BRB No. 98-0697 BLA

HASEN M. PASTOVICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY)		
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits issued by Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Debra Henry, Belle Vernon, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM

Employer appeals from the Decision and Order Awarding Benefits (97-BLA-0573) of Administrative Law Judge Richard A. Morgan on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). A claimant becomes entitled to benefits under the Act by establishing that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by the disease. 30 U.S.C. §901; *Director, OWCP v. Siwiec*, 894 F.2d 635, 636, 13 BLR 2-259, 2-261 (3d Cir.

1990); *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 BLR 2-1, 2-5 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Claimant filed the instant claim for benefits under the Act on July 14 and September 22, 1995.[1] DX-1. This claim was administratively denied on January 29, 1996, and again on May 14, 1996. Pursuant to claimant's request, the matter was referred to the Office of Administrative Law Judges for a formal hearing which was held on October 21, 1997.

[1]Claimant initially filed for benefits on November 11, 1984. DX-36-1. This claim was administratively denied by the Office of Workers' Compensation Programs (OWCP) on May 9, 1985. DX-36 [DX-1-15]. Although claimant requested a formal hearing, he withdrew his claim and this matter was voluntarily dismissed. DX-36-30. As a result, the previous denial remained unchallenged. Because it was filed more than one year after the denial of the first claim, this second application for benefits constitutes a duplicate claim which must be denied unless claimant demonstrates a "material change in conditions." 20 C.F.R. §725.309(d); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 316, 20 BLR 2-76, 2-92 (3d Cir. 1995). In order to show a "material change," claimant must prove, on the basis of new evidence developed subsequent to the denial of the previous claim, at least one of the elements of entitlement previously adjudicated against him. *Swarrow*, 72 F.3d at 317, 20 BLR at 2-94. Claimant has met his burden in this case.

The administrative law judge credited claimant with at least 28 years of coal mine employment, and found that claimant suffers from a totally disabling pulmonary or respiratory impairment.[2] Decision and Order at 3, 33. He also determined that claimant established the existence of pneumoconiosis based on the record evidence as a whole,[3] Decision and Order at 31-32; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997); 20 C.F.R. § 718.202(a), that the disease arose out of claimant's coal mine employment, 20 C.F.R. § 718.203(b), and that claimant's coal workers' pneumoconiosis is a substantial contributor to the total disability. Decision and Order at 34; *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989); 20 C.F.R. § 718.204(b), (c). The administrative law judge awarded benefits and employer brought this appeal.

On appeal, employer contests the administrative law judge's finding that claimant established that he is afflicted with totally disabling pneumoconiosis derived from his coal mine employment. 20 C.F.R. § 718.202(a), 718.203(b) and 718.204(b), (c). Overall, employer's appeal challenges the administrative law judge's evaluation of the considerable medical opinion evidence proffered in defense to this claim. Claimant, by counsel, responds to employer's appeal urging that the Board affirm the Decision and Order of the administrative law judge in all respects. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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 applicable law, they are binding upon this Board and may not be disturbed. 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.

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[2]These findings are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal* Co., 6 BLR 1-710, 1-711 (1983).

[3]The administrative law judge found that claimant failed to prove the existence of pneumoconiosis on the basis of x-ray or biopsy evidence standing alone. 20 C.F.R. § 718.202(a)(1), (2); Decision and Order at 24-27. He recognized that this case arises within the territorial jurisdiction of the United States Court of Appeals for the Third Circuit, which requires that "all types of relevant evidence must be weighed together to determine whether the claimant suffers from [pneumoconiosis]." *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, BLR (3d Cir. 1997), and properly applied this standard.

359 (1965).

Employer raises a variety of arguments on appeal, but at bottom assails the Administrative Law Judge's decision to choose the opinions of claimant's experts, specifically the conclusions of Dr. Perper, CXs-1, 3, that Mr. Pastovich suffers totally disabling pulmonary or respiratory impairment arising out of coal mine employment, over the contrary views of highly qualified pulmonary experts who insist that, while claimant is disabled from a pulmonary or respiratory standpoint, his disease is completely unrelated to coal mine dust exposure and is entirely idiopathic in nature.

Upon consideration of the record as a whole, the arguments presented by counsel, and the decision and order of the administrative law judge, we conclude that the award of benefits is supported by substantial evidence and that the Administrative Law Judge did not commit reversible error in rendering his findings of fact and conclusions of law. We therefore affirm the Decision and Order awarding benefits.

We disagree with employer that the administrative law judge's reliance on the medical opinions of Dr. Perper is misplaced, and conclude that the opinions of Dr. Perper provide substantial evidence to support the administrative law judge's findings of pneumoconiosis and causation in this instance. On August 2, 1997, Dr. Perper provided a consultation report after reviewing claimant's medical records and opinions of other physicians in evidence, and concluded that claimant suffered from Desquamative Interstitial Pneumonitis (DIP), which he considered to be a variant of claimant's Pulmonary Interstitial Fibrosis (PIF). CX-1 at 13-19. He placed a singular reliance on the length of claimant's coal mine employment, in which claimant was exposed both to coal dust and asbestos, and stated that

> [claimant's] diagnosis severe interstitial pulmonary fibrosis is substantiated by the lung biopsy and supported by the clinical, radiological and laboratory findings ... [t]his process is reliably related to the occupational exposure to coal mine dust and to the occupational exposure to asbestos [and that a]s a result of this occupational pulmonary disease related to coal dust and asbestos exposure [claimant] is totally and permanently disabled.

CX-1 at 17. In a subsequent letter, dated September 10, 1997, Dr. Perper responded to criticism from employer's experts, particularly Drs. Naeye and Kleinerman, *see* EXs-6, 10, 11, to reiterate his conclusion that, while the biopsy and radiographic evidence did not show clinical pneumoconiosis, claimant's DIP variant of his interstitial disease arose out of his coal mine employment. CX-3.

In both crediting Dr. Perper's opinions and discounting the contrary opinions of record, the administrative law judge could properly criticize employer's experts for failing to account persuasively for the length of claimant's coal mine dust exposure in formulating their opinions that claimant's interstitial disease was in no way associated with coal mine employment.[4] *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 417 (6th Cir. 1997)(affirmance of administrative law judge's rejection of opinions which failed to discount persuasively the exposure effects of miner's length of coal mine employment). [5] Moreover, in choosing to defer primarily to the conclusions of Dr. Perper, the administrative law judge thoroughly considered all of the evidence of record, particularly the impressive qualifications of the pulmonologists arrayed in

[4]The administrative law judge specifically found that the opinions of employer's experts, particularly Drs. Kleinerman, Naeye and Renn, who hold that pneumoconiosis is not a progressive disease, were not "hostile" to the Act. Decision and Order at 30-31. Nevertheless, the administrative law judge emphasized that pneumoconiosis as defined in the Act has been held to be a progressive disease. *See e.g. Plesh v. Director, OWCP*, 71 F.3d 103, 108, 20 BLR 2-30, 2-40 (3d Cir. 1995). Further, the administrative law judge reiterated the broad definition of pneumoconiosis to find that claimant's pulmonary interstitial fibrosis constituted pneumoconiosis as that disease is broadly defined in the Act and the Secretary's regulations, given its attribution, at least in part, to occupational exposure dust and asbestos in claimant's coal mine employment, even though employer's experts opined to the contrary as a matter of science. Decision and Order at 31; *see generally Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 174, 19 BLR 2-265, 2-269 (4th Cir. 1995); *Mitchell v. OWCP*, 25 F.3d 500, 507 n.12, 18 BLR 2-257, 2-273 n.12 (7th Cir 1994); *Eagle v. Armco Inc.*, 943 F.2d 509, 511 n.2, 15 BLR 2-201, 2-203-04 n.2 (4th Cir. 1991); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 591 (7th Cir. 1985)(chronic obstructive pulmonary disease meets statutory definition whether or not technical pneumoconiosis).

[5]Employer's citation to *Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) to assert that the administrative law judge should not have assumed causation based on the length of a miner's coal mine employment, is inapposite. While the administrative law judge may not exceed his expertise and make this connection, as did the administrative law judge in *Hicks*, a medical expert may acknowledge an exposure history in rendering an opinion as to the etiology of both pneumoconiosis and total respiratory disability. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 417, 21 BLR 2-192, 2-199 (6th Cir. 1997).

defense of this claim, and thus discharged his obligation to assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

The administrative law judge is charged with the evaluation and weighing of the medical evidence and may draw appropriate inferences therefrom, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962)("fact-finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction"); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Because the administrative law judge's findings of pneumoconiosis and disability causation are neither patently unreasonable nor inherently incredible, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and, further, because the administrative law judge's findings of pneumoconiosis and both disability and disease causation are supported by substantial evidence based on the record as a whole with no reversible error, they are affirmed.[6] 20 C.F.R. §§ 718.202(a), 718.204(b).

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6]We recognize the impressive credentials of employer's experts, as well as their point by point rebuttal of the conclusions of Dr. Perper. *See* EXs-1 (Dr. Bush); 3, 10 (Naeye); 5, 12 (Fino); 6, 11 (Kleinerman); 7 (Morgan). These matters were adequately considered by the administrative law judge.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge