BRB No. 00-1035 BLA

L. D. WALLACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Laura A. Woodruff and Carranza M. Pryor (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Helen H. Cox (Howard M. Radzely, Acting 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 and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (99-BLA-

0805) of Administrative Law Judge Daniel J. Roketenetz 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] The procedural history of this case is as follows: Claimant filed an application for benefits on October 12, 1983. On September 11, 1987, Administrative Law Judge C. Richard Avery issued his Decision and Order - Denying Benefits. Judge Avery found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000). Director's Exhibit 27. Claimant did not pursue this claim.

On September 7, 1993, claimant filed a new application for benefits. The case was considered by Administrative Law Judge Christine M. Moore, who found the newly submitted evidence insufficient to establish a material change in conditions. Accordingly, she issued a Decision and Order Denying Benefits on July 31, 1995. Director's Exhibit 41. On claimant's appeal, the Board held that the evidence submitted by claimant established, as a matter of law, a material change in conditions under the then applicable standard for establishing a material change in conditions enunciated in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). The Board remanded the case to the administrative law judge for consideration of the evidence. The Board also instructed the administrative law judge to address claimant's assertion that he had submitted evidence to the district director which was not included in the record. *See Wallace v. Drummond Co., Inc.*, BRB No. 95-2065 BLA (Feb. 29, 1996)(unpub.); Director's Exhibit 47.[2]

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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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] On July 31, 1996, Administrative Law Judge Christine McKenna issued an Order on Remand from Board: Remanding to District Director, instructing the district director to investigate claimant's contention that proffered evidence was not included in the record.

The case was assigned to Administrative Law Judge Gerald M. Tierney, who issued his Decision and Order Denying Benefits on January 13, 1998. Judge Tierney credited claimant with thirty-two years of coal mine employment, and found the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis. The administrative law judge also found that "[a]lthough the objective studies indicate that the Claimant may be totally disabled, the physician opinions (sic) establish that the Claimant's disability is not due to pneumoconiosis." Director's Exhibit 58 at 10.

Claimant filed a Motion for Reconsideration, and submitted new evidence with this motion. Director's Exhibit 59. Subsequently, claimant filed a Petition for Modification with the district director. Director's Exhibit 62. On November 11, 1998, Judge Tierney issued an Order on Claimant's Motion for Reconsideration. Judge Tierney stated that he could not consider the evidence submitted by claimant with his Motion for Reconsideration, and advised claimant to submit the evidence to the district director with a petition for modification. Director's Exhibit 61. The case was then considered by the district director, who determined that claimant was entitled to benefits. Director's Exhibit 74.

The case was transferred to Administrative Law Judge Daniel J. Roketenetz (the administrative law judge), who issued a Decision and Order - Award of Benefits, which is the subject of the instant appeal. The administrative law judge noted the procedural history of the case, and credited claimant with thirty-two years and one month of coal mine employment. The administrative law judge found the newly submitted evidence sufficient to establish that claimant's disability is due to pneumoconiosis, and thus found that claimant established modification based on a change in condition under 20 C.F.R. §725.310 (2000). The administrative law judge reviewed the evidence as a whole and found it sufficient to establish the existence of pneumoconiosis and total disability. The administrative law judge found that claimant established a material change conditions under 20 C.F.R. §725.309(d) (2000) because "[i]n the prior claim... none of the elements of entitlement were established by the Claimant... [and] pneumoconiosis, total disability and total disability due to pneumoconiosis have now been established...." Decision and Order at 8. Accordingly, benefits were awarded.

Director's Exhibit 48. While the case was before the district director, claimant submitted copies of several physicians' qualifications. Director's Exhibit 49.

On appeal, employer asserts that the administrative law judge erred in finding a material change in conditions established. Employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in this appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on April 23, 2001, to which all of the parties have responded. Claimant and the Director state that the amended regulations will not have any impact on the Board's consideration of this appeal. Employer, however, asserts that the amended versions of 20 C.F.R. §§718.104, 718.201 and 718.204(a) impact the Board's consideration of this case, and urges the Board to stay consideration of this appeal. The amended regulation regarding the quality standards applies only to evidence developed after January 19, 2001, *see* 20 C.F.R. §§718.101(b), 718.104, none of which is contained in the record in this case. Also, the definition of pneumoconiosis, *see* 20 C.F.R. §718.201, is not at issue in this case. Further, the revised regulation at 20 C.F.R. §718.204(a) is not at issue in our consideration of the disability causation issue. Accordingly, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law

[3] Inasmuch as the administrative law judge's length of coal mine employment finding and his findings that the evidence is sufficient to establish a basis for modification and that the evidence as a whole establishes total respiratory disability, are not challenged on appeal, it is recommended that they be affirmed by the Board. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, we consider employer's challenge to the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Employer asserts that since Drs. Rusakoff, Fino and Hasson considered more evidence than Dr. Waldrum, they should be accorded greater weight. Further, employer asserts that the administrative law judge erred by giving dispositive weight to the opinion of Dr. Waldrum on the ground that he is claimant's treating physician, and urges that the administrative law judge should have more prominently considered the fact that Dr. Hasson examined claimant. Employer also asserts that the administrative law judge should have given less weight to Dr. Waldrum's opinion because Dr. Waldrum, unlike the other physicians, is not a B-reader.[4]

In considering the medial opinion evidence, the administrative law judge stated:

> I give more weight to the opinion of Dr. Waldrum, as he is the Claimant's treating physician, he is highly qualified, his opinion is consistent with the Claimant's lengthy history of both smoking and coal mine employment, his opinion is based in part on the x-ray interpretations of B-readers, and he has been consistently treating the Claimant for pneumoconiosis at the

[4] Dr. Rusakoff examined claimant in 1987 and later reviewed medical evidence and opined that there was no evidence of coal workers' pneumoconiosis. Director's Exhibit 27-32. In 1999 Dr. Rusakoff reviewed medical evidence and opined that there was no evidence of coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Fino, who reviewed the medical evidence in 1999, stated that the objective evidence is insufficient to justify a diagnosis of coal workers' pneumoconiosis and opined that claimant had no occupationally acquired pulmonary condition. Employer's Exhibit 2. Dr. Hasson examined claimant in 1999 and opined that he did not have pneumoconiosis. Director's Exhibits 11, 30, 71. The record also contains Dr. Waldrum's treatment notes from 1997 through 1999, where he repeatedly indicates that he is following claimant for coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibits 55, 62, 69; Claimant's Exhibit 1. In a 1998 opinion, Dr. Waldrum opined that claimant has coal workers' pneumoconiosis. Director's Exhibit 62. Drs. Rusakoff, Fino, Hasson and Waldrum are all Board-certified in Internal Medicine and Pulmonary Diseases. In addition, Drs. Waldrum and Hasson are also Board-certified in Critical Care Medicine. Director's Exhibits 27, 71; Claimant's Exhibit 2; Employer's Exhibits 1, 2.

University of Alabama.

Decision and Order at 7. The administrative law judge gave less weight to the opinions of Drs. Fino and Rusakoff because they did not examine claimant and accorded less weight to the opinions of Drs. Fino, Rusakoff and Hasson because they did not sufficiently address how claimant's "totally disabling COPD could be unaffected by the Claimant's 32 years of coal dust exposure." Decision and Order at 8. In finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge relied on these findings and noted that Dr. Waldrum's opinion is well-reasoned. Decision and Order at 8.

We reject employer's challenge to Dr. Waldrum's diagnosis of pneumoconiosis based on the fact that the physician is not a B-reader. Since Dr. Waldrum's medical opinion is based on more than interpretations of radiographic evidence, *see* Director's Exhibits 55, 62, 69; Claimant's Exhibit 1, there is no requirement that the administrative law judge, who noted that Dr. Waldrum is Board-certified in internal medicine and pulmonary diseases, address Dr. Waldrum's credentials for interpretation of radiographic evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, the administrative law judge specifically noted that Dr. Waldrum based his opinion on the x-ray interpretations of other physicians who are B-readers. Decision and Order at 7.

We also reject employer's assertion that the administrative law judge erred by relying on the Dr. Waldrum's opinion. The administrative law judge is charged with evaluating the evidence and determining the credibility of the medical opinions. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). The administrative law judge may accord greater weight to the opinion of a claimant's treating physician because of his familiarity with claimant's condition. *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge properly considered the qualifications of the physicians, the bases for their opinions and whether they examined claimant, reviewed his records, or treated claimant, and permissibly accorded greater weight to Dr. Waldrum's opinion. In addition, the administrative law judge permissibly determined that Dr. Waldrum's opinion is the best reasoned opinion, and we affirm his reliance upon Dr. Waldrum's opinion on this basis as well. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, we hold that the administrative law judge adequately considered Dr. Hasson's status as an examining physician. *See* Decision and Order at 7. Accordingly, we affirm the administrative law judge's finding that claimant has established the existence of pneumoconiosis.

Next, we consider employer's assertion that the administrative law judge erred by finding the evidence sufficient to establish a material change in conditions. Employer asserts that in order to establish a material change in conditions, claimant must prove that

his physical condition has changed, and argues that the newly submitted evidence does not support the causal link between claimant's total disability and pneumoconiosis found by the administrative law judge.

As a preliminary matter, we hold that the administrative law judge applied the correct standard in determining whether claimant established a material change in conditions, *i.e.*, claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. 20 C.F.R. §725.309 (2000); *see Allen v. Mead Corp.*, 22 BLR 1-61 (2000)(*en banc*). The Board adopted this standard for establishing a material change in conditions for use in cases, such as the instant case, which arise in a circuit where the United States Court of Appeals has not yet addressed the standard applicable under 20 C.F.R. §725.309 (2000). *Id.* Moreover, inasmuch as the administrative law judge found a material change in conditions established based on his findings of pneumoconiosis and total disability, *see* Decision and Order at 8, findings which we have affirmed, we, likewise, affirm the administrative law judge's finding that claimant has established a material change in conditions, *see Allen, supra*. Therefore, we need not address employer's remaining assertion concerning the administrative law judge's material change in conditions finding. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Turning to the issue of disability causation, employer asserts that claimant does not have pneumoconiosis, and therefore argues that his disability cannot be due to the disease. Further, employer notes that Dr. Waldrum was unable to distinguish what portion of claimant's disability was due to pneumoconiosis and what portion was due to claimant's cigarette smoking, while Drs. Fino, Rusakoff and Hasson provided well documented and reasoned opinions establishing that claimant's disability was due to factors other than pneumoconiosis.[5] Finally, employer asserts that Dr. Waldrum's

[5] Dr. Rusakoff opined that it is unlikely that claimant's coal mine employment is the cause of any impairment. Director's Exhibit 27-32 at 22. Dr. Rusakoff stated that claimant's lung condition was not caused by coal dust inhalation, but rather, his significant history of cigarette smoking coupled with an asthmatic component. Employer's Exhibit 1. Dr. Fino concluded that claimant's inhalation of coal mine dust did not cause or contribute to his disability, which he opined was due to claimant's smoking. Employer's Exhibit 2. Dr. Hasson stated that there is no evidence that pneumoconiosis caused claimant's pulmonary impairment. Director's Exhibit 11, 30, 71. Dr. Waldrum opined that claimant's chronic respiratory condition is directly related to his occupational exposure to coal dust, rock dust and cigarette smoking. Dr. Waldrum stated that quantifying the percentage of the contribution by tobacco smoke and coal dust is not possible, but he stated that both factors significantly contribute to claimant's

opinion is insufficient to satisfy the standard enunciated in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

We disagree. We hold that the administrative law judge permissibly found Dr. Waldrum's opinion to be the better reasoned opinion regarding the cause of claimant's disability because Drs. Fino, Hasson and Rusakoff "did not sufficiently address how the Claimant's totally disabling COPD could be unaffected by the Claimant's 32 years of coal dust exposure," Decision and Order at 7-8, while Dr. Waldrum's opinion is "consistent with the Claimant's lengthy history of both smoking and coal mine employment," Decision and Order at 7; *see Fields, supra*. Inasmuch as the administrative law judge permissibly relied upon the medical opinion which he found to be better reasoned, *see Clark, supra*; *Fields, supra*, and since the Board may not reweigh the evidence, *see Anderson, supra*, we hold that the administrative law judge acted within his discretion in weighing the medical opinion evidence and we affirm the administrative law judge's reliance on Dr. Waldrum's opinion regarding the cause of claimant's disability. Moreover, we hold that the administrative law judge properly determined that Dr. Waldrum's opinion, that pneumoconiosis significantly contributes to claimant's disability, satisfies claimant's burden of establishing disability causation. *See* 20 C.F.R. §718.204(c); Director's Exhibit 62.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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respiratory impairment. Director's Exhibit 62.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge