BRB No.00-1037 BLA

HUGH CLAYTON MAHAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALABAMA BY-PRODUCTS COMPANY c/o DRUMMOND COMPANY, INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Laura A. Woodruff and Carranza M. Pryor (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Rita Roppolo (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 appeals the Decision and Order - Award of Benefits (99-BLA-0767) of Administrative Law Judge Daniel J. Roketenetz 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 procedural history of this case is as follows. Claimant filed an application for benefits on May 28, 1985, which was denied by the claims examiner on August 6, 1985. Director's Exhibit 31. Claimant did not pursue this claim.

On June 4, 1992, claimant filed a new application for benefits. Director's Exhibit 1. After holding a hearing, Administrative Law Judge Donald W. Mosser issued a Decision and Order Denying Benefits on August 5, 1994. Judge Mosser credited claimant with twelve years of coal mine employment and found the x-ray evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment. Judge Mosser found the evidence sufficient to establish total respiratory disability, but found that claimant failed to establish that his disability was due to pneumoconiosis. Accordingly, benefits were denied. Director's Exhibit 35. In his Supplemental Decision and Order - Motion for Reconsideration, Judge Mosser denied reconsideration, and explained the procedures for requesting modification. Director's Exhibit 40.

Claimant appealed to the Board. Director's Exhibit 41. Subsequently, on June 5, 1995, claimant filed a petition for modification. Director's Exhibit 39. In an Order dated July 31, 1995, the Board dismissed claimant's appeal and remanded the case to the district director. The district director denied claimant's request for modification, Director's Exhibit 57, and the case was transferred to Administrative Law Judge Gerald M. Tierney, Director's Exhibit 71. In his Decision and Order - Denying Benefits dated June 12, 1997, Judge Tierney found that claimant did not establish a basis for

[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.

modification. Accordingly, benefits were denied. Director's Exhibit 74.

On April 24, 1998, claimant submitted a new application for benefits. Director's Exhibit 76. The district director denied benefits, Director's Exhibit 85, and claimant requested a formal hearing, Director's Exhibit 86. After holding a hearing, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) issued his Decision and Order - Award of Benefits, which is the subject of the instant appeal. The administrative law judge noted that the instant case involves the modification of a duplicate claim and found the evidence sufficient to demonstrate a basis for modification and also found the evidence sufficient to establish a material change in conditions. The administrative law judge then proceeded to adjudicate the claim on the merits. The administrative law judge credited claimant with twelve years of coal mine employment, and found the evidence sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment and further found the evidence sufficient to establish that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding a material change in conditions established. Employer contends that the administrative law judge erred by finding the x-ray, biopsy and medical opinion evidence sufficient to establish the existence of pneumoconiosis. Employer also asserts that the evidence is insufficient to establish that claimant's disability was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in this appeal.[2]

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 Association v. Chao*, No.

[2] Inasmuch as the administrative law judge's length of coal mine employment finding and his findings that the evidence is sufficient to establish a basis for modification and that the evidence as a whole establishes total respiratory disability, are not challenged on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 23, 2001, to which claimant, employer and the Director have responded. Claimant and the Director state that the amended regulations will not have any impact on the Board's consideration of this appeal. Employer, however, asserts that the amended versions of 20 C.F.R. §718.104 and 20 C.F.R. §718.201 impact the Board's consideration of this case, and urges the Board to stay consideration of this appeal. Inasmuch as the amended regulation regarding the quality standards only applies to evidence developed after January 19, 2001, *see* 20 C.F.R. §718.101(b), and since the definition of pneumoconiosis, *see* 20 C.F.R. §718.201, is not at issue in the instant case, we reject employer's assertions. Based on our review of the case, 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 consider employer's assertions concerning the administrative law judge's findings regarding the existence of pneumoconiosis. Employer specifically asserts that the administrative law judge erred in finding the x-ray and the biopsy evidence sufficient to establish the existence of pneumoconiosis. However, with regard to the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis, employer merely states "Contrary to the ALJ['s] conclusion, the x-ray evidence weighs negatively for pneumoconiosis. The ALJ's error is compounded by medical reports, including biopsy evaluations, that find no evidence of pneumoconiosis." Employer's Brief at 10. In the conclusion of its brief, employer states "the ALJ wrongly found that the weight of the medical evidence even established the existence of pneumoconiosis." Employer's Brief at 13. By failing to make specific allegations of error with respect to the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis, employer has not adequately raised this issue on appeal in order to invoke the Board's review of this issue. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Inasmuch as the methods of establishing the existence of pneumoconiosis are alternative, *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985)*; cf. Island Creek Coal Co. v. Compton,* 211 F.3d 203, BLR (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 21 BLR 2-

104 (3d Cir. 1997), we need not address employer's assertions regarding the administrative law judge's weighing of the x-ray evidence or the biopsy evidence.

We next turn to employer's assertions regarding the administrative law judge's finding that claimant established a material change in conditions. Employer asserts that claimant must prove a change in his physical condition, and employer contends that the administrative law judge erred in finding that the newly submitted evidence supports the causal link between pneumoconiosis and total disability. Specifically, employer maintains that Dr. Waldrum's September 1999 opinion is not based on any new evidence.

As a preliminary matter, we hold that the administrative law judge applied the correct standard for determining whether claimant has established a material change in conditions, *i.e.,* 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. Mead Corp.,* 22 BLR 1-61 (2000). The Board has adopted this standard for establishing a material change in conditions for use in cases, such as the instant case, which arise in a circuit where the United States Court of Appeals has not yet addressed the standard applicable under 20 C.F.R. §725.309(2000). *See Allen, supra*. We, therefore, hold that the administrative law judge applied the correct standard in determining whether claimant established a material change in conditions.

We reject employer's challenge to the administrative law judge's reliance upon Dr. Waldrum's opinion.[3] Contrary to employer's assertion, Dr. Waldrum' s 1998 opinion, identified as Director's Exhibit 80, was not considered by Judge Tierney in his 1997 Decision and Order, nor was it a part of the record when the case was considered by Judge Tierney, *see* Director's Exhibits 71; 74. We also reject employer's assertion that

[3] In a 1998 opinion, Dr. Waldrum noted that claimant had worked in dusty coal mine and that he had a substantial smoking history. Dr. Waldrum opined that coal workers' pneumoconiosis and cigarette smoking contributed to claimant's pulmonary disability. The physician stated that quantifying the percentage of contribution by tobacco smoke and coal dust is not possible in this case, however, "[b]oth factors clearly have an effect that significantly contributes to his disabling respiratory impairment." Director's Exhibit 80. In a 1999 opinion, Dr. Waldrum quoted portions of his 1998 opinion and stated that pneumoconiosis is a "substantial or significant contributor to [claimant's] respiratory impairment." Claimant's Exhibit 1. Dr. Waldrum also stated that "The COPD is primary and the CWP is secondary but it is significant....I believe that [claimant's] disability is multi-factorial and includes exposure to coal dust." Claimant's Exhibit 1.

Dr. Waldrum's letter written in 1999 is a labored attempt to "manufacture causality." Employer's Brief at 10. The administrative law judge is charged with determining whether a medical opinion is reasoned. Implicit in his crediting of Dr. Waldrum's opinion is the administrative law judge's finding that it is reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984). Moreover, we reject employer's contention that Dr. Waldrum's reports are inconsistent. In both the 1998 and the 1999 reports, Dr. Waldrum indicates that claimant's disability was significantly related to both cigarette smoking and coal dust exposure. While Dr. Waldrum uses slightly different phrasing in these two reports, there is no "inexplicable discrepancy," as employer alleges, *see* Employer's Brief at 9, between these two reports. Inasmuch as this is the extent of employer's challenge to the administrative law judge's material change in conditions finding, we hold that the administrative law judge permissibly found the evidence sufficient to establish a material change in conditions.

Finally, employer asserts that the evidence is insufficient to establish that claimant's disability is due to pneumoconiosis. The only argument raised by employer in support of this assertion is that Dr. Waldrum provided no basis for the alleged change in his opinions. Inasmuch as we have rejected this assertion, and since this is employer's sole assertion in support of its argument that the administrative law judge erred in finding that claimant's total disability is due to pneumoconiosis, we affirm the administrative law judge's finding that claimant has established that his disability is due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge