BRB No. 93-2170 BLA

WILLIAM SPANGLER )
)
Claimant-Respondent )
)
v. )
)
A & E COAL COMPANY )
)
and )
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
Employer/Carrier- )
Respondents )
) )
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest )DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Richard A. Counts (Appalachian Research & Defense Fund of Kentucky, Inc.), Hazard, Kentucky, for claimant.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (91-BLA-2573) of Administrative

Law Judge J. Michael O'Neill awarding benefits 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 involves a duplicate claim. The administrative law judge considered the claim pursuant to 20 C.F.R. Part 718 and determined that claimant[1] established at least 10 years of qualifying coal mine employment, that he is totally disabled due to pneumoconiosis which arose from his coal mine employment pursuant 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(c)(1) and (4), and that he established a material change in conditions pursuant to 20 C.F.R. §725.309(c) and (d). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions pursuant to Section 725.309, the existence of pneumoconiosis and totally disability due to pneumoconiosis pursuant to Sections 718.202(a)(1) and 718.204. Claimant responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not responded to this appeal.

[1]Claimant is William Spangler who filed the present claim, his fifth, on January 29, 1990. The four previous claims were all denied, the last denial being one based on abandonment of claim dated February 11, 1988. Director's Exhibit 34. Claimant did not establish the existence of pneumoconiosis or the existence of a totally disabling respiratory condition in any of his prior claims. Director's Exhibit 34.

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. 359 (1965).

Employer first contends that the doctrine of *res judicata* prohibits the administrative law judge from finding that claimant established a material change in conditions pursuant to Section 725.309. This contention is without merit, however, because the doctrine of *res judicata* generally has no application in the context of a duplicate claim, as the purpose of Section 725.309(d) is to provide relief from the principles of *res judicata* to a miner whose condition worsens over time. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993).

Employer further contends that the evidence is legally insufficient to establish either pneumoconiosis, total pulmonary disability, or a causal relationship between the two and, thus, is insufficient to establish a material change in conditions pursuant Section 725.309. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Sixth Circuit, the jurisdiction within which this claim arises, issued *Ross*, *supra*, in which it held that in order to assess whether a material change in conditions is established, 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. Then 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. *See Ross*, 42 F.3d at 997-998, 19 BLR at 2-20.

In the present claim, the administrative law judge considered the newly submitted evidence pursuant to 20 C.F.R. Part 718 and found that claimant established that he is totally disabled due to pneumoconiosis which arose from his coal mine employment, and that, as a result, he established a material change in conditions pursuant to Section 725.309. Decision and Order at 5-9. Employer contends that these findings are in error.

Pursuant to Section 718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence and found that the true doubt rule is applicable and gave the benefit of the doubt to claimant. Decision and Order at 5. However, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court, in *Director, OWCP v. Greenwich Collieries [Ondecko]*, U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub. nom.*, *Greenwich v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3rd Cir. 1993), held that the true doubt rule may no longer be applied in the weighing of the evidence to assist claimant in

meeting his burden of proof. Thus, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand the case for the administrative law judge to weigh the evidence of record pursuant to Section 718.202(a).

Employer next contends that the administrative law judge erred substituting his opinion for that of Dr. Kraman on the validity of the pulmonary function study and in failing to weigh the significant evidence tending to show other causes affecting the pulmonary function study results. Employer's Brief at 15-16. Pursuant to Section 718.204(c)(1), the administrative law judge properly found that the newly submitted pulmonary function study yielded qualifying results and permissibly found it to be in substantial compliance with the quality standards as set forth in §718.103, in spite of Dr. Kraman's invalidation of the study due to a insufficient number of tracings. Decision and Order at 6-7; Director's Exhibits 8, 9; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). Further, contrary to employer's contentions that the administrative law judge failed to weigh Dr. Williams' statement that claimant was "weak o (sic) apathetic", the administrative law judge considered the physician's statement and noted that the physician also listed claimant's cooperation and understanding as "good". Decision and Order at 6; Director's Exhibit 8. Employer also states that the administrative law judge should have considered the superior qualifications of Dr. Kraman. Employer's Brief at 16. However, the administrative law judge is not required to defer to the physician with superior qualifications. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR

1-149 (1989). Thus, we reject employer's contentions and affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).[2]

Employer next contends that the erred in finding that claimant establish total respiratory disability pursuant to Section 718.204(c)(4). This contention of error is without merit, however, as the administrative law judge stated that "Dr. Williams failed to specify on the form report the severity of the claimant's chronic respiratory or pulmonary impairment." Decision and Order at 8. As the administrative law judge did not find that claimant established total respiratory disability pursuant to Section 718.204(c)(4), we reject employer's contention of error.

Employer next contends that the administrative law judge failed to weigh all of the evidence of record pursuant to *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). However, after making his findings pursuant to Section 718.204(c)(1)-(4), the administrative law judge stated that "[i]n accordance with the *Shedlock* case, *supra*, I have weighed all of the evidence, including the mixed x-ray readings, the nonqualifying and qualifying pulmonary function results, the nonqualifying arterial blood gas studies, and the various medical opinions of record." Decision and Order at 8. The administrative law judge next permissibly stated that "[i]n view of the

[2]We affirm the administrative law judge's findings pursuant to Section 718.204(c)(2) and (3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

progressive nature of pneumoconiosis, I accord the most weight to the recent x-ray, pulmonary function studies, arterial blood gas test, and medical opinion of Dr. Williams." Decision and Order at 9; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge then permissibly stated that "[a]lthough the arterial blood gas test at rest is nonqualifying, this study measures a different functional condition than a pulmonary function study. Accordingly, the mere fact that the resting blood gases are nonqualifying does not preclude a finding of total disability based upon the pulmonary function studies." Decision and Order at 9; *see Tussey v. Island Creek Coal Co.*, 17 BLR 2-16 (1993). Thus, employer's contention that the administrative law judge did not weigh the contrary probative evidence is without merit. Thus, we affirm the administrative law judge's finding that claimant established total respiratory disability pursuant to Section 718.204. Further, as claimant has established total respiratory disability, we affirm the administrative law judge's finding that claimant established a material change in conditions pursuant to Section 725.309.

Employer next contends that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b). Pursuant to Section 718.204(b), the administrative law judge permissibly that Dr. Williams' statement that "I cannot exclude exposure to coal dust as having minimal contribution to his pulmonary emphysema and chronic obstructive pulmonary disease", is sufficient to establish total disability due to pneumoconiosis

pursuant to the holding of the United States Court of Appeals for the Sixth Circuits in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Decision and Order at 9; Director's Exhibit 10. However, in *Adams*, the Court states that "in order to qualify for benefits under Part 718, a miner, who is found to suffer from pneumoconiosis under Section 718.202, must affirmatively establish only that his totally disabling respiratory impairment...was due `at least in part' to his pneumoconiosis." *See Adams*, 886 F.2d at 818, 13 BLR at 2-63. Thus, as we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we also vacate the administrative law judge's finding pursuant to Section 718.204(b). If, on remand, the administrative law judge finds that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge must again consider Section 718.204(b).

Finally, employer contends that the administrative law judge erred in finding that the onset date of total disability is 1990 because claimant became totally disabled due to neurological and orthopedic causes since 1982. However, as we vacate the award of benefits, we need not address employer's onset argument.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge