BRB No. 03-0517 BLA

ARNOLD I. KEEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BEATRICE POCOHONTAS COMPANY	)	DATE ISSUED: 05/18/2004
	)	
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 on Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson and Kelly), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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:

Employer appeals the Decision and Order Awarding Benefits on Modification (02-BLA-0282) of Administrative Law Judge Daniel F. Solomon rendered 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] Claimant filed a claim for benefits on July 5, 1979. Administrative Law Judge V.M. McElroy found that both employer and claimant stipulated to the existence of simple pneumoconiosis, and that, on his independent review of the record, the x-ray evidence established the existence of simple pneumoconiosis. The administrative law judge, therefore, found that claimant was entitled to the interim presumption of totally disabling pneumoconiosis at 20 C.F.R. §727.203(a)(1). The administrative law judge further found, however, that the presumption was rebutted at 20 C.F.R. §§727.203(b)(2) and (3). Accordingly, benefits were denied. Director's Exhibit 36.

Claimant filed a timely motion for modification. Administrative Law Judge Stuart A. Levin found that the evidence failed to establish the existence of complicated pneumoconiosis or a totally disabling pulmonary impairment due to coal workers' pneumoconiosis and was, therefore, insufficient to establish either a change in conditions or a mistake in a determination of fact. Claimant's motion for modification was, therefore, denied. Director's Exhibit 88. The Board affirmed Judge Levin's Decision and Order denying benefits. Director's Exhibit 94.

Claimant filed a second request for modification on April 2, 1996, submitting an additional report interpreting claimant's x-ray of February 11, 1996 as showing complicated pneumoconiosis. Following review of a re-reading of the February 1996 x-ray as negative for complicated pneumoconiosis, Director's Exhibit 100, the district director denied the request for modification and forwarded the case to the Office of Administrative Law Judges for a hearing. Director's Exhibits 101, 105. Pursuant to the parties agreement to waive a formal hearing, Judge Levin issued a decision on the record denying benefits on modification. Director's Exhibit 113. Claimant appealed without the assistance of counsel. The Board vacated Judge Levin's denial of benefits and remanded the case with instructions to review all the evidence of record *de novo* and to provide findings of fact and conclusions of law for his decision. Director's Exhibit 117. On January 5, 2000, Judge Levin issued a decision on remand, again denying benefits as claimant failed to establish the existence of complicated pneumoconiosis, a change in condition, or a mistake in fact. Director's Exhibit 120. He also found that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3).

Claimant filed a third request for modification on April 7, 2000, along with an x-ray reading which was positive for complicated pneumoconiosis by Dr. Kathleen A.

[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.

Deponte, dated March 15, 2000. The district director issued a proposed Decision and Order Denying Request for Modification. Director's Exhibit 142.

Claimant filed a fourth request for modification on August 24, 2001, submitting additional medical records, including a CT scan report, a single x-ray reading, and a one-page report from Dr. Robinette. Director's Exhibit 151. The Department of Labor responded to the modification request by granting the parties thirty days to submit additional evidence concerning modification. Director's Exhibit 152. Both parties developed additional evidence. The district director issued a proposed Decision and Order denying the request for modification. Claimant requested a formal hearing, and the case was referred to Judge Daniel F. Solomon (the administrative law judge). Director's Exhibits 95, 96.

The administrative law judge found that the sole issue before him was whether claimant established the existence of complicated pneumoconiosis. The administrative law judge found the existence of complicated pneumoconiosis established as of April 15, 2002, based on an x-ray of that date which was read as positive for complicated pneumoconiosis. Because this finding entitled claimant to invocation of the irrebuttable presumption of totally disabling pneumoconiosis, the administrative law judge found that he did not need to discuss the evidence proffered by employer rebutting the interim presumption. Accordingly, the administrative law judge found that claimant had established a change in conditions as of April 15, 2002 when he was first diagnosed with complicated pneumoconiosis, and that he was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis at 30 U.S.C. §921(c)(3). In finding the existence of complicated pneumoconiosis established, the administrative law judge gave significant weight to Dr. Deponte's reading of the April 15, 2002 x-ray and discounted the opinions of physicians who opined that claimant did not have complicated pneumoconiosis because they failed to accept the fact that the record showed that claimant had established the existence of simple pneumoconiosis.

On appeal, employer contends that the administrative law judge erred: in failing to explain how claimant established a change in condition or a mistake in fact; in rejecting the medical opinion evidence that claimant did not have simple pneumoconiosis based on employer's stipulation to the existence of simple pneumoconiosis and the finding of simple pneumoconiosis by Judge McElroy; in applying mechanically and inconsistently the "later evidence" rule; in failing to consider separately each item of evidence present in the Part 727 claim and; in failing to explain the weight given to the evidence. Claimant has not responded. The Director, Office of Workers' Compensation Programs, (the Director) participates in this appeal only to the extent that he argues that the Board should reject employer's argument that the administrative law judge erroneously held it to its prior stipulation of simple pneumoconiosis in the initial stages of the claim. In support of this position, the Director points out that employer reaffirmed its stipulation when the case was most recently before the administrative law judge. Specifically, the

Director refers to employer's January 30, 2003 closing brief to the administrative law judge in this proceeding, in which employer stated that the parties had stipulated to the existence of simple coal workers' pneumoconiosis in the initial hearing before Judge McElroy in 1988 and that this stipulation has not changed throughout the modification proceedings.

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge failed to explain how claimant established a change in condition or a mistake in fact when he granted claimant's request for modification. Claimant is not, however, required to allege or establish a change in condition or a mistake in a particular fact; instead, the administrative law judge may reevaluate the case and consider whether the ultimate finding of entitlement is in error, *i.e.*, there is no need for a smoking gun factual error or change in condition. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In this case, even though Judge Levin had previously found that the existence of complicated pneumoconiosis was not established, the administrative law judge was not precluded from considering all the evidence of record, both old and new, and determining that the existence of complicated pneumoconiosis was, in fact, established. *Jessee*, 5 F.3d 723, 18 BLR 2-26. Contrary to employer's argument, the administrative law judge fully discussed and explained his findings; he found that a change in conditions was established, *i.e.*, that claimant now has complicated pneumoconiosis based on the most recent x-ray of record, April 15, 2002, read by Dr. Deponte as positive for complicated pneumoconiosis. Because the record showed that claimant had established the existence of simple pneumoconiosis, and because pneumoconiosis is an irreversible disease and may be progressive, the administrative law judge found this most recent x-ray, read by Dr. Deponte, who was a Board-certified B-reader, to be credible evidence of claimant's current condition.

Employer next contends that the administrative law judge erred in finding that the parties were bound in the current modification proceeding by their previous stipulation, that the miner suffered from simple pneumoconiosis. Specifically, employer contends that because the new evidence fails to establish the existence of simple pneumoconiosis (majority of previous x-rays were read as positive for simple pneumoconiosis; while some recent x-rays and CT scans were read as negative for simple pneumoconiosis), the underlying facts in this case have changed, and it should not be bound by its prior stipulation. Likewise, employer contends that the doctrine of collateral estoppel cannot have preclusive effect on the issue of simple pneumoconiosis in this case because the

administrative law judge must consider *de novo* all evidence in determining whether modification has been established. *See Jessee*, 5 F.3d 723, 18 BLR 2-26.

In this case, claimant's request for modification was based on new evidence showing the existence of complicated pneumoconiosis. The administrative law judge determined that the existence of complicated pneumoconiosis was the sole issue before him on modification and reviewed the evidence as it related to that issue. Although the administrative law judge stated that the doctrines of "law of the case" and "collateral estoppel" prevented him from reconsidering the issue of simple pneumoconiosis and the previous finding of invocation of Section 727.203(a)(1), that determination is harmless error inasmuch as the administrative law judge also found that the existence of simple pneumoconiosis was established based on his review of the record. Decision and Order at 18. Thus, we conclude that the administrative law judge properly rejected medical evidence denying the existence of complicated pneumoconiosis because it denied the presence of simple pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Additionally, the administrative law judge found the existence of simple pneumoconiosis established based on his review of the record, and he determined that Judge McElroy's finding of simple pneumoconiosis, in the initial decision, was based on a review of the record independent from the parties stipulation. Thus, whether we conclude that employer is bound by its stipulation to the existence of simple pneumoconiosis is not determinative in this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Nonetheless, we conclude that employer is bound by its stipulation to the existence of simple pneumoconiosis. 73 AM.JUR.2d Stipulations 8 (1974); *see Sullivan v. Newport News Shipbuilding and Dry Dock Co.*, 120 F.3d 262 (4th Cir. 1997)(Table); *Hagan v. McNallen* (in re *McNallen*), 62 F.3d 619 (4th Cir. 1995); *American Title Insurance Co. v. Lace law Corp.*, 861 F.2d 224 (9th Cir. 1988); *see also Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994); *see also Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996).

Employer also contends that the administrative law judge erred in mechanically and inconsistently applying the "later evidence" rule to find the existence of complicated pneumoconiosis established. Employer contends that the administrative law judge's crediting of the most recent x-ray of record, April 15, 2002, due to its recency, violates the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We disagree. In fact, the administrative law judge's crediting of the April 15, 2002 x-ray is in keeping with the court's pronouncement in *Adkins*. In rejecting mechanical application of the "later is better" rule, the court pointed out that inasmuch as the rule was premised on the fact that more recent evidence is a more reliable indicator of

a miner's condition precisely because pneumoconiosis is a progressive disease and miners cannot getter better, the rule cannot apply where the more recent evidence was negative. *Adkins*, 958 F.2d at 51-52, 16 BLR at 2-65. Regarding situations where the most recent evidence is positive, however, the court held that, all other considerations aside, the later evidence was more likely to reflect the miner's current condition. 958 F.2d at 52, 16 BLR at 2-65. Accordingly, the administrative law judge's accordance of greater weight to the most recent x-ray of record which was read as showing the existence of complicated pneumoconiosis by a dually qualified physician was proper. *Adkins*, 958 F.2d 49, 16 BLR 2-61; *Anderson*, 12 BLR at 1-113; *see* 20 C.F.R. §§718.201; 718.202(a)(1); 718.304(a); *see Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

Employer also contends that the administrative law judge erred by not separately considering each type of evidence in this Part 727 claim. Invocation of the interim presumption at Section 727.203(a)(1) is not, however, at issue in this case. Instead, as the administrative law judge found, the sole issue before him was whether claimant had established the existence of complicated pneumoconiosis. In determining whether the existence of complicated pneumoconiosis is established, the administrative law judge must consider together all relevant evidence. Accordingly, we reject employer's argument and affirm the administrative law judge's consideration of all the evidence relevant to a finding of complicated pneumoconiosis. This was proper. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), necessitates the weighing of conflicting evidence on the question of whether complicated pneumoconiosis is present).

Finally, employer contends that the administrative law judge erred in failing to explain how he weighed all the evidence. We disagree. In a thirty-six page decision, the administrative law judge thoroughly discussed all the evidence relevant to the issue of complicated pneumoconiosis, and gave his reasons for crediting it or according it less weight. The administrative law judge explained that although some of the evidence, submitted prior to the April 15, 2002 x-ray showed complicated pneumoconiosis, other evidence indicated only the existence of simple pneumoconiosis. He concluded, therefore, that the existence of only simple pneumoconiosis was established prior to April 15, 2002. In finding the existence of complicated pneumoconiosis established based on the April 15, 2002 x-ray, the administrative law judge stated that he accorded it determinative weight for several reasons: its recency; the progressive nature of pneumoconiosis; earlier evidence showed the existence of pneumoconiosis, and the April 15, 2004 x-ray was read by a dually qualified physician. The administrative law judge further found the thirteen-month lapse in time between the April 15, 2002 x-ray and the next most recent x-ray of March 13, 2001 and the ninth-month lapse between the April 15, 2002 x-ray and the most recent CT scan of July 9, 2001 were sufficient to accord greater weight to the more recent April 15, 2002 x-ray. This was rational. *See Adkins*,

958 F.2d 49, 16 BLR 2-61; *Anderson*, 12 BLR at 1-113; *Stanley v. Director, OWCP*, 7 BLR 1-386 (1984); *see also Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge