BRB No. 02-0842 BLA

THOMAS E. DAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 09/16/2003
	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

James M. Nolan (Walston, Wells, Anderson & Bains, LLP), Birmingham, Alabama, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (01-BLA-0747) of Administrative Law Judge Gerald M. Tierney 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] This case involves a duplicate claim filed on December 9, 1999.[2] In a Decision and Order dated August 20, 2002, the administrative law judge credited claimant with forty-one and one-half years of coal mine employment and considered the claim under the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), but found the newly submitted medical opinion evidence sufficient to establish the presence of the disease pursuant to Section 718.202(a)(4). The administrative law judge found the medical opinion evidence outweighed the x-ray evidence and determined that, inasmuch as the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Considering the claim on the merits, the administrative law judge found the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge further found that this evidence outweighed the negative x-ray evidence at Section 718.202(a)(1). He concluded, therefore, that claimant established the existence of pneumoconiosis under Section 718.202(a). The administrative law judge also found claimant entitled to the presumption that

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[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.

[2]Claimant filed a previous claim on January 3, 1980. Director's Exhibit 30. In a Decision and Order dated December 11, 1985, Administrative Law Judge Tom M. Allen credited claimant with forty-one and one-half years of coal mine employment, and considered the claim under the applicable regulations at 20 C.F.R. Part 727. *Id*. Judge Allen found the pulmonary function study evidence sufficient to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(2). *Id*. Judge Allen further found, however, that employer established rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(2) and (b)(4) because the evidence established that claimant neither suffered from a totally disabling pulmonary or respiratory impairment nor pneumoconiosis. *Id*. Accordingly, Judge Allen denied benefits. *Id*. Claimant appealed. The Board affirmed Judge Allen's decision denying benefits. *Dailey v. United States Steel Corp.*, BRB No. 86-0113 BLA (May 26, 1988)(unpublished). Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on December 9, 1999. Director's Exhibit 1.

his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. With regard to total disability, the administrative law judge found the pulmonary function study and medical opinion evidence of record sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i) and (iv), respectively, and, weighing the like and unlike evidence together under Section 718.204(b)(2)(i)-(iv), the administrative law judge found the evidence sufficient to establish total disability. The administrative law judge further found the evidence of record sufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings under Sections 725.309 (2000), 718.202(a)(4) and 718.204(c). Claimant responds in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he presently does not intend to participate in the proceedings on appeal.[3]

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. 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).

In challenging the administrative law judge's finding that claimant established a material change in conditions pursuant to Section 725.309 (2000), employer argues that the previously submitted evidence is merely similar to the newly submitted evidence and that, therefore, claimant failed to establish that his condition progressed or worsened. Employer notes that the previously submitted evidence consisted of positive and negative x-ray readings, qualifying pulmonary function studies and medical opinions which, if credited, would have supported a conclusion that claimant has pneumoconiosis, but which were discounted by Administrative Law Judge Tom M. Allen in his Decision and Order dated December 11, 1985. Director's Exhibit 30. Employer contends that the newly submitted evidence consists of nothing more than what was developed with the previous claim: conflicting x-ray interpretations, qualifying pulmonary function

[3]We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to claimant's length of coal mine employment, as well as the administrative law judge's findings on the merits pursuant to 20 C.F.R. §718.202(a)(1), 718.203(b) and 718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2, 6-8.

studies and medical opinion evidence which, employer argues, the administrative law judge should have discounted.

This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, inasmuch as claimant's coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3. In *Allen v. Mead Corp.*, 22 BLR 1-61 (200), the Board noted that the Eleventh Circuit had not declared the standard to apply in determining if a claimant has established a material change in conditions. *Allen*, 22 BLR at 1-65. The Board held that, in cases arising in circuits where the United States Courts of Appeals have not yet addressed the standard applicable under Section 725.309 (2000), [4] in order to establish a material change in conditions pursuant to Section 725.309 (2000), claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. *Allen*, 22 BLR at 1-66; *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev=g en banc*, 57 F.2d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). There is no requirement in cases arising outside of the jurisdiction of the United States Court of Appeals for the Sixth Circuit that claimant explicitly establish a worsening of his condition in order to establish a material change in conditions under Section 725.309 (2000). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

The administrative law judge correctly stated that Administrative Law Judge Tom M. Allen denied the previous claim on the bases that the evidence was insufficient to establish the existence of pneumoconiosis and total disability. Director's Exhibit 30. Employer appealed Judge Allen's decision. The Board affirmed Judge Allen's finding that the evidence failed to establish total disability, and held that it thus did not need to review Judge Allen's finding that the evidence was insufficient to establish the existence of pneumoconiosis. *Dailey v. United States Steel Corp.*, BRB No. 86-0113 BLA (May 26, 1988)(unpublished). Employer does not challenge the administrative law judge's finding that the previous claim was denied for claimant's failure to establish the existence of pneumoconiosis in addition to total disability.

In finding that claimant established a material change in conditions, the administrative law judge found the newly submitted medical opinion evidence

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[4]The amendments to the regulation at 20 C.F.R. ' 725.309 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. ' 725.2, 65 Fed. Reg. 80,057.

sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). The administrative law judge correctly stated that the newly submitted medical opinion evidence consists of opinions from Drs. Shad and Waldrum.[5] Dr. Shad examined claimant on September 9, 1999 and on January 19, 2000, diagnosing claimant with coal workers' pneumoconiosis. Director's Exhibits 9, 10, 26. Dr. Waldrum, who examined claimant on August 8, 2000 and on March 15, 2001, likewise diagnosed claimant with coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to cigarette smoking and coal dust exposure. Director's Exhibit 25; Claimant's Exhibit 1. The administrative law judge found Dr. Shad's opinion insufficient on its own to establish the existence of pneumoconiosis because Dr. Shad based his diagnosis of pneumoconiosis primarily on a positive reading of an x-ray taken on January 19, 2000 which was reread as negative by two well-qualified radiologists, Drs. Wiot and Sargent. Decision and Order at 5-6; Director's Exhibits 9, 10, 14, 16, 26. The administrative law judge properly found that Dr. Shad's opinion supported Dr. Waldrum's opinion, however. Decision and Order at 5-6; Director's Exhibit 25; Claimant's Exhibit 1. The administrative law judge properly found Dr. Waldrum's opinion sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) on the basis that it is well-documented and reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 5-6; Director's Exhibit 25; Claimant's Exhibit 1. The administrative law judge also credited Dr. Waldrum's opinion because it is unrefuted by any newly submitted medical opinion evidence, and because Dr. Waldrum is a Board-certified in pulmonary medicine. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5-6. We affirm, therefore, the administrative law judge's finding that claimant established a material change in conditions pursuant to Section 725.309 (2000). *Allen*, 22 BLR at 1-66.

In challenging the administrative law judge's findings on the merits, employer argues that the administrative law judge improperly relied upon Dr. Shad's opinion in finding the evidence of record sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Contrary to employer's suggestion, the administrative law judge did not accord determinative weight to

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[5]Employer asserts that it has presented new evidence from Drs. Wiot and Sargent which negates the existence of pneumoconiosis and compels a finding that a material change in conditions was not established. Employer's Brief at 14. The reports from Drs. Wiot and Sargent are x-ray interpretations of the film dated January 19, 2000, however, and are not relevant under 20 C.F.R. §718.202(a)(4). Director's Exhibits 14, 16.

Dr. Shad's opinion in finding the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Rather, the administrative law judge merely found that Dr. Shad's opinion supports Dr. Waldrum's opinion, which the administrative law judge properly credited as sufficient to establish the existence of pneumoconiosis, for the reasons discussed above. Decision and Order at 5-6. Furthermore, the administrative law judge properly found Dr. Waldrum's 2000 and 2001 opinions entitled to greater weight than the previously submitted opinions, which dated back to 1980 and 1985, based upon the relative dates of the evidence.[6] It is rational for an administrative law judge to accord less weight to medical reports submitted several years prior to other reports of record. *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182, 1-1183-1184 (1984); Decision and Order at 6; Director's Exhibits 25, 30; Claimant's Exhibit 1. We affirm, therefore, the administrative law judge's finding that the medical opinion evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

With regard to the administrative law judge's disability causation finding, employer argues that Dr. Waldrum's opinion, which the administrative law judge credited as sufficient to satisfy claimant's burden at Section 718.204(c), does not definitively establish whether claimant's exposure to coal dust was a substantial contributing factor to total disability. We disagree. In order to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), claimant must establish that his pneumoconiosis is a substantially contributing cause of his totally disabling pulmonary or respiratory impairment.[7] 20 C.F.R. §718.204(c);

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[6]The record includes the previously submitted medical opinions of Drs. Jones and Shelton, indicating that claimant does not have pneumoconiosis, as well as opinions to the contrary from Drs. Goodman, Boyd and Burnum. Director's Exhibit 30.

[7]Revised Section 718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 1265, 13 BLR 2-277, 2-283 (11th Cir. 1990). Dr. Waldrum indicated, with regard to claimant's forty pack year cigarette smoking habit and forty plus years of coal dust exposure, that "both factors make a significant contribution to his respiratory impairment." Claimant's Exhibit 1. The administrative law judge thus properly found that Dr. Waldrum's opinion meets the criterion that pneumoconiosis be a substantially contributing cause of claimant's total disability. 20 C.F.R. §718.204(c); *Lollar*, 893 F.2d at 1265, 13 BLR at 2-283. We affirm, therefore, the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis under Section 718.204(c).

Inasmuch as we herein have affirmed the administrative law judge's findings that claimant has met his burden at Sections 718.202(a)(4), 718.203(b) and 718.204(b), (c), we hold that the administrative law judge properly found claimant entitled to benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

> (ii) Materially 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).

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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PETER A. GABAUER, Jr.
Administrative Appeals Judge