

BRB No. 09-0231 BLA

EDWARD NALEPKA)	
)	
Claimant-Respondent)	
)	
v.)	
)	
U. S. STEEL MINING COMPANY, LLC)	DATE ISSUED: 11/10/2009
)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Christopher Pierson (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-5857) of Administrative Law Judge Michael P. Lesniak on a subsequent miner's claim filed on September 12, 2006, 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 Director's Exhibit 3. The administrative law judge accepted employer's concession that claimant worked at least forty-three years in coal mine employment and that he has pneumoconiosis arising out of coal mine employment. The administrative law judge

¹ Claimant filed four prior claims for benefits. Director's Exhibit 1. His most recent prior claim was denied by the administrative law judge on October 10, 2002, because the evidence failed to establish that claimant was totally disabled. *Id.*

determined that the newly submitted medical opinion evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, thus, found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding disability causation established at 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, submitted a letter stating that he will not file a substantive response unless specifically requested to do so by the Board.

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.² 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also 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 v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, because his prior claim was denied for failure to establish total disability, claimant had to submit new evidence to establish that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) in order to have his claim considered on the merits. *See White*, 23 BLR at 1-3. The administrative law judge determined that the medical opinion evidence established that claimant was totally disabled by a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv) and also found that claimant proved his total disability overall at 20 C.F.R. §718.204(b). Therefore, the administrative law judge focused his

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

analysis on whether the evidence was sufficient to establish that claimant was totally disabled due, at least in part, to pneumoconiosis.³

The regulation at 20 C.F.R. §718.204(c) provides that a miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment, which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003).

In addressing the issue of disability causation pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the opinions of five physicians, Drs. Martin, Kasdan, Schaaf, Begley and Fino. Decision and Order at 12. Dr. Martin examined claimant at the request of the Department of Labor on October 9, 2006, and stated in his report that it was "impossible to determine the disability from lung disease [as opposed] to his other illness (brain tumor)[,] which severely limits his mobility." Director's Exhibit 17.

In a report dated September 24, 2007, Dr. Kasdan indicated that claimant suffers from a progressive form of spinal muscular atrophy or motor neuron disease, with symptoms having first been diagnosed in 1980. Employer's Exhibit 9. Dr. Kasdan evaluated claimant in order to determine "whether he has respiratory compromise from his motor neuron disease that would explain his respiratory disability." *Id.* Dr. Kasdan opined that [c]laimant's motor neuron disease "may be contributing to his respiratory problems." *Id.* (emphasis added). Dr. Kasdan explained that "it is not clear exactly how much respiratory difficulty [claimant] has since he is ventilating on his own, however, based on his reduced Forced Vital Capacity (FVC), he clearly has respiratory muscle involvement caused by his motor neuron disease." *Id.* Dr. Kasdan concluded:

At this stage of his primary motor neuron disease, which would be twenty-five years into the disease, there has to be some element of respiratory difficulty from the motor neuron disease. This would be chiefly in

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b) and 725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

handling secretions, which leads to aspiration and aggravation of his underlying lung condition. It would be my opinion that after twenty-five years of progressive motor neuron disease[,] there is always respiratory involvement that compromises breathing. However, I cannot comment on what percentage, if any, black lung disease would contribute to his respiratory difficulty, but if in fact there was black lung disease, the net effect on his respiratory system would be additive.

Id.

During his deposition, Dr. Kasdan noted that problems with swallowing and clearing phlegm are symptoms common to both motor neuron disease and chronic bronchitis. Employer's Exhibit 9. According to Dr. Kasdan, since claimant's x-rays "did not show evidence of motor neuron disease affecting his lungs, arthritis affecting his lungs or even black lung affecting his lungs, [it is] difficult to talk about what's causing his lung problem when his lung problem doesn't seem that bad." *Id.* at 18. However, Dr. Kasdan reiterated that he was "only stating that [claimant] has motor neuron disease[] and [that] *typically*, there is some [respiratory] involvement [thirty] years later." *Id.* at 19. (emphasis added).

Dr. Schaff examined claimant on November 30, 2006. Director's Exhibit 18. He opined that claimant is totally disabled from chronic bronchitis and obstructive lung disease due to coal dust exposure. *Id.* Although Dr. Schaaf acknowledged that claimant's muscle weakness and wheel chair confinement would prevent him from returning to his last coal mine job, he specifically opined that claimant's pulmonary condition alone was totally disabling. *Id.* Similarly, Dr. Begley examined claimant and submitted a report dated October 1, 2007. Claimant's Exhibit 1. He opined that there is "no other reason to explain [claimant's] current pulmonary impairment except for his significant coal workers' pneumoconiosis and chronic bronchitis[,] which is related to industrial dust exposure." *Id.* Dr. Begley testified that claimant's pulmonary function tests were inconsistent with neuromuscular disease, insofar as they showed normal residual volume. Claimant's Exhibit 5. Dr. Begley also noted that while motor neuron disease can make it difficult for an individual to clear phlegm or secretions, it does not *produce* secretions. *Id.* Thus, Dr. Begley attributed claimant's complaints of excessive phlegm and secretions to chronic bronchitis due to coal dust exposure. *Id.*

Finally, Dr. Fino examined claimant on January 31, 2007, and reported a moderate obstructive ventilatory defect, as evidenced by a reduction in the FEV1 and in the FEV1/FVC ratios. Employer's Exhibit 2. Dr. Fino opined that claimant did not have coal workers' pneumoconiosis and that he may have only a minimal obstruction secondary to both smoking and coal dust exposure. *Id.* Dr. Fino opined that the pattern of impairment on pulmonary function testing between 2001 and 2007, which showed a

loss of almost fifty percent of FEV1 in a period of six years, was not consistent with worsening of obstruction due to smoking or coal dust exposure. *Id.* Rather, Dr. Fino attributed claimant's respiratory impairment entirely to his motor neuron disease. *Id.*

In weighing the conflicting medical opinions, the administrative law judge found that the opinions of Drs. Martin, Kasdan and Fino were entitled to little weight in comparison to the reasoned and documented opinions of Drs. Schaaf and Begley, which established that claimant was totally disabled due, in part, to pneumoconiosis. Decision and Order at 13. Employer contends that the administrative law judge erred in rendering his credibility determinations with respect to Drs. Kasdan and Fino. We disagree.

Contrary to employer's contention, the administrative law judge properly considered that Dr. Kasdan was a Board-certified neurologist in assessing the weight to accord his opinion. However, the administrative law judge reasonably found that Dr. Kasdan's opinion was "vague and equivocal" because the doctor "did not offer a concrete opinion as to whether claimant was totally disabled from a respiratory problem[,] or otherwise "offer an opinion on the contribution of [c]laimant's various conditions [to] his disability." Decision and Order at 13; see *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

With regard to the opinion of Dr. Fino, the administrative law judge properly found that, while Dr. Fino attributed claimant's respiratory symptoms to motor neuron disease, because it is a condition that affects all the muscles of the body, including the diaphragm, Dr. Fino "did not offer evidence to show that [c]laimant's motor disease had progressed to [a] level" where it was, in fact, causing claimant's respiratory symptoms. *Id.* As noted by the administrative law judge, Dr. Fino "was willing to defer to Dr. Kasdan's opinions on the state of [c]laimant's motor neuron disease, [but] Dr. Kasdan offered only vague statements that there would be some involvement of the respiratory system," given the length of time that claimant suffered from his neurological disorder. Decision and Order at 13; see *Clark*, 12 BLR at 1-155. Thus, because the administrative law judge found that Drs. Kasdan and Fino based their opinions on generalities, and did not explain the basis for their finding that claimant's motor neuron disease caused a respiratory condition, we see no error in the administrative law judge's decision to accord their opinions less weight. See *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985).

Employer's arguments on appeal amount to little more than a request that the Board reweigh the evidence. Employer's assertion that the administrative law judge erred in failing to rely on the combined opinions of Drs. Kasdan and Fino to conclude that claimant's motor neuron disease was the sole contributor of claimant's respiratory impairment concerns a matter of credibility within the sound discretion of the administrative law judge. See *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829,

836, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Because the administrative law judge gave permissible reasons for according less weight to the opinions of Drs. Kasdan and Fino, and for finding the opinions of Drs. Schaff and Begley to be credible, documented and reasoned, and sufficient to support claimant's burden of proof at 20 C.F.R. §718.204(c), we defer to those credibility findings. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 553 (6th Cir. 2002); *Stephens*, 298 F.3d at 522, 22 BLR at 2-512. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and the award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge