BRB No. 02-0718 BLA

BILLY F. McNEELY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZEIGLER 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-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (01-BLA-0324) of Administrative Law Judge Robert L. Hillyard on a duplicate 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] After consideration of the

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the

newly submitted evidence, the administrative law judge concluded that claimant was unable to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. Decision and Order at 19-24. The administrative law judge, therefore, found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in admitting Employer's Exhibits 3-8 into evidence. Claimant also argues that the administrative law judge erred in failing to conclude that certain medical opinion evidence supported a finding of legal pneumoconiosis and thus a material change in conditions. Lastly, claimant argues that the evidence of record establishes the presence of a totally disabling respiratory impairment due to pneumoconiosis. Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed 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).

Claimant first asserts that the administrative law judge erred in admitting

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amended regulations.

[2] Claimant first filed a claim for benefits on December 7, 1982. Director's Exhibit 30. On September 20, 1988, Administrative Law Judge Ralph Musgrove denied benefits because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 30. Claimant appealed to the Board, but the Board dismissed the appeal as untimely. Director's Exhibit 30; *McNeely v. Zeigler Coal Co.*, BRB No. 88-4280 BLA (Order)(Feb. 28, 1989). Claimant took no further action until the filing of the instant, duplicate, claim on October 4, 1999. Director's Exhibit 1.

[3] A review of the administrative law judge's Decision and Order demonstrates that while the administrative law judge recognized the presence of newly submitted x-ray evidence, *i.e.*, x-ray interpretations submitted subsequent to the prior denial of benefits, he failed to make a specific inquiry into whether such evidence on the whole supported a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant failed, however, to allege that the administrative law judge erred in not discussing the x-ray evidence. The administrative law judge listed all the x-ray findings. A review of the evidence demonstrates that it is overwhelmingly negative for the existence of pneumoconiosis. Accordingly, we will not discuss the x-ray evidence. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Director's Exhibits 7, 9, 17-22, 27.

Employer's Exhibits 3-8, consulting opinions and additional x-ray readings, into the evidentiary record. Claimant argues that that evidence was "unduly repetitious" and should have been excluded by the administrative law judge based on the requirement of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), that an administrative law judge "shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence." 5 U.S.C. §556(b). Claimant argues that since the reports of Drs. Repsher and Renn, Employer's Exhibit 3, 4, and depositions of Drs. Renn, Tuteur, Repsher and Wiot, Employer's Exhibits 5-8, consulting physicians, were based on the same medical information already in the record, they were unduly repetitious and, as such, highly prejudicial to claimant. In fact, claimant contends that since all of the opinions were based on the same information, they should have been considered as one medical opinion.

Claimant's assertion is rejected. An administrative law judge is granted broad discretion in resolving procedural disputes and his determinations will be vacated only if he has committed a clear abuse of the discretion given to him. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984). In this case, the administrative law judge did not abuse his discretion in admitting Employer's Exhibits 3-8 as he found that they contained well-reasoned opinions of highly qualified physicians and were therefore relevant and probative. *See Troup*, *supra*. The administrative law judge's admission of Employer's Exhibits 3-8 into evidence is, therefore, affirmed.

Claimant next asserts that the administrative law judge erred in concluding that the newly submitted medical opinion evidence failed to establish the existence of legal pneumoconiosis and thus erred in failing to find a material change in conditions was established. Specifically, claimant argues that the newly submitted opinions of Drs. Simpao, Director's Exhibit 7, Buchanan, Director's Exhibit 29, Khan, Director's Exhibit 9, and West, Director's Exhibit 9, all support a finding of legal pneumoconiosis. Claimant argues that the administrative law judge erred in relying upon the contrary opinions of Drs. Renn, Employer's Exhibits 4, 5, Repsher, Employer's Exhibits 3, 7, Selby, Director's Exhibit 22, and Tuteur, Employer's Exhibits 2, 6, as none of these physicians, except Dr. Selby, considered whether claimant suffered from an occupationally acquired pulmonary disease, *i.e.*, legal pneumoconiosis. Claimant argues that Dr. Selby's opinion was not reasoned and should, therefore, have been accorded little weight. In conjunction with these

[4] While the revised regulations place limits on the amount of evidence that may be admitted, *see* 20 C.F.R. §725.414, the regulations do not apply in this case which was pending on January 19, 2001. 20 C.F.R. §725.2(c).

assertions, claimant argues that the consulting opinions of Drs. Tuteur, Repsher and Renn should not be considered in determining whether claimant established a material change in conditions because they were based on medical evidence previously developed and did not, therefore, constitute new evidence.

Initially, we reject claimant's assertion that the consulting opinions of Drs. Tuteur, Repsher and Renn do not constitute new evidence. A review of the opinions demonstrates that the physicians addressed new medical evidence as well as previously submitted medical evidence in reaching their medical determinations. *See* Employer's Exhibits 2-7. Accordingly, we conclude that such evidence does constitute "new" evidence. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997); *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).

In considering the newly submitted medical opinion evidence of record, the administrative law judge permissibly found the opinions of Drs. Renn, Repsher, Selby, Tuteur and Wiot to be entitled to the greatest weight based on the superior qualifications of those doctors. This was permissible. Decision and Order at 23; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Further, contrary to claimant's assertion, Drs. Tuteur, Repsher, Renn and Selby all concluded that claimant did not suffer from a pulmonary disease arising out of coal mine employment. Their opinions are not, therefore, supportive of a finding of legal pneumoconiosis. 20 C.F.R §§718.201, 718.202(a)(4).

Turning to the opinions supportive of a finding of pneumoconiosis, the administrative law judge permissibly found that the opinions of Drs Buchanan and Simpao, diagnosing the existence of the disease, were entitled to little weight as the physicians provided no bases for their conclusions. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Further, the administrative law judge permissibly concluded that Dr. Khan's diagnosis of coal workers' pneumoconiosis was entitled to diminished weight because the opinion was based on pulmonary function study evidence, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987), and x-ray findings which were disputed by better qualified radiologists; *see Winters v. Director, OWCP*, 6 BLR 1-877 (1984). Additionally, the administrative law judge found that Dr. West's opinion of pneumoconiosis was an old opinion which failed to take into account new medical evidence. The administrative law judge also found that Dr. West failed to sufficiently explain his conclusions. Decision and Order at 23. Thus the administrative law judge permissibly found his opinion entitled to diminished weight. *See Clark*, *supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985). Accordingly, the administrative law judge concluded that the weight of the new opinion evidence

was not supportive of a finding of pneumoconiosis. 20 C.F.R. §§718.201, 718.202; *see Clark, supra*; *Peskie, supra*; *Lucostic*, *supra*.

Claimant's contentions regarding the administrative law judge's weighing of the medical opinion evidence are tantamount to a request that the Board reweigh the evidence of record, which is outside the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge has reviewed all of the newly submitted medical opinion evidence pertaining to the existence of pneumoconiosis. Substantial evidence supports his ultimate conclusion that the evidence fails to establish a material change in conditions by establishing the existence of pneumoconiosis. Because the new medical evidence fails to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that claimant has failed to establish a material change in conditions and must therefore affirm the denial of benefits, *see Spese*, *supra*; *McNew*, *supra*, and we need not, therefore, reach claimant's contention that total disability due to pneumoconiosis is established based on the evidence of record. *See Spese*, *supra*; *McNew*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge