BRB No. 00-0986 BLA

RICHARD D. KUNSELMAN Claimant-Respondent v. CANTERRA COAL COMPANY/ CANTERBURY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Second Remand - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Debra L. Henry (United Mine Workers of America), Belle Vernon, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand - Awarding Benefits (95-BLA-1271) of Administrative Law Judge Gerald M. Tierney 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).[1] The instant case, involving a duplicate claim filed on March 1, 1994, is before the Board for the third time. In the initial decision, the administrative law judge credited claimant with twenty-three years of coal mine employment, found that the newly submitted evidence established a basis for modification, and found, considering the claim on the merits, that claimant established the existence of pneumoconiosis arising from coal mine employment and total disability due to pneumoconiosis. Accordingly, benefits were awarded. Employer appealed, and in *Kunselman v. Canterra Coal Co.*, BRB No. 97-0227 (Oct. 23, 1997)(unpub.), the Board affirmed the finding of total disability as unchallenged on appeal, but vacated the administrative law judge's findings at Sections 718.202(a), 718.203(b) and 718.204(b)(2000) and remanded the case for the administrative law judge to address whether the evidence was sufficient to establish a material change in conditions in accordance with the standard set forth by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge was also directed to consider whether claimant established the existence of pneumoconiosis in accordance with the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). On remand, the administrative law judge found the evidence sufficient to establish a material change in conditions and further found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Benefits were again awarded. Employer appealed, and in *Kunselman v. Canterra Coal Co.*, BRB No. 98-1339 BLA (Feb. 28, 2000)(unpub.), the Board held that the administrative law judge failed to follow the Board's instruction to examine all of the newly submitted evidence, favorable and unfavorable, in determining whether a material change in conditions had been established pursuant to *Swarrow, supra*. Additionally, although the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis, it vacated the administrative law judge's finding that the medical opinion evidence established the existence of

[1] 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.

pneumoconiosis and remanded the case for the administrative law judge to weigh the x-ray and medical opinion evidence together in determining whether the evidence was sufficient to establish the existence of pneumoconiosis per *Williams*, *supra*. The Board also vacated the administrative law judge's findings at Sections 718.203(b) and 718.204(b)(2000) and remanded the case for further findings thereunder. On remand, the administrative law judge again found the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis established. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in failing to comply with the Board's remand instructions by rendering new findings on material change and erred in his weighing of the medical reports on the merits. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not responded.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United 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 claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association 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 20, 2001, to which all the parties have responded, asserting that the regulations at issue in the lawsuit will not affect the outcome of this case. Based on the responses submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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 the administrative law judge erred in failing to follow the Board's instructions in finding a material change in conditions established on remand. We disagree. Contrary to employer's contention, the administrative law judge weighed the newly submitted evidence and found that claimant established not only total disability, but also the existence of pneumoconiosis at Section 718.202(a), which he had failed to establish previously. As claimant needs to establish only one element of entitlement previously found against him, the administrative law judge properly found a material change in conditions established and properly reviewed the claim on the merits. *Swarrow*, *supra*; Decision and Order on Second Remand at 4, n.4. We further reject employer's contention that the

administrative law judge erred in failing to provide the parties with an opportunity to respond to a change in the law, as the Board addressed this argument in its previous Decision and Order. *See Kunselman v. Canterra Coal Co.*, BRB No. 98-1339 BLA (Feb. 28, 2000)(unpub.); *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Accordingly, we affirm the administrative law judge's finding that claimant established a material change in conditions.

Employer next contends that the administrative law judge erred in his weighing of the medical opinion evidence. Specifically, employer contends that the administrative law judge mischaracterized Dr. Pickerill's opinion by finding it equivocal simply because Dr. Pickerill could not diagnose the existence of coal workers' pneumoconiosis with a reasonable degree of medical certainty nor rule out the possibility of its existence.

In according less weight to Dr. Pickerill's opinion, the administrative law judge found that it was equivocal because Dr. Pickerill testified, in pertinent part, that while he was unable to find the type of opacity associated with coal dust exposure, he nonetheless could not exclude the possibility that the opacities seen were related to coal dust exposure. Employer's Exhibits 1, 3. Based on this testimony, the administrative law judge found that Dr. Pickerill's opinion did not preclude a finding of coal workers' pneumoconiosis. Decision and Order on Second Remand at 6. This was rational. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-97 (1995); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77, 1-81 (1990).

Employer next contends that the administrative law judge erred in discrediting the opinions of Drs. Pickerill, Laman, Fino and Branscomb because they were based on an inflated history of asbestos exposure. Rather, employer contends that the opinions of these physicians were entirely consistent with the administrative law judge's revised findings on asbestos exposure. Employer also contends that the administrative law judge erred in substituting his opinion for the experts' opinions on the significance of claimant's asbestos exposure.

In considering the evidence on claimant's exposure to asbestos, the administrative law judge found, based on claimant's testimony, Hearing Transcript 18-19, 31-33 and the other evidence of record, that claimant had limited exposure to asbestos compared to a coal mine employment of at least twenty-three years. In addition to finding that the opinions of Drs. Pickerill, Laman, Fino and Branscomb were less credible because they were based, in part, on an inflated history of asbestos exposure, the administrative law judge also found that, despite their impressive credentials and their attempts to explain that the opacities seen on claimant's x-rays were not caused by coal workers' pneumoconiosis or coal dust exposure, the opinions of Drs. Pickerill, Laman, Fino and Branscomb were entitled to less weight than the opinions of Drs. Levine, Thomas and Bizovsky because the latter opinions were more consistent with claimant's histories of coal mine employment, asbestos exposure, cigarette

smoking and the objective evidence of record. This was rational. Decision and Order on Second Remand at 6-8; Employer's Exhibits 1, 2, 4, 5, 9, 11, 14, 15, 16; Claimant's Exhibit 1; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Next, employer contends that the administrative law judge erred in finding claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). In finding claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment, the administrative law judge reiterated his finding that the opinions of Drs. Levine, Thames and Bizovsky were more credible for the reasons previously given than the opinions of Drs. Pickerill, Laman, Fino and Branscomb. The administrative law judge further noted that, based on the physicians' opinions, claimant had established not only the existence of clinical pneumoconiosis but legal pneumoconiosis, as well, *i.e.*, pneumoconiosis as defined by the Act (a respiratory impairment arising out of coal mine employment). 20 C.F.R. §718.201. Thus, considering the evidence as a whole, the administrative law judge concluded that claimant was entitled to the presumption that his pneumoconiosis arose out of his more than ten years of coal mine employment, and that employer had not rebutted this presumption. 20 C.F.R. §718.203(b).

Finally, employer contends that the administrative law judge's crediting of the opinions of Drs. Levine, Bizousky and Thames, notwithstanding their lack of expertise, was irrational and that the reasons given by the administrative law judge for crediting their opinions were impermissible. Contrary to employer's argument, however, the credentials of a physician are merely one factor relevant in weighing his opinion and the administrative law judge is not required to accord greater weight to the opinion of a physician based on his superior credentials. *See generally Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Additionally, contrary to claimant's argument, the administrative law judge may consider factors such as an accurate knowledge of claimant's work and smoking histories in determining whether a physician's opinion is reasoned. *Hutchens, supra*; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Stark, supra*. Also, contrary to employer's argument, pneumoconiosis has been recognized as a progressive disease, *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), and that factor may be considered in evaluating the credibility of the medical opinion evidence. We therefore affirm the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4). Moreover, pursuant to *Williams, supra*, the administrative law judge properly weighed all the evidence at Section 718.202(a)

together and found that claimant established the existence of pneumoconiosis.[2] Additionally, we affirm the administrative law judge's weighing of the medical evidence on the issue of disability causation on the same grounds, and therefore affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2] In the Board's most recent Decision and Order, the Board affirmed the administrative law judge's finding that the record lacks any evidence of biopsy or autopsy evidence at 20 C.F.R. §718.202(a)(2)(2000), and that claimant cannot avail himself to any presumptions found at 20 C.F.R. §718.202(a)(3)(2000). *Kunselman v. Canterra Coal Co.*, BRB No. 98-1339 BLA (Feb. 28, 2000)(unpub.).