BRB No. 08-0592 BLA

G.A.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	DATE ISSUED: 05/29/2009
	)	
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Anthony K. Finaldi (Ferreri & Fogle), Louisville, Kentucky, for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-BLA-5967) of Administrative Law Judge Daniel F. Solomon rendered 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). Upon stipulation of the parties, the administrative law judge credited claimant with twenty-four years of qualifying coal

mine employment, and adjudicated this claim,[1] filed on January 22, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718 and 20 C.F.R. §725.309. After finding that the present claim was timely filed pursuant to 20 C.F.R. §725.308, the administrative law judge determined that employer was properly designated the responsible operator herein. The administrative law judge found that the newly submitted x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, an element of entitlement previously adjudicated against claimant, and, thus, claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found the weight of the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges its designation as responsible operator. Employer also maintains that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), and that the evidence of record is insufficient to establish any element of entitlement.[2] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging affirmance of the administrative law judge's finding that employer was properly designated the responsible operator herein.

[1] Claimant's first claim for benefits was filed under Part B of the Act on July 26, 1972, and was denied by the Social Security Administration on June 1, 1979. Director's Exhibit 1-220. Under the 1977 Amendments to the Act, claimant elected review of this claim by the Department of Labor. Director's Exhibit 1-204. On August 4, 1982, the district director awarded benefits under the working miner provisions of the Act. Director's Exhibit 32-10. When claimant did not cease coal mine employment within one year of the decision, as provided therein, the award converted to a denial of benefits. Claimant took no further action on this claim. Claimant's second claim, filed on December 31, 1991, was denied by the district director on July 1, 1992. Director's Exhibits 2-110, 2-6. Claimant's third claim, filed on June 19, 2000, was denied by the district director on September 29, 2000. Director's Exhibits 3-66, 3-3. Claimant filed the present subsequent claim on January 22, 2004. Director's Exhibit 4.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment, and his finding that the current claim was timely filed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[3] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Initially, we reject employer's contention that, because the Department of Labor (DOL) transferred liability for benefits in claimant's original claim from employer[4] to the Black Lung Disability Trust Fund (Trust Fund) pursuant to the 1981 Amendments to the Act, principles of *res judicata* preclude the designation of employer as the responsible operator herein. Employer's Brief at 5-10.

The Black Lung Benefits Reform Act of 1977 transferred liability for payment of certain special claims from operators and carriers to the Trust Fund. These provisions apply to claims that were denied before March 1, 1978, and that have been, or will be, approved under Section 435 of the Act. The provisions at 20 C.F.R. §725.496(b) identify the following claims as eligible for transfer of liability to the Trust Fund:

> (1) Claims filed with and denied by the Social Security Administration prior to March 1, 1978;
> (2) Claims filed with the Department of Labor in which the claimant was notified by the Department of an administrative or informal denial before March 1, 1977, and in which the claimant did not within one year of such notification either:
>
> (i) Request a hearing; or
> (ii) Present additional evidence; or
> (iii) Indicate an intention to present additional evidence; or
> (iv) Request a modification or reconsideration of the denial on the ground of a change in conditions or because of a mistake in a determination of fact.

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1-208.

[4] Employer agrees that Cimarron Coal Corporation, which was named as the responsible operator in claimant's first claim, was a predecessor of employer. Employer's Brief at 1; Director's Exhibit 9.

> (3) Claims filed with the Department of Labor and denied under the law in effect prior to the enactment of the Black Lung Benefits Reform Act of 1977, that is, before March 1, 1978, following a formal hearing before an administrative law judge or administrative review before the Benefits Review Board or review before a United States Court of Appeals.

20 C.F.R. §725.496(b). The regulation further provides that the procedural history of each claim is to be considered separately to determine whether the transfer provisions apply, unless such claims are required to be merged by the agency's regulations. 20 C.F.R. §725.496(c). The merger provision of Section 725.309(b) states, in pertinent part, that "[i]f a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim shall be merged with the earlier claim for all purposes." 20 C.F.R. §725.309(b). However, "if a claimant files a claim … more than one year after the effective date of a final order denying a claim previously filed by the claimant … the later claim shall be considered a subsequent claim for benefits." 20 C.F.R. §725.309(d). It is clear, therefore, that a later claim cannot be merged with an earlier claim that has been finally denied. 20 C.F.R. §725.309(b), (d). Rather, the earlier claim must still be pending in order for it to merge. *See Hagerman v. Island Creek Coal Co.*, 11 BLR. 1-116 (1988).

In the present case, claimant's original Part B claim,[5] filed with the Social Security Administration, which was subject to transfer under Section 725.496, was initially approved by DOL but was automatically converted into a denial and administratively closed after one year, when claimant did not cease working in coal mine employment.[6] Director's Exhibit 32-11. Although employer asserts that claimant was only able to continue working because employer accommodated him through job modification, the applicable regulation would still have precluded claimant from obtaining benefits on his original claim after one year if he was still working as a miner "in any capacity." 20 C.F.R. §725.503A(b) (1999). As claimant took no further action on his original claim and continued to work as a miner until 1993, the only claim still pending for adjudication before the administrative law judge was the instant Part C subsequent claim filed on January 22, 2004. This claim cannot support a transfer of liability, as it was not denied prior to March 1, 1978, the effective date of the Black Lung Benefits Reform Act of

[5] Part B claims are those filed after the inception of the Act and before July 1, 1973, while Part C claims are those filed after December 31, 1973. *Chadwick v. Island Creek Coal Co.*, 7 BLR 1-833 (1985).

[6] The 1982 Decision and Order provides that "if claimant's coal mine employment continues for more than one year after this Order becomes final, his claim shall be denied." Director's Exhibit 32-11; *see* 20 C.F.R. §725.419.

1977, and it is not subject to the provisions of Section 435 of the Act. *See Hagerman*, 11 BLR 1-116; *see also Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997). Employer's due process and *res judicata* arguments lack merit, as employer received notice of the current claim and had a fair opportunity to defend against it. *See Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577 (1984). Moreover, claimant is not collaterally attacking a prior denial of benefits, but has filed a subsequent claim in an attempt to demonstrate that his physical condition has changed. *See Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996); Decision and Order at 5. Accordingly, we affirm the administrative law judge's responsible operator determination, as supported by substantial evidence.

Next, in finding a change in an applicable condition of entitlement established at Section 725.309(d) by means of the newly submitted x-ray evidence at Section 718.202(a)(1), the administrative law judge initially found that "Drs. Wiot, Capiello and Whitehead are the best qualified readers in this record," noting that they are all dually qualified Board-certified radiologists and B readers.[7] Decision and Order at 8. Contrary to employer's contention, the administrative law judge correctly identified Dr. Selby as a B reader.[8] Decision and Order at 6, 8; Director's Exhibits 21-12, 21-24. The administrative law judge reviewed the newly submitted x-ray evidence of record, consisting of three positive interpretations and three negative interpretations of three films, and permissibly concluded, based on the readers' qualifications and the most recent x-ray, that the weight of the evidence was sufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1), and a change in an applicable condition of entitlement pursuant to Section 725.309(d).[9] Decision and Order at 8; *see Crace v.*

[7] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B-reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

[8] While the record indicates that Dr. Selby is Board-certified in internal medicine, pulmonology, and critical care, it does not reflect that he is Board-certified in radiology. Director's Exhibit 21-24.

[9] The administrative law judge determined that the May 20, 2004 x-ray was interpreted as negative by Dr. Selby, a B reader, Director's Exhibit 21, and as positive by Dr. Capiello, who is dually qualified as a Board-certified radiologist and B reader. Claimant's Exhibit 2; Decision and Order at 6, 8, 9. The September 23, 2004 x-ray was read as negative by Dr. Wiot, who is dually qualified, Director's Exhibit 31, and as positive by Dr. Simpao, an A reader. Director's Exhibit 25. The October 5, 2005 x-ray

Kentland-Elkhorn Coal Corp., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Dixon v. North Camp Coal Co.*, 8 BLR 1-31 (1991); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 n.5 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Considering the entire record, the administrative law judge rationally concluded that the more recent evidence was the most probative, and permissibly found that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 9. As substantial evidence supports the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 725.309(d), they are affirmed.

Next, employer contends that the administrative law judge erred in finding legal pneumoconiosis established at Section 718.202(a)(4) based on Dr. Houser's opinion, arguing that the diagnosis was not well-reasoned because the physician's most recent pulmonary function study revealed partially reversible FEV1 and FVC values, and he understated claimant's smoking history while overstating claimant's length of coal mine employment. Employer asserts that the contrary opinion of Dr. Selby, that claimant does not have pneumoconiosis, is well-reasoned, better explained, and entitled to determinative weight. Employer essentially seeks a reweighing of the medical opinions of record, which is beyond the scope of the Board's review. *See Anderson*, 12 BLR 1-111. The administrative law judge accurately summarized the conflicting medical opinions and "other" medical evidence of record at Section 718.202(a)(4), and noted that claimant had been treated by multiple physicians from 1980 to 2004 for respiratory complaints, specifically for chronic obstructive pulmonary disease (COPD), with pneumoconiosis, COPD and/or emphysema diagnosed by x-ray and CT scan. Decision and Order at 6-8; Director's Exhibits 21, 23, Employer's Exhibits 2, 5, 6. The administrative law judge acknowledged that Dr. Houser exaggerated claimant's coal mine employment history and understated claimant's smoking history, but acted within his discretion in finding that the inaccuracies did not undermine his opinion that claimant had a moderately severe and disabling obstructive respiratory impairment due in part to smoking but due primarily to claimant's exposure to coal mine and rock dust from his coal mine employment.[10] Decision and Order at 10; Claimant's Exhibit 1; *see McMath v.*

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was read as negative by Dr. Meyer, a B reader, Employer's Exhibit 7, and as positive by Dr. Whitehead, who is dually qualified. Claimant's Exhibit 1.

[10] While the administrative law judge indicated that Dr. Houser listed a smoking history of approximately 13 years at the general rate of ¼ pack per day, the record reflects that Dr. Houser in fact reported on October 5, 2005 that claimant "generally smoked one half to one pack of cigarettes per day" from 1945 to 1953 and from 1960 through 1965; and on June 5, 2006, Dr. Houser reported that "[b]etween 1945 and 1965 [claimant] smoked a total of approximately 13 years, generally ½ pack of cigarettes per

Director, OWCP, 12 BLR 1-6 (1989). Considering the factors listed at 20 C.F.R. §718.104(d), the administrative law judge determined that Dr. Houser was a Board-certified pulmonologist who conducted examinations, obtained pulmonary function studies, blood gas studies, and x-rays of claimant between 2005 and 2007, and followed claimant after testing. Decision and Order at 7-10. While declining to accord Dr. Houser's opinion controlling weight based on his status as a treating physician, the administrative law judge found the opinion to be well-reasoned and consistent with claimant's past medical treatment and clinical testing. Decision and Order at 11; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We reject employer's argument that the partial reversibility of claimant's FEV1 and FVC values "strongly suggests" that claimant's obstructive impairment is caused by a condition other than pneumoconiosis, an irreversible disease, and demonstrates that Dr. Houser's opinion is not well-reasoned. Employer's Brief at 15. The regulatory definition of legal pneumoconiosis encompasses any type of chronic pulmonary or respiratory disease or impairment that is related to coal dust exposure, and does not exclude impairments that may show reversibility. 20 C.F.R. §718.201(a)(2). The administrative law judge permissibly concluded that Dr. Houser's opinion was entitled to greater weight than the contrary opinion of Dr. Selby, a Board-certified internist and pulmonologist, who diagnosed claimant with non-disabling emphysema due solely to smoking. Director's Exhibit 21. Noting that the regulations specifically recognize that legal pneumoconiosis includes "any chronic pulmonary disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment," the administrative law judge permissibly found Dr. Selby's opinion to be not as well-reasoned because the doctor did not discuss whether the emphysema he diagnosed on CT scan as showing "mild parenchymal scarring and emphysematous change[s]," Director's Exhibit 21, was affected by claimant's at least twenty-four years of coal mine employment. *See* 20 C.F.R. §718.201; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) citing *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 10. By contrast, Dr. Houser referenced the American Thoracic Society's official statement that "[q]uantitative epidemiologic studies have confirmed a relationship between [occupational] dust exposure and degree of emphysema independent of cigarette smoking." Decision and Order at 10; Claimant's Exhibit 1. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding of legal pneumoconiosis at Section 718.202(a)(4).

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day." Claimant's Exhibit 1. Thus, Dr. Houser's reported smoking history was not significantly different from the "one pack per day for twelve years" noted by Dr. Simpao, and the "about ten pack years" noted by Dr. Selby. Director's Exhibits 15, 21.

Next, employer maintains that the preponderance of the evidence is insufficient to establish total respiratory disability at Section 718.204(b)(2), arguing that the objective studies of record produced non-qualifying values, and that Dr. Selby concluded that claimant had the respiratory capacity to perform vigorous work output based on claimant's treadmill performance. Contrary to employer's arguments, however, the administrative law judge permissibly relied on the more recent opinion of Dr. Houser, that claimant's spirometry and flow volume loop results demonstrated a combined mild restrictive and moderately severe obstructive ventilatory impairment that would prevent claimant from performing his prior work as a coal miner, as he concluded that Dr. Houser's status as a treating physician afforded him a better opportunity to evaluate claimant's current condition. Decision and Order at 12; Claimant's Exhibit 1; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir.1993). As substantial evidence supports the administrative law judge's findings at Section 718.204(b)(2), and as employer has not identified any error in the administrative law judge's weighing of the evidence, we affirm his finding that claimant established total respiratory disability thereunder.

Lastly, employer challenges the administrative law judge's finding that claimant established disability causation at Section 718.204(c). Specifically, employer contends that the administrative law judge erred in crediting the opinion of Dr. Houser, that claimant's disability was due to both smoking and coal dust exposure, over the opinion of Dr. Selby, that any impairment was due entirely to smoking. Employer's arguments are without merit. Based on his weighing of the conflicting medical opinions in finding the existence of legal pneumoconiosis established, the administrative law judge acted within his discretion in finding that Dr. Houser's opinion was entitled to determinative weight and was sufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's disability. Decision and Order at 13; *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). We affirm the administrative law judge's finding of disability causation at Section 718.204(c), as supported by substantial evidence, and further affirm his award of benefits.

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