BRB Nos. 04-0751 BLA
and 04-0751 BLA-A

JAY MAY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 06/13/2005
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denying Benefits (2003-BLA-5723) of Administrative Law Judge Richard A. Morgan with

respect to 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 approximately forty years of qualifying coal mine employment, and determined that this subsequent claim, filed on May 21, 2001, was timely filed pursuant to 20 C.F.R. §725.308(a), and that claimant's previous claim was denied on the ground that the evidence failed to establish a totally disabling respiratory or pulmonary impairment.[1] The administrative law judge found that the new evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and thus claimant established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge then considered all of the evidence of record, and determined that the doctrine of collateral estoppel was not applicable to preclude relitigation of the issue of the existence of pneumoconiosis. The administrative law judge found that the weight of the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant argues on appeal that the doctrine of collateral estoppel is applicable, and alternatively contends that the administrative law judge erred in weighing the x-ray evidence at Section 718.202(a)(1) and the medical opinion evidence at Section 718.202(a)(4), which affected his findings on the issue of disability causation at Section 718.204(c). Employer responds, urging affirmance of the denial of benefits, and cross-appeals, contending that the administrative law judge erred in finding that this subsequent claim was timely filed under Section 725.308. Claimant responds, urging the Board to

[1] Claimant's initial claim for benefits, filed with the Social Security Administration (SSA) on May 19, 1970, was repeatedly denied by SSA and by the Department of Labor (DOL), with the last denial issued by the district director on March 3, 1981, based on claimant's continued employment and his failure to establish that he was totally disabled by pneumoconiosis. Director's Exhibit 1. Claimant took no further action until the filing of a second claim on February 5, 1987, which was denied by the district director on March 23, 1987, for failure to establish any element of entitlement. Director's Exhibit 2. Claimant's third application for benefits, filed on August 24, 1994, was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order issued on May 5, 1997. Director's Exhibit 3. Judge Tierney found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), but insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *Id*. This claim was deemed finally denied and administratively closed when claimant took no action within one year of its denial. Director's Exhibit 41. Claimant filed the present claim for benefits on May 21, 2001. Director's Exhibit 4.

reject employer's arguments on cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), has declined to address the merits of this appeal, but has filed limited responses, urging the Board to reject claimant's argument that the doctrine of collateral estoppel is applicable, and to reject employer's timeliness arguments under Section 725.308.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that the administrative law judge erred in declining to give preclusive effect to Administrative Law Judge Gerald M. Tierney's finding of the existence of pneumoconiosis under Section 718.202(a)(4), made in the May 5, 1997 Decision and Order denying benefits in claimant's third claim. We disagree. For collateral estoppel to apply in this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant must establish that: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). Additionally, it is well-settled that relitigation of an issue is not barred when there is a difference in the allocation of the burdens of proof and production, or a difference in the substantive legal standards pertaining to the two proceedings. *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003).

In the present case, the administrative law judge initially found that because employer did not previously stipulate to the presence of pneumoconiosis, no findings rendered on that issue in the prior claim were binding on employer in the present claim, as expressly provided at 20 C.F.R. §725.309(d)(4). Decision and Order at 5. The administrative law judge then correctly determined that Judge Tierney's finding of pneumoconiosis was not necessary to the outcome of the prior proceeding, wherein benefits were denied. *Id.*; *see Hughes*, 21 BLR at 1-137, 1-138. Further, the administrative law judge accurately determined that Judge Tierney's finding of pneumoconiosis was based solely on the medical opinion evidence, whereas the subsequent holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), requires that the different types of evidence submitted pursuant to 20 C.F.R. §718.202(a)(1)-(4) be weighed together to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis. Decision and Order at 5.

As the change in law altered the substantive legal standard to be applied, the issue was not identical in the two proceedings, thus the administrative law judge properly found that application of the doctrine of collateral estoppel was precluded. *Id*., *see Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314 (2003); *Collins*, 22 BLR at 1-232, 1-233. We therefore reject claimant's arguments.

Turning to the merits, claimant maintains that the administrative law judge erred in weighing the x-ray evidence of record at Section 718.202(a)(1). Claimant asserts that the administrative law judge should have resolved the conflict in the interpretations of each film to determine which films were positive for pneumoconiosis and which films were negative, and then the administrative law judge should have determined whether the x-rays viewed in sequence established a natural pattern of progression of pneumoconiosis sufficient to accord the more recent positive x-rays controlling weight. Claimant's Brief at 13-14. Claimant, however, has failed to identify any specific error in the administrative law judge's findings at Section 718.202(a)(1), nor has claimant explained how his suggested method of weighing the evidence would alter the outcome thereunder.

The administrative law judge determined that the preponderance of the previously submitted x-ray evidence was negative for pneumoconiosis, but acknowledged that, in view of the progressive nature of pneumoconiosis, the more recent x-ray evidence is generally more probative. Decision and Order at 8. The administrative law judge reviewed the new x-ray interpretations of five films submitted in conjunction with this subsequent claim, and properly considered not simply the number of positive and negative interpretations, but the qualifications of the physicians. Decision and Order at 7; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The administrative law judge determined that every new film was interpreted as positive by either a B-reader or by a dually-qualified Board-certified radiologist and B-reader, and as negative by a dually-qualified physician. As the record contained multiple conflicting interpretations by dually-qualified readers, the administrative law judge reasonably concluded that the x-ray evidence neither established nor precluded the presence of pneumoconiosis, and that claimant failed to meet his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order at 8; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994). The administrative law judge's findings pursuant to Section 718.202(a)(1) are supported by substantial evidence and thus are affirmed.

Claimant next contends that the administrative law judge erred in weighing the conflicting medical opinions of record at Section 718.202(a)(4), and asserts that the opinions of Drs. Baker, Ranavaya and Rasmussen, all highly qualified physicians who diagnosed pneumoconiosis, outweigh the contrary opinions of Drs. Crisalli and Zaldivar.

Claimant's arguments essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge accurately reviewed the conflicting medical opinions, and determined that Drs. Rasmussen, Ranavaya and Baker all provided limited analyses of the cause of claimant's ventilatory impairment and failed to address the effect of heart disease and bypass surgery on claimant's pulmonary or respiratory condition. As he concluded that Drs. Rasmussen, Ranavaya and Baker relied upon limited clinical data and inadequately explained their bases for diagnosing legal pneumoconiosis, the administrative law judge permissibly accorded their opinions less weight.[2] Decision and Order at 18; *see Collins v. J&L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). By contrast, the administrative law judge determined that Drs. Crisalli and Zaldivar were both Board-certified pulmonary specialists who provided more detailed discussions of claimant's respiratory impairment and its etiology, and explained the medical bases for their conclusion that claimant's impairment was unrelated to coal dust exposure.[3] Decision and Order at 18-19; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Although the administrative law judge was also critical of the analyses offered by Drs. Crisalli and Zaldivar,[4] he acted within his discretion in finding that Dr. Zaldivar's

[2] The administrative law judge also determined that Drs. Rasmussen, Ranavaya and Baker diagnosed pneumoconiosis based primarily on claimant's coal mine employment history and positive x-ray interpretations, which were questionable in view of the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 18.

[3] We reject claimant's assertion that Dr. Zaldivar's opinion is contrary to the Act and, as such, merits little weight. Claimant argues that Dr. Zaldivar's conclusion, that pneumoconiosis was not present due to a negative CT scan, is tantamount to a finding that pneumoconiosis cannot exist absent a positive CT scan or x-ray, contrary to the provisions at 20 C.F.R. §718.202(b). Claimant's Brief at 18. The record reflects, however, that Dr. Zaldivar merely changed his opinion, that a 1995 x-ray was positive for pneumoconiosis, after reviewing a 1993 CT scan which was negative. Noting that the CT scan was a more precise tool than the x-ray, and after analyzing claimant's medical history, test results, and deterioration in breathing capacity between 1995 and 2002, Dr. Zaldivar concluded that the x-ray abnormalities which he originally diagnosed as pneumoconiosis actually represented vascular engorgement from left ventricular failure. Decision and Order at 14-16; Director's Exhibit 29; Employer's Exhibits 2, 14.

[4] The administrative law judge found it "somewhat troubling" that Dr. Crisalli attributed claimant's pulmonary problems to a smoking habit which had ended approximately 40 years ago, while ruling out 40 years of coal dust exposure ending in

opinion, particularly on the disability causation issue, was the best reasoned of all the medical opinions of record, as the physician examined claimant in 1995 and 2002, reviewed extensive data, and persuasively explained that claimant's respiratory condition deteriorated from a minimal impairment in 1995 to a totally disabling impairment in 2002 due entirely to nonpulmonary conditions, including aging, physical deconditioning and cardiac disease. Decision and Order at 18-20; *see Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As they are supported by substantial evidence, we affirm the administrative law judge's findings that the weight of the medical opinion evidence was insufficient to establish pneumoconiosis at Section 718.202(a)(4) or disability causation at Section 718.204(c), and that the different types of evidence weighed together were insufficient to establish the existence of pneumoconiosis at Section 718.202(a), *see Compton*, 211 F.3d 203, 22 BLR 2-162. Consequently, we affirm the administrative law judge's denial of benefits, and need not reach employer's arguments on cross-appeal regarding the timeliness issue at Section 725.308.

1985 as a source of impairment. Decision and Order at 18; Director's Exhibit 25; Employer's Exhibits 6, 13. The administrative law judge was also "somewhat puzzled" by Dr. Zaldivar's reliance upon the negative interpretation of a 1993 CT scan over his own positive 1995 x-ray reading; despite Dr. Zaldivar's explanation that the CT scan was a superior diagnostic tool, the administrative law judge observed that it would not necessarily preclude a subsequent finding of pneumoconiosis in view of the progressive and latent nature of the disease. Decision and Order at 18; Director's Exhibit 29; Employer's Exhibits 2, 14.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge