BRB No. 98-0994 BLA

GERALD O. GOMEZ Claimant-Respondent v. BEAR COAL COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Scott M. Busser (Zarlengo, Mott, Zarlengo and Winbourn, P.C.), Denver, Colorado, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-0756) of Administrative Law Judge Daniel J. Roketenetz 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). This case involving a duplicate claim pursuant to 20 C.F.R. §725.309(d) is before the Board for the second time.[1] Previously, we vacated the administrative law judge's finding that a material change in conditions was established under Section 725.309(d) and remanded the case for him to consider this issue under the standard set forth in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). *Gomez v. Bear Coal Co*., BRB No. 96-0507 BLA (Jul. 3, 1997)(unpub.). Additionally, we vacated the administrative law judge's finding that the existence of pneumoconiosis was established by x-ray pursuant to 20 C.F.R. §718.202(a)(1) and instructed him to consider a physician's x-ray readings and his testimony that despite the ILO classifications of opacities seen on claimant's chest x-rays, the x-rays did not reveal opacities consistent with pneumoconiosis and were therefore negative for the disease. *Gomez*, slip op. at 3-4. We also instructed the administrative law judge to weigh the qualifying[2] blood gas studies against the non-qualifying studies at Section

[1] Claimant's initial application for benefits filed on April 25, 1988 was informally denied by the Department of Labor on October 17, 1988, and after additional consideration, on November 18, 1988. Director's Exhibit 31. Claimant filed a timely request for modification of the denial, but subsequently withdrew the request. *Id*. On February 8, 1993, claimant filed the present application for benefits which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d).

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-

718.204(c)(2) to determine whether they demonstrated total respiratory disability, and then to weigh together all of the contrary probative evidence to determine whether claimant established total respiratory disability pursuant to Section 718.204(c).[3] *Gomez*, slip op. at 5.

On remand, the administrative law judge found that the new medical opinions established a material change in conditions pursuant to Section 725.309(d) by demonstrating that claimant's respiratory impairment worsened sufficiently since the prior denial to prevent him from performing his employment as a roof bolter. On the merits, the administrative law judge weighed the x-ray readings in light of conflicting testimony by two experts regarding whether the opacities seen were diagnostic of pneumoconiosis and found that the x-rays established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge also found that the qualifying blood gas studies established total respiratory disability pursuant to Section 718.204(c)(2), and concluded that the blood gas studies and the better reasoned medical opinions diagnosing disability outweighed the non-qualifying pulmonary function studies to establish total respiratory disability pursuant to Section 718.204(c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established under Section 725.309(d). Employer further asserts that the administrative law judge erred in his weighing of the x-ray evidence pursuant to Section 718.202(a)(1). Additionally, employer alleges that the administrative law judge failed to properly resolve the blood gas study evidence pursuant to Section 718.204(c)(2) and did not adequately consider a contrary probative medical opinion at Section 718.204(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[3] The Board affirmed the administrative law judge's findings and credibility determinations regarding length of coal mine employment, the benefits commencement date, and pursuant to 20 C.F.R. §§718.203(b), 718.204(c)(1), (3), (4), and 718.204(b). *Gomez*, slip op. at 2 n.2, 5.

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 law. 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).

To be entitled to benefits under 20 C.F.R. Part 718, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that to establish a material change in conditions, "a claimant must prove for each element that was actually decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Brandolino*, 90 F.3d at 1511, 20 BLR at 2-320-21. The administrative law judge must "compar[e] [the] evidence obtained after [the] prior denial to [the] evidence considered in or available at the time of [the] prior claim" to determine whether claimant has "demonstrated that each of these elements previously found against him [has] worsened materially since the previous denial." *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321.

The district director denied claimant's prior claim because the evidence then in the file did not establish total respiratory disability pursuant to Section 718.204(c). Director's Exhibit 31. Therefore, the inquiry on remand was whether the medical evidence developed since the prior claim demonstrated material worsening with respect to the element of total respiratory disability. *See Brandolino, supra*.

The administrative law judge found that although the new pulmonary function and blood gas studies yielded values similar to those obtained in the prior claim, two of the three new medical opinions assessed a greater degree of respiratory impairment than was diagnosed in the prior claim. The administrative law judge further noted that in the prior claim, a physician rated claimant as capable of performing moderately heavy labor, while in this claim a physician familiar with the exertional requirements of claimant's usual coal mine employment as a roof bolter

opined that claimant's respiratory impairment prevents him from performing that job.[4] Assigning less weight to the opinion of another physician who opined that claimant could perform heavy labor, the administrative law judge found that the new medical opinions indicated material worsening and thus established a material change in conditions. Decision and Order on Remand at 4-6.

Employer contends that the administrative law judge should have determined whether the new medical opinion assessments of increased impairment outweighed "the lack of material change in the x-ray, pulmonary function, and arterial blood gas evidence" before finding that claimant's condition materially worsened. Employer's Brief at 14. After reviewing the administrative law judge's Decision and Order on Remand in light of the relevant evidence, we conclude that he adequately weighed the evidence in finding that material worsening was demonstrated.

[4] The administrative law judge found previously that claimant's job as a roof bolter was strenuous and required heavy lifting. Decision and Order at 9; *see Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989).

In the prior claim, Dr. Chamberlain obtained a non-qualifying pulmonary function study and a non-qualifying resting blood gas study. Based upon these results, Dr. Chamberlain stated that no impairment was "showing up in either the pulmonary function tests or blood oxygen tests," concluded that claimant was only minimally impaired, and opined that he could perform "any type of work up to moderately heavy work."[5] Director's Exhibit 31.

In the present claim, Dr. Bechtel examined claimant and obtained a non-qualifying pulmonary function study and a blood gas study that was qualifying after exercise. Director's Exhibits 14-16. Dr. Bechtel interpreted the exercise blood gas study as revealing "oxygen desaturation with exercise" indicative of a "mild impairment." Director's Exhibits 14 at 4, 15 at 2. Dr. James, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and interpreted the same blood gas study as revealing "mild exercise induced hypoxemia." Claimant's Exhibit 2 at 2. Dr. James wrote that if claimant's job required heavy lifting, he might not be able to perform the work. *Id*. Later, when informed of claimant's specific job duties, Dr. James testified that claimant's mild impairment would prevent him from performing all of the tasks of a roof bolter. Claimant's Exhibit 4 at 21-22. Dr. Repsher, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant, obtained a non-qualifying pulmonary function study, and reviewed the medical evidence of record. Director's Exhibit 27. He interpreted claimant's exercise blood gas studies as abnormal, but indicated that this was due to non-occupational interstitial lung disease, and opined that claimant could perform heavy labor based upon extrapolated treadmill test values. Director's Exhibit 27; Employer's Exhibit 1.

[5] A second blood gas study taken two months later yielded qualifying results on exercise, but Dr. Chamberlain apparently was not asked to review it. Director's Exhibit 31.

Because the administrative law judge has broad discretion to determine the weight and credibility of the evidence, *see Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-334, 2-338-339 (10th Cir. 1996), he permissibly concluded that Dr. Repsher did not adequately explain his opinion that claimant could perform heavy labor despite the abnormal exercise blood gas studies. Substantial evidence supports the administrative law judge's findings that Drs. Bechtel and James diagnosed a more severe respiratory impairment than Dr. Chamberlain diagnosed in the prior claim, and that, unlike Dr. Chamberlain in the prior claim, Dr. James stated that claimant is unable to perform his usual coal mine employment. *See Brandolino, supra*. Bearing in mind that a claimant "need not go as far as proving that he or she now satisfies the element" of entitlement previously decided against him but need only make a threshold showing of material worsening, *Brandolino*, 90 F.3d at 1511, 20 BLR at 2-317, we conclude that the administrative law judge properly found that the new medical opinions demonstrated material worsening. We therefore affirm the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d).[6]

Pursuant to Section 718.202(a)(1), employer contends that the administrative law judge erred in finding the x-ray readings to be positive for pneumoconiosis because Dr. Repsher's opinion establishes that the opacities seen on claimant's chest x-rays are not consistent with pneumoconiosis. Employer's Brief at 10-11. Employer's contention lacks merit.

The record contains seven ILO numerical classifications of three x-rays. Director's Exhibits 18, 19, 27, 31; Claimant's Exhibit 4; Employer's Exhibit 1. Drs. Sargent, Deklos, and James, all of whom are B-readers, and Dr. Bechtel, indicated that they saw opacities consistent with pneumoconiosis on claimant's x-rays. By contrast, Dr. Repsher, also a B-reader, numerically classified the x-rays under the ILO system, but opined that the opacities he saw were the wrong shape and in the wrong location to be consistent with pneumoconiosis. Director's Exhibit 27; Employer's Exhibit 1. He concluded that the x-rays revealed only opacities consistent with smoking and old healed tuberculosis, and were negative for

[6] Because Dr. James reviewed medical evidence developed since the prior claim, employer's contention that Dr. James' opinion is legally insufficient to prove material worsening lacks merit. Employer's Brief at 13. Additionally, because the bulk of the administrative law judge's analysis at Section 725.309(d) was properly focused upon whether the new medical evidence demonstrated material worsening in the total disability element, his brief citation to the fact that claimant had retired is, at best, a harmless error. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984); Employer's Brief at 6.

pneumoconiosis. In support of his view, Dr. Repsher cited a research article in the record regarding the causes of irregular opacities on the chest x-rays of miners. Employer's Exhibit 1 (Deposition Exhibit). However, Dr. James cited the same research article to support his opinion that the irregular opacities seen on claimant's x-rays were consistent with pneumoconiosis, and testified that certain features necessary to indicate old healed tuberculosis, such as pleural scarring, were absent from the x-rays. Claimant's Exhibits 2, 4.

The administrative law judge carefully considered the x-ray readings and testimony, and reviewed the research article. Decision and Order at 7-9. The administrative law judge stated that since Drs. Repsher and James were equally qualified, delivered equally reasonable opinions, and cited the same research article to support their opposing views, he could find no reason to credit Dr. Repsher's opinion over that of Dr. James. Decision and Order on Remand at 9. Noting, however, that Dr. Repsher stood alone in stating that the x-rays were negative for pneumoconiosis, the administrative law judge permissibly found that "Dr. Repsher . . . has failed to persuade me that the [x-ray] evidence does not indicate the presence of pneumoconiosis." Decision and Order at 9; *see [Pickup], supra*. Since there were no other negative readings, the administrative law judge rationally concluded that claimant met his burden to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Employer insists that Dr. Repsher's view of the x-rays was more credible, but we must observe that "[t]he evidence was conflicting and, where medical professionals are in disagreement, the trier of fact is in a unique position to determine credibility and weigh the evidence." *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993). The administrative law judge considered all of the relevant evidence as instructed on remand and properly exercised his discretion in declining to credit Dr. Repsher's opinion, and we therefore reject employer's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.204(c)(2), the administrative law judge weighed the non-qualifying resting blood gas study values against the qualifying exercise values and reasonably found that, because claimant's job as a roof bolter was strenuous in nature, "the blood gas tests measuring the [c]laimant at exercise are most probative of [his] condition." Decision and Order at 10; *see [Pickup], supra; Hansen, supra*. Accordingly, he concluded that the blood gas studies established total respiratory disability pursuant to Section 718.204(c)(2). Employer does not challenge the administrative law judge's reasoning, but contends that remand is required for the administrative law judge to consider Dr. Repsher's opinion that the drop in claimant's exercise blood gases results from "alternative and more credible causes." Employer's Brief at 12.

Dr. Repsher testified that claimant's exercise blood gas studies were "abnormal," but opined that the drop was due to "bibasilar fibrosis" unrelated to claimant's coal mine employment. Employer's Exhibit 1 at 18. However, the causation of a respiratory impairment is not relevant to a determination of the existence of a totally disabling respiratory impairment, *see* 20 C.F.R. §§718.204(b), 718.204(c), and the Board has already affirmed as unchallenged the administrative law judge's disability causation finding pursuant to Section 718.204(b). *See Mangus v. Director, OWCP*, 882 F.2d 1527, 1531, 13 BLR 2-9, 2-19 (10th Cir. 1989). Dr. Repsher's additional statement that the drop in blood oxygenation was due to a Bohr integral and the effects of altitude is not further explained, and conflicts with the altitude-adjusted table under which the tests in question are qualifying. *See Big Horn v. OWCP [Alley]*, 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990)("These tables reflect the Department of Labor's best estimate of the extent to which altitude may affect blood-gas tests in the black lung context."). Therefore, we reject employer's argument that remand is required, and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(2).

Pursuant to Section 718.204(c), the administrative law judge concluded that the qualifying exercise blood gas studies and the "better reasoned" opinions of Drs. Bechtel and James outweighed the contrary non-qualifying pulmonary function studies. *See Bosco v. Twin Pines Coal Co*., 892 F.2d 1473, 1479, 13 BLR 2-196, 2-208 (10th Cir. 1989)(administrative law judge must consider all evidence relevant to total disability); *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986). Employer contends that the administrative law judge failed to adequately consider Dr. Repsher's opinion that if claimant's treadmill test results were extrapolated to his maximum heart rate, they would demonstrate that he could perform heavy labor. Employer's Brief at 11; Employer's Exhibit 1 at 21-22. "[T]he task of weighing conflicting medical evidence is within the sole province of the [administrative law judge]," *Hansen*, 984 F.2d at 368, 17 BLR at 2-54, and here the administrative law judge reasonably took into account who better explained his opinion in light of the abnormal exercise blood gas studies. Decision and Order on Remand at 6, 10. Substantial evidence supports the administrative law judge's finding that Dr. Repsher did not explain how claimant can perform heavy labor with abnormal blood oxygenation on exercise. Employer's Exhibit 1 at 18, 49. Therefore, regardless of Dr. Repsher's view that claimant's work ability should be estimated based upon an extrapolated treadmill test score,[7] he did not explain his non-disability opinion to the administrative law judge's reasonable satisfaction with

[7] Dr. James opined that such an extrapolation should not be done in this case. Claimant's Exhibit 2.

respect to other objective evidence. *See Hansen, supra*. Substantial evidence supports the administrative law judge's finding at Section 718.204(c), which we therefore affirm.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge