BRB No. 98-1382 BLA

PRIMITIVO GRANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PITTSBURG & MIDWAY COAL MINING COMPANY	)	DATE ISSUED: 8/10/99
	)	
	)	
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 on Remand - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

William C. Erwin, Raton, New Mexico, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (93-BLA-0959) of Administrative Law Judge Robert L. Hillyard 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). The relevant procedural history of this case is as follows: Claimant submitted an application for benefits on December 2, 1980. Director's Exhibit 28. This claim was denied by Administrative Law Judge Eric Feirtag in a Decision and Order dated November 9, 1984, on the grounds that claimant did not establish the existence of pneumoconiosis or that he was suffering from a totally disabling respiratory or pulmonary impairment. *Id.*. Claimant appealed the denial of benefits to the Board, but later withdrew his appeal. *Id.*. Claimant filed a second claim for benefits on

June 17, 1985. *Id.*. In a Decision and Order dated March 13, 1990, Administrative Law Judge Ellin M. O'Shea treated this claim as a request for modification pursuant to 20 C.F.R. §725.310 and determined that the denial of benefits regarding the initial claim did not contain a mistake in a determination of fact. Judge O'Shea then weighed all of the evidence of record under the regulations set forth in 20 C.F.R. Part 718 and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and failed to prove that he is totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. *Id.*. Claimant took no further action until filing his third claim for benefits on July 28, 1992. Director's Exhibit 1.

In his initial Decision and Order with respect to this claim, Administrative Law Judge Robert L. Hillyard (the administrative law judge) accepted the parties' stipulation to forty-one years of coal mine employment and noted the presence of duplicate claims in the record. The administrative law judge stated that inasmuch as the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this claim arises, had not yet ruled on the appropriate standard for determining whether a material change in conditions has been established pursuant to 20 C.F.R. §725.309(d), he would apply the standard adopted by the United States Courts of Appeals for the Third, Fourth, and Sixth Circuits. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The administrative law judge determined that the newly submitted evidence did not support a finding of pneumoconiosis under Section 718.202(a)(1)-(4) and denied benefits on the ground that claimant did not demonstrate a material change in conditions.

Claimant appealed to the Board and argued that the evidence of record is sufficient to establish a material change in conditions in accordance with the holding of the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), a case decided subsequent to the issuance of the administrative law judge's Decision and Order. Claimant also asserted that the administrative law judge did not properly weigh the newly submitted x-ray evidence pursuant to Section 718.202(a)(1) and did not properly consider the newly submitted medical reports of record under Section 718.202(a)(4). The Board rejected claimant's allegations of error under Section 718.202(a)(1) and (a)(4), but vacated the administrative law judge's determination that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). *Grano v. Pittsburg & Midway Coal Mining Co.*, BRB No. 96-1417 BLA (June 26, 1997)(unpub.). The Board remanded the case to the administrative law judge with instructions to reconsider the material change issue in light of *Brandolino*. *Id.*. The Board subsequently reaffirmed its holdings in a Decision and Order on Reconsideration. *Grano v. Pittsburg & Midway Coal Mining Co.*, BRB No. 96-1417 BLA (Jan. 26, 1998)(unpub.).

On remand, the administrative law judge considered the newly submitted evidence under the *Brandolino* standard and determined that it was insufficient to establish a material worsening in claimant's condition with respect to the existence of pneumoconiosis under Section 718.202(a)(1)-(4) and total disability under Section 718.204(c)(1)-(4). The administrative law judge concluded, therefore, that claimant did not establish a material change in conditions pursuant to Section 725.309. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly apply the holding in *Brandolino* and did not properly weigh the newly submitted medical evidence under Sections 718.202(a)(1), 718.202(a)(4), 718.204(c)(1), (c)(2), and (c)(4). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[1]

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 applicable 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).

Claimant initially contends that the administrative law judge did not properly apply the *Brandolino* standard under Section 718.202(a)(1), as the administrative law judge required claimant to submit x-ray interpretations that were positive for pneumoconiosis, rather than interpretations that demonstrated a worsening of claimant's condition. Claimant argues that inasmuch as the newly submitted x-ray readings indicate a greater incidence of parenchymal abnormalities consistent with pneumoconiosis, the administrative law judge should have determined that claimant established a material worsening of his condition. We disagree.

The United States Court of Appeals for the Tenth Circuit stated in *Brandolino* that:

> [I]n order to bring a duplicate claim, a claimant must prove for each element that actually was 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. In order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element. Instead, under the plain language of the statute and regulations, and consistent with *res judicata*, the

[1]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(c)(3), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> claimant need show only that this element has worsened materially since the time of the prior denial.

90 F3d at 1510, 20 BLR at 2-320 (footnotes omitted). The court further indicated that a claimant could show a material worsening regarding the issue of the existence of pneumoconiosis by comparing past and present x-rays and demonstrating that the present x-rays reflect that "any conditions suggesting that claimant has pneumoconiosis have become materially more severe since the last claim was rejected." *Id.*. With respect to the issue of total disability, the court noted that a claimant "might present more extreme blood gas test results obtained since the prior denial to indicate that his or her disability has become materially more severe since the last claim was rejected." *Id.*.

The newly submitted x-ray evidence in this case consists of Dr. James's 1/0 reading of an x-ray dated September 11, 1992, Dr. Sargent's 0/1 reading of the same x-ray, and Dr. Repsher's 0/1 reading of an x-ray dated December 7, 1992. Director's Exhibits 13, 17, 23. Dr. James's reading included a determination that the opacities appeared in all six lung zones, while Dr. Sargent indicated that opacities appeared in the mid and lower lung zones. Director's Exhibits 13, 17. Dr. Repsher identified opacities in the two lower right lung zones and one mid left lung zone. Director's Exhibit 23. The x-ray interpretations considered in the prior denial of benefits consisted of two 0/0 readings, two 0/1 readings, a 1/0 reading, a 1/1 reading, a 1/2 reading, and 5 readings in which the physicians stated that there were no pleural or parenchymal abnormalities consistent with pneumoconiosis. Director's Exhibit 28. With respect to the interpretations of 0/1 or greater, opacities were identified in the mid and lower right lung zones, the lower left lung zone, the four mid and upper lung zones, and all six lung zones. *Id.*.

Upon considering the newly submitted x-ray evidence, the administrative law judge stated that:

> Placing the greater weight on the interpretation by Dr. Sargent, the most qualified reader, and on the majority of the readings which were negative, I find that the x-rays show at most a reading of 0/1. This is insufficient to show the existence of pneumoconiosis under §718.202(a)(1). The readings before Judge Shea were predominantly 0/0 and 0/1. Consequently, I find that the claimant has not shown a material worsening by x-ray evidence.

Decision and Order on Remand at 7. Although the administrative law judge indicated that the preponderance of the newly submitted x-ray evidence was not positive for pneumoconiosis, contrary to claimant's contention, he did not base his determination that a material worsening of claimant's condition was not established upon his finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis. The administrative law judge rationally concluded that the profusion of opacities seen on claimant's newly submitted chest x-rays does not differ in significant respect from the profusion observed on the x-rays considered in the prior denial.

Decision and Order on Remand at 7; Director's Exhibits 13, 17, 23, 28. Moreover, the distribution of opacities observed in the different zones of claimant's lungs on the newly submitted x-rays conforms to the distribution noted on the previously considered x-rays. Director's Exhibits 13, 17, 23, 28. We affirm, therefore, the administrative law judge's finding that claimant did not establish a material worsening in his condition under Section 718.202(a)(1), as it is supported by substantial evidence. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986).

Regarding Section 718.202(a)(4), the administrative law judge noted that the Board affirmed his determination, in his prior Decision and Order, that Dr. Repsher's opinion was entitled to greater weight than Dr. James's opinion on the grounds that it was more thorough and better supported by the evidence of record. Decision and Order on Remand at 7; *see Grano*, *supra*, slip opinion at 4. The administrative law judge accorded more weight to Dr. Repsher's opinion again, therefore, and found that claimant failed to establish a material worsening of his condition regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 7. Claimant maintains that inasmuch as pneumoconiosis, as defined in Section 718.201, includes impairments related to dust exposure in coal mine employment, the administrative law judge should have determined that the results of claimant's newly submitted pulmonary function and blood gas studies demonstrated that claimant's condition, with respect to the existence of pneumoconiosis, has materially worsened. Claimant also argues that the administrative law judge should have discredited Dr. Repsher's opinion under Section 718.202(a)(4) on the ground that Dr. Repsher does not acknowledge that coal dust exposure can cause an obstructive lung disease. These contentions are without merit.

When considering the newly submitted evidence relevant to the issue of total disability under Section 718.204(c), the administrative law judge acknowledged that the pulmonary function studies and the blood gas studies supported a finding of a material worsening in claimant's pulmonary impairment pursuant to Section 718.204(c)(1) and (c)(2). Decision and Order on Remand at 8; Director's Exhibits 10, 14, 23. In order for such an impairment to constitute pneumoconiosis as defined in Section 718.201, however, the impairment must be significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See* 20 C.F.R. §718.201. The administrative law judge acted within his discretion in giving more weight to Dr. Repsher's opinion, that claimant's impairment is not related to dust exposure in coal mine employment, on the grounds that is better documented and more well reasoned than Dr. James's opinion. Decision and Order on Remand at 7; Director's Exhibits 11, 12, 23; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Concerning Dr. Repsher's statements regarding the source of claimant's obstructive impairment, contrary to claimant's suggestion, Dr. Repsher did not exclude the possibility that coal dust exposure can cause an obstructive impairment. Dr. Repsher merely explained that in light of the fact that claimant's obstruction was reversible and his diffusing capacity was normal, claimant's impairment is consistent with asthma, a congenital condition that is not related

to coal dust exposure.[2] Director's Exhibit 23; Hearing Transcript at 38-47. The administrative law judge rationally concluded, therefore, that the newly submitted medical opinions of record do not support a finding of a material worsening in claimant's condition regarding the existence of pneumoconiosis under Section 718.202(a)(4).

Inasmuch as the administrative law judge permissibly determined that claimant did not establish a material worsening with respect to the existence of pneumoconiosis, one of the elements decided adversely to claimant in the prior denial, we affirm the administrative law judge's finding that claimant did not establish a material change in conditions pursuant to Section 725.309(d). *See Brandolino*, *supra*. Thus, we must also affirm the denial of benefits under Part 718.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is affirmed

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2]In light of our affirmance of the administrative law judge's finding under 20 C.F.R. §725.309(d) and the denial of benefits, we decline to address claimant's allegations regarding the administrative law judge's findings under 20 C.F.R. §718.204(c)(1)-(4), as any error contained therein is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

JAMES F. BROWN
Administrative Appeals Judge