BRB No. 98-1625 BLA

EDNA CHURCH (Widow of HOWARD L. CHURCH)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 11/9/99
EASTERN ASSOCIATED COAL COMPANY	)	
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 on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton and Hayes), Bluefield, West Virginia, for claimant.

John D. Maddox (Arter & Hadden LLP), Washington D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-1893) of Administrative Law Judge Clement J. Kichuk 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). This case is on appeal to the Board for the third time. In the initial Decision and Order in this duplicate claim,

Administrative Law Judge Eric Feirtag found that claimant's prior claim was finally denied on August 10, 1984.[1] Judge Feirtag found the newly submitted evidence sufficient to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309. Based on the parties' stipulation at the hearing, Judge Feirtag credited claimant with in excess of fifteen years of coal mine employment. Judge Feirtag found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Judge Feirtag further found that the evidence was insufficient to establish rebuttal of the presumption that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Moreover, Judge Feirtag noted that employer stipulated to the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(c). Judge Feirtag then found that the medical opinion evidence was sufficient to establish that claimant's pneumoconiosis contributed to his pulmonary disability under 20 C.F.R. §718.204(b). Accordingly, benefits were awarded.

On appeal, the Board rejected employer's arguments regarding the validity of Section 725.309 and declined to apply the duplicate claim standard enunciated in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). The Board affirmed Judge Feirtag's finding that claimant established a material change in conditions at Section 725.309 under *Shupink v. LTV Steel Co.*, 17

[1]Claimant filed his initial claim on June 2, 1983. Director's Exhibit 24. The district director denied the claim on August 10, 1984 on the ground that the evidence of record failed to establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.203, 718.204(b) and (c). *Id.* Claimant took no further action until he filed the present claim on December 19, 1985. Director's Exhibit 1.

BLR 1-24 (1992).[2] The Board also affirmed, as unchallenged on appeal, Judge Feirtag's findings at Sections 718.203(b) and 718.204(b) and his finding that employer conceded the presence of a totally disabling respiratory impairment. However, the Board vacated Judge Feirtag's finding that the x-ray evidence of record established the presence of pneumoconiosis at Section 718.202(a)(1). The Board also vacated Judge Feirtag's finding that benefits were payable as of December 1, 1985 and that claimant was entitled to an award of prejudgment interest. The Board remanded case for further consideration. *Church v. Eastern Associated Coal Co.*, BRB No. 92-1308 BLA (Mar. 10, 1994)(unpub.).

On remand, Judge Feirtag found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the evidence, citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Judge Feirtag, however, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Thus, Judge Feirtag awarded benefits as of June 1989 and awarded interest from April 3, 1992.

[2]In *Shupink v. LTV Steel Co.,* 17 BLR 1-24 (1992), the Board defined a material change in conditions as that evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result.

On appeal, employer renewed its argument that the Board should adopt the standard set forth by the United States Court of Appeals for the Seventh Circuit in *McNew* regarding claimant's burden to establish a material change in conditions pursuant to Section 725.309. The Board stated that subsequent to the issuance of Judge Feirtag's Decision and Order on Remand, the United States Court of Appeals for the Fourth Circuit adopted a standard which required a claimant to establish either that the miner did not have pneumoconiosis at the time of the first application for benefits but had since contracted it and become totally disabled by it or that the miner's disease had progressed to the point of total disability, although it was not totally disabling at the time of the first application.[3] The Board further stated that the Fourth Circuit had granted a motion for *en banc* reconsideration of that decision, which had, in effect, vacated the previous panel judgement and opinion. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc,* No. 94-2523 (4th Cir. Nov. 16, 1995). Thus, the Board declined to disturb its previous material change in conditions finding at Section 725.309 in accordance with the standard set forth in *Shupink*. On the merits, the Board affirmed Judge Feirtag's finding that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). The Board also held that since employer advanced no new arguments, it would not revisit its affirmance of Judge Feirtag's finding at Section 718.204(b). Consequently, the Board affirmed the award of benefits and granted claimant's counsel's request for attorney's fees. *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996).

On employer's motion for reconsideration, the Board vacated Judge Feirtag's material change in conditions finding at Section 725.309 in light of the Fourth Circuit's decision in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). The Board remanded this case to the fact-finder to reconsider the issue of a material change in conditions at Section 725.309. The Board also held that employer's arguments at Sections 718.202(a)(4) and 718.204(b) were without merit and declined to alter its previous holdings. *Church v. Eastern Associated Coal Co.*, 21 BLR 1-51 (1997).

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[3]Inasmuch as claimant's last coal mine employment took place in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

On remand, this case was reassigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge) without objection from the parties. By Order dated March 30, 1998, the administrative law judge reopened the record to allow the submission of additional evidence. In his Decision and Order, the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Thus, the administrative law judge found that claimant established a material change in conditions under Section 725.309. The administrative law judge also found that he was bound by the Board's affirmance of Judge Feirtag's finding of entitlement on the merits. Accordingly, benefits were awarded as of June, 1989.

On appeal, employer challenges the administrative law judge's treatment of the new medical opinion evidence at Section 718.202(a)(4). Claimant responds, urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309. The United States Court of Appeals for the Fourth Circuit has held that in order to establish a material change in conditions, a claimant is required to prove, by a preponderance of the newly submitted evidence, at least one of the elements previously adjudicated against him. *Rutter,* 86 F.3d at 1362-63, 20 BLR at 2-235-237.

Employer argues that the administrative law judge erred in finding the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), and thus sufficient to establish a material change in conditions pursuant to Section 725.309. Specifically, employer argues that the administrative law judge's weighing of the medical opinion evidence does not comport with recent decisions issued by the United States Court of Appeals for the Fourth Circuit.

In finding the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge, initially noted that Drs. Cardona, Rasmussen, and Sherer found that claimant had pneumoconiosis and that Drs. Zaldivar, Fino, Tuteur, Harris and Vasudevan found that claimant did not have pneumoconiosis. Decision and Order on Remand at 18. The administrative law judge found that the medical opinions of Drs. Rasmussen and Sherer were the most persuasive and entitled to greatest weight. *Id*. Specifically, the administrative law judge stated that Drs. Rasmussen and Sherer periodically examined claimant, reviewed objective studies and had a complete picture of claimant's employment, smoking and medical histories. *Id*. The administrative law judge concluded that these opinions were clear and well supported by documented medical evidence. *Id*. The administrative law judge also accorded greatest weight to the report of Dr. Sherer as he was claimant's treating physician. *Id*. The administrative law judge gave less weight to Dr. Cardona's medical opinion because he found that it was not as clearly reasoned or documented as the other reports. *Id*. The administrative law judge further found that the reports of Drs. Tuteur and Fino were entitled to less weight than the opinions of Drs. Sherer and Rasmussen because they did not examine claimant. *Id*. at 19. The administrative law judge also determined that Drs. Harris and Vasudevan failed to explain adequately the reasons for their diagnoses, and did not address the issues of disability or the etiology of the medical conditions diagnosed. *Id*. Finally, the administrative law judge further found that Dr. Zaldivar's opinion was outweighed by the medical opinions of Drs. Sherer and Rasmussen. *Id*.

As employer properly observes, the Fourth Circuit has held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner; rather, the administrative law judge should also consider the qualifications of the physicians, the explanation of their medical opinions, and the documentation underlying their opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Thus, we agree with employer that the administrative law judge erred in failing to consider the qualifications of the physicians and erred in failing to consider the credibility of the reports of Drs. Tuteur and Fino. *Id.; Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Moreover, the administrative law judge did not provide a sufficient rationale for finding Dr. Zaldivar's opinion outweighed by the reports of Drs. Sherer and Rasmussen. *See Akers, supra.*

Employer also argues that the administrative law judge did not adequately assess the credibility of Dr. Sherer's diagnosis of pneumoconiosis, contending that

the administrative law judge overlooked the fact that Dr. Sherer did not diagnose pneumoconiosis based on his testing or physical examination. Although the administrative law judge stated that Dr. Sherer's opinion was well supported by documented medical evidence, the administrative law judge erred in not considering whether the physician adequately explained how the documentation supported his diagnosis of pneumoconiosis. *Hicks, supra; Akers, supra; Fuller v. Gibraltar Coal Corp.,* 6 BLR 1-1291 (1984); Decision and Order at 18; Claimant's Exhibit 5. However, we reject employer's argument that the administrative law judge erred in finding that the opinion in which Dr. Rasmussen diagnosed coal workers' pneumoconiosis contains a credible diagnosis of statutory pneumoconiosis. The administrative law judge acted within his discretion in crediting Dr. Rasmussen's diagnosis of pneumoconiosis as reasoned and documented in light of the objective tests and occupational history underlying Dr. Rasmussen's opinion. 30 U.S.C. §902(b); *Fuller, supra;* Director's Exhibit 31. Moreover, we reject employer's argument that the administrative law judge erred in crediting Dr. Rasmussen's opinion, which was based in part upon a positive x-ray reading, because the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis.[4] An administrative law judge is not required to discredit an opinion on this ground. *See generally Winters v. Director, OWCP*, 6 BLR 1-877 (1984).

However, in light of the errors identified above, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section

[4]In his 1994 Decision and Order, Judge Feirtag concluded that the x-ray evidence was in equipoise and that claimant therefore failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). After considering the additional x-ray readings submitted on remand, the administrative law judge concluded that, based upon the Board's affirmance of Judge Feirtag's finding and his own review of the x-ray readings, the x-ray evidence was insufficient to establish the existence of pneumoconiosis. 1994 Decision and Order at 8.

718.202(a)(4) and, therefore, a material change in conditions under Section 725.309, and remand this case to the administrative law judge for reconsideration of all of the newly submitted medical opinion evidence.

Turning to claimant's entitlement to benefits on the merits, employer also argues that the Board should reconsider its prior decision to affirm Judge Feirtag's finding that the medical opinion evidence of record is sufficient to establish the existence of pneumoconiosis under Sections 718.202(a)(4) and 718.204(b) in light of the Fourth Circuit's decisions in *Hicks* and *Akers.* As Judge Feirtag gave less weight to the opinions of Drs. Tuteur and Fino because they did not examine claimant, we agree that Judge Feirtag's findings with regard to Drs. Fino and Tuteur must be vacated based upon the holdings in *Hicks* and *Akers*. *See Hicks, supra; Akers, supra;* 1994 Decision and Order at 2; 1992 Decision and Order at 15. On remand, should the administrative law judge find the newly submitted evidence sufficient to establish a material change in conditions under Section 725.309, he must also reconsider whether the evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). If the administrative law judge finds pneumoconiosis established, he must then consider whether the evidence of record is sufficient to establish that pneumoconiosis is at least a contributing cause of his totally disabling respiratory impairment.[5] 20 C.F.R. §718.204(b); *Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[5]Employer also asserts that it was error for Judge Feirtag to weigh the report of Dr. Swamy, which was submitted in conjunction with the first claim, when considering the merits of entitlement as to do so would violate the principles of *res judicata*. The Board rejected this argument in a Decision and Order on Reconsideration issued on September 30, 1997. *Church v. Eastern Associated Coal Corp.*, 21 BLR 1-51, 1-57 (1997). Inasmuch as employer has not identified any meritorious ground upon which to alter our prior disposition of this issue, we decline to do so. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Finally, we reject employer's argument that its due process rights were violated under the principle established in *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). In *Lockhart*, the United States Court of Appeals for the Fourth Circuit held that due to the Department of Labor's inexcusable, seventeen year delay in notifying the employer of the decreased miner's claim, the employer was deprived of the opportunity to mount a meaningful defense, which would include an opportunity to examine a miner and, therefore, was denied due process. *See Lockhart, supra.* In the instant case, employer was notified of the instant claim, which was filed on December 19, 1985, by letter dated January 31, 1986. *See* Director's Exhibits 16, 18. Since filing its initial controversion of liability in February 1982, employer submitted a number of medical reports, *see* Employer's Exhibits 1-4; Director's Exhibits 17, 19, 28, 29, 32, 34, 43, 44, and had the opportunity to have claimant examined in 1988 and 1990. *See* Director's Exhibits 34, 44. Inasmuch as employer had notice of claimant's potential eligibility and an adequate opportunity to contest it, we reject employer's contention that its due process rights were violated and that employer should be dismissed as responsible operator.[6] *See Betty B Coal Co. v. Director, OWCP*

[6]In *Lane Hollow Coal Co. v. Director [Lockhart]*, 137 F.3d 799, 21 BLR-306 (4th Cir. 1998), the court stated:

> The Due Process Clause does not require the government to insure the lives of black lung claimants. The problem here is not so much that Lockhart died before notice to Lane Hollow, but rather that he died many years after such notice could and should have been given. The government's grossly inefficient

[Stanley], F.3d , Nos. 98-2731 and 99-1057 (4th Cir. Oct. 21, 1999); *Lockhart*, *supra*.

> handling of the matter--and not the random timing of death denied Lane Hollow the opportunity to examine Lockhart.

Lockhart, 137 F.3d at 807, 21 BLR at 2-319.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge