BRB No. 05-0774 BLA

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| HARLIE BOWLING | ) | |
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| Claimant | ) | |
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| v. | ) | |
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| SCOTT COAL COMPANY | ) | DATE ISSUED: 06/20/2006 |
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| 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Decision and Order (2003-BLA-5538) of Administrative Law Judge Edward Terhune Miller awarding benefits on a subsequent 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 19.4 years of qualifying coal mine employment, and adjudicated this claim, filed on November 23, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established a change in an applicable

condition of entitlement pursuant to 20 C.F.R. §725.309(d), as new evidence submitted in support of this subsequent claim established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). The administrative law judge then found that the weight of the evidence established all elements of entitlement. Accordingly, benefits were awarded.

On appeal, employer contends that this claim is time-barred pursuant to 20 C.F.R. §725.308; that the administrative law judge erred in his analysis at 20 C.F.R. §725.309(d) and his weighing of the evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c); and that the administrative law judge, in awarding benefits commencing as of April 2001, did not acknowledge the correct date of filing of this claim or provide an analysis which comports with the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to address the merits of this claim, but urging the Board to reject employer's arguments pursuant to 20 C.F.R. §§725.308 and 725.309(d), as the Director asserts that employer waived the timeliness issue and that the administrative law judge properly found that claimant demonstrated a change in an applicable condition of entitlement. Employer has also filed a reply brief in support of its position.[1]

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).

Employer first contends that, because timeliness was listed as a contested issue on Form CM-1025, the administrative law judge erred in failing to adjudicate the issue pursuant to Section 725.308. We disagree. The regulations explicitly provide that "[a] party may, on the record, withdraw his or her controversion of any or all issues set for hearing." 20 C.F.R. §725.462. The Director correctly maintains that employer withdrew the issue from consideration at the hearing, when the administrative law judge asked whether any of the issues identified by the district director as being in dispute could be

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment; his finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3); and his finding that the evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

conceded or withdrawn, Hearing Transcript at 6-7, and employer's counsel responded "I think the claim has probably been timely filed so we do not contest issue one." Hearing Transcript at 7. Consequently, employer has waived the timeliness issue. 20 C.F.R. §§725.462, 725.463; *see generally Big Horn Coal Co. v. Director, OWCP* [*Madia*], 55 F.3d 545, 19 BLR 2-209 (10th Cir. 1990).

Employer next contends that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309(d) based on new evidence of total respiratory disability, when the prior denial was based on a finding of no pneumoconiosis or disability causation. Employer also asserts that because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit,[2] the administrative law judge's analysis pursuant to Section 725.309(d) must include consideration of the qualitative difference between the earlier evidence and the new evidence, consistent with *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Some of employer's arguments have merit.

Where a miner 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004)(*en banc*). The "applicable conditions of entitlement" are limited to "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In denying claimant's last claim filed in 1997, the district director checked all of the boxes on Form CM-1000a to indicate that the evidence did not show that claimant had pneumoconiosis caused at least in part by coal mine work, or that claimant was totally disabled by the disease; but the district director also attached Form CM-998, which listed the qualifying values of claimant's ventilatory study performed on May 6, 1997, and noted that "although the results of this test indicate that you have a breathing impairment, other evidence in your file fails to show that this condition was caused by coal mine work." Director's Exhibit 3. Moreover, a review of the record indicates that claimant's 1995 and 1988 claims also contained qualifying pulmonary function study results and/or medical opinions of total disability, *see* Director's Exhibits 1-3; and the Board upheld Administrative Law Judge E. Earl Thomas's denial of claimant's 1988 claim on the ground that the evidence was

[2] The administrative law judge incorrectly applied Fourth Circuit precedent in adjudicating this claim despite his accurate determination that claimant was last employed in the coal mine industry in Tennessee. Decision and Order at 2; *Shupe v. Director, OWCP*, 12 BLR 1-202 (1989)(*en banc*).

insufficient to establish the existence of pneumoconiosis.[3] Director's Exhibit 1; *see Bowling v. Scott Coal Co.*, BRB No. 92-0935 BLA (Dec. 30, 1993)(unpub.). Therefore, this subsequent claim could be approved only if new evidence submitted in conjunction therewith establishes that claimant has pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *Dempsey*, 23 BLR 1-47.

While the administrative law judge based his finding of a change in an applicable condition of entitlement on new evidence of total disability, Decision and Order at 6-7, he also found, in adjudicating the merits of this claim, that the weight of the new evidence established the existence of pneumoconiosis. Decision and Order at 7-9. Employer, however, has identified error in the administrative law judge's weighing of the evidence pursuant to Section 718.202(a), as set forth below. Consequently, we vacate the administrative law judge's findings at Sections 725.309(d) and 718.202(a), and remand this case for the administrative law judge to reweigh the new evidence on the issue of the existence of pneumoconiosis and determine whether it is sufficient to establish a change in that condition of entitlement. If so, the administrative law judge must then weigh all of the evidence of record, old and new, in adjudicating the merits of this claim. However, we reject employer's assertion that the administrative law judge's analysis under Section 725.309(d) must include a determination of whether the evidence developed in the current claim differs qualitatively from the evidence developed in the prior claim, as the Sixth Circuit precedent relied upon by employer construed the prior version of Section 725.309, while the current claim was filed after the effective date of the amendments to this regulation. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in condition;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based.[4] *See* 20 C.F.R. §725.309(d)(2), (3).

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[3] Judge Thomas found the weight of the evidence insufficient to establish the existence of pneumoconiosis or disability causation, but determined that pulmonary function studies performed by Drs. Seargeant, Hudson and Dewar produced qualifying results adequate to establish total respiratory disability under the Act, and that Drs. Hudson, Seargeant and Baker opined that claimant was totally disabled. Director's Exhibit 1; 1988 Decision and Order at 8-12.

[4] The Director notes that, in revising 20 C.F.R. §725.309, the Department of Labor intended to afford full effect to the Fourth Circuit's decision in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), which rejected the Sixth Circuit's requirement that the factfinder consider the qualitative difference between earlier and current evidence. Director's Brief at 2; *see* 64 Fed. Reg. 54984 (Oct. 8, 1999).

Turning to the merits, employer challenges the administrative law judge's weighing of the conflicting evidence of record in finding that Dr. Baker's opinion and the x-ray evidence combined establish the existence of pneumoconiosis at Section 718.202, and that Dr. Baker's opinion is sufficient to establish disability causation at Section 718.204(c). Employer asserts that the administrative law judge mechanically relied solely upon the later evidence, although claimant's coal mine exposure had ended in 1985 but he continued to smoke, and the evidence in claimant's 1988, 1995 and 1997 claims showed that claimant did not have pneumoconiosis but had a totally disabling respiratory impairment due to smoking. Employer further argues that the administrative law judge mischaracterized Dr. Repsher's opinion and improperly credited Dr. Baker's conclusions over those of employer's experts, when Dr. Baker's opinion lacks any rationale for his conclusions and does not demonstrate a change from the findings in his 1989 report. Again, there is merit in some of employer's arguments.

Initially, we note that the administrative law judge rendered conflicting findings of fact with regard to the newly-submitted x-ray evidence of record and the qualifications of the readers. The administrative law judge first determined that the new x-ray evidence consisted of five negative and six positive interpretations of four films dated May 6, 1997, January 23, 2002, February 9, 2002 and April 26, 2002; and that the negative interpretations were rendered by Drs. Wiot, Perme and Shipley, all dually-qualified Board-certified radiologists and B-readers, and by Dr. Dahhan, a B-reader, while the positive interpretations were rendered by Drs. Ahmed and Alexander, dually-qualified readers, and by Drs. Pathak and Baker, B-readers. Decision and Order at 3. The administrative law judge subsequently stated that Dr. Pathak was dually-qualified, *see* Decision and Order at 7, 9; that Dr. Baker's opinion "is corroborated by the x-ray interpretations of three dually-qualified physicians and a fellow B-reader," Decision and Order at 7; and that there were positive x-ray interpretations by "three dually-qualified physicians and five B-readers," Decision and Order at 8. A review of the record, however, reflects that Dr. Pathak is a B-reader who lists the British equivalent of Board-certification on his *curriculum vitae*, *see* Claimant's Exhibit 7; and Dr. Baker's B-reader certification was not in effect at the time he interpreted the film dated January 23, 2002,[5] *see* Director's Exhibit 11. As the administrative law judge relied in part on the readers' qualifications in crediting the positive x-ray evidence together with Dr. Baker's opinion to find the existence of pneumoconiosis established, he should reassess this evidence on remand.

[5] Dr. Baker interpreted this film on January 23, 2002, but his B-reader certification was in effect from June 1, 2002 until May 31, 2006. Director's Exhibit 11. The list of approved B-readers on the Department of Labor's website at http://www.oalj.dol.gov/public/black_lung/references_works/bread3d_08_05.htm lists Dr. Baker as an A-reader from February 1, 2001 to May 31, 2002.

Next, in evaluating the conflicting medical opinions on the issues of the existence of pneumoconiosis and disability causation, the administrative law judge did not consider the earlier medical opinions submitted in conjunction with claimant's prior claims. While the administrative law judge may find this evidence to be of diminished probative value, *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*), he is instructed on remand to address and weigh the earlier opinions, which could serve to either buttress or undercut the current medical opinions of record. The administrative law judge also found that the explanations provided by employer's experts to support their conclusions were unpersuasive, yet he credited Dr. Baker's opinion despite its lack of rationale and substantial similarity to Dr. Baker's 1989 report. Further, the administrative law judge discounted Dr. Repsher's opinion on the ground that the physician's underlying premise was incorrect, *i.e.*, Dr. Repsher reported that the B-reader radiologists had uniformly interpreted claimant's x-ray as negative for pneumoconiosis, *see* Employer's Exhibit 2, when the administrative law judge determined that Drs. Baker, Pathak, Ahmed and Alexander were all B-readers who found positive x-ray evidence of pneumoconiosis. Decision and Order at 8. Dr. Repsher, however, discussed the positive interpretations of Drs. Pathak, Alexander and Ahmed in a post-hearing addendum report which the administrative law judge did not address.[6] Consequently, on remand, the administrative law judge must reassess the medical opinions of record at Sections 718.202(a)(4), 718.204(c), and subject Dr. Baker's opinion to the same scrutiny as he applies to the remaining opinions.

Lastly, employer challenges the administrative law judge's award of benefits commencing as of April 2001, "the month in which the claim was filed," *see* Decision and Order at 10, when in fact, this subsequent claim was filed in November 2001, *see*

[6] At the hearing, employer's counsel requested that he be allowed to submit post-hearing rehabilitative evidence in response to the positive x-ray interpretations at Claimant's Exhibits 7 and 8, which were submitted for introduction into evidence precisely 20 days prior to the hearing on April 12, 2004. Hearing Transcript at 15-24. Specifically, employer sought to obtain supplemental reports from Drs. Fino and Repsher, who did not have the opportunity to review the positive x-rays at the time they rendered their consultative reports. Hearing Transcript at 16-19. The administrative law judge indicated that he would reserve a ruling on admissibility until such time as employer submitted its rehabilitative evidence. Hearing Transcript at 22-24. Employer submitted supplemental reports to the administrative law judge from Drs. Fino and Repsher on May 10, 2004 and April 27, 2004, respectively. The record, however, does not contain a ruling on the admissibility of this evidence, and while the administrative law judge considered Dr. Fino's post-hearing report, *see* Decision and Order at 6, he did not acknowledge or weigh Dr. Repsher's addendum report.

Director's Exhibit 5. If, on remand, the administrative law judge again finds that claimant is entitled to benefits, he is instructed to redetermine the month of onset of total disability due to pneumoconiosis consistent with 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge