BRB No. 97-0728 BLA

JAMES E. DANIEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRICE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	
	)	DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits and Order Denying Motion for Reconsideration [Attorney Fees] of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus and Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Order Denying Motion for Reconsideration [Attorney Fees] (96-BLA-0263) of Administrative Law Judge Thomas M. Burke 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 administrative law judge, noting the existence of a previously denied claim, determined that the instant claim is a duplicate claim pursuant to 20 C.F.R. §725.309. The administrative law judge credited claimant with at least twenty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's October 1994 filing date. Initially, the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), one of the elements previously adjudicated against claimant, and, thus, sufficient to establish a material change in conditions pursuant to Section 725.309. Thereafter, considering all of the evidence of record, old and new, the administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment. 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found the medical evidence of record sufficient to establish a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b). Accordingly, the administrative law judge awarded benefits, finding that the date from which benefits commence was October 1, 1994. In a supplemental Decision and Order, the administrative law judge awarded claimant's attorney a total fee of $2,250.00, representing eleven and one-quarter hours of legal services at an hourly rate of $200.00. Finally, the administrative law judge denied employer's motion for reconsideration of the attorney fee award.

On appeal, employer contends that the administrative law judge erred in failing to render a separate finding concerning a material change in conditions pursuant to Section 725.309. In addition, employer contends that the administrative law judge erred in finding that medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer further contends that the administrative law judge erred in finding that the evidence of record supports a finding of total disability and that claimant's total disability was due to his pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.[1]

Employer also challenges the administrative law judge's award of attorney fees, contending that the administrative law judge erred in denying employer's motion for reconsideration concerning the award of legal fees. Claimant responds, urging

[1] Inasmuch as the parties do not challenge the administrative law judge's decision to credit claimant with at least twenty years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b) and 718.204(c)(1)-(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

affirmance of the administrative law judge's award of legal fees. The Director has filed a letter stating that he will not file a response brief to employer's supplemental appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In challenging the administrative law judge's award of benefits, employer contends initially that the administrative law judge erred in proceeding directly to the merits of the claim rather than providing a separate analysis of whether the newly submitted evidence was sufficient to establish a material change in conditions under Section 725.309. *See* Employer's Brief at 16. Contrary to employer's contention, the administrative law judge provided a detailed analysis of the newly submitted evidence in finding that claimant established a material change in conditions pursuant to Section 725.309.[2] Specifically, after concluding that the weight of the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis, the administrative law judge found that the preponderance of the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 13. Inasmuch as the administrative law judge has provided a detailed and specific finding pursuant to Section 725.309, we reject employer's contention that the administrative law judge did not render a separate material change in conditions finding. Since employer does not otherwise challenge this finding, we affirm the administrative law judge's finding that the newly evidence is sufficient to establish a material change in conditions pursuant to Section 725.309. 20 C.F.R. §725.309; *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] As the administrative law judge correctly found, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit and, therefore, in order to establish a material change in conditions, claimant must establish, through the new evidence of record, one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's previous application for benefits was denied by the district director, on December 5, 1989, on the basis that claimant failed to establish any of the elements of entitlement under Part 718. Director's Exhibit 57 at 88.

In addition, we affirm the administrative law judge's finding that the weight of the medical opinion evidence, old and new, is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 13. Contrary to employer's contention, the administrative law judge did not impermissibly substitute his view of the facts for those of the experts. Rather, within a reasonable exercise of his discretion as trier-of-fact, the administrative law judge found the opinions of Drs. Broudy and Fino were not convincing inasmuch as those physicians did not adequately discuss their diagnoses in light of claimant's smoking history.[3] Director's Exhibits 17, 46, 48-50, 52; Employer's Exhibits 8, 15; Decision and Order at 13. Inasmuch as the administrative law judge is granted broad discretion in weighing the medical evidence and drawing his own inferences therefrom, we affirm the administrative law judge's decision to accord less weight to the opinions of Drs. Broudy and Fino, as within a rational exercise of this discretion. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985).

Moreover, contrary to employer's contention, the administrative law judge has not relied solely on a mechanical application of the numerical superiority of the evidence in contravention of the holding of the United States Court of Appeals for the Fourth Circuit in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).[4] Rather, the administrative law judge weighed the individual medical reports and reasonably accorded greater weight to the medical opinions of Drs. Mettu, Fritzhand, Clarke and Sundaram, which diagnosed the existence of pneumoconiosis, over the contrary medical opinions of Drs. Broudy, Fino and Clarke, based in part on the administrative law judge's finding that the contrary medical opinions were not convincing. Decision and Order at 13; *see generally Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Furthermore, the administrative law judge acted within his discretion as trier-of-fact in according more weight to the opinion of Dr. Sundaram as claimant's treating physician. *See* Claimant's Exhibits 1-2; Employer's Exhibit 8; Hearing Transcript at 12-14; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Lastly, contrary to employer's contention, the administrative

[3] The administrative law judge found that Drs. Broudy and Fino, who attributed claimant's significant pulmonary impairment to smoking, did not adequately discuss the fact that claimant quit smoking in 1977 or 1978 and that claimant's symptoms and complaints began in 1986, the year claimant left mining. Decision and Order at 13; *see also* Decision and Order at 8; Hearing Transcript at 11-12.

[4] Contrary to employer's suggestion, this case does not arise within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Rather, since claimant's coal mine employment was within the Commonwealth of Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

law judge was not required to discredit the medical opinions of Drs. Fritzhand, Clarke and Sundaram because the physicians relied on x-ray interpretations which were reread as negative by other doctors, *see Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Rather, the administrative law judge fully discussed the medical opinions of Drs. Mettu, Fritzhand, Clarke and Sundaram, each of whom diagnosed the existence of pneumoconiosis, including the evidence upon which their opinions are based, and reasonably credited these opinions as establishing the existence of pneumoconiosis. Director's Exhibits 16, 21, 33, 56B; Claimant's Exhibits 1-2; Decision and Order at 10-13; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983); *see generally Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985). Consequently, we affirm his finding that the weight of these opinions establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer further challenges the administrative law judge's finding that the evidence of record is sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). We disagree. Contrary to employer's contention, the administrative law judge discussed all of the relevant evidence, including the objective studies, in his consideration of the evidence at Section 718.204(c). *See* Decision and Order at 14-16. In addition to the medical opinions of Drs. Mettu, Fritzhand, Clarke and Sundaram, which stated that claimant was totally disabled, the administrative law judge found the opinions of Drs. Broudy and Fino supportive of a finding of total disability inasmuch as their opinions, that claimant would have difficulty doing arduous manual labor, were consistent with a finding of total disability based on the physical requirements of claimant's usual coal mine employment.[5] Decision and Order at 16; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Moreover, contrary to employer's contention, the administrative law judge reasonably relied upon the more recent medical opinions inasmuch as they more accurately reflect claimant's current condition. *See Wetzel, supra*; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). The remainder of employer's contentions are seeking a reweighing of the evidence of record, which the Board is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the evidence of record is sufficient to establish a totally disabling respiratory or

[5] The administrative law judge determined that claimant's usual coal mine employment was that of a belt line operator, which involved operating and servicing equipment on the surface, with a lifting requirement of over 100 pounds each day. Decision and Order at 2, 8; Hearing Transcript at 11, 14-16. Dr. Broudy, in his most recent report, opined that claimant would have difficulty performing arduous manual labor. Director's Exhibit 52; Employer's Exhibit 8. Dr. Fino opined that claimant would have difficulty performing heavy labor on a sustained basis. Director's Exhibit 50; Employer's Exhibit 15.

pulmonary impairment. 20 C.F.R. §718.204(c); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In challenging the administrative law judge's finding that claimant established that his total disability was due to pneumoconiosis under Section 718.204(b), employer contends that "as for the source of Daniel's disability, the administrative law judge rendered no findings at all." Employer's Brief at 23. This contention lacks merit. After finding that Drs. Mettu, Fritzhand, Sundaram and Clarke opined that claimant's total respiratory disability was secondary to his pneumoconiosis, the administrative law judge found that the opinions of Drs. Broudy and Fino, who opined that claimant's respiratory impairment was due to his smoking history, were not convincing on the issue of causation because they failed to explain adequately their diagnoses. Decision and Order at 16. Inasmuch as employer does not otherwise challenge this finding, we affirm the administrative law judge's finding that claimant's totally disabling respiratory condition was due to pneumoconiosis. 20 C.F.R. §718.204(b); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Skrack, supra*.

Furthermore, although employer states that the record does not support the administrative law judge's determination of October 1994 as the date from which benefits commence, Employer's Brief at 5, employer fails to brief further its allegation in terms of relevant law or allege any specific errors on the part of the administrative law judge. Since employer has not provided the Board with a basis to review the administrative law judge's determination of the date from which benefits commence, that finding is affirmed. 20 C.F.R. §802.211; *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, in a supplemental appeal, employer contends that the administrative law judge erred in denying employer's motion for reconsideration concerning the administrative law judge's award of legal fees to claimant's counsel.[6] In particular, employer contends that the administrative law judge erred in refusing to order service of the fee petition on employer's counsel and also in refusing to grant an extension of time

[6] In his fee petition to the administrative law judge, claimant's counsel requested a total fee of $5,950.00, representing twenty-nine and three-quarters hours of legal services at an hourly rate of $200.00. Noting that there were no objections to the fee petition, the administrative law judge disallowed eighteen and one-half hours of legal services as services not performed before the Office of Administrative Law Judges, thereby awarding a total fee of $2,250.00, representing eleven and one-quarter hours of legal services at the requested hourly rate of $200.00. Supplemental Decision and Order Awarding Representative's Fee at 1-2. By Order dated September 11, 1997, the administrative law judge denied employer's motion for reconsideration concerning the award of attorney's fees.

to employer's counsel to submit a response brief upon receipt of the fee petition. In addition, employer contends that the administrative law judge erred in awarding claimant's counsel an hourly rate of $200.00 and also erred in failing to reduce several entries as requesting an excessive amount of time to perform routine tasks. We disagree. Inasmuch as a review of the record indicates that claimant's counsel timely served his fee petition on employer's trial counsel, the counsel of record before the administrative law judge, *see* Attorney Fee Petition dated March 25, 1997; 20 C.F.R. §725.366, we affirm the administrative law judge's finding that service was perfected on employer, by service on trial counsel.[7] *See generally Consolidation Coal Co. v. Gooding*, 703 F.2d 230, 5 BLR 2-66 (6th Cir. 1983). Thus, the administrative law judge properly denied employer's motion to direct service of the fee petition and motion to hold case in abeyance until appellate counsel was served with the fee petition. *See* 20 C.F.R. §725.364; *Clark, supra*; *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Moreover, we decline to address employer's contention that the administrative law judge erred in his decision to award claimant's counsel a fee based on eleven and one-quarter hours of legal services at an hourly rate of $200.00, inasmuch as employer did not raise this issue in a timely objection to the fee petition before the administrative law judge. *See* 20 C.F.R. §725.366(d), (e); *see also Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Order Denying Motion for Reconsideration [Attorney Fees] are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[7] Employer's appellate counsel, in a Notice of Appearance filed with the Board on February 19, 1997, did not indicate that it was appearing on behalf of employer for any purpose other than representing employer in its appeal before the Board.

JAMES F. BROWN Administrative Appeals Judge