BRB No. 02-0851 BLA

LEON WOODS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY,	)	DATE ISSUED: 09/24/2003
		INCORPORATED
		)
	)	
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.

Franklin G. Williams and James C. King (King, Harrison & Bryan), Jasper, Alabama, for claimant.

Kevin W. Patton (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (01-BLA-0461) of

Administrative Law Judge Gerald M. Tierney on a duplicate claim[1] 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).[2] The administrative law judge, considering the newly submitted evidence, found that it established the existence of pneumoconiosis, an element of entitlement previously adjudicated against claimant, and thereby, a material change in conditions. Consequently, the administrative law judge considered all the evidence of record and determined that it established the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that claimant was totally disabled, and that the pneumoconiosis was a significantly contributing cause of the total disability. Accordingly, benefits were awarded.

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[1] Claimant, Leon Woods, filed his first claim for benefits on February 20, 1986. That claim was denied on June 4, 1986 because claimant failed to prove any of the elements of entitlement. Director=s Exhibit 50. Claimant did not appeal the denial. On July 8, 1994, claimant filed a duplicate claim with the Department of Labor. That claim was also denied by Administrative Law Judge Gerald M. Tierney on December 19, 1997 because claimant failed to prove any of the elements of entitlement. Director=s Exhibit 50-38. Claimant did not appeal that denial, either. On February 11, 1999, claimant filed a third claim which is the subject of the instant appeal. Director=s Exhibit 1.

[2] 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.

On appeal, employer argues that the administrative law judge erred in finding that claimant established a material change in conditions, the existence of pneumoconiosis, total disability, and that the total disability was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits.[3] The Director, Office of Workers= Compensation Programs (the Director), as party-in-interest, has filed a response letter, asserting that, contrary to employer=s contentions, the administrative law judge properly applied *Allen v. Mead Corp.*, 22 BLR 1-61 (2000) in determining that a material change in conditions was established and properly applied the newly revised regulation at 20 C.F.R. '718.204(c)(1) in determining that disability causation was established.[4]

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

First, citing *Spese v. Peabody Coal Co.*, 11 BLR 1-174, 1-176 (1988), employer argues that the administrative law judge erred in finding a material change in conditions established since the medical evidence of record showed that claimant=s pulmonary condition had not worsened over time, but had in fact improved as evidenced by a new pulmonary function study revealing higher values than tests performed in connection with prior claims; blood gas studies which continued to be non-qualifying except while claimant was hospitalized for acute illness; and a new chest x-ray which while read positive by one reader was subsequently read negative by three other experts. In response, the Director contends that employer incorrectly cites to the standard set forth in *Spese*, 11 BLR 1-174. Instead, the Director contends that the administrative law judge correctly applied the Board=s holding in *Allen*, 22 BLR 1-61 (Board adopted the Director=s interpretation of the material change in conditions standard to find a material change in conditions established). In *Allen*, the Board held that in order to establish a material change in conditions claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior

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[3] Claimant attached a medical report, copy of sworn testimony, and a curriculum vitae of Dr. Lott, a medical report by Dr. Perper, and a medical journal article to his brief. These documents were already contained in the evidence of record, however. *See* Director=s Exhibits 27, 42.

[4] We affirm the administrative law judge=s determinations pursuant to 20 C.F.R. ''718.202(a)(2)-(3), 718.203(b), and 718.204(b)(2)(i), (iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5, 8, 10.

claim, at least one of the elements of entitlement previously adjudicated against him. Moreover, we note that the Amaterial change@ standard set forth by the Board in *Spese*, 11 BLR 1-174, was subsequently modified by the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc reh=g*), *modif=g* 94 F.3d 369 (7th Cir. 1996), and *aff=g* 19 BLR 1-45 (1995)(adopting the Director=s Aone element@ test). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Thus, since the administrative law judge properly cited and applied the correct standard for determining whether a material change in conditions had been established, his finding is affirmed.

Next, employer argues that the administrative law judge erred in finding that the x-ray and medical opinion evidence established the existence of pneumoconiosis. Contrary to employer=s contention, however, the administrative law judge did not find the existence of pneumoconiosis established by x-ray evidence. Decision and Order at 4 and 8. Moreover, because the administrative law judge found the existence of pneumoconiosis established at 20 C.F.R. ' 718.202(a)(2) based on the biopsy evidence of record, and Section 718.202(a) provides alternative methods of establishing the existence of pneumoconiosis, we need not address employer=s argument that the administrative law judge erred in also finding the existence of pneumoconiosis established by medical opinion evidence at Section 718.202(a)(4). *See* 20 C.F.R. ' 718.202(a)(2)-(4); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1988). Moreover, since employer has not challenged the administrative law judge=s finding of pneumoconiosis by biopsy evidence at Section 718.202(a)(2), that finding is affirmed. 20 C.F.R. ' 718.202(a)(2); *Dixon*, 8 BLR at 344; *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Additionally, employer asserts that the administrative law judge erred in finding total disability established by blood gas study evidence and medical opinion evidence. Specifically, employer contends that the administrative law judge erred in relying on the qualifying blood gas study evidence which was conducted during claimant=s hospitalization due to acute illness. Employer contends that the five qualifying studies conducted while claimant was hospitalized due to acute illness were not reliable when compared to the twenty-one non-qualifying studies which were not conducted while claimant was hospitalized due to illness. While the qualifying studies may have been affected by claimant=s illness during his hospitalization and may, therefore, actually be unreliable, absent qualified medical testimony to that effect, neither the Board nor the administrative law judge has the requisite medical expertise to render that judgment. *Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984). Accordingly, notwithstanding the fact that many of

the blood gas studies which resulted in qualifying values were conducted while claimant was hospitalized, the administrative law judge properly found that the qualifying blood gas studies established total disability pursuant to Section 718.204(b)(2)(ii).[5] 20 C.F.R. ' 718.204(b)(2)(ii); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

With respect to the medical opinion evidence, employer asserts that the administrative law judge erred in finding total disability established at Section 718.204(b)(2)(iv) as the only physician who directly addressed the question of whether claimant=s respiratory impairment prevented him from performing his usual coal mine employment was Dr. Caffrey, who was aware of the exertional requirements of claimant=s usual coal mine employment and concluded that claimant was not significantly disabled by his respiratory condition. Employer further contends that the administrative law judge erred in inferring that claimant was totally disabled based on his recurring episodes of hospitalization and treatment.

While recognizing that none of the physicians directly addressed the issue of whether claimant=s respiratory condition prevented him from performing his usual coal mine employment, the administrative law judge concluded that the medical opinion evidence was sufficient to establish claimant was totally disabled from performing his usual coal mine employment as a roof bolter, which constituted Aheavy manual labor.@ The administrative law judge credited a preponderance of the opinions, *i.e.*, the opinion of Dr. Hasson, diagnosing a mild impairment, the opinion of Dr. Westerman noting that claimant had significant dyspnea with a moderate debilitative state; and the opinion of Dr. Perper, noting that a clinically recognized and diagnosed pulmonary disability was present. Moreover, the administrative law judge noted that, on weighing all the evidence relevant to total disability together, *i.e.*, pulmonary function studies, blood gas studies, and medical opinion evidence, claimant had established total disability. This was rational. 20 C.F.R. ' 718.204(b)(2)(i)-(iv); *see Cross Mountal Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff=d on recon. en banc* 9 BLR 1-236 (1987); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984).

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[5] A Aqualifying@ pulmonary function study or blood gas 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, Appendices B and C, respectively. A Anon-qualifying@ study yields values that exceed those values. 20 C.F.R. ' 718.204(b)(2)(i), (ii).

Turning to the issue of disability causation, employer contends that the administrative law judge improperly relied on the new regulation at Section 718.204(c) rather than the standard set forth by the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Employer argues that the new regulation that defines causation cannot be retroactively applied to claims, such as this, that were pending at the time the new regulations became effective. That argument has been rejected, however. *National Mining Ass=n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F. Supp. 2d 47, BLR (D.D.C. 2001). Further, as the Director asserts, in promulgating Section 718.204(c)(1), the Department of Labor merely codified the causation standard already formulated in court decisions, including the standard set forth by the Eleventh Circuit in *Lollar*; *i.e.*, that pneumoconiosis must be a substantially contributing cause of total disability. 20 C.F.R. '718.204(c); *Lollar*, 893 F.2d at 1265, 13 BLR at 2-283; *see Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996); *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *see also National Mining Ass=n*, 292 F.3d 849, BLR . Because we see no distinction between the standard set forth in the revised regulation and that declared by the Eleventh Circuit in *Lollar*, we reject employer=s argument.

Employer avers further that the administrative law judge erred in finding that pneumoconiosis was a substantially contributing factor to any total respiratory impairment because Dr. Hasson attributed claimant=s mild pulmonary impairment to heart disease; Drs. Caffrey and Goldstein similarly opined that any impairment was not due to coal dust exposure but instead due to heart disease; while only Dr. Perper, a pathologist, who had not examined claimant, suggested that pneumoconiosis was a substantially contributing cause of disability, and Dr. Perper had never stated whether claimant was totally disabled. Employer contends that the administrative law judge erred in relying on the opinion of Dr. Perper, a pathologist, who never examined claimant, over the opinions of pulmonary specialists, who had examined claimant. Additionally, employer avers that the administrative law judge erred in according little weight to Dr. Goldstein=s opinion due to its uncertainty, when, in fact, Dr. Goldstein specifically declared that claimant=s impairment was due to heart disease, rather than pneumoconiosis. Further, employer contends that the administrative law judge erred in rejecting Dr. Caffrey=s opinion because, contrary to the other pathologists, he did not find the existence of pneumoconiosis.

In addressing disability causation, the administrative law judge noted that Drs. Caffrey and Goldstein pointed to heart disease as the cause of claimant=s respiratory problems, that Dr. Hasson found that heart disease caused a mild impairment, and that the treatment records

of Drs. Lott and Westerman indicated they considered claimant=s heart problem to be a cause of his symptoms. The administrative law judge also observed that many hospital and treatment records documented claimant=s ongoing diagnosis of chronic obstructive pulmonary disease, and that pneumoconiosis was added to claimant=s diagnosed conditions in 1998. The administrative law judge further noted that Dr. Perper reviewed the evidence, including records of claimant=s heart problems and history of heavy smoking, and he concluded that claimant=s coal workers= pneumoconiosis and associated diffuse interstitial fibrosis was a substantially contributing cause of claimant=s disability. Regarding Dr. Caffrey=s opinion, the administrative law judge noted that, unlike the other pathologists, he did not find evidence of pneumoconiosis, nor did he determine the etiology of claimant=s interstitial fibrosis. Further, the administrative law judge noted that Dr. Goldstein=s report conveyed a sense of uncertainty because Dr. Goldstein suggested it would be Aunusual@ for interstitial disease to cause claimant=s problems and he had Aexpected@ to see more apparent chest x-ray and pulmonary function abnormalities with coal workers= pneumoconiosis. The administrative law judge observed, however, that Dr. Goldstein was not aware that the majority view of the pathologists was that claimant=s lung biopsy showed pneumoconiosis. Additionally, the administrative law judge stated that although Dr. Hasson was not privy to the biopsy reports or other medical evidence, he had opined that claimant was equally impaired from each of his diagnosed conditions, *i.e.*, pneumoconiosis, smoking related chronic obstructive pulmonary disease, and mild heart disease; the doctor never indicated that pneumoconiosis played only a negligible, inconsequential, or insignificant contribution to claimant=s disability. Based on this evidence as a whole, therefore, the administrative law judge found that Dr. Perper=s opinion established that pneumoconiosis was a substantially contributing cause of claimant=s total disability and that the other opinions were not sufficient to outweigh Dr. Perper=s opinion. This was rational. *See Marcum*, 95 F.3d 1079, 20 BLR 2-325; *Lollar*, 893 F.2d 1258, 13 BLR 2-277; *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-299 (6th Cir. 1983); *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Anderson*, 12 BLR 1-111; *Clark*, 12 BLR 1-149; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Brown*, 7 BLR 1-730; *Hess v. Clinchfield Coal Co.*,7 BLR 1-295, 1-296 (1984). Consequently, we affirm the administrative law judge=s weighing of the medical reports and his finding that disability causation was established. Because the administrative law judge properly found that claimant affirmatively established all requisite elements of entitlement,

we affirm the administrative law judge=s determination that claimant is entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge