BRB No. 01-0387 BLA

ROBERT W. PAZICNI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LTV STEEL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND	)	
	)	
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 - Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

William J. Walls (Marshall, Dennehey, Warner, Coleman & Goggin), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (99-BLA-1057) of Administrative Law Judge Robert J. Lesnick on a duplicate claim[1] filed pursuant to the

[1] Claimant is Robert W. Pazicni, who filed his first application for benefits on November 22, 1988, which was finally denied on March 17, 1989. Director's Exhibit 33. The record contains no evidence demonstrating that claimant appealed this denial.

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).[2] Adjudicating this duplicate claim pursuant to 20 C.F.R. Part 718 (2000), the administrative law judge considered all of the newly submitted evidence since the denial of the previous claim and credited claimant with thirteen years of qualifying coal mine employment. Next, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Therefore, the administrative law judge determined that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Consequently, the administrative law judge considered all of the evidence of record and determined that claimant established pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred by finding that claimant established the existence of pneumoconiosis and total disability, and therefore,

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Subsequently, claimant filed a second application for benefits on January 19, 1999, which is the subject of the appeal before us. Director's Exhibit 1.

[2] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the Director, Office of Workers' Compensation Programs, regarding the impact of the challenged regulations, *i.e.*, that the regulation at 20 C.F.R. §725.309 concerning material change is prospective only, *see* 20 C.F.R. §725.2(c), and that the revised regulations at 20 C.F.R. §§718.201(a), (c) and 718.204 will not affect the outcome of this case as they merely codify existing case law.

established a material change in conditions. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not respond to the arguments on the merits, and contends that the revised regulations will not affect the outcome of the case.[3]

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 725.309 (2000), the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, articulated the standard for adjudicating duplicate claims, holding that to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). In this case, the denial of the previous claim was based on claimant's failure to establish either the existence of pneumoconiosis or total respiratory disability. *See* Director's Exhibit 33.

Relevant to Section 725.309, employer contends that the administrative law judge applied an improper standard in determining whether claimant established a material change in conditions. Employer asserts that in cases where the preponderance of the newly submitted evidence fails to establish the existence of pneumoconiosis, a requisite element of entitlement, the administrative law judge is consequently precluded from determining whether the miner has proven at least one of the other elements of entitlement previously adjudicated against him, *i.e.*, whether pneumoconiosis arose out of coal mine employment,

[3] We affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2), (a)(3), 718.203(b), 718.204(b), and 718.204(c)(1)-(3) (2000) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10-13, 14-15.

whether the miner was totally disabled, and whether total disability is due to pneumoconiosis. Contrary to employer's contention, however, the Third Circuit specifically held, "the [administrative law judge] must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven *at least one of the elements of entitlement previously adjudicated against him*. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change." *Swarrow*, 72 F.3d at 317, 20 BLR at 2-94 [emphasis added]. Subsequently, the administrative law judge "must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits." *Swarrow*, *supra*; *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-20 (6th Cir. 1994). Therefore, in a case where the newly submitted evidence fails to establish the existence of pneumoconiosis, a claimant may demonstrate the threshold determination of a material change in conditions by establishing any other element of entitlement that was previously adjudicated against him. In the case at bar, however, the administrative law judge properly determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, *see* discussion *infra*, and therefore, properly found that claimant demonstrated, as a matter of law, a material change in condition. *See Swarrow*, *supra*; *Ross*, *supra*; Decision and Order at 11.

Relevant to Section 718.202(a)(1), employer argues that the administrative law judge erred by finding that the preponderance of the x-ray evidence established the existence of pneumoconiosis because there was only one newly submitted positive x-ray interpretation of a film dated December 17, 1998. Contrary to employer's contention, however, the newly submitted evidence consists of four positive interpretations of two x-ray films dated March 20, 1989 and December 17, 1998 by three Board-certified radiologists who are also B-readers and one A-reader and three negative readings of films dated February 4, 1999 and May 27, 1999 by one Board-certified radiologist who is also B-reader and two B-readers. Director's Exhibits 18, 19, 29, 30, 33. The administrative law judge properly considered the qualitative and quantitative nature of the newly submitted x-ray evidence by assessing the readings rendered by the physicians with demonstrated radiological expertise and, within a rational exercise of his discretion, accorded determinative weight to the positive x-ray readings. Consequently, the administrative law judge properly accorded probative weight to the positive interpretations by the radiologists with dual qualifications, and hence, concluded that the preponderance of the newly submitted evidence established the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). Because the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we affirm the administrative law judge's Section 718.202(a)(1) (2000) determination. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 11.

Relevant to Section 718.202(a)(4), employer avers that the administrative law judge

erred by failing to credit the opinions of Drs. Cho and Fino, who opined that claimant does not suffer from pneumoconiosis, over that of Dr. Levine, who diagnosed the presence of pneumoconiosis. Contrary to employer's contention, however, the newly submitted medical opinion evidence contains the opinions of four physicians who diagnosed the existence of pneumoconiosis, Drs. Levine, Silverman, Bassali, and Mathur. Director's Exhibits 29, 30, 33. The administrative law judge permissibly accorded less weight to Dr. Fino's opinion because Dr. Fino's opinion that claimant does not suffer from any respiratory impairment was contrary to the weight of the evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 12. Likewise, the administrative law judge reasonably found Dr. Cho's opinion less persuasive because Dr. Cho's report contained limited information and his qualifications were not contained in the record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Decision and Order at 12. Hence, the administrative law judge found the opinions of Drs. Levine, Bassali, Mathur,[4] and Silverman entitled to determinative weight because their opinions were better reasoned, documented, and supported by the objective medical evidence. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Clark*, *supra*; *Lucostic*, *supra*; Decision and Order at 12. Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established by medical opinion evidence. 20 C.F.R. §718.202(a)(4).

Relevant to Section 718.204, employer asserts that the administrative law judge erroneously found that the newly submitted evidence is sufficient to demonstrate total respiratory disability inasmuch as Drs. Cho and Fino opined that claimant is not totally disabled. Contrary to employer's contention, however, Dr. Cho did not render an opinion as to whether claimant is totally disabled. Director's Exhibit 15. The administrative law judge,

[4] The administrative law judge found that Drs. Mathur and Bassali based their pneumoconiosis diagnoses on their interpretations of claimant's chest x-rays, which is consistent with the administrative law judge's determination that the x-ray evidence established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 12; Director's Exhibit 29.

within a rational exercise of his discretion, accorded dispositive weight to the opinions of Drs. Levine and Silverman, who each opined that claimant is totally and permanently disabled due to pneumoconiosis, because these physicians' opinions were better supported by the objective medical evidence. *See King, supra*; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984). Inasmuch as the determination as to whether a physician's report is sufficiently documented and reasoned is a credibility matter, and as such, is for the administrative law judge to determine, *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983), we affirm the administrative law judge's finding that claimant established total disability by medical opinion evidence. 20 C.F.R. §718.204.

Because the administrative law judge properly considered all of the newly submitted evidence of record to determine that claimant established the existence of pneumoconiosis and total disability, elements that were previously adjudicated against claimant, we affirm the administrative law judge's finding that claimant, therefore, established a material change in conditions, the threshold requirement for consideration of all of the evidence of record. *See* 20 C.F.R. §725.309 (2000); *Swarrow, supra*. Since employer has not otherwise challenged the administrative law judge's weighing of the medical evidence of record in its entirety or the credibility determinations on the merits of entitlement, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis, and therefore, is entitled to benefits. *See Trent, supra*; *Perry, supra*.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge