BRB No. 05-0297 BLA

H.E.P.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED ENERGIES, INCORPORATED/ HARRISBURG COAL COMPANY	)	DATE ISSUED: 12/19/2007
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on
Party-in-Interest	)	RECONSIDERATION

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration With Suggestion of Reconsideration *En Banc* of the Board's Decision and Order in *Pearce v. United Energies, Inc./Harrisburg Coal Co.*, BRB No. 05-0297 BLA (Nov. 3, 2005)(unpub.). In its Decision and Order in *Pearce*, the Board affirmed the administrative law judge's denial of employer's requests to develop evidence on the latency and progressivity of pneumoconiosis and to depose Dr. Tuteur a second time. The Board also affirmed the administrative law judge's decision to exclude Dr. Rosenberg's deposition and the administrative law judge's finding that employer failed to demonstrate a mistake in a determination of fact in the finding that claimant established the existence of clinical pneumoconiosis. Lastly, the Board rejected employer's argument that claimant was precluded from receiving black lung benefits because he suffers from a pre-existing nonrespiratory condition that is totally disabling.

However, the Board vacated the administrative law judge's denial of employer's request to compel claimant to appear for a physical examination and remanded the case to the administrative law judge with instructions to reconsider whether claimant's refusal to appear for an examination was reasonable under 20 C.F.R. §718.402 (2000) and the holding of the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). The Board further held that the administrative law judge did not engage in the requisite *de novo* consideration of whether there was a mistake of fact in the prior finding that claimant established that he has legal pneumoconiosis and is totally disabled by it. The Board instructed the administrative law judge to reconsider these issues on remand.

In its motion for reconsideration, employer argues that the Board erred in affirming the administrative law judge's decision to bar employer from developing evidence regarding the validity of the definition of pneumoconiosis set forth in 20 C.F.R. §718.201. Employer asserts that because it presented a challenge to the validity of the regulation as applied, rather than on its face, it should have been permitted to develop and submit evidence regarding whether claimant's specific condition meets the definition of pneumoconiosis. Employer also contends that the Board did not properly apply the Seventh Circuit's material change standard, which requires that the newly submitted evidence show deterioration in the miner's condition. Employer further argues that the Board erred in holding that the administrative law judge was not required to credit a letter from employer setting forth the qualifications of its radiological experts. In addition, employer maintains that the Board erred in determining that the district director's failure to identify specifically the bases for the denial of claimant's first application for benefits deprived employer of its right to due process. Finally, employer contends that the Board should have held that the administrative law judge erred in awarding benefits when the

Department of Labor determined in 1989 that claimant was disabled due to a nonrespiratory condition.[1]

Claimant has responded and urges the Board to deny employer's motion. The Director, Office of Workers' Compensation Programs (the Director), has responded to employer's arguments concerning the Board's affirmance of the administrative law judge's evidentiary rulings and asserts that employer's allegations of error are without merit.

In the Decision and Order at issue, the Board affirmed the administrative law judge's evidentiary rulings as being both within his discretion and in accordance with the relevant case law, holding that because a party challenging the validity of a regulation is limited to relying upon evidence available to the agency at the time that the rule was promulgated, the administrative law judge acted rationally in denying employer's motions to obtain additional testimony from Drs. Tuteur and Rosenberg. *Pearce*, slip op. at 6, citing *Pittston Coal Group v. Sebben***,** 488 U.S. 105, 12 BLR 2-89 (1988); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Wisconsin Electric Power Co. v. Costle*, 715 F.2d 323 (7th Cir. 1983). The Board also held, with respect to Dr. Rosenberg's deposition, that the administrative law judge acted within his discretion in granting claimant's Motion to Strike, as the deposition testimony exceeded the scope of the administrative law judge's Order giving employer permission to depose Dr. Rosenberg. *Id*. at 7, citing *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987).

Employer argues on reconsideration that the Board erred in interpreting its arguments regarding the latency and progressivity of pneumoconiosis as a facial challenge to the validity of Section 718.201(c). Employer acknowledges that there are limits to the type of evidence that can be presented in support of a facial challenge, but asserts that because it was challenging how the regulation was applied in this case, it was entitled to develop additional evidence. The Director responds that the Board should find no merit in employer's argument, because employer's request to obtain additional evidence is premised upon employer's faulty understanding that it is now required by Section 718.201(c) to rebut a presumption that pneumoconiosis is latent and progressive. Claimant responds that employer is being disingenuous in stating that it is not

[1] Employer also requests that the Board publish its Decision and Order in this case because it sets forth the Board's interpretation and application of the holding in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). Because we do not find this to be a compelling reason to publish our Decision and Order, employer's request is denied.

challenging the validity of Section 718.201(c) on its face, but rather, as applied in this particular case.

The Board declines to alter the disposition of these issues set forth in *Pearce v. United Energies, Inc./Harrisburg Coal Co.*, BRB No. 05-0297 BLA (Nov. 3, 2005)(unpub.). The administrative law judge permitted employer to depose Dr. Rosenberg for the specific purpose of fully developing his written report. When employer sought to admit Dr. Rosenberg's deposition and the attached exhibits, however, the administrative law judge granted claimant's motion to strike because employer elicited testimony concerning the latency and progressivity of pneumoconiosis, thereby exceeding the scope of the Order granting employer's request. Order dated June 24, 2004 at 3-5. As the Board previously held, the administrative law judge's disposition of this issue was within the discretion granted to him in resolving procedural matters. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 153 (1989); *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986).

The Board also declines to disturb the holding that employer was not entitled to depose Dr. Tuteur and develop additional evidence as to the latency and progressivity of pneumoconiosis, as recognized in the amended version of Section 718.201. Regardless of the manner in which employer characterizes its arguments, it essentially sought to admit evidence that casts doubt upon the Department of Labor's conclusion that pneumoconiosis can be latent and progressive. The administrative law judge acted within his discretion in denying employer's requests to obtain and submit this evidence. *Clark*, 12 BLR at 1-153; *Morgan*, 8 BLR at 1-493.

Next, employer renews its argument that the Board must vacate the administrative law judge's finding that there was no mistake of fact in the prior decision that claimant established the existence of clinical pneumoconiosis at Section 718.202(a)(1), as the administrative law judge erred in declining to credit employer's description of the qualifications of Drs. Abramowitz, Wershba, Gogineni and Binns as set forth in a cover letter attached to their x-ray interpretations. Employer also reiterates its contention that the 1989 letter in which the district director notified claimant that his initial application for benefits, filed on October 1, 1988, was denied, set forth information precluding an award of benefits. Employer further maintains that because the basis for the district director's denial of claimant's initial application for benefits was unclear, it was deprived of the opportunity to defend against that claim.

In the Decision and Order at issue, the Board held that employer's description of the physicians' qualifications in a cover letter did not constitute evidence establishing their qualifications as Board-certified radiologists and B readers, and that the administrative law judge was not required to look outside the record to ascertain the physicians' radiological qualifications. *Pearce*, slip op. at 7-8. The Board further held

that the information contained in the district director's letter did not establish that claimant was totally disabled due to a respiratory impairment that was not related to pneumoconiosis. *Id*. at 8-9. The Board also noted that, even if employer's characterization of the letter is correct, an award of benefits is not precluded in this case based upon the Seventh Circuit's holding in *Shores*, that total disability due to pneumoconiosis is established where the miner suffers from several conditions, each of which is independently sufficient to render the miner totally disabled, as long as one of the conditions is related to dust exposure in coal mine employment. *Id*. at 9, citing *Shores*, 358 F.3d at 496, 23 BLR at 1-35-36.

The Board declines to alter the disposition of these issues, as employer has not set forth any compelling reason to do so. Employer has added nothing new to its argument regarding the physicians' radiological qualifications. Regarding its due process argument, employer has failed to allege with specificity how the district director's 1989 letter deprived it of its right to meaningfully defend the claim. In the letter, the district director checked the boxes indicating that claimant failed to establish any of the elements of entitlement. As the Board indicated, the fact that the district director set forth the qualifying results of a pulmonary function study submitted by claimant in the accompanying "Guide to Submitting Additional Evidence" does not establish that the claim was actually denied solely due to claimant's failure to establish total disability causation. *Pearce*, slip op. at 8-9**.** Lastly, contrary to employer's argument, the Seventh Circuit's holding in *Gulley v. Director, OWCP*, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005), that an award of benefits in a claim filed prior to January 19, 2001, is precluded if the miner has a pre-existing totally disabling nonrespiratory or nonpulmonary condition, does not apply in this case. There is no evidence in the record suggesting that claimant became totally disabled by a nonrespiratory or nonpulmonary condition prior to the award of benefits in 1996.

Accordingly, the Board denies the Motion for Reconsideration With Suggestion of Reconsideration *En Banc* submitted by employer and reaffirms the Decision and Order of November 3, 2005.[2] This case is remanded to the administrative law judge for further proceedings in accordance with that Decision and Order.

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

[2] As a majority of the permanent Board members has denied reconsideration, employer's Suggestion of Reconsideration *En Banc* is also denied. 20 C.F.R. §801.301(c).