BRB No. 99-1279 BLA

EZRA FRALEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PETER CAVE COAL MINING COMPANY	)	DATE ISSUED:
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez Kentucky, for claimant.

Terri L. Bowman and Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0879) of Administrative Law Judge Daniel J. Roketenetz 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 administrative law judge initially found that twenty-six years of

coal mine employment, as stipulated by the parties, was supported by the evidence of record and found that the instant claim, Director's Exhibit 1, was a duplicate claim pursuant to 20 C.F.R. §725.309(d), filed more than one year after the denial of claimant's prior claim, Director's Exhibit 52. Thus, the administrative law judge considered whether the new evidence submitted since, and dated subsequent to, the denial of claimant's prior claim established a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The administrative law judge determined that claimant did not establish any element of entitlement in his previous claim and considered all of the new evidence dated subsequent to the prior denial pursuant to 20 C.F.R. Part 718. The administrative law judge found the new x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, found that claimant established a material change in conditions pursuant to Section 725.309(d).

Next, the administrative law judge considered all of the evidence of record on the merits pursuant to Part 718. The administrative law judge found that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §718.202(a)(1) and (4) and 20 C.F.R. §718.203(b). The administrative law judge further found that total disability was demonstrated by the pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(1) and (4), but not by the blood gas study evidence pursuant to 20 C.F.R. §718.204(c)(2), and ultimately found the evidence of record weighed in favor of a finding of total disability due to pneumoconiosis pursuant to Section 718.204. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d) in accordance with the standard enunciated in *Ross*. Employer also contends that the administrative law judge erred in finding the existence of pneumoconiosis established by the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1) and (4), in finding total disability demonstrated by the pulmonary function study and medical opinion evidence pursuant to Section 718.204(c)(1) and (4), and in not specifically addressing whether total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204(b). Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed.

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[1] Claimant originally filed a claim on August 29, 1977, which was denied by reason of abandonment in July, 1991, without claimant having submitted any evidence in support of his claim, Director's Exhibit 51. Claimant took no further action on that claim. Claimant filed a second claim on July 23, 1981, which was also denied by reason of abandonment in April, 1982, without claimant having submitted any evidence in support of his claim, Director's Exhibit 52. Subsequently, claimant filed the instant claim, at issue herein, on December 23, 1996, Director's Exhibit 1.

The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, responds, urging the Board to affirm the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) in accordance with the standard enunciated in *Ross*.

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred by failing to properly consider whether a material change in conditions was established pursuant to Section 725.309(d) in accordance with the standard enunciated in *Ross* and, therefore, in addressing the merits of entitlement. The administrative law judge initially found that the instant claim was a duplicate claim and, therefore, considered whether claimant established a material change in conditions pursuant to Section 725.309(d) pursuant to the standard enunciated by the Sixth Circuit in *Ross*. However, although the administrative law judge determined that claimant did not establish any element of entitlement in his previous claim, Decision and Order at 5, claimant's prior claim in this case was denied solely on procedural grounds as abandoned, without the submission or consideration of any evidence on the merits of entitlement, *see* Director's Exhibit 52. The Board has recently held that an element of entitlement which was not explicitly addressed in the denial of the prior claim does not constitute "an element of entitlement previously adjudicated against a claimant and, therefore, is not an element of entitlement which must be considered in determining whether a material change in conditions has been established pursuant to Section 725.309(d) in accordance with *Ross*, *see Caudill v. Arch of Kentucky, Inc.*, BLR , BRB No. 98-1502 BLA (Sep. 29, 2000)(on recon. *en banc*). Similarly, the United States Court of Appeals for the Seventh Circuit has recently held that a claimant may advance a second claim for benefits on the merits and is not required to demonstrate a "material change in conditions" pursuant to Section 725.309(d) where a claimant's prior claim was denied solely on procedural grounds, *see Crowe v. Director, OWCP*, 226 F.3d 609, BLR (7th Cir. 2000). Moreover, if a claim is denied by reason of abandonment, 20 C.F.R. §725.409(b) authorizes that "a new claim

[2] In *Ross*, the Sixth Circuit held that in order to determine whether a material change in conditions is established under Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him, *see Ross, supra*. If claimant establishes the existence of that element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits, *id*.

may be filed at any time and new evidence submitted where the requirements of §725.310 are not met," *see* 20 C.F.R. §725.409(b). Thus, inasmuch as claimant's prior claim in this case was denied solely on procedural grounds as abandoned, without the submission or consideration of any evidence on the merits of entitlement, the administrative law judge permissibly considered the instant claim on the merits, *see Crowe*, *supra*; *Caudill*, *supra*; *see also* 20 C.F.R. §725.409(b). Thus, any potential error by the administrative law judge in finding a material change in conditions established pursuant to Section 725.309(d) in accordance with the standard enunciated in *Ross* was harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, employer contends that the administrative law judge erred in finding that the existence of pneumoconiosis was established by the x-ray evidence pursuant to Section 718.202(a)(1). In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Moreover, pursuant to Section 718.204(b), in this case arising within the jurisdiction of the Sixth Circuit, claimant must prove that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis, *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

The administrative law judge initially considered the x-ray evidence dating from the prior denial, which consisted of ten readings of three x-rays, nine of which were positive, *i.e.*, classified as Category 1/0 or greater, *see* 20 C.F.R. §§718.102(b); 718.202(a)(1). A September, 1998, x-ray was read as positive by three physicians, *i.e.*, Drs. Miller, Alexander and Baker, Claimant's Exhibits 2-4, and was read as 1/1 by Dr. West, who nevertheless found that it did not indicate coal workers' pneumoconiosis, Employer's Exhibit 6. A January, 1997, x-ray was read as positive, 1/1, by Dr. Sargent, Director's Exhibit 14, and was read as 1/1 by Dr. West, who nevertheless found that it did not indicate coal workers' pneumoconiosis, Director's Exhibit 15. Finally, an October, 1997, x-ray was read as positive by Drs. Alexander and Cappiello, both B-readers and board-certified radiologists, Director's

[3] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director,*

Exhibit 43; Claimant's Exhibit 1, and by Dr. Aycoth, a B-reader, Director's Exhibit 46, but was read as negative by Dr. Fino, a B-reader, Director's Exhibit 38.

The administrative law judge found that, even if he considered the two 1/1 readings from Dr. West as negative because Drs. West found that the x-rays did not indicate coal workers' pneumoconiosis, the preponderance of the x-ray evidence dating from the prior denial by physicians who were either B-readers and/or board-certified radiologists established the existence of pneumoconiosis. Decision and Order at 7. Moreover, the administrative law judge noted that the only x-ray of record pre-dating the denial of claimant's prior claim was also read as positive by Dr. Anderson, Director's Exhibit 39. Thus, the administrative law judge found that the existence of pneumoconiosis was established on the merits pursuant to Section 718.202(a)(1) by a preponderance of the x-ray evidence.

Employer contends that the administrative law judge failed to consider the findings of those physicians who related the changes they found on claimant's x-rays to conditions other than pneumoconiosis and contends that the administrative law judge merely based his finding on a mechanical counting of the x-ray evidence without considering the quality of the x-ray evidence. Contrary to employer's contention, and the administrative law judge's consideration of Dr. West's 1/1 readings as negative because Dr. West found the x-rays did not indicate coal workers' pneumoconiosis, a physician's comments that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at Section 718.202(a)(1), *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(on recon. *en banc*). However, the administrative law judge, within his discretion, permissibly found that the existence of pneumoconiosis was established under subsection (a)(1) based on the weight and numerical superiority, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), of the positive x-rays from readers who were both board-certified radiologists and/or B-readers, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent*, *supra*. Inasmuch as the administrative law judge considered the qualifications of the physicians and weighed the results of all of the x-ray evidence, his finding is in accord with the holding of the Sixth Circuit in *Woodward*, *supra*. Consequently, the administrative law judge's finding that the existence of pneumoconiosis was established by the x-ray evidence under Section 718.202(a)(1) is affirmed as supported by substantial evidence.

OWCP, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[4] Inasmuch as the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), we need not address employer's contentions and the administrative law judge's findings pursuant to Section 718.202(a)(4), *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). In addition, the

Next, employer contends that the administrative law judge erred in finding total disability demonstrated by the pulmonary function study evidence pursuant to Section 718.204(c)(1). The administrative law judge considered the seven pulmonary function studies of record and found that two were invalid, Director's Exhibits 40-41, one was non-qualifying, Director's Exhibit 10, and three were qualifying, Director's Exhibits 11, 44; Claimant's Exhibit 2. Decision and Order at 12-14. Thus, the administrative law judge found total disability demonstrated by the pulmonary function study evidence pursuant to subsection (c)(1).

Employer initially contends that because the regulations do not specify qualifying pulmonary function study values for a miner beyond the age of 71, a pulmonary function study administered on a miner over age 71 cannot be qualifying. Contrary to employer's contention, the administrative law judge's reasonably extrapolated the appropriate table values to be utilized for determining whether a pulmonary function study administered on a miner older than age 71 is qualifying, Decision and Order at 13 n. 9. *See Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA at 7, n. 7 (Dec. 20, 1996)(unpub.).

In addition, the administrative law judge found the March, 1997, pulmonary function study from Dr. Fritzhand was qualifying and valid, Director's Exhibit 11, and that the September, 1998, pulmonary function study from Dr. Baker was qualifying and valid, although the administrative law judge noted that both pulmonary function studies had been found invalid on review by Drs. Burki, Director's Exhibit 11, and Hippensteel, Employer's

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administrative law judge's finding that pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b) is affirmed as unchallenged by any party on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim filed after January 1, 1982, Director's Exhibit 1. *See* 20 C.F.R. §718.305(a), (e).

[5] Inasmuch as the administrative law judge's findings that total disability was not demonstrated by the blood gas study evidence pursuant to Section 718.204(c)(2) and that total disability was not demonstrated pursuant to Section 718.204(c)(3) are not challenged by any party on appeal, they are affirmed, *see Skrack*, *supra*.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

[7] Six of the seven pulmonary function studies of record, and the three pulmonary function studies that the administrative law judge found were qualifying, were administered when claimant was either 72 or 73 years of age.

Exhibit 5, respectively. Because Drs. Fritzhand and Baker, who were the administering physicians, found their respective pulmonary function studies to be valid, and the administrative law judge found no persuasive reason why the lone opinion of a consulting physician should be given more weight than the opinion of the physician who was actually able to observe the claimant's effort, cooperation and performance, the administrative law judge gave more weight to the opinions of Drs. Fritzhand and Baker. Decision and Order at 14. Employer contends that the administrative law judge irrationally and impermissibly assumed that the physicians who requested a pulmonary function study had a better perspective to determine its validity, noting that technicians had administered the March, 1997, and September, 1998, pulmonary function studies, not Drs. Fritzhand and Baker.

While the administrative law judge must provide a rationale for accepting the opinions of consultants over those who actually conducted the pulmonary function studies in assessing their reliability, there is no requirement that he must accord greater weight to the opinion of the consulting physicians. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting). In the instant case, the administrative law judge found no persuasive reason to credit the consulting physicians' opinions. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, the administrative law judge's crediting of the opinions of Drs. Fritzhand and Baker as to the validity of the March, 1997 and September, 1998, pulmonary function studies is affirmed. Consequently, the administrative law judge's finding that total disability was demonstrated by the pulmonary function study evidence is affirmed as supported by substantial evidence, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Finally, the administrative law judge considered the medical opinion evidence pursuant to Section 718.204(c)(4), noting that Drs. Baker, Claimant's Exhibit 2, and Fritzhand, Director's Exhibit 12, both examined claimant and found claimant totally disabled, whereas Dr. Fino, Director's Exhibit 38, examined claimant and found that he was not totally disabled, as did Drs. Tuteur, Director's Exhibit 48, Hippensteel, Employer's Exhibits 3, 5, and Castle, Employer's Exhibit 1, who reviewed the evidence. The administrative law judge found that for "the reasons explained above," apparently

referencing his prior weighing of the medical opinion evidence and findings under Section 718.202(a)(4), Dr. Baker's opinion was the most persuasive of record and, therefore, found total disability demonstrated pursuant to subsection (c)(4). Decision and Order at 15. Because the administrative law judge found total disability demonstrated pursuant to Section 718.204(c)(1) and (4), the administrative law judge found that the evidence weighs in favor of finding claimant totally disabled due to pneumoconiosis.

Contrary to Dr. Baker's opinion, Dr. Fino also examined claimant, but found that he was not totally disabled. The administrative law judge gave Dr. Fino's opinion less weight under Section 718.202(a)(4) because his opinion that claimant did not have pneumoconiosis based on a negative x-ray was contrary to the weight of the x-ray evidence and the administrative law judge gave more weight to Dr. Baker's opinion as it was supported by the objective x-ray and pulmonary function study evidence. Decision and Order at 10-11. The administrative law judge also gave less weight to the opinions of Drs. Tuteur, Hippensteel and Castle under Section 718.202(a)(4) because their opinions were contrary to the weight of the x-ray evidence and because they had not examined claimant. However, the administrative law judge did not address why Dr. Fino's opinion that claimant was not totally disabled was entitled to less weight than Dr. Baker's opinion. While Dr. Fino did not diagnose pneumoconiosis, his failure to diagnose pneumoconiosis does not necessarily entitle his opinion of disability to less weight, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *see also Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge also did not specifically address why the opinions of Drs. Tuteur, Hippensteel and Castle, as non-examining physicians, are necessarily entitled to less weight under Section 718.204(c)(4), *see Cochran v. Consolidation*

[8] Employer contends that Dr. Baker's opinion is insufficient to establish total disability because Dr. Baker did not consider the functional demands of claimant's last coal mine employment when rendering his opinion. Contrary to employer's contention, where the record contains an opinion providing an assessment of physical limitations due to pulmonary disease or an assessment of a miner's impairment, as well as evidence of the exertional requirements of the miner's usual coal mine employment, such an opinion may be sufficient to allow the administrative law judge to infer a finding on the issue of total disability, by comparing the physician's opinion as to the miner's physical limitations or extent of impairment to the exertional requirements of the miner's usual coal mine employment, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parson v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1987); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983), and the ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with the physician's opinion regarding the miner's physical abilities, *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire*, *supra*.

Coal Co., 16 BLR 1-101, 1-104 (1992). Thus, the administrative law judge's finding that the medical opinion evidence demonstrated total disability pursuant to subsection (c)(4) is vacated and the case is remanded for reconsideration.

In addition. the administrative law judge did not weigh the non-qualifying blood gas study evidence together with the pulmonary function study and medical opinion evidence in finding total disability established pursuant to Section 718.204(c), *see Budash, supra*; *Fields, supra*; *Rafferty, supra*; *Shedlock, supra*. Thus, the administrative law judge should also weigh all relevant evidence on remand pursuant to Section 718.204(c). Finally, as employer contends, the administrative law judge did not specifically address whether the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(b). Thus, if the administrative law judge finds total disability established pursuant to Section 718.204(c) on remand, he should then consider whether the evidence establishes total disability due to pneumoconiosis pursuant to Section 718.204(b) in accordance with the standard enunciated in *Adams, supra*.

Accordingly, the Decision and Order of the administrative law judge's awarding benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge