BRB No. 01-0917 BLA

BETTY L. SHERTZER, on behalf of EDWARD L. SHERTZER (deceased)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED:
McNALLY PITTSBURGH MANUFACTURING COMPANY	)	
Employer-Petitioner	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

William H. Howe (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Helen H. Cox (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order--Awarding Benefits (2000-BLA-0340) of Administrative Law Judge Rudolf L. Jansen rendered 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 miner's initial application for benefits filed on August 4, 1983 was finally denied by the District Director of the Office of Workers' Compensation Programs on November 18, 1983 because the evidence did not establish the existence of pneumoconiosis or that the miner was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 23. On February 24, 1992, the miner filed the current application, which is a duplicate claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000).

After a hearing, an administrative law judge credited the miner with six years of coal mine employment and found that a material change in conditions under 20 C.F.R. §725.309(d)(2000) was established pursuant to the Board's standard set forth in *Spese v. Peabody Coal Co*., 11 BLR 1-174 (1988).[2] Director's Exhibit 27. The administrative law judge further found that the existence of pneumoconiosis and total disability were not established, and denied benefits. *Id*.

The miner timely requested modification of the denial of the duplicate claim pursuant to 20 C.F.R. §725.310(2000), which the administrative law judge denied. Director's Exhibits 28, 40. In that proceeding, employer and the Director, Office of Workers' Compensation Programs (the Director), raised the threshold issue of a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), but the administrative law judge did not address the issue. He instead found on the merits of the claim that the miner was totally disabled by a respiratory or pulmonary impairment, but did not establish that he had pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 40. Upon consideration of the miner's *pro se* appeal, the Board remanded the case for the administrative law judge to reconsider the medical opinion evidence regarding the existence of pneumoconiosis. Director's Exhibit 41. The administrative law judge did so and denied benefits on remand. Director's Exhibit 42.

By then, the miner had died. His widow timely filed a second request for modification of the denial of the miner's duplicate claim and submitted additional medical evidence, including the results of an autopsy. Director's Exhibit 43.

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Subsequent to the issuance of the administrative law judge's Decision and Order, the *Spese* standard was rejected by the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises. *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

Employer and the Director again raised 20 C.F.R. §725.309(d)(2000). Director's Exhibit 50. Prior to the scheduled hearing, the parties waived their right to a hearing and requested a decision on the record. *See Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69, 1-72 (2000).

In the ensuing Decision and Order--Awarding Benefits at issue in this appeal, the administrative law judge found that the evidence submitted in the duplicate claim plus the evidence submitted on modification demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d)(2000) by establishing that the miner had pneumoconiosis arising out of coal mine employment. The administrative law judge further found that the miner was totally disabled by a respiratory or pulmonary impairment and that his total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his application of the law when he found that a material change in conditions was established. Employer further asserts that the administrative law judge erred in his weighing of the autopsy and medical opinion evidence when he found that the existence of pneumoconiosis was established. Additionally, employer argues that the administrative law judge did not provide a valid reason for the weight accorded to the medical opinions regarding the cause of the miner's total disability. Both claimant and the Director respond that the administrative law judge properly determined that a material change in conditions was established. Claimant further urges affirmance of the award of benefits.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final

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[3] We affirm as unchallenged on appeal the administrative law judge's findings that the miner's pneumoconiosis arose out of coal mine employment and that he was totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §§718.203(c), 718.204(b); *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that to establish a material change in conditions, "a claimant must prove for each element that was actually decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 1511, 20 BLR 2-302, 2-320-21 (10th Cir. 1996). The administrative law judge must "compar[e] [the] evidence obtained after [the] prior denial to [the] evidence considered in or available at the time of [the] prior claim" to determine whether claimant has "demonstrated that each of these elements previously found against him [has] worsened materially since the previous denial." *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321.

Employer contends that the administrative law judge misapplied the *Brandolino* test because he did not require claimant to prove that the miner's condition worsened since the time of the decision denying the first request for modification. Employer's Brief at 5. Employer's contention lacks merit. A request for modification of a duplicate claim denied for failure to establish a material change in conditions[4] does not alter the procedural character of the duplicate claim. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Accordingly, the administrative law judge correctly recognized that the threshold issue remained whether claimant established a material change in conditions pursuant to Section 725.309(d). Decision and Order--Awarding Benefits at 10.

Because the miner's previous claim was denied for failure to establish either the existence of pneumoconiosis or total disability, Director's Exhibit 23, the issue before the administrative law judge was whether all the evidence developed in the duplicate claim, including that submitted with the requests for modification, established material worsening in both the pneumoconiosis and total disability elements since the denial of the first claim. *See Brandolino, supra*; *Hess, supra*. As we will set forth below, substantial evidence supports the administrative law judge's finding that this evidence established the existence of pneumoconiosis, and employer does not challenge the finding that the duplicate claim evidence established total disability. By establishing the elements that were decided against the miner in the first claim, claimant demonstrated a material change in conditions. *See Brandolino*, 90 F.3d at 1511, 20 BLR at 2-317 (Claimant need not actually establish the element to prove a material change; claimant "need only show that this element has worsened materially.") Finding no reversible error in the administrative

[4] In this case, a material change in conditions was found established in 1994 but under a test since rejected by the Tenth Circuit court. *See* n.2, *supra*.

law judge's application of the *Brandolino* standard, we reject employer's contention.[5]

The administrative law judge found that the weight of the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge considered an autopsy report and supplemental report by the prosector, Dr. Heidingsfelder, a review of the autopsy report and slides plus other medical evidence by pathologists Drs. Green and Tomashefski, and a supplemental report from Dr. Tomashefski. All three pathologists agreed that the miner's lungs were severely diseased; all three also agreed that he did not have clinical coal workers' pneumoconiosis. Drs. Heidingsfelder and Green instead diagnosed a "mixed dust pneumoconiosis" manifested by the presence of severe interstitial fibrosis containing silicotic nodules, and by small airways disease due to coal dust exposure. By contrast, Dr. Tomashefski concluded that the miner's lung disease was not coal workers' pneumoconiosis or any other type of pneumoconiosis, but was idiopathic pulmonary fibrosis, a disease of unknown cause. The administrative law judge gave greater weight to the opinions of Drs. Heidingsfelder and Green because he found them better reasoned and explained than Dr. Tomashefski's opinion. The administrative law judge also gave additional weight to Dr. Green's opinion because of Dr. Green's "qualifications as an author, presenter, and researcher in the field of occupational lung disease." Decision and Order--Awarding Benefits at 12.

Employer contends that the administrative law judge erred in crediting the opinions of Drs. Heidingsfelder and Green because they relied on a ten-year coal mine employment history when the miner was credited with six years of coal mine employment. Employer's Brief at 6. The administrative law judge's decision reflects that he took this discrepancy into account and found that it detracted somewhat from Dr. Green's opinion, but did not affect Dr. Heidingsfelder's opinion because Dr. Heidingsfelder attributed the miner's lung disease to coal mine employment even assuming an employment history of six years. Decision and Order--Awarding Benefits at 12. Employer asserts that Dr. Heidingsfelder's statement to that effect was mere speculation, but Heidingsfelder explained that he reached this conclusion because the miner's less-than-twenty-year smoking history did not explain his severe lung disease, and the miner had no other occupational dust exposure. Claimant's Exhibit 4. The effect of an inaccurate employment history on the credibility of a medical opinion "is a determination to be made by the administrative law judge." *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988). The

[5] Employer's argument, that permitting claimant to file two successive modification requests violated *res judicata* and employer's due process rights, lacks merit. *See Old Ben Coal Co. v. Director, OWCP*, [Hilliard], 292 F.3d 533, 540-41, --- BLR --- (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP* [Stanley], 194 F.3d 491, 500, 22 BLR 2-1, 2-15-16 (4th Cir. 1999); *Garcia v. Director, OWCP*, 12 BLR 1-24, 1-26 (1988). Therefore, we reject employer's contention.

administrative law judge in this case reasonably resolved the issue and the Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge. *Mays v. Piney Mountain Coal Co*., 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting). Consequently, we reject employer's allegation of error in the weighing of Dr. Green's and Dr. Heidingsfelder's opinions.

Employer argues further that the administrative law judge erred in according less weight to Dr. Tomashefski's opinion, which employer asserts was documented and reasoned. Employer's Brief at 7, 9. The administrative law judge not only took into account the physicians' conflicting conclusions, but also considered that Dr. Green criticized Dr. Tomashefski's medical analysis, and found that Dr. Tomashefski did not effectively rebut Green's criticism of his reasoning. Decision and Order--Awarding Benefits at 11. "[W]here medical professionals are in disagreement, the trier of fact is in a unique position to determine credibility and weigh the evidence." *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993). Contrary to employer's contention, the administrative law judge acted within his discretion when he found that, viewed in context, Dr. Tomashefski's "diagnosis of a disease process which by definition has no etiology," lacked "the sophistication, explanation, and documentation of Drs. Green and Heidingsfelder, entitling it to less weight." Decision and Order--Awarding Benefits at 11; *see Hansen, supra*; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Additionally, the record supports the administrative law judge's determination to give additional weight to Dr. Green's opinion based upon his documented credentials in the research field of occupational lung disease. Claimant's Exhibit 3; *see Hansen*, 984 F.2d at 368, 17 BLR at 2-55; *Dillon v. Peabody Coal Co*., 11 BLR 1-113, 1-114 (1988).

In sum, the administrative law judge properly exercised his discretion in weighing the medical evidence, and substantial evidence supports his finding. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2). Because we affirm the administrative law judge's finding that the autopsy evidence established the existence of pneumoconiosis, we need not address employer's allegations of error in the weighing of the medical opinions pursuant to 20 C.F.R. §718.202(a)(4). *See Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985).

Based primarily on the opinion of Dr. Koenig, the administrative law judge further found that the miner's total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(b)(2000); *Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir.

1989). Employer contends that the administrative law judge erred in according little weight to the disability causation opinions of Drs. Tomashefski and Bennett because neither physician diagnosed pneumoconiosis. Employer's Brief at 10. In this case, the administrative law judge found that the miner suffered from pneumoconiosis arising out of coal mine employment. The record reflects that both Dr. Tomashefski and Dr. Bennett concluded that the miner had neither clinical nor legal pneumoconiosis. Director's Exhibits 26, 44; Employer's Exhibit 1; *see* 20 C.F.R. §718.201. Thus, the administrative law judge permissibly found that their opinions regarding the cause of the miner's respiratory disability were rendered under the mistaken belief that the miner did not have pneumoconiosis, contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co*., 289 F.3d 263, 269-70, --- BLR ---, (4th Cir. 2002); *Trujillo v. Kaiser Steel Corp*., 8 BLR 1-472, 1-473 (1986). Consequently, we reject employer's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge