BRB No. 00-0970 BLA

JAMES K. ROBERTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BERRY MOUNTAIN MINING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	
	)	
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

John Bergquist (Parsons, Lee & Juliano, P.C.), Birmingham, Alabama, for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and DOLDER, Administrative Appeals Judges, and

NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (99-BLA-1153) of Administrative Law Judge Gerald M. Tierney awarding benefits in a duplicate claim[1] 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).[2] The administrative law judge credited claimant with ten and one-half years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). Consequently, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4) (2000) and 718.203(b) (2000). Further, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[4] Accordingly, the administrative law judge awarded benefits.

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[1]Claimant's initial claim was filed on September 12, 1994. Director's Exhibit 26. This claim was denied by the Department of Labor on March 27, 1995 and December 5, 1995 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed on June 26, 1998. 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.

[3]The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000). Employer additionally challenges the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c) (2000). Lastly, employer challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Claimant responds to employer's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has declined to respond to employer's appeal.[5]

[5]Inasmuch as the administrative law judge's length of coal mine employment finding, and his finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(4), are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on April 18, 2001, to which claimant and the Director have responded. Employer has not responded to the Board's order.[6] In a brief dated May 14, 2001, claimant indicated that the revisions to the regulations which are the subject of litigation would not affect the outcome of the case. In a brief dated May 8, 2001, the Director indicated that it is his position that the instant case would not be affected by application of the litigated regulations. The Director, therefore, indicated that the Board could decide the instant case. Based on the briefs submitted by claimant and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contention that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). The administrative law judge correctly stated, "[i]n his previous claim, [c]laimant failed to prove any of the elements of entitlement." Decision and Order at 3; Director's Exhibit 26. The instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has not declared a legal standard to apply in determining if a claimant has established a material change in conditions. The Board has held, in cases arising in circuits where the United States Court of Appeals has not yet addressed the standard applicable under Section 725.309 (2000), that it adopts the Director's position that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. *See Allen v.*

[6]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's order issued on April 18, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Mead Corp., 22 BLR 1-61 (2000).

In finding the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000), the administrative law judge considered the only new relevant report of record. In a surgical pathology report dated June 3, 1998, Dr. Parker opined that the lung tissue from the left upper lobe has both gross and microscopic features of simple coal workers' pneumoconiosis. Director's Exhibit 5. The administrative law judge stated that "[the] biopsy evidence [by Dr. Parker]...establishes the existence of simple coal workers' pneumoconiosis." Decision and Order at 3. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted biopsy evidence is sufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Further, inasmuch as the administrative law judge found the newly submitted biopsy evidence of record sufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(2), we affirm the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *See Allen, supra*.

Next, we reject employer's contention that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000). The record contains the relevant pathology reports of Drs. DeVos, Naeye and Parker. In a report dated June 26, 1995, Dr. DeVos opined that claimant does not suffer from simple pneumoconiosis. Director's Exhibit 26. Similarly, in a report dated September 8, 1995, Dr. Naeye opined that claimant does not suffer from coal workers' pneumoconiosis. *Id*. However, as previously noted, Dr. Parker, in a surgical pathology report dated June 3, 1998, opined that the lung tissue from the left upper lobe has both gross and microscopic features of simple coal workers' pneumoconiosis. Director's Exhibit 5. The administrative law judge properly accorded greater weight to the opinion of Dr. Parker because it is the most recent evidence of record.[7] *See Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the biopsy evidence is sufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2).

[7]The administrative law judge observed that "the more recent 1998 biopsy evidence [by Dr. Parker] establishes the existence of disease." Decision and Order at 3. The administrative law judge stated, "[a]s pneumoconiosis is a progressive disease, I find the more recent evidence more probative." *Id*.

Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c) (2000). Specifically, employer asserts that the administrative law judge erred in weighing the contrary probative evidence. The administrative law judge provided separate and distinct findings with respect to the various types of relevant evidence concerning the issue of total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii), (iii), (iv). The administrative law judge also weighed all the evidence, like and unlike, together in accordance with *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987), and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). The administrative law judge stated, "I do not find the fact that [c]laimant does not establish total disability by arterial blood gas study evidence or by evidence of cor pulmonale with right-sided congestive heart failure at §718.204(c)(2) and (c)(3) to be detrimental to his claim." Decision and Order at 6. To the contrary, the administrative law judge stated, "I find physician opinion evidence at §718.204(c)(4) to be the more reliable indicator of a miner's respiratory or pulmonary condition as it is based on a totality of factors - not just whether one type of test results meet a numeric criteria or a specific finding, cor pulmonale with right-sided congestive heart failure, is present." *Id*. The administrative law judge also stated, "I consider the more recent evidence more probative as it reflects [c]laimant's current pulmonary status." *Id*. The administrative law judge observed that "the June 1995 and the latest August 1998 pulmonary function study results support the January 12, 2000 opinion of [c]laimant's treating pulmonary physician that [c]laimant suffers from a respiratory or pulmonary condition that is totally disabling." *Id*. Thus, we reject employer's assertion that the administrative law judge erred in weighing the contrary probative evidence. Moreover, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability. *See* 20 C.F.R. §718.204(b); *Fields, supra*; *Rafferty, supra*; *Shedlock, supra*.

In addition, we reject employer's contention that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Citing *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990), the administrative law judge stated, "[r]elying on Dr. Patton's opinion, I find that [c]laimant has established, by the preponderance of the evidence, that pneumoconiosis is a substantial contributor to his totally disabling respiratory or pulmonary condition." Decision and Order at 6-7. In *Lollar*, the Eleventh Circuit held that in order to qualify for benefits under 20 C.F.R. §718.204 (2000), a claimant must establish that his pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disability.[8] Further, in *Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95

[8]The revisions to the regulation with regard to disability causation are consistent with the holding by the United States Court of Appeals for the Eleventh Circuit in *Lollar v.*

F.3d 1079, 20 BLR 2-325 (11th Cir. 1996), the Eleventh Circuit clarified its holding in *Lollar* with regard to the substantial contributing cause standard by explaining that a conclusion that a contributing cause played more than an infinitesimal or *de minimis* part does not mean that the contributing cause was substantial.

Alabama By-Products Corp., 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). *See* 20 C.F.R. §718.204(c).

In the instant case, the administrative law judge considered the relevant opinions of Drs. Goldstein and Patton.[9] Whereas Dr. Goldstein opined that claimant's moderate impairment is due to cigarette smoking, Director's Exhibit 9, Dr. Patton opined that claimant's pulmonary disability is due at least in part to pneumoconiosis, Claimant's Exhibit 1. The administrative law judge properly accorded greater weight to the opinion of Dr. Patton than to the contrary opinion of Dr. Goldstein because he found Dr. Patton's opinion to be better reasoned and documented.[10] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to the opinion of Dr. Patton because of Dr. Patton's status as claimant's treating physician.[11] *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(b); *Marcum, supra*; *Lollar, supra*.

[9]The administrative law judge stated, "[a]s the existence of pneumoconiosis was not proved until 1998, the earlier evidence at DX 26 is not relevant to this discussion." Decision and Order at 6.

[10]The administrative law judge stated that "in his latest 1998 report, Dr. Goldstein acknowledged the biopsy evidence of pneumoconiosis." Decision and Order at 6. However, the administrative law judge also stated that "in [Dr. Goldstein's] opinion [c]laimant's pulmonary defect is not related to pneumoconiosis." *Id*. The administrative law judge observed that "[Dr. Goldstein] found [c]laimant's chronic obstructive pulmonary disease and lung cancer, caused by smoking, 100% responsible for [c]laimant's pulmonary impairment." *Id*. In contrast, the administrative law judge stated that "in his January 12, 2000 letter, Dr. Patton opined that at least a major portion of [c]laimant's pulmonary disability has been at least in part caused by pneumoconiosis." *Id*. The administrative law judge observed that "Dr. Patton's rationale included the biopsy evidence of pneumoconiosis and that [c]laimant's dyspnea has been disproportionate to the amount of lung tissue removed for the bronchogenic carcinoma." *Id*.

[11]The administrative law judge stated, "as [c]laimant's treating physician since 1992, I find Dr. Patton in the best position to assess the origin of [c]laimant's pulmonary disability." Decision and Order at 6. The administrative law judge observed that "Dr. Patton's treatment records at DX 26 indicate that he was aware of [c]laimant's long term, heavy smoking history." *Id*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge