proved that claimant is suffering from pneumoconiosis under Section 718.202(a)(4). The administrative law judge determined that the evidence of record established that the onset of total disability occurred in June 1989. Accordingly, benefits were awarded effective as of the latter date.

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indicated that the parties had stipulated that claimant was employed as a miner for more than fifteen years and that he is suffering from a totally disabling respiratory impairment. The administrative law judge found that the evidence of record was sufficient to demonstrate the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that claimant established that his pneumoconiosis contributed to his total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. Employer appealed the administrative law judge's Decision and Order to the Board.

Employer argues on appeal that the administrative law judge erred in determining that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer also challenges the Board's decision to affirm the administrative law judge's finding under Section 725.309 rather than apply the holding of the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.[2] Employer also contends that the administrative law judge's original finding that pneumoconiosis was a contributing cause of claimant's total disability was based upon the application of an incorrect standard and an improper consideration of the relevant evidence. Claimant requested an extension of time within which to file a response brief which the Board granted in an unpublished Order issued on January 26, 1995, but did not file a response brief. *Church v. Eastern Associated Coal Corp.*, BRB No. 95-0516 BLA (Jan. 26, 1995)(unpublished Order). The Director, Office of Workers' Compensation Programs, has also responded and asserts that the Board should reject employer's contentions regarding Section 725.309. Employer has replied and essentially reiterates the arguments in its Brief In Support of Petition for Review.

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

Employer asserts that the Board should adopt the standard set forth by the United States Court of Appeals for the Seventh Circuit in *McNew* regarding claimant's burden to establish a material change in conditions pursuant to Section 725.309. Subsequent to the issuance of the administrative law judge's Decision and Order Upon Remand, the United States Court of Appeals for the Fourth Circuit adopted a standard which requires a claimant to establish either that the miner did not have pneumoconiosis at the time of the first application for benefits but has since contracted it and become totally disabled by it or that the miner's disease has progressed to the point of total disability although it was not totally disabling at the time of the miner's first application. However, the Fourth Circuit has granted a motion for *en banc* reconsideration of its decision, which in effect has vacated the previous panel judgment and opinion. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc*, No. 94-2523 (November 16, 1995). Accordingly, we decline to disturb our previous holding affirming the

[2]This case arises in the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's qualifying coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge's determination that the record contains newly submitted evidence which establishes a material change in conditions under Section 725.309(d) in accordance with the standard set forth in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992).

We will now turn to consideration of employer's allegations of error regarding the administrative law judge's findings on the merits. Employer argues that the administrative law judge's finding under Section 718.202(a)(4) must be vacated on several grounds. Employer asserts that the Board's affirmance of the administrative law judge's findings with respect to the medical opinions of Drs. Fino, Tuteur, Swamy, and Rasmussen occurred in connection with the issue of total disability causation under Section 718.204(b) and is not transferrable to Section 718.202(a)(4), because the Board never addressed the reliability of these opinions regarding the existence of pneumoconiosis. In addition, employer alleges that the administrative law judge acted improperly in according less weight to the opinions of the physicians who did not examine claimant. Employer also argues that the administrative law judge erred in relying upon the diagnoses of pneumoconiosis contained in the opinions of Drs. Rasmussen and Swamy, inasmuch as their diagnoses were based solely upon positive x-ray readings. Employer further contends that Dr. Sherer's diagnosis of pneumoconiosis was based upon claimant's recitation of his medical history.[3]

We reject employer's contentions. With respect to the administrative law judge's reliance upon the Board's affirmance of his weighing of the medical reports of Drs. Swamy, Rasmussen, and Sherer under Section 718.204(b), the administrative law judge acted within his discretion in referring to the Board's holding when weighing the medical opinions of record under Section 718.202(a)(4). The Board held that the administrative law judge permissibly accorded a "great deal of weight" to the opinion of Dr. Swamy on the grounds that the doctor specifically identified the studies upon which he relied and the conclusion he reached was consistent with the underlying objective evidence of record. *Church*, *supra*, *slip opinion at 7 n. 14*; Decision and Order Granting Benefits at 4. The Board further held that the administrative law judge properly credited Dr. Rasmussen's opinion because Dr. Rasmussen examined claimant and reviewed chest x-rays, pulmonary function studies, and blood gas studies. *Ibid.*. The Board affirmed the administrative law judge's decision to accord "a great deal of weight" to Dr. Sherer's opinion because the doctor based his diagnosis of total disability due to pneumoconiosis on "extensive medical information

[3]Employer also argues that the opinions of Drs. Cardona and Daniel are entitled to little or no weight because these physicians relied solely on positive x-ray readings. We reject employer's contention with respect to the reports of Drs Cardona and Daniel, as the administrative law judge did not rely upon these opinions in determining that claimant established the existence of pneumoconiosis under Section 718.202(a)(4).

gathered over a period of many years" and in light of Dr. Sherer's status as claimant's treating physician. *Church*, *supra*, *slip opinion at 7 n. 14*; Decision and Order Granting Benefits at 15. Inasmuch as the Board's holding affirming the administrative law judge's weighing of the opinions of Drs. Swamy, Rasmussen, and Sherer under Section 718.204(b) necessarily encompassed the physicians' determinations that claimant is suffering from pneumoconiosis, it was not error for the administrative law judge to rely upon the Board's holding in considering these opinions under Section 718.202(a)(4). Similarly, the administrative law judge did not err in referring to the Board's holding that the administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Fino and Tuteur than to the opinions of the physicians who examined claimant. *Church*, *supra*, *slip opinion at 7*; Decision and Order Granting Benefits at 15.

In addition, the administrative law judge did not abuse his discretion in crediting the opinions in which Drs. Rasmussen, Swamy, and Sherer diagnosed pneumoconiosis under Section 718.202(a)(4) despite his determination that the x-ray evidence of record was insufficient to support a finding of pneumoconiosis under Section 718.202(a)(1). Contrary to employer's assertions, Dr. Rasmussen referred to claimant's history of occupational exposure in addition to a positive x-ray reading in concluding that claimant has pneumoconiosis. Director's Exhibit 27. The administrative law judge also noted in his initial Decision and Order that Dr. Swamy's opinion was supported by the results of a physical examination and a pulmonary function study, in addition to a chest x-ray which showed moderate interstitial fibrosis and was read as positive for pneumoconiosis. Decision and Order Granting Benefits at 14; Director's Exhibit 24. The administrative law judge indicated that Dr. Sherer relied upon numerous examinations of claimant and numerous x-rays and objective studies obtained during claimant's hospital admissions for the treatment of acute respiratory distress. Decision and Order Granting Benefits at 15; Director's Exhibit 39; Claimant's Exhibits 4, 5. Therefore, the administrative law judge did not err in treating these opinions as sufficiently reasoned and documented pursuant to Section 718.202(a)(4). *See Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985)(Brown, J., dissenting); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Regarding employer's assertion that the administrative law judge's finding that the x-ray evidence of record did not establish the existence of pneumoconiosis under Section 718.202(a)(1) compelled the administrative law judge to discredit the opinion of any doctor who referred to a positive x-ray reading in diagnosing pneumoconiosis, the Board has held that an administrative law judge may not discredit an opinion solely on the ground that it is based, in part, upon an x-ray reading which is at odds with the administrative law judge's finding with respect to the x-ray evidence of record. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985).

Employer also contends that the Board should reconsider its affirmance of the administrative law judge's finding that claimant established that pneumoconiosis is a contributing cause of his total disability pursuant to Section 718.204(b). In making this argument, employer reiterates the allegations of error set forth in its initial appeal before the

Board. Specifically, employer asserts that the administrative law judge applied an erroneous interpretation of the standard set forth by the United States Court of Appeals for the Fourth Circuit in *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), and mischaracterized or otherwise improperly weighed the medical opinions of record. In light of the fact that employer has advanced no new arguments in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of the issue, we decline to revisit the administrative law judge's findings under Section 718.204(b). *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Inasmuch as we have affirmed the administrative law judge's finding on remand that the existence of pneumoconiosis was established under Section 718.202(a)(4) and will not disturb our previous affirmance of the administrative law judge's determination that claimant established that pneumoconiosis is a contributing cause of his total disability pursuant to Section 718.204(b), *see Robinson*, *supra*, we affirm the award of benefits on remand. Accordingly, the Decision and Order Upon Remand of the administrative law judge awarding benefits is affirmed.

The record in the present case also includes an attorney fee petition submitted by counsel for claimant. Counsel requests a fee of $1011.25 for 10 hours of legal services at an hourly rate of $100.00 and .25 hours of legal services at an hourly rate of $45.00. The 10.25 hours of legal services were performed in conjunction with employer's first appeal before the Board. No objections to the fee petition have been received. Claimant's counsel is hereby awarded a fee of $1011.25 to be paid directly to him by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Desk Book Section: PART III.G

Subsequent to the issuance of the administrative law judge's Decision and Order Upon Remand in this case, the Fourth Circuit adopted a standard with respect to 20 C.F.R. §725.309 that requires a claimant to establish either that the miner did not have pneumoconiosis at the time of the first application for benefits but has since contracted it and become totally disabled by it or that the miner's disease has progressed to the point of total disability although it was not totally disabling at the time of the miner's first application. However, the Fourth Circuit has granted a motion for en banc reconsideration of its decision, which in effect has vacated the previous panel judgment and opinion. *See* ***Lisa Lee Mines v. Director, OWCP [Rutter]***, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc*, No. 94-2523 (November 16, 1995). Accordingly, the Board declined to disturb its previous holding affirming the administrative law judge's determination that the record contains newly submitted evidence that establishes a material change in conditions under Section 725.309(d) in accordance with the standard set forth in ***Shupink v. LTV Steel Corp.***, 17 BLR 1-24 (1992). ***Church v. Eastern Associated Coal Corp.***, 20 BLR 1-8 (1996).