BRB No. 04-0660 BLA

JAMES O. GIVEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 04/26/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Larry L. Rowe, Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (01-BLA-0865) of Administrative Law Judge Richard A. Morgan on a duplicate 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] Claimant filed the instant duplicate claim on

[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). The amendments to the regulations at 20 C.F.R §725.309 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R.

October 12, 2000.[2] Director's Exhibit 1. The district director issued a Proposed Decision and Order Awarding Benefits on April 23, 2001. Director's Exhibit 30. Employer requested a hearing, which was held on November 19, 2003. The administrative law judge found that claimant worked at least thirty-seven years in coal mine employment, and that he suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, however, found that claimant failed to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000) because the new evidence failed to establish either the existence of coal worker's pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

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

The United States Court of Appeals for the Fourth Circuit has held that in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1364, 20 BLR 2-227, 235 (4th Cir.1996) (*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the

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§725.2. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant initially filed a claim for benefits on January 6, 1986, which was finally denied by the district director on August 21, 1986. Director's Exhibit 36. Claimant filed a duplicate claim on October 23, 1987, which was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order dated October 31, 1991. Director's Exhibit 36. On appeal, the denial was affirmed by the Board, *see Given v. Consolidation Coal Co.*, BRB Nos. 92-0486 BLA and 92-0486 BLA/A (June 10, 1993) (unpub.). *Id.* Claimant next filed a third claim on February 5, 1998, which was denied by the district director on July 28, 1998. Director's Exhibit 37. Claimant took no action with respect to the denial of his third claim. Claimant filed the instant duplicate claim on October 12, 2000. Director's Exhibit 1.

administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id*.

In this case, the administrative law judge noted that claimant's prior claim filed on February 5, 1998 was denied because claimant failed to establish the existence of pneumoconiosis or that he was disabled as a result of that disease. Reviewing the new evidence submitted with respect to the instant duplicate claim, the administrative law judge also found that claimant failed to establish the existence of pneumoconiosis or disability causation pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), and thus that claimant failed to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000). After consideration of the administrative law judge's Decision and Order, the issue on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's denial of benefits. Specifically, we reject claimant's assertion that the administrative law judge erred in weighing the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).

With respect to Section 718.202(a)(1), the administrative law judge noted that there were twenty interpretations of the new x-rays dated December 13, 1998, November 14, 2000, March 22, 2001, August 14, 2001, September 13, 2001, March 27, 2002, April 30, 2003 and October 9, 2003, of which there were only four positive readings for pneumoconiosis compared to sixteen negative readings for the disease. Director's Exhibits 15-17, 28, 34, 37; Claimant's Exhibits 2, 8; Employer's Exhibits 4, 6, 14, 16, 17, 19, 20; Decision and Order at 7. The administrative law judge correctly considered the qualifications of the physicians interpreting the x-rays and found that a majority of the x-ray readings from Board-certified radiologists and B-readers were negative for pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7. Thus, because substantial evidence supports the administrative law judge's finding that that the preponderance of the x-ray evidence was negative for pneumoconiosis, we affirm his finding at 20 C.F.R. §718.202(a)(1).

Turning to 20 C.F.R. §718.202(a)(4), we also reject claimant's contention that the administrative law judge erred in weighing the medical opinion relevant to the existence of pneumoconiosis. The administrative law judge first permissibly rejected Dr. Sembello's "To Whom it May Concern Letter" diagnosing pneumoconiosis because he found that it was cursory and not reasoned. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Claimant's Exhibit 5; Decision and Order at 20-21. He therefore correctly noted, "the crux of this case rests on the relative weight to be given the medical opinions of Drs. Scattaregia, Belotte, Morgan, Fino, and Renn, who found that Claimant does not suffer from coal worker's pneumoconiosis or any other chronic coal mine dust-induced

disease versus those of Drs. Rasmussen and Gaziano, who diagnosed coal workers' pneumoconiosis and/or attributed a significant part of Claimant's respiratory impairment to his coal mine dust exposure." Decision and Order at 21; Director's Exhibits 13, 34, Claimant's Exhibits 1, 5-7; Employer's Exhibits 4, 8-13, 21, 24. The administrative law judge credited the former over the latter, noting that Drs. Gaziano and Rasmussen placed undue emphasis on "the few positive x-ray interpretations, in conjunction with Claimant's coal mine employment history."[3] Decision and Order at 21. More importantly, the administrative law judge permissibly found that the opinions of Drs. Scattaregia, Belotte, Morgan, Fino, and Renn were more thorough and better reasoned than the opinions of Drs. Gaziano and Rasmussen. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 21-22. The administrative law judge further noted that among the physicians who were Board-certified in Pulmonary Medicine, only Dr. Gaziano diagnosed pneumoconiosis.[4] Decision and Order at 22. The administrative law judge had discretion to find Dr. Gaziano's opinion to be outweighed for this reason. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Furthermore, we reject claimant's contention that the administrative law judge erred in refusing to admit into the record copies of the medical articles cited by Dr. Rasmussen in support of his opinion that claimant's respiratory impairment was due to a combination of smoking and coal dust exposure.[5] The administrative law judge properly noted with respect to his evidentiary ruling that he was not a medical expert and therefore was not in a position to independently evaluate the medical literature at issue. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Hearing Transcript at 14, 33-37. Moreover, the administrative law judge specifically recognized Dr. Rasmussen as a medical expert , and thus it was not necessary for the medical articles he relied upon in

[3] Dr. Gaziano, a B-reader, read claimant's November 14, 2000 and October 9, 2003 x-rays as positive for pneumoconiosis. The administrative law judge, however, credited the negative readings of those same films by readers who held superior qualifications.

[4] Dr. Rasmussen is Board-certified in Internal Medicine but not in Pulmonary Medicine. The administrative law judge had discretion to credit the weight of the evidence from those physicians he deemed to be the best qualified of record. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon.*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988)

[5] Claimant proffered medical articles as exhibits at the hearing, which document the impact of coal dust exposure and smoking on coal miners in general. Claimant argued that the articles undermined the opinions of employer's physicians who opined that claimant's emphysema was due to entirely to smoking. Claimant's Brief at 21, 23.

forming his opinion to actually be a part of the record. There is nothing in the regulations or the Act which require that the materials on which a physician, as a medical expert, bases his opinion be admitted into the record, provided that they are of the type of evidence which a responsible expert would normally use in formulating a professional opinion. *See Peabody Coal Co. v. Director, OWCP* [*Durbin*], 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999); *see generally* Fed. R. Evid. 703.

Additionally, despite claimant's assertion, the administrative law judge properly addressed whether claimant established legal pneumoconiosis. Although the administrative law judge intermingled his discussion of legal pneumoconiosis with the issue of disability causation, he properly set forth in his Decision and Order that Drs. Belotte, Morgan, Fino and Renn were in agreement that claimant's chronic obstructive pulmonary disease was due to smoking. Director's Exhibit 34; Employer's Exhibits 4, 8, 9, 11-13, 18, 24, 25, 34. With respect to the claimant's diagnosis of asthma, the administrative law judge noted that Dr. Belotte specifically opined that claimant was predisposed to asthma based on family history, and that his asthma was not due to coal mine employment. Director's Exhibit 34; Decision and Order at 10. In weighing the conflicting evidence, the administrative law judge permissibly found that the opinions of Drs. Belotte, Morgan, Fino and Renn were well-reasoned as to why claimant's respiratory problems were not related to coal dust exposure, and found that they outweighed Dr. Rasmussen's opinion that claimant's chronic obstructive pulmonary disease was due to a combination of smoking and coal dust exposure. *See Mabe*, 9 BLR at 1-67; Decision and Order at 21. Consequently, as the administrative law judge properly found that the majority of the credible physicians opined that claimant had neither clinical or legal pneumoconiosis, we affirm as supported by substantial evidence the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 21.

Because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we also affirm his determination that claimant was unable to establish disability causation pursuant to 20 C.F.R. §718.204(c). Additionally, contrary to claimant's argument, since he failed to establish the existence of pneumoconiosis, claimant was not entitled to the presumption at 20 C.F.R. §718.203. Claimant's Brief at 24.

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *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*, 12 BLR at 1-149. Thus, we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) or 718.204(c) Further, we affirm the administrative law judge's finding that claimant failed

to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Rutter*, 86 F.3d at 1358, 20 BLR at 2-227.

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