BRB No. 97-1400 BLA

JAMES CHARLES WILBURN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes, Pittsburgh, Pennsylvania, for claimant.

Brian D. Hall (Porter, Wright, Morris & Arthur), Columbus, Ohio, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-2613) of Administrative Law Judge Donald W. Mosser denying 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). The administrative law judge credited claimant with at least twenty-five years of coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718.

[1]Claimant filed his initial claim on January 28, 1983. Director's Exhibit 34. This claim was denied by the Department of Labor on April 29, 1983 because claimant failed to establish the existence of pneumoconiosis. *Id*. Inasmuch as

The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge further found that although the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), the evidence is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. Claimant had not previously established the existence of pneumoconiosis

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claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on June 29, 1994. Director's Exhibit 1.

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(c) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

arising out of coal mine employment or a totally disabling respiratory impairment due to pneumoconiosis in his prior claim. Director's Exhibit 34. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).

Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We disagree. The record consists of twelve x-ray interpretations of eight x-rays. Director's Exhibits 11, 12, 17, 24, 29; Claimant's Exhibits 2, 3; Employer's Exhibits 1-3. The administrative law judge correctly stated that "[o]nly one reading is positive for the existence of pneumoconiosis."[3] Decision and Order at 9; Claimant's Exhibit 3. Claimant asserts that the administrative law judge should have accorded determinative weight to Dr. Bassali's positive x-ray interpretation because of the doctor's credentials as a B-reader and a Board-certified radiologist. The administrative law judge observed that the positive "reading by Dr. Bassali, who is a B-reader and [B]oard-certified radiologist, was of the September 27, 1995 film." Decision and Order at 9. Further, the administrative law judge observed that "Dr. Wiot, also a B-reader and [B]oard-certified radiologist, read this same film as negative for pneumoconiosis." *Id*. In addition, the administrative law judge observed that "[a]ll of the remaining films were read as negative for pneumoconiosis by B-readers and [B]oard-certified radiologists." *Id*. at 9-10; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In light of Dr. Wiot's negative rereading, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Bassali's positive x-ray interpretation because of Dr. Bassali's credentials as a B-reader and a Board-certified radiologist.[4] Furthermore, since eleven of the twelve newly submitted x-ray

[3]Claimant asserts that some of the newly submitted x-rays of record that have been read as negative for pneumoconiosis fall within the definition of pneumoconiosis. Contrary to claimant's assertion, none of the physicians, other than Dr. Bassali, provided a positive x-ray reading in accordance with the ILO classification system. *See* 20 C.F.R. §718.102.

[4]Claimant further asserts that the administrative law judge should have accorded determinative weight to Dr. Bassali's positive interpretation of the

interpretations of record are negative for pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

September 27, 1995 x-ray because it is the most recent x-ray of record. Contrary to claimant's assertion, Dr. Bassali's interpretation is not the most recent x-ray reading of record. The record contains x-rays dated October 17, 1995, May 22, 1996 and September 19, 1996 which were uniformly interpreted as negative. Claimant's Exhibit 2; Employer's Exhibits 1, 2.

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. Whereas Drs. Subbiah and Westmoreland opined that claimant suffers from pneumoconiosis,[5] Director's Exhibits 9, 24, 29, Drs. Lockey and Long opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 32; Employer's Exhibits 1, 2. Although Drs. Ottaviano,[6] Wade and Ward[7] opined that claimant suffers from chronic obstructive pulmonary disease, none of these doctors specifically indicated that claimant's condition was caused by coal dust exposure. Director's Exhibit 29; Claimant's Exhibits 2, 3. The administrative law judge properly accorded greater weight to the opinion of Dr. Lockey than to the contrary opinions of Drs. Subbiah and Westmoreland because he found Dr. Lockey's opinion to be better reasoned and documented.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*);

[5]Dr. Subbiah opined that claimant suffers from severe chronic obstructive lung disease due to coal dust exposure. Director's Exhibit 9. Similarly, Dr. Westmoreland opined that claimant suffers from chronic obstructive pulmonary disease caused by coal dust exposure. Director's Exhibits 24, 29.

[6]Dr. Ottaviano stated that claimant "has had exposure to the coal mines with possible pneumoconiosis, but further diagnostic work-up needs to be done." Claimant's Exhibit 2.

[7]The administrative law judge found that "Dr. Ward does not include pneumoconiosis in his diagnosis of claimant's conditions." Decision and Order at 11.

[8]The administrative law judge stated that Dr. Lockey "has examined the claimant on two separate occasions and provided objective data to support his diagnosis." Decision and Order at 11. The administrative law judge also stated that Dr. Lockey's reports "are well-documented and based not only on his examinations of the miner, but also on a review of all the medical evidence of record, thereby providing him with a broad base from which to draw his conclusions." *Id*. Further, the administrative law judge stated that "[g]iven the claimant's smoking history, Dr. Lockey's findings of conditions other than pneumoconiosis are logical." *Id*. In contrast, the administrative law judge stated that "it is unclear from [Dr. Westmoreland's] notes upon what data he based his opinion of chronic obstructive pulmonary disease arising from coal mine dust exposure." *Id*. The administrative law judge observed that "[a]lthough [Dr. Westmoreland] notes that the claimant was being tested for black lung disease, he does not address what these tests included, who or where they were performed, or the results of that testing." *Id*. Lastly, the administrative law judge stated that "even taking into account the opinion of Dr.

Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).[9]

Subbiah who diagnosed chronic obstructive pulmonary disease arising in part from coal dust exposure,...the opinions of Dr. Lockey [are] entitled to greater weight." *Id*.

[9]Claimant asserts that the administrative law judge erroneously relied on the opinion of Dr. Lockey because Dr. Lockey's opinion is merely a restatement of a negative x-ray reading. Contrary to claimant's assertion, the administrative law judge found that Dr. Lockey "examined the claimant on September 19, 1996 and reviewed the medical evidence of record." Decision and Order at 9. The administrative law judge also observed that Dr. Lockey "administered a chest x-ray, pulmonary function study, arterial blood gas study and EKG." *Id*. Further, the administrative law judge observed that "Dr. Lockey noted 23 plus years of coal mine employment and that the claimant quit smoking in 1995." *Id*.; Employer's Exhibits 1, 2; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982).

Additionally, the administrative law judge properly accorded greater weight to the opinion of Dr. Lockey because he found Dr. Lockey's opinion to be supported by Dr. Long's opinion.[10] *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject claimant's assertion that the administrative law judge erred by discounting the opinions of Drs. Subbiah and Westmoreland.

[10]The administrative law judge stated that Dr. Lockey's "opinion...is supported by Dr. Long and not contraindicated by Dr. Wade or Dr. Ottaviano." Decision and Order at 12. The administrative law judge observed that "Drs. Long and Lockey have diagnosed chronic bronchitis and chronic obstructive pulmonary disease due to smoking with no evidence of pneumoconiosis." *Id.* at 10.

Claimant also asserts that the administrative law judge should have accorded determinative weight to Dr. Westmoreland's opinion because Dr. Westmoreland is claimant's treating physician. Notwithstanding the fact that Dr. Westmoreland is claimant's treating physician,[11] his status as such does not by itself render his opinion reasoned and documented. The administrative law judge properly discounted Dr. Westmoreland's opinion on the basis that "it is unclear from his notes upon what data he based his opinion of chronic obstructive pulmonary disease arising from coal mine dust exposure." Decision and Order at 11; *see Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Thus, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Westmoreland's opinion because Dr. Westmoreland is claimant's treating physician. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In addition, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). We disagree. The administrative law judge observed that while "Dr. Subbiah and Dr. Westmoreland stated that [claimant's totally disabling respiratory] impairment is due to coal dust exposure..., Drs. Long and Lockey find that this impairment is due to [claimant's] smoking history." Decision and Order at 13; Director's Exhibits 9, 29; Employer's Exhibits 1, 2. As previously noted, the administrative law judge properly accorded greater weight to the opinion of Dr. Lockey than to the contrary opinions of Drs. Subbiah and Westmoreland because he found Dr. Lockey's opinion to be better reasoned and documented. *See Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Furthermore, the administrative law judge properly accorded greater weight to the opinion of Dr. Lockey because he found Dr. Lockey's opinion to be supported by Dr. Long's opinion. *See Walker, supra*; *Massey, supra*; *Newland, supra*. Therefore, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). However,

[11]The administrative law judge observed that "Dr. Westmoreland...states that he treated the claimant primarily for his low back pain." Decision and Order at 11.

since we affirm the administrative law judge's unchallenged finding that the newly submitted evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c), we reverse the administrative law judge's finding that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309, and remand the case for further consideration of all of the evidence of record on the merits. *See Ross, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge