BRB No. 07-0556 BLA

D.N., o/b/o W.N. (Deceased)[1]	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 03/20/2008
PITTSBURG & MIDWAY COAL MINING 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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

John W. Hargrove (Bradley Arant Rose & White LLP), Birmingham, Alabama, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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.

[1] Claimant is the miner's widow. The miner died in May 2006, prior to the scheduled hearing on the current claim. The administrative law judge granted the widow's motion to be substituted as the claimant in this case. Decision and Order at 1 n.1.

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

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-5802) of Administrative Law Judge Robert D. Kaplan awarding benefits 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). The miner's prior application for benefits, filed on July 16, 2001, was finally denied on March 11, 2002, because the miner failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 5. On August 18, 2005, the miner filed his current application, his sixth, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 7.

In a Decision and Order dated February 23, 2007, the administrative law judge credited the miner with fourteen years and ten months of coal mine employment[2] and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge determined that claimant met her burden to establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 990, 23 BLR 2-213, 2-236 (11th Cir. 2004); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 8. Reviewing the entire record, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer initially asserts that claimant cannot establish entitlement to benefits because she did not file a separate survivor's claim, and the miner was not found to be totally disabled due to pneumoconiosis prior to his death. Employer further contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 725.309(d), and erred in his evaluation of the medical opinion

[2] The record indicates that the miner's coal mine employment occurred in Alabama. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Slatick v. Director, OWCP*, 698 F.2d 433, 5 BLR 2-49 (11th Cir. 1983); *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response, urging the Board to reject employer's arguments that the widow is ineligible to receive benefits on the miner's claim, and that the miner was not totally disabled because less demanding work was available in his area.[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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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); *White*, 23 BLR at 1-3. The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because the miner failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 5. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to obtain review of the merits of the miner's claim. 20 C.F.R. §725.309(d)(2), (3); *see Jones*, 386 F.3d at 990, 23 BLR at 2-236.

Initially, we reject employer's contention that claimant is not eligible to receive benefits because the miner's claim was not adjudicated prior to his death, and claimant did not file a separate survivor's claim. Employer's Brief at 4. A miner is entitled to benefits for each month beginning with the first month on or after January 1, 1974, in

[3] The administrative law judge's finding that the evidence establishes fourteen years and ten months of coal mine employment is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

which he is found to be totally disabled due to pneumoconiosis arising out of coal mine employment, and ending with the month before the month in which he died. 20 C.F.R. §725.203(a)(1). In this case, the administrative law judge properly found, and employer does not contest, that benefits are payable to the miner beginning August 2005, the month he filed his claim. 20 C.F.R. §§725.309(d)(5), 725.503(b); Decision and Order at 12. The record reflects that following the miner's death, by Motion dated February 7, 2007, claimant was properly substituted as a party on the miner's behalf. *See* 20 C.F.R. §§725.360(b), 725.545(c)-(e), 802.402(b); *Clarke v. Director, OWCP*, 11 BLR 1-169, 1-170 (1988). Thus, contrary to employer's argument, as the Director correctly asserts, claimant is entitled to pursue the miner's claim on his behalf, and, as the miner's beneficiary, is entitled to receive any benefits owed on the miner's claim that were not paid to him in his lifetime, regardless of her own eligibility for benefits as a surviving spouse. *See* 20 C.F.R. §§725.203, 725.545(c)(1); Employer's Brief at 4; Director's Brief at 2.

Regarding the administrative law judge's evaluation of the medical evidence, employer asserts that the administrative law judge erred in finding that the newly submitted evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). We disagree. The administrative law judge properly found that the newly submitted x-ray evidence consists of two readings of an x-ray dated October 5, 2005.[4] Decision and Order at 5-6. The October 5, 2005 x-ray was read as negative by Dr. Goldstein, a B reader, and as positive by Dr. Ballard, who is a B reader and Board-certified radiologist. Contrary to employer's arguments, the administrative law judge permissibly accorded greater weight to the positive reading by Dr. Ballard, based on the physician's superior radiological qualifications, to conclude that the October 5, 2005 x-ray is positive for the existence of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985); Decision and Order at 6; Director's Exhibit 17; Employer's Exhibit 1. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence.

In evaluating the new medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge properly found that the only medical opinion of record is that of Dr. Hawkins, who diagnosed coal workers' pneumoconiosis. The administrative law judge permissibly credited Dr. Hawkins' opinion, as reasoned and well-documented, because the physician based his

[4] The October 5, 2005 x-ray was also read for quality only (Quality 1), by Dr. Barrett. Director's Exhibit 17.

diagnosis on the results of his physical examination, the miner's symptoms, the abnormal x-ray and pulmonary function study results, the miner's history of dust exposure, and the miner's lack of smoking history. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). We, therefore, affirm the administrative law judge's conclusion that the uncontradicted opinion of Dr. Hawkins supports a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and, when weighed together with the positive x-ray evidence, establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[5]

Turning to the merits of entitlement, the administrative law judge initially found that, given the progressivity of pneumoconiosis, the more probative evidence was the more recent evidence developed in 2005 in connection with the current claim, that he had already found sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 8. The administrative law judge noted that the next most recent evidence was developed in 2001, and that all other prior evidence antedates the new evidence by at least nine years. The administrative law judge permissibly accorded no weight to the 2001 evidence, which consisted of one negative x-ray reading by Dr. Westerman, who possesses no radiological qualifications, and Dr. Westerman's "equivocal" opinion that the miner's chronic obstructive pulmonary disease and chronic bronchitis were "possibly dust related." *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375; *Cranor*, 22 BLR at 1-7; *Worhach*, 17 BLR at 1-108; *Roberts*, 8 BLR at 1-213; Decision and Order at 8. Thus, as the administrative law judge properly considered all of the evidence of record, and acted within his discretion in finding that the new evidence "is entitled to substantially more weight than the old evidence," we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order at 8.

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(b)(2)(iv), that the medical evidence of record establishes the existence of a totally disabling respiratory impairment. Employer specifically contends

[5] In view of the alternative methods of establishing the existence of pneumoconiosis, the administrative law judge was not required to consider whether both the x-rays and medical opinions weighed together established pneumoconiosis. *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 991, 23 BLR 2-213, 2-237 (11th Cir. 2004); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, on appeal no party challenges this aspect of the administrative law judge's decision.

that the medical opinions of Drs. Hawkins and Westerman establish that, "[a]t most, [the] [m]iner would have been restricted from heavy labor" and that there are "hundreds of medium, light, and sedentary jobs in the job market." Employer's Brief at 4.

Contrary to employer's argument, as the Director asserts, the availability of less physically demanding work is not relevant to establishing total disability under the Act. Employer's Brief at 4; Director's Brief at 2. Rather, a miner is considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his usual coal mine work or comparable gainful work. 20 C.F.R. §718.204(b)(1)(i)-(ii); *see Black Diamond Coal Co. v. Benefits Review Board* [*Raines*]**,** 758 F.2d 1532, 7 BLR 2-209, *reh'g denied,* 768 F.2d 1353 (11th Cir. 1985). In evaluating the medical opinion evidence relevant to the issue of total disability, the administrative law judge again accorded the greatest weight to the most recent opinion of Dr. Hawkins, developed in 2005 in connection with the current claim. Dr. Hawkins diagnosed a moderate respiratory impairment, and concluded that the miner "cannot perform manual labor" and "cannot perform [his] last coal mine job." Director's Exhibit 17. Finding that the miner's coal mine employment required heavy exertion, the administrative law judge permissibly credited Dr. Hawkins' opinion, as reasoned and well-documented, and supported by the miner's symptoms of exertional dyspnea and his abnormal pulmonary function study results.[6] *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375; Decision and Order at 10. Thus, as the administrative law judge properly considered all of the evidence of record, and acted within his discretion in finding that Dr. Hawkins' opinion outweighed the earlier medical opinions of record, we affirm the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-27; Decision and Order at 8.

In evaluating the evidence relevant to the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge permissibly accorded greatest weight to the 2005 opinion of Dr. Hawkins, that pneumoconiosis contributed one-hundred percent to the miner's disabling lung impairment, because he found the opinion to be reasoned and documented, uncontradicted by the new evidence of record, and more probative than the earlier medical opinions of record. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375; *Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-

[6] The administrative law judge noted that the next most recent evidence consists of the 2001 report of Dr. Westerman, who also diagnosed a "mild to moderate" pulmonary impairment but did not offer an opinion as to whether this impairment prevented the miner from performing his usual coal mine work, and he noted that all other prior evidence antedates the new evidence by at least nine years. Decision and Order at 10.

27; Decision and Order at 11; Director's Exhibit 17. As the administrative law judge's determination is supported by substantial evidence, and is unchallenged by employer, we affirm the administrative law judge's finding that Dr. Hawkins' opinion establishes that pneumoconiosis was a substantially contributing cause of the miner's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). *See Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); Decision and Order at 11; Director's Exhibit 17.

In sum, it is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375. Because the administrative law judge fully explained why he accorded greater weight to the opinion of Dr. Hawkins, than to the contrary opinions of record under 20 C.F.R. §§718.202(a), 718.204(b), (c), and because substantial evidence supports these findings, we affirm the administrative law judge's determination that the evidence establishes that the miner was totally disabled due to pneumoconiosis.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge