BRB No. 03-0645 BLA

JOSEPH GRETCHEN, SR.)
)
Claimant-Respondent)
)
v.) DATE ISSUED: 06/30/2004
)
WYOMING POCAHONTAS)
LAND 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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Erik A. Schramm (Hanlon, Duff, Estadt & McCormick Co., LPA), St. Clairsville, Ohio, for employer.

Helen H. Cox (Howard Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (01-BLA-0843) of Administrative Law Judge Gerald M. Tierney 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] This case involves a duplicate claim filed on May 2, 2000.[2] After crediting claimant with thirty-three years of coal mine employment, the administrative law judge found the newly submitted medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Noting that claimant's prior claim had been denied on the basis that claimant did not establish total disability, the administrative law judge thus found claimant established a material change in conditions under 20 C.F.R. §725.309 (2000). Turning to the merits, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. The administrative law judge then found claimant established total disability under 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding a material change in conditions established under Section 725.309 (2000), and in finding disability causation established pursuant to Section 718.204(c). Claimant responds in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in which he agrees with employer's argument that the administrative law judge erred by failing to weigh the old evidence before finding a material change in conditions established. The Director contends that a remand is not warranted, however,

[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 amended regulations.

[2]Claimant filed a prior claim on August 29, 1980. Director's Exhibit 37. The claim was finally denied in a Decision and Order on Remand, dated August 30, 1989, by Administrative Law Judge Rudolf L. Jansen, who found that claimant failed to establish total disability under 20 C.F.R. §718.204(c). *Id.* Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on May 2, 2000. Director's Exhibit 1.

because the outcome is a foregone conclusion as the new medical opinion evidence unanimously supports a finding of total disability. The Director indicates he does not otherwise intend to respond to employer's arguments on appeal with respect to the administrative law judge's findings on the merits. Employer has filed a reply brief reiterating contentions raised in its Petition for Review and brief.[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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309 (2000)[4] provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309 (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that in addressing whether the material change in conditions requirement of Section 725.309(d) (2000) has been satisfied, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. The Board has held that in determining whether the newly submitted evidence is sufficient to establish a material change in conditions in accordance with the standard enunciated in *Ross*, the administrative law judge must determine:

> 1) whether the newly submitted evidence demonstrates at least one of the elements of entitlement that was the basis of the prior denial, and,

---

[3]We affirm, as unchallenged on appeal, the administrative law judge's findings on the merits that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8.

[4]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

> 2) if the administrative law judge determines that it does, the administrative law judge must then analyze whether the new evidence differs qualitatively from the evidence submitted with the previously denied claim, or was merely cumulative of, or similar to, the earlier evidence.

If the trier-of-fact finds this qualitative difference, it follows that claimant's condition has worsened in accordance with the court's requirement that claimant show there has been a "worsening" of his condition. *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000); *see also Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997).

On appeal, employer and the Director correctly contend that the administrative law judge erred in failing to compare the previously submitted and newly submitted evidence and to provide an analysis detailing why the later evidence is "qualitatively different" from the previously submitted evidence.[5] After noting that the prior claim was denied for claimant's failure to establish total disability, Decision and Order at 2, the administrative law judge only considered the newly submitted evidence in addressing whether total disability, and therefore a material change in conditions, was established. The administrative law judge credited the newly submitted medical opinion evidence as sufficient to establish total disability under Section 718.204(b)(2)(iv). Decision and Order at 4-5. This evidence consists of medical opinions from Drs. Fino, Cohen and Diaz, who opined that claimant is totally disabled from a pulmonary standpoint, Director's Exhibit 29; Claimant's Exhibits 1, 2, and the opinion of Dr. Reddy, who did not

---

[5]In *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000), the administrative law judge had considered all of the newly submitted and previously submitted evidence in finding the existence of pneumoconiosis established, the element previously adjudicated against claimant, and the Board held that the new evidence credited by the administrative law judge was not merely cumulative of the previously submitted evidence. *Stewart*, 22 BLR at 1-90. In *Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997), the Board held that it was not clear from the administrative law judge's decision whether, in finding a material change in conditions established, he found that the new medical opinion evidence was sufficient to establish total disability and, therefore, a worsening of claimant's condition since the previous denial of benefits, or whether the administrative law judge merely disagreed with the previous determination (by the district director) that the medical opinion evidence was insufficient to establish total disability. Flynn, 21 BLR at 1-42-43.

specifically make a total disability determination except to indicate that claimant has a moderate expiratory airflow obstruction. Director's Exhibit 7.

We agree with Director's position, however, that the administrative law judge's failure to consider the previously submitted medical opinion evidence – *i.e.*, Dr. Kress's 1981 medical report and 1985 deposition testimony indicating that claimant is not totally disabled – constitutes harmless error. Because the newly submitted medical opinion evidence, which the administrative law judge found was significantly more recent and, therefore, more probative of claimant's current condition, uniformly supports a finding that claimant is totally disabled, claimant's demonstration of total disability on remand is "a foregone conclusion."[6] In similar circumstances in *Tennessee Consolidated Coal Co. v. Kirk*, 22 BLR 2-291 (2001), the Sixth Circuit decided not to remand a case for the administrative law judge to reconsider the previously submitted evidence pursuant to *Ross* because the newly submitted evidence, developed five years after the latest of the previously submitted evidence, amounted to substantial evidence supporting a finding that Mr. Kirk had pneumoconiosis – the element of entitlement at issue in that case. The court essentially held that, in light of the new, substantial evidence indicating that Mr. Kirk had pneumoconiosis, it was a foregone conclusion that a material change in conditions had been established. *Kirk*, 22 BLR at 2-301, 2-302.

Employer next argues that even if, for the sake of argument, the administrative law judge properly found a material change in conditions established, the administrative law judge erred in finding that claimant established

---

[6]The administrative law judge weighed, pursuant to *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), the newly submitted medical opinion evidence against the newly submitted pulmonary function studies and arterial blood gas studies under 20 C.F.R. §718.204(b)(2). The administrative law judge rationally found the medical opinion evidence the most probative means of establishing total disability because it takes into account a totality of factors. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en* banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 5. In addressing the issue of total disability on the merits of the claim, the administrative law judge stated that upon his review of all of the evidence of record, he continued to find that claimant established total disability. Decision and Order at 5. The administrative law judge properly accorded greater weight to the significantly more recent medical opinion evidence developed from 2000 to 2002, which uniformly supports a finding that claimant is totally disabled, finding it to be the most probative evidence of claimant's current respiratory condition. *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); Decision and Order at 5; Director's Exhibits 7, 29; Claimant's Exhibits 1, 2. We affirm, therefore, the administrative law judge's finding on the merits that claimant established total disability pursuant to Section 718.204(b).

total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer argues that none of the medical reports submitted by claimant, from Drs. Reddy, Diaz and Cohen, supports a finding of disability causation. Specifically, employer argues that Dr. Reddy, claimant's treating physician, opined, without any reasoning, only that claimant has a forty percent respiratory impairment, and did not indicate whether this impairment is due to pneumoconiosis. Employer contends that Dr. Diaz failed to quantify the degree of claimant's disability and offered mere conclusions without indicating what documentation he relied upon to support his opinion. Employer further argues that Dr. Cohen's opinion, that claimant's pneumoconiosis and cigarette smoking both contributed to claimant's moderate impairment, is legally insufficient to support a finding of disability causation. Employer also contends that Dr. Cohen's opinion is poorly reasoned and documented because Dr. Cohen did not address claimant's advanced age, did not comment on Dr. Kress's 1985 deposition testimony that pneumoconiosis does not progress once coal dust exposure ceases, and did not discuss claimant's lack of coal dust exposure for more than twenty years. Finally, employer contends that Dr. Fino's opinion, that claimant's disability is not due to pneumoconiosis or coal dust exposure, should have been accorded determinative weight because Dr. Fino examined claimant and submitted a well-reasoned and documented report.

Employer's contentions lack merit. First, contrary to employer's contentions, the administrative law judge properly found that the opinions of Drs. Reddy, Diaz and Cohen support a finding that claimant's pneumoconiosis substantially contributed to his totally disabling respiratory impairment.[7] 20

---

[7]Revised Section 718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

C.F.R. §718.204(c); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); Decision and Order at 8-9; Director's Exhibit 7; Claimant's Exhibits 1, 2. Second, whether a medical opinion is reasoned and documented is for the administrative law judge as factfinder to determine. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en* banc). The administrative law judge accorded determinative weight to the opinion of Dr. Cohen, crediting it over Dr. Fino's opinion that claimant's totally disabling respiratory impairment is due entirely to smoking for twelve years. Decision and Order at 8-9; Director's Exhibit 29; Claimant's Exhibit 1. Contrary to employer's contention, the administrative law judge properly credited Dr. Cohen's opinion upon finding that Dr. Cohen's report was well-reasoned and documented since Dr. Cohen conducted a thorough review of the evidence of record, set forth detailed reasons why he believed claimant's totally disabling respiratory condition is related to his thirty-three years of underground coal mining, and explained why he disagreed with Dr. Fino's contrary conclusions with regard to disability causation. *Clark*, 12 BLR at 1-155; Decision and Order at 7-9; Claimant's Exhibit 1. In addition, the administrative law judge properly found that Dr. Cohen's report was supported by the reports of Drs. Reddy and Diaz. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 8; Director's Exhibit 7; Claimant's Exhibit 2. The administrative law judge further properly credited Dr. Cohen's opinion based upon Dr. Cohen's qualifications relating specifically to coal workers' pneumoconiosis.[8]

Dr. Reddy indicated that claimant has a forty percent pulmonary impairment, which the doctor attributed only to occupational pneumoconiosis. Director's Exhibit 7. Dr. Diaz opined that claimant's occupational coal dust exposure "has contributed significantly to his disease," and that "his disease renders him unable to do his last [welding] job in the mines." Claimant's Exhibit 2. Dr. Cohen opined that claimant's "respiratory impairment prevents him from being able to perform the duties of a welder in the coal mines," and indicated that claimant's "33 years of coal dust exposure and 12-24 pack years of exposure to tobacco smoke is [sic] the primary cause [sic] of the development of his moderate obstructive defect." Claimant's Exhibit 1.

[8]The administrative law judge noted that Dr. Cohen's curriculum vitae indicates that he serves as the Director of the Black Lung Program at Cook County Hospital in Chicago, Illinois, and as a consultant for various coal mine related programs. Decision and Order at 8; Claimant's Exhibit 1. The administrative law judge further noted that Dr. Cohen has received grant support for black lung studies, and has authored numerous publications and lectured on subjects related to coal workers' pneumoconiosis. *Id.* The administrative law judge noted that, in contrast, while Dr. Fino, like Dr. Cohen, is Board-certified in pulmonary

Woodward v. Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 8; Claimant's Exhibit 1. Contrary to employer's suggestion, the administrative law judge was not required to credit Dr. Fino's opinion on the ground that Dr. Fino, unlike Dr. Cohen, examined claimant. *Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985).

Furthermore, the administrative law judge properly discounted the previously submitted evidence, which dated from 1980 to 1985, including Dr. Kress's 1985 opinion that pneumoconiosis does not progress once coal dust exposure ceases, finding that the significantly more recent evidence developed from 2000 to 2002 was more probative of claimant's current respiratory status. *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); Decision and Order at 5. Contrary to employer's argument, it is well-settled that pneumoconiosis, even in the absence of further coal dust exposure, is a progressive disease. *See* 65 Fed. Reg. 79970 (Dec. 20, 2000); *Woodward*, 991 F.2d at 320, 17 BLR at 2-85; *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). Accordingly, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). 20 C.F.R. §718.204(c).

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

SO ORDERED.

---

medicine, Dr. Fino's curriculum vitae does not include entries specifically related to coal workers' pneumoconiosis. Decision and Order at 8; Director's Exhibit 29.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge