BRB No. 01-0909 BLA

CARL MAGGIO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
USX CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 B Denial of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William J. Evans and Katherine Venti (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order B Denial of Benefits (00-BLA-0618) of Administrative Law Judge Paul H. Teitler 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=s initial application for benefits, filed in 1970, *see* Director=s Exhibit 24, was denied by the Social Security Administration and by the Department of Labor for the final time on October 24, 1979. Director=s Exhibit 24. On December 10, 1982, claimant filed a new application for benefits, and on March 10, 1983, a claims examiner denied benefits. Director=s Exhibit 25. On March 14, 1994, claimant filed another application for benefits. Benefits were denied by the district director on July 5, 1994 because claimant failed to establish a material change in conditions; the existence of pneumoconiosis; the causal relationship, *i.e.,* that his pneumoconiosis arose out of coal mine employment; and disability causation, *i.e.*, that his disability is due to pneumoconiosis. *See* Director's Exhibit 26. On April 7, 1998, claimant filed a new application for benefits. Director=s Exhibit 1. Benefits were denied by the claims examiner, Director=s Exhibit 7, however, the district director determined that claimant was entitled to benefits, Director=s Exhibit 21. At employer=s request, the case was transferred to the Office of Administrative Law Judges, Director=s Exhibits 22, 27, and a hearing was held.

In his Decision and Order, the administrative law judge credited claimant with thirty-nine years of coal mine employment based on a stipulation of the parties, and noted that the instant case involves a duplicate claim. The administrative law judge detailed the standard for establishing a material change in conditions, as set forth in *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), and summarized the newly submitted evidence. The administrative law judge found the newly submitted x-ray and medical opinion evidence insufficient to establish a material change in conditions, *see* 20 C.F.R. '718.202(a)(1), (a)(4), and noted that 20 C.F.R. '718.202(a)(2) and (a)(3) are inapplicable in this case. The administrative law judge found the newly submitted pulmonary function study and the blood gas study evidence insufficient to demonstrate total disability pursuant to 20 C.F.R. '718.204(b)(2)(i) and (ii). He further noted that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure, and thus, found that the newly submitted evidence does not demonstrate total disability pursuant to 20 C.F.R. '718.204(b)(2)(iii). The administrative law judge also found the newly submitted medical opinion evidence insufficient to demonstrate total disability pursuant to 20 C.F.R. '718.204(b)(2)(iv). Consequently, the administrative law judge found the evidence insufficient to establish a

[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.

material change in conditions. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis and erred in failing to give claimant the benefit of the presumption that pneumoconiosis arose out of coal mine employment. Claimant also asserts that the administrative law judge erred in finding the pulmonary function study evidence insufficient to demonstrate total disability and in finding a lack of deterioration in the blood gas studies over time. Claimant also maintains that the record does not support the administrative law judge=s finding that he has not established a material change in conditions. Employer responds, urging affirmance of the administrative law judge=s Decision and Order. The Director, Office of Workers' Compensation Programs, has not submitted a brief in 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 address claimant=s assertion that he has established a material change in conditions. Where a claimant files a claim for benefits more than one year after the final 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(2000).[2] The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that:

in order to bring a duplicate claim, a claimant must prove for each element that actually was 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. In order to meet the claimant=s threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element. Instead, under the plain language of the statute and regulations, and consistent with res judicata, the claimant need show only that this element has worsened materially since the time of the prior denial.

[2] Although the regulation pertaining to duplicate claims and establishing a material change in conditions, *see* 20 C.F.R. '725.309, has been amended, the revised regulation applies only to claims filed after January 19, 2001. *See* 20 C.F.R. '725.2.

Wyoming Fuel Co. v. Director, OWCP [*Brandolino*], 90 F.3d 1502, 1511, 20 BLR 2-302, 2-320 (10th Cir. 1996)(footnotes omitted). The Tenth Circuit also stated:

> One of the elements of proving a successful claim for benefits is showing that any pneumoconiosis arose at least in part out of coal mine employment. *See* 20 C.F.R. ' 718.203. Unlike the other two elements of a benefits claimBthe existence of pneumoconiosis and total disabilityCthis element is not technically progressive; a claimant=s pneumoconiosis either did or did not arise out of coal mine work. Therefore, this element has no meaning in a context where the claimant has been found not to have pneumoconiosis and a claimant need not demonstrate a material change in this element when the [administrative law judge] in his prior claim decided the claimant did not yet have pneumoconiosis.

Brandolino, 90 F.3d at 1512 n.17, 20 BLR at 2-321 n.17.

In the instant case, the district director considered claimant=s 1994 claim, and denied benefits because claimant failed to establish a material change in conditions in addition to the existence of pneumoconiosis; *see* 20 C.F.R. '718.202(a)(2000), the causal relationship, *i.e.,* that his pneumoconiosis arose out of coal mine employment, *see* 20 C.F.R. '718.203(2000); and disability causation, *i.e.*, that his disability is due to pneumoconiosis, *see* 20 C.F.R. '718.204(b)(2000).[3] *See* Director's Exhibit 26. The claim was *not* denied for failure to establish total disability pursuant to 20 C.F.R. '718.204(c)(2000). In view of the statement by the Tenth Circuit that pneumoconiosis and total disability are the only two elements of entitlement that are progressive and can show a worsening, *see Brandolino, supra*, and in view of the bases of the prior denial, *see* Director's Exhibit 26, the only avenue by which claimant can demonstrate a material change in conditions, in this case, is by showing a worsening of the disease. *See Brandolino, supra.*

In determining that claimant failed to establish a material change in conditions, the administrative law judge found that neither the x-ray nor the CT scan evidence submitted since the prior denial shows evidence of pneumoconiosis, and he found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20

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[3] 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).

C.F.R. ' 718.202(a)(1). The administrative law judge also noted that 20 C.F.R. '718.202(a)(2) and (a)(3) are not available in this case. The administrative law judge considered the newly submitted medical opinion evidence and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4). The administrative law judge stated A[t]he newly submitted medical reports are again conflicting, and certainly establish no change in status of [claimant=s] pulmonary condition.@ Decision and Order at 13.

We hold that the administrative law judge properly found that claimant failed to establish a material change in conditions pursuant to Sections 718.202(a)(1)-(3). As the administrative law judge found, none of the newly submitted x-ray interpretations are positive for the existence of pneumoconiosis, *see* Director's Exhibits 6, 16; Claimant's Exhibit 9. Moreover, there is no biopsy evidence or evidence of complicated pneumoconiosis in this living miner=s claim filed in 1998. *See* 20 C.F.R. '718.202(a)(2)-(3). Consequently, we affirm the administrative law judge=s finding that claimant has not demonstrated a worsening of the disease at Section 718.202(a)(1)-(3), as this finding is supported by substantial evidence.

Turning to the medical opinion evidence, the administrative law judge found that the better reasoned and better documented medical opinion evidence establishes that claimant is not suffering from coal workers' pneumoconiosis.[4] The administrative law

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[4] The newly submitted medical opinion evidence includes several reports from Dr. James in 1998, that claimant has had a worsening in his respiratory status, Director's Exhibit 4, and that he has evidence of black lung based on his lung function and airway obstruction, Director's Exhibit 19. In a report dated August 18, 2000, Dr. James opined that claimant=s symptoms had progressed over the prior two years, although he noted that claimant=s lung functions are approximately what they were in 1998, and that there was no significant change in his blood gas study. Claimant's Exhibit 1. In his deposition, Dr. James opined that claimant=s coal mine employment is the most significant cause of his chronic obstructive pulmonary disease, and Dr. James stated that from 1994 through 1998, there was a worsening of claimant=s disease and disability. Claimant's Exhibit 9. At the hearing, Dr. James testified that the blood gas study administered in 2000 shows a significant improvement from 1998, and that from 1994 through 2000, claimant=s pulmonary function study results improved. Hearing Transcript at 57, 72. In a November 1998 report, Dr. Maier stated that claimant suffers from pneumoconiosis. Director's Exhibit 18; Employer's Exhibit 1. In a deposition on October 18, 2000, Dr. Maier opined that claimant suffers from chronic obstructive pulmonary disease and lung disease due to coal dust exposure and tobacco use. Employer's Exhibit 6. Dr. Fowles authored a hospital discharge diagnosis on January 3, 1998, wherein he noted a Astrong

judge found Dr. Farney=s opinion, that claimant has no lung disease related to his coal mine employment, to be the best reasoned and documented opinion. The administrative law judge also found that Dr. Fowles=s statement, that he suspected pneumoconiosis, is not adequately explained and is not a definitive diagnosis of coal workers' pneumoconiosis. Decision and Order at 12-13.

The administrative law judge found that Dr. James=s diagnosis of pneumoconiosis is not supported by the objective laboratory data, and found that Dr. James relied heavily on claimant=s lengthy history of coal mine employment, which the administrative law judge stated, is an insufficient basis for a diagnosis of pneumoconiosis. Decision and Order at 12. The administrative law judge also found that Dr. James=s opinion was insufficient to support a finding of a material change in conditions in view of the physician=s statement that claimant=s lung function had improved since 1994. The administrative law judge found that, at best, Dr. James=s opinion is equivocal. Decision and Order at 12. We hold that the administrative law judge, who is charged with evaluating the evidence and determining the credibility of the medical opinions, *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Lafferty, supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), permissibly determined that Dr. James=s opinion regarding claimant=s respiratory status, *see* Director's Exhibits 4, 19; Claimant's Exhibits 1, 9; Hearing Transcript, is too equivocal to support claimant=s burden of establishing a material change in conditions. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985).

The administrative law judge found that Dr. Maier=s diagnosis of pneumoconiosis is not supported by the physician=s objective findings, nor did she explain the lack of deterioration in the pulmonary function study and blood gas study results over the years. Moreover, the administrative law judge found that Dr. Maier did not fully explain how she determined that claimant=s pulmonary symptoms are due to coal workers' pneumoconiosis. Decision and Order at 12. We affirm the administrative law judge=s

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suspicion of black lung.@ Claimant's Exhibit 6. In a letter dated April 28, 1998 to claimant, Dr. Fowles indicated that claimant=s x-ray findings and difficulty breathing are independent of his heart disease. Director's Exhibit 19. Dr. Mann reviewed a CT scan on October 22, 1998 and stated that it did not show evidence of pneumoconiosis. Director's Exhibit 16. In October 1998, Dr. Farney noted an apparent decrease in claimant=s lung volumes, but stated that he was not able to diagnose coal workers' pneumoconiosis. Director's Exhibit 16. Dr. Farney also testified at the hearing and stated that claimant does not have a lung disease significantly related to or substantially aggravated by coal dust exposure. Hearing Transcript at 161.

consideration of Dr. Maier=s opinion. The administrative law judge is charged with evaluating the medical evidence and determining whether the opinions are reasoned and documented, and determining the relative weight to accord to each opinion, s*ee Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The Board has held that in order to be considered documented, a medical opinion must set forth the clinical findings, observations and facts upon which the physician based his diagnosis. In order to be considered reasoned, the documentation must support the physician=s assessment of the miner=s health. *See Fields, supra*. We hold that the administrative law judge permissibly determined that Dr. Maier=s opinion is not sufficiently reasoned as it fails to adequately explain the effect of claimant=s heart diseases on his ability to exercise and his lung function, and because the physician did not explain the lack of deterioration on claimant=s pulmonary function study and blood gas study results over the years. *See Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields, supra*. Inasmuch as they are supported by substantial evidence, we affirm the administrative law judge=s finding that the opinion of Dr. Maier is not entitled to determinative weight.

Inasmuch as we affirm the administrative law judge=s decision to accord no weight to the opinions of Drs. James and Maier, the only two newly submitted medical opinions which would support claimant=s burden of demonstrating a material change in conditions in accordance with *Brandolino*, we need not address the administrative law judge=s consideration of the other medical opinion evidence. Accordingly, we affirm the administrative law judge=s finding that claimant has failed to establish a material change in conditions and further affirm the administrative law judge=s denial of benefits.[5]

[5] We vacate the administrative law judge=s finding that the newly submitted evidence is insufficient to establish a material change in conditions based on a finding of total disability or total disability due to pneumoconiosis pursuant to Section 718.204(b) and (c). Decision and Order at 13-15. The prior claim was *not* denied based on a failure to establish total disability. *See* 20 C.F.R. ' 725.309(2000); *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996); Director's Exhibit 26. Moreover, in *Brandolino*, the court held that disability causation is not an element of entitlement that is progressive, and therefore, this element Ahas no meaning@ in determining whether a claimant has established a material change in conditions. *Brandolino*, 90 F.3d at 1512 n.17, 20 BLR at 2-321 n.17.

Accordingly, the administrative law judge=s Decision and Order B Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge