BRB No. 91-1673 BLA

JACKIE SPEARS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELRO COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
VIRGINIA INDEPENDENT COAL ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Vernon M. Williams and Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Daniel E. Durden (Howe, Anderson & Steyer), Washington, D.C., for employer.

Roscoe C. Bryant, III (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and

BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order (88-BLA-2030) of Administrative Law Judge Joan Huddy Rosenzweig awarding benefits and attorney fees 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 determined that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309, and properly considered the merits of this duplicate claim, filed on October 14, 1987, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge credited claimant with more than twenty-five years of qualifying coal mine employment, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings pursuant to Sections 725.309, 718.202(a)(1) and 718.204, as well as her award of benefits commencing with the month of filing, and her approval of attorney fees in the amount of $7,865. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's findings pursuant to Section 725.309, but requesting a remand for further findings regarding the onset date of total disability pursuant to 20 C.F.R. §725.503.

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).

Employer initially contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309. We disagree. The administrative law judge properly determined that new evidence submitted subsequent to the denial of claimant's original claim was sufficient, if fully credited, to change the prior administrative result.[1] Decision and Order at 7; *see Shupink v. LTV Steel Co.,* 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.,* 15

[1] The administrative law judge determined that the relevant and probative new evidence supportive of a material change in conditions consisted of positive x-ray readings and the opinion of Dr. Williams, claimant's treating physician, that claimant has pneumoconiosis and is totally disabled by significant pulmonary disease. Decision and Order at 7; Claimant's Exhibit 2.

BLR 1-19 (1990)(*en banc*); *Spese v. Peabody Coal Co.,* 11 BLR 1-174 (1988). Contrary to employer's arguments, in making this determination, the administrative law judge was not required to weigh the new evidence supportive of a finding of a material change against all contrary evidence. *Shupink, supra.* As the administrative law judge's findings pursuant to Section 725.309 are supported by substantial evidence and comport with applicable law, we affirm her finding that claimant established a material change in conditions thereunder.

Turning to the merits, employer contends that the administrative law judge, in finding that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), erred in mechanically and improperly applying the later evidence rule and the true doubt rule. Contrary to employer's arguments, however, the administrative law judge accurately reviewed the x-ray evidence of record and the qualifications of the readers, and noted that all of the films taken between 1977 and 1984 were interpreted as negative for pneumoconiosis, and that films taken between November 10, 1987 and June 6, 1988 received both positive and negative interpretations, with the vast numerical preponderance interpreted as negative. The administrative law judge then reasonably found that since pneumoconiosis is a progressive disease, the positive interpretation of an April 26, 1990 film by Dr. Mathur, a highly qualified Board-certified radiologist and B-reader, was more probative;[2] and acted within her discretion as trier-of-fact in finding the existence of pneumoconiosis established at Section 718.202(a)(1) based on Dr. Mathur's positive interpretation, despite the negative interpretations of that film by two equally qualified physicians. Decision and Order at 7-9, 14, 15, 18; Claimant's Exhibit 3; Employer's Exhibits 26, 17; *see generally Grizzle v. Pickands Mather and Company,* 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990). We therefore affirm the administrative law judge's findings pursuant to Section 718.202(a)(1), as supported by substantial evidence.

Employer next contends that the administrative law judge erred in finding that the opinion of Dr. Robinette supported that of Dr. Williams, and in relying on these opinions, which are contrary to the opinions of all other physicians and the objective

[2] The film of April 26, 1990 was also interpreted as positive for pneumoconiosis by Dr. Williams, claimant's treating physician. *See* Decision and Order at 9, 18; Claimant's Exhibit 2.

evidence of record, to find total disability due to pneumoconiosis established at Section 718.204. Specifically, employer asserts that Dr. Robinette did not address the issue of total disability, but interpreted claimant's objective tests as normal; that Dr. Williams' diagnosis of "possible black lung" in his office notes of April 6, 1990, was equivocal and inconsistent with the diagnosis of pneumoconiosis contained in his report of April 26, 1990; and that the latter report, finding total respiratory disability, was devoid of underlying objective documentation. Employer's arguments are without merit. While we agree that Dr. Williams' office notes of April 6, 1990, are too equivocal to support a finding of the existence of pneumoconiosis, the physician's opinion of April 26, 1990, that claimant had pneumoconiosis clinically and radiographically, was based in part on a positive x-ray obtained that day and reviewed by Dr. Williams, thus the administrative law judge could reasonably rely, in his discretion, on Dr. Williams' ultimate finding. *See* Claimant's Exhibit 2; Employer's Exhibit 25; *see generally Hunley v. Director, OWCP,* 8 BLR 1-323 (1985). In evaluating the evidence of record pursuant to Section 718.204, the administrative law judge accurately determined that all of the objective tests and the medical opinions up until the time of Dr. Robinette's report in June of 1988 were insufficient to establish total disability due to pneumoconiosis. The administrative law judge noted that Dr. Robinette did not explicitly discuss the issue of total disability, but diagnosed occupational pneumoconiosis with significant subjective complaints of dyspnea, cough and congestion occurring as a direct consequence of his respiratory disease, which he anticipated that claimant would continue to suffer. Decision and Order at 17; Claimant's Exhibit 1. The administrative law judge then acted within his discretion as trier-of-fact in according determinative weight to the opinion of Dr. Williams that claimant was totally disabled by significant pulmonary disease, based on his status as claimant's treating physician and because his opinion was the most recent and was supported by Dr. Robinette's conclusions. Decision and Order at 17, 18; *see generally Gorzalka v. Big Horn Coal Co.,* 16 BLR 1-48 (1990); *Revnack v. Director, OWCP,* 7 BLR 1-771 (1985); *Bates v. Director, OWCP,* 7 BLR 1-113 (1984). Contrary to employer's arguments, the administrative law judge properly weighed all contrary probative evidence and could permissibly rely on Dr. Williams' opinion as reasoned and documented, since it was based on x-rays, personal, medical and employment histories, symptoms, physical examinations, review of Dr. Byers' opinion and objective tests, and his observations of claimant's worsening condition over time. *See* Claimant's Exhibit 2; Employer's Exhibits 18, 25; *see generally Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Watson v. Director, OWCP,* 4 BLR 1-186 (1981). Consequently, we affirm the administrative law judge's findings pursuant to Section 718.204 as supported by substantial evidence, and we affirm the award of benefits herein.

Employer and the Director also challenge the administrative law judge's order directing payment of benefits commencing October 1, 1987, the month claimant filed

the instant claim. Inasmuch as the administrative law judge did not determine whether the evidence of record establishes an onset date of total disability pursuant to the provisions at Section 725.503(b), we remand this case for the administrative law judge to consider all relevant evidence and determine the appropriate date from which benefits are payable
herein. *See Green v. Director, OWCP,* 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Lykins v. Director, OWCP,* 12 BLR 1-181 (1989); *see also Rochester & Pittsburgh Coal Co. v. Krecota,* 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989).

Lastly, employer challenges the administrative law judge's award of attorney fees in the amount of $7,865. Specifically, employer maintains that an hourly rate of $175 is excessive for 36.05 hours of services performed by Attorney Wolfe in this routine case. Employer further argues that counsel's expenditure of 1.25 hours on June 11, 1988, was excessive in order to review a one-paragraph cover letter, three x-ray interpretations and the case file. Employer's arguments are without merit. The administrative law judge properly addressed all of employer's objections to the fee petition, considered the regulatory criteria at 20 C.F.R. §725.366, and acted within her discretion in finding that counsel's fee was reasonable for the work performed, that counsel's expenditure of 1.25 hours on June 11, 1988 was not excessive, and that the services performed could reasonably be regarded as necessary to establish entitlement. *See generally Lanning v. Director, OWCP,* 7 BLR 1-314 (1984); *Busbin v. Director, OWCP,* 3 BLR 1-374 (1981). Consequently, we affirm the administrative law judge's award of $7,865 in attorney fees as supported by substantial evidence. *See generally Abbott v. Director, OWCP,* 13 BLR 1-15 (1989).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part, and this case is remanded for further findings regarding the date of onset. The administrative law judge's Supplemental Decision and Order awarding attorney fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge