BRB No. 04-0474 BLA

MICHAEL J. POPOVICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	
	)	DATE ISSUED: 02/28/2005
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensberg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5572) of Administrative Law Judge Michael P. Lesniak 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] Claimant filed a subsequent claim on December 13, 2001.[2] Director's Exhibit 4. The district director issued a Proposed Decision and Order denying benefits on December 10, 2002. Director's Exhibit 46. Claimant requested a hearing, which was held on September 23, 2003. In his Decision and Order, the administrative law judge first addressed evidentiary issues and decided to exclude from the record a medical report of Dr. Gress and an x-ray reading by Dr. Harron, which were proffered by claimant in support of his claim.[3] The administrative law judge then found that the new evidence failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial, and therefore that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

[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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant initially filed a claim for benefits on July 13, 1982, which was denied by the district director on the grounds that he failed to establish the existence of pneumoconiosis, that the disease arose out of coal mine employment or that he was totally disabled by pneumoconiosis. Director's Exhibit 1. Claimant filed a duplicate claim on November 10, 1988 but later requested that claim be withdrawn. Director's Exhibit 3. He next filed a duplicate claim on July 28, 1995, which was denied by Judge Lesniak on August 27, 1997 because claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.*

[3] As part of his affirmative case, claimant submitted two readings of a June 12, 2002 x-ray, and two medical reports from Drs. Gordon and Gress. Employer objected at the hearing to the admission of Dr. Gress's report because it included Dr. Gress's own reading of the June 12, 2002 x-ray, which reading exceeded the allowable number of x-ray readings permitted at 20 C.F.R. §725.414(a)(2)(i). In response to employer's objection, the administrative law judge accepted claimant's request to withdraw the x-ray reading by Dr. Gress. The administrative law judge held in his Decision and Order that Dr. Gress's report had to be excluded because Dr. Gress relied on his own reading of the June 12, 2002 x-ray in opining that claimant did not have pneumoconiosis. The administrative law judge cited 20 C.F.R. §725.414(a)(2)(i) in support of his ruling, and further found that claimant failed to establish good cause for admitting evidence in excess of that regulation. Decision and Order at 5.

On appeal, claimant argues that the administrative law judge erred in excluding, in its entirety, the medical report and the deposition testimony of Dr. Gress because the physician based his opinion in part on an x-ray reading in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer, responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, filed a response brief, arguing that while Dr. Gress's opinion was properly excluded with respect to the issue of the existence of pneumoconiosis, the administrative law judge improperly failed to consider Gress's opinion on the issue of total disability. The Director, however, maintains that the administrative law judge's error was harmless insofar as "the evidence submitted since the denial of claimant's prior application for benefits does not establish the existence of pneumoconiosis, and the overwhelming evidence of record developed in all of the previous claims fails to establish this condition." Director's Brief at 2. The Director thus argues that, even if Dr. Gress's opinion were given proper consideration on the issue of total disability, claimant's failure to establish the existence of pneumoconiosis precludes his entitlement to benefits. *Id.*

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).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's denial of benefits.

A. Evidentiary Limitations

Claimant asserts that the administrative law judge erred in excluding Dr. Gress's entire medical opinion and deposition testimony pursuant to 20 C.F.R. §725.414(a)(2)(i) simply because Dr. Gress's report included his own interpretation of a chest x-ray, which was inadmissible as an excess x-ray reading under the evidentiary limitations of that provision:

> The claimant shall be entitled to submit, in support of his affirmative case, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest x-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in the medical

report must be each admissible under this paragraph or paragraph (a)(4) of this section. 20 C.F.R. §725.414(a)(2)(i).

The Director also argues that the portion of Dr. Gress's opinion addressing the issue of total disability was not tainted by the inadmissible x-ray interpretation and should have been considered by the administrative law judge. Claimant's Exhibit 1; Director's Brief at 2. Thus, the Director maintains that Dr. Gress's opinion was relevant to the issue of whether claimant had a totally disabling respiratory or pulmonary impairment, and whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

Notwithstanding the Director's argument, we hold that error, if any, committed by the administrative law judge in excluding Dr. Gress's opinion is, at best, harmless error, s*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), based on the administrative law judge's determination, after consideration of the evidence in the prior claims and the current, subsequent claim, that claimant failed to establish the existence of pneumoconiosis. Director's Brief at 2.

B. Merits of Entitlement

The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Third Circuit has held, in a case involving the prior regulations, that in order to determine whether a material change in conditions has been established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the 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 his original Decision and Order dated August 25, 1997, the administrative law judge determined that the x-ray evidence was equally balanced with positive and negative readings by the most qualified Board-certified radiologists and B-readers. Decision and Order (August 25, 1997) at 11. Since he found that the x-ray evidence was in equipoise, he held that claimant failed to carry his burden of proof to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* There was no biopsy evidence for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)(2000) and claimant

was unable to avail himself of the presumptions to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) (2000). With respect to the medical opinion evidence, the administrative law judge weighed the opinions of Drs. Malhotra, Bush, Srivastava, Hanzel, Strother and Schaaf. The administrative law judge rejected the opinions of Drs. Malhotra and Hanzel at 20 C.F.R. §718.202(a)(4) (2000) because he found that they were not well-reasoned. Decision and Order (August 25, 1997) at 12. The administrative law judge assigned less weight to Dr. Schaaf's opinion, that claimant had pneumoconiosis, because Dr. Schaaf based his diagnosis in part on his own positive x-ray reading and claimant's symptom of shortness of breath. *Id*. The administrative law judge noted that Dr. Schaaf did not address the results of claimant's EKG testing and whether claimant's shortness of breath was attributable to his documented heart condition. In contrast, the administrative law judge credited the opinions of Drs. Bush and Strother, that claimant did not have pneumoconiosis, as better supported by the objective evidence. *Id*. He further noted that Drs. Bush and Strother were highly qualified Board-certified pulmonary physicians. *Id*. The administrative law judge thus found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000).

With respect to the instant duplicate claim, the administrative law judge considered ten readings of four new x-rays dated November 19, 2001, January 15, 2002, March 12, 2002, and June 12, 2002. Director's Exhibits 16, 17, 37, 38; Claimant's Exhibits 1, 3, 5; Employer's Exhibits C, D. The administrative law judge considered each x-ray individually and properly assigned weight to the x-ray interpretations based on the qualifications of the readers. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). He found the November 19, 2001 x-ray was negative for pneumoconiosis, permissibly crediting the negative reading by Dr. Pendergrass, a dually qualified Board-certified radiologist, over the positive reading by Dr Schaaf, who held neither of these qualifications. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 14. Of the January 15, 2002 x-ray, the administrative law judge noted that three dually qualified physicians provided negative readings compared to one positive reading by a dually qualified physician. Decision and Order at 14-15. With respect to the x-rays dated March 12, 2002 and June 12, 2002, the administrative law judge noted that each x-ray had only two readings, which included one positive and one negative reading by a dually qualified Board-certified radiologist and B-reader. Decision and Order at 15. The administrative law judge then concluded that "claimant failed to establish, by a preponderance of the evidence, the existence of pneumoconiosis pursuant to [20 C.F.R. §718.202(a)(1)]." Decision and Order at 15. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the new x-ray evidence at 20 C.F.R. §718.202(a)(1).

The administrative law judge also correctly found that since there is no new biopsy evidence of record, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 14. Claimant is also unable to avail himself of any of the presumptions to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 14, n.10.

In weighing the new medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the reports from Drs. Malhotra, Strother and Schaaf. Director's Exhibits 16, 17, 37. The administrative law judge once again found Dr. Malhotra's opinion to be insufficiently reasoned. S*ee Kertesz v. Crescent Hills Coal Co*., 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-148 (1989) (*en banc*). The administrative law judge, however, permissibly credited the opinion of Dr. Strother, that claimant did not suffer from pneumoconiosis, over the contrary opinion of Dr. Schaaff, that claimant had pneumoconiosis, because he found Dr. Strother's opinion to be better reasoned and better supported by the objective medical evidence as a whole. *See Clark*, 12 BLR at 1-148; Decision and Order at 16. The administrative law judge thus found that claimant failed to establish the existence of pneumoconiosis based on the new medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Because the administrative law judge acted within his discretion in weighing the conflicting medical opinion evidence for pneumoconiosis, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a)(4). Weighing all of the evidence together, the administrative law judge also properly found that claimant failed to establish the existence of pneumoconiosis based on the new evidence overall at 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order at 16.

Consequently, because claimant was unable to establish the existence of pneumoconiosis, a requisite element of entitlement, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we affirm as supported by substantial evidence, the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge