BRB No. 09-0439 BLA

PAUL VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: 02/17/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2005-BLA-00024) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) 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

has been before the Board previously.[1] The Board affirmed the administrative law judge's findings that claimant was a miner, that employer was the responsible operator, and that claimant established twenty-seven years and seven months of coal mine employment. Additionally, the Board affirmed the administrative law judge's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3), but vacated the administrative law judge's finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4). The Board also affirmed the administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii) and (iii), but vacated the administrative law judge's finding that total disability was not established at 20 C.F.R. §718.204(b)(2)(i) and (iv). The Board further held that the administrative law

[1] Claimant filed his first claim for benefits on February 12, 1997. Director's Exhibit 16. The claim was denied on July 13, 1999, by Administrative Law Judge Robert Hillyard, for failure to establish any element of entitlement. *Id*. Claimant did not appeal the denial. Claimant filed a second claim for benefits, now before us, on December 4, 2000. Director's Exhibit 1. The district director issued a Proposed Decision and Order on March 15, 2001, denying benefits on that claim. Director's Exhibit 6. Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges (the OALJ). On July 11, 2003, Administrative Law Judge Thomas F. Phalen, Jr. found that claimant established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and, therefore, found a material change in conditions established pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 16. Judge Phalen denied benefits, however, because he found that, although claimant established that he was totally disabled based on the evidence of record, he did not establish that his total disability was due to pneumoconiosis. *Id*. Claimant appealed. Pursuant to a motion to remand filed by the Director, Office of Workers' Compensation Programs (the Director), the Board vacated Judge Phalen's decision and remanded the case to the district director to provide claimant with a complete pulmonary evaluation. *P.V.* [*Varney*] *v. Kentucky Carbon Corp.*, BRB No. 03-0742 BLA (June 24, 2004)(unpub.). On remand, following a complete pulmonary evaluation of claimant, the case was returned to the OALJ and assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge) for consideration. The administrative law judge treated the case as a request for modification and denied benefits on March 27, 2007. Pursuant to claimant's appeal, the Board affirmed in part, and vacated in part, the administrative law judge's decision denying benefits and remanded the case for reconsideration. The Board set aside the administrative law judge's finding that pneumoconiosis and total disability were established at 20 C.F.R. §§718.202(a) and 718.203(b) and remanded the case for reconsideration of those issues. The Board also instructed the administrative law judge to treat the case as a duplicate claim pursuant to 20 C.F.R. §725.309(d)(2000), rather than a request for modification pursuant to 20 C.F.R. §725.309(d)(2000).

judge erred in considering the case as a request for modification pursuant to 20 C.F.R. §725.310 (2000), rather than as a duplicate claim pursuant to 20 C.F.R. §725.309 (2000).[2] Accordingly, the Board vacated the administrative law judge's decision denying benefits and remanded the case for reconsideration of the new evidence on pneumoconiosis and total disability pursuant to Section 725.309(d)(2000), and for review of all of the evidence on the merits of entitlement under 20 C.F.R. Part 718, if reached.

On remand, the administrative law judge found that legal pneumoconiosis[3] was established by the new medical opinion evidence at Section 718.202(a)(4),[4] and that, while total disability was not established based on the new pulmonary function study evidence at Section 718.204(b)(2)(i), it was established by the new medical opinion evidence at Section 718.204(b)(2)(iv). The administrative law judge, therefore, found that a material change in condition was established at 20 C.F.R. §725.309 (2000). On consideration of all of the evidence, the administrative law judge found that legal pneumoconiosis, total disability, and disability causation were established at 20 C.F.R. §§718.202(a) and 718.204(b), (c).[5] Benefits were, accordingly, awarded.

On appeal, employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence and in finding that it established legal pneumoconiosis at Section 718.202(a)(4), total disability at Section 718.204(b), and total disability due to pneumoconiosis (disability causation) at Section 718.204(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs, is participating in this appeal.

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[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. The 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.

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[4] The administrative law judge found that clinical pneumoconiosis was not established by the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

[5] The administrative law judge further noted that because a finding that pneumoconiosis arose out of coal mine employment was subsumed in his finding of legal pneumoconiosis, it was unnecessary to apply the presumption of causation at 20 C.F.R. §718.203(b). Decision and Order on Remand at 8; *see Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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, 1-112 (1989).

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)(2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that, pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994). Claimant "must also demonstrate that this change rests upon a qualitatively different evidentiary record" than was considered in the previous claim. *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479, 23 BLR 2-44, 2-63 (6th Cir. 2003)(Moore, J., concurring in the result). If claimant is successful, he has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence supports a finding of entitlement. *Flynn*, 353 F.3d at 480, 23 BLR at 2-66.

Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Therefore, claimant had to submit new, qualitatively different evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d) (2000); *see Ross*, 42 F.3d at 997, 19 BLR at 2-18.

After consideration of the arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law

[6] Because claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

judge's Decision and Order awarding benefits is rational, supported by substantial evidence and in accordance with law. It is, therefore, affirmed.

20 C.F.R. §718.202(a)(4)

In finding that the medical opinion evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge properly accorded the greatest weight to the opinion of Dr. Ammisetty, who diagnosed a respiratory impairment due to coal mine employment, because he found it better reasoned and more consistent with the regulations than the other opinions. *See* 65 Fed. Reg. 79940 (Dec. 20, 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Specifically, the administrative law judge noted that Dr. Ammisetty's opinion was based on his consideration of claimant's pulmonary function and blood gas testing, his observations of claimant, his physical examinations of claimant, and claimant's work and medical histories. Decision and Order on Remand at 7. In addition, the administrative law judge correctly noted that Dr. Ammisetty's opinion was supported by the opinion of Dr. Mettu, who found that claimant's respiratory impairment was caused by both smoking and coal mine employment. The administrative law judge properly rejected the contrary opinions of Drs. Dahhan, Tuteur and Jarboe, that claimant did not have legal pneumoconiosis, as they cited to "reversibility" on bronchodilation, as a reason to rule out legal pneumoconiosis as a cause of claimant's respiratory impairment. Decision and Order on Remand at 7. Further, the administrative law judge properly found that the opinions of Drs. Dahhan, Tuteur and Jarboe were faulty because they did not comment on whether "the remainder of [claimant's] impairment" was reversible and, unlike Drs. Ammisetty and Mettu, they did not comment on the impact that claimant's lengthy coal mine employment had on his respiratory condition. *See* 65 Fed. Reg. 79940 (Dec. 20, 2000); *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In conclusion, therefore, the administrative law judge properly found legal pneumoconiosis established at Section 718.202(a)(4), based on the better reasoned opinion of Dr. Ammisetty that was substantiated by the opinion of Dr. Mettu. Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence establishes legal pneumoconiosis at Section 718.202(a)(4), and that all of the medical opinion evidence of record establishes legal pneumoconiosis at Section 718.202(a)(4).

20 C.F.R. §718.204(b)(2)(iv)

Turning to the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge properly credited the opinion of Dr. Ammisetty over the opinions of Drs. Dahhan, Jarboe and Tuteur[7] because Dr. Ammisetty, who found

[7] The administrative law judge properly rejected the opinion of Dr. Fino, that claimant did not have a respiratory impairment, because it was based on invalid

claimant's disability to be "moderate," "took the fact that claimant performed very heavy work into consideration." Decision and Order on Remand at 9; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In crediting Dr. Ammisetty's opinion, the administrative law judge considered claimant's testimony that his usual coal mine employment was "heavy" work. Decision and Order on Remand at 9. The administrative law judge also properly concluded that Dr. Ammisetty was in a better position to have "a better understanding of the nature of [claimant's] past work[,]" Decision and Order on Remand at 9, based on the doctor's long history of treating claimant. *See* 20 C.F.R. §718.104(d); *Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006). In addition, the administrative law judge found that Drs. Dahhan, Jarboe and Tutuer diagnosed only a "mild" impairment, but such an assessment does not rule out total disability, depending on the exertional nature of claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Moreover, the administrative law judge properly found that the fact that Drs. Dahhan, Tuteur and Jarboe failed to discuss exactly what restrictions, if any, claimant's mild impairment placed on his ability to perform his usual coal mine employment undermined their credibility. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. In conclusion, therefore, the administrative law judge properly evaluated the new medical opinion evidence on the issue of total disability at Section 718.204(b)(2)(iv) and properly found that Dr. Ammisetty's opinion established total disability. Further, the administrative law judge considered the medical opinion evidence in light of the pulmonary function and blood gas study evidence at Section 718.204(b)(2)(i) and (ii) and properly concluded that total disability was established at Section 718.204(b) based on his consideration of all the relevant evidence. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987).

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pulmonary function studies. Decision and Order on Remand at 9; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The administrative law judge also properly rejected the opinion of Dr. Mettu regarding total disability, despite crediting his opinion on the issue of legal pneumoconiosis. The administrative law judge rejected Dr. Mettu's opinion that claimant "retains the respiratory functional capacity to return to his past work as an underground coal miner," Director's Exhibit 19; Decision and Order on Remand at 9, because Dr. Mettu did not recognize that claimant's usual coal mine employment was "heavy" and did not consider claimant's "current exertional capacity with the demands of his [usual coal mine employment]." Decision and Order on Remand at 9; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

20 C.F.R. §718.204(c)

Additionally, contrary to employer's argument, the administrative law judge properly found that disability causation was established at Section 718.204(c), based, primarily, on the opinion of Dr. Ammisetty. The administrative law judge properly credited the opinion of Dr. Ammisetty on disability causation because it was in keeping with the underlying premises that claimant had legal pneumoconiosis and was totally disabled, while the opinions of Drs. Dahhan, Fino, Jarboe and Tuteur were not. *See Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Accordingly, we affirm the administrative law judge's finding at Section 718.204(c).

20 C.F.R. §725.309(d)(2000)

Finally, the administrative law judge found that the new medical evidence submitted since the 1999 denial of claimant's first claim was sufficient to establish pneumoconiosis and total disability at Sections 718.202(a)(4) and 718.204(b)(2)(iv) and, was, therefore, sufficient to establish a material change in conditions at Section 725.309(d)(2000).[8] Weighing all of the evidence of record, and according greater weight to the more recent evidence as pneumoconiosis is a progressive disease, *see* 20 C.F.R. §718.201(c), the administrative law judge properly found that entitlement was established on the merits of the case and, therefore, properly awarded benefits on this duplicate claim. *See Ross*, 42 F.3d at 997-98, 19 BLR at 2-18.

[8] In making this finding, the administrative law judge noted the qualitative difference in the old and new evidence. The administrative law judge noted that there was a dispute as to whether any of the old pulmonary function study evidence was valid, while the new evidence did contain some valid pulmonary function study evidence. The administrative law judge also noted that the new evidence contained evidence of an obstructive respiratory impairment, while the old evidence did not. The administrative law judge, therefore, found that the new evidence showed that claimant's condition had "worsened." Decision and Order on Remand at 11; *see Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479, 23 BLR 2-44, 2-63 (6th Cir. 2003)(Moore, J., concurring in the result).

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

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