BRB No. 97-0345 BLA

EDWARD J. CHAPMAN	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
	)	
JEDDO-HIGHLANDS COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

a r o l y n M. M a r c o n i s ,

Pottsville, Pennsylvania, for claimant.

James E. Pocius and Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Poggin), Scranton, Pennsylvania for employer.

Before: Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0537) of Administrative Law Judge Ainsworth H. Brown denying 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*. Claimant filed a duplicate claim on December 7, 1994.[1] The case was assigned to Administrative Law Judge Ainsworth H. Brown, who issued a Decision and Order on October 31, 1996. After finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings under Section 725.309(d). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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 rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 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).

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[1] Claimant initially filed a claim with the Social Security Administration (SSA) on June 5, 1973. Director's Exhibit (DX) 50. The SSA denied benefits on January 4, 1974. *Id*. Pursuant to the Black Lung Benefits Reform Act of 1978, the SSA reconsidered claimant's 1973 claim, but once again denied benefits on April 16, 1979. The case was then referred to the Department of Labor (DOL). The DOL also denied benefits on July 14, 1980. *Id*. Claimant next filed a claim on November 7, 1988. DX 49. On July 31, 1991, however, Administrative law Judge David W. Di Nardi granted claimant's request to have the November 1988 claim withdrawn. *Id*.

Because this case involves a duplicate claim under Section 725.309(d), claimant was required to establish a material change in conditions since the denial of his last claim. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, has held in order for a miner to establish a material change in conditions, the administrative law judge must review all of the new evidence, favorable and unfavorable, to determine whether the miner has established one of the elements of entitlement previously adjudicated against him. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. *Id*. Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Id*.

On appeal, claimant generally contends that the administrative law judge erred by not finding that he established a material change in conditions under Section 725.309(d). Claimant specifically argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish that he has pneumoconiosis. Under 20 C.F.R. §718.202(a)(1), the administrative law judge weighed the five newly submitted x-rays of record dated November 2, 1994, December 28, 1994, May 5, 1995, May 18, 1995, and August 2, 1995. Decision and Order (D&O) at 3. In weighing the conflicting x-ray evidence, the administrative law judge found that the positive and negative readings by B-readers to be in equipoise as to the existence of pneumoconiosis.[2] *Id*. Because claimant

[2] As noted by the administrative law judge, a film dated November 2, 1994 was read by six B-readers as negative and one B-reader as positive for pneumoconiosis. D&O at 3; DXs 19, 21, 22, 35, 31. A film dated December 28, 1994 x-ray was interpreted as positive by four B-readers and negative by four B-readers. D&O at 3; DXs 23, 24; Claimant's

bears the burden of establishing pneumoconiosis by a preponderance of the x-ray readings, *see Director, OWCP, v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251 *aff'g sub. nom*. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the administrative law judge permissibly found that claimant was unable to carry his burden of establishing the existence of pneumoconiosis based on the newly submitted evidence pursuant to Section 718.202(a)(1).[3]

Contrary to claimant's contention, the administrative law judge also permissibly found the newly submitted medical opinion evidence insufficient to establish pneumoconiosis under 20 C.F.R. §718.202(a)(4). As noted by the administrative law judge, the newly submitted medical opinion evidence includes the opinion of Dr. Kraynak, who diagnosed coal workers' pneumoconiosis, compared to the contrary opinions of Ditman and

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Exhibits (CXs) 1-4; Employer's Exhibits (EXs) 7, 8. A film dated May 5, 1995 was read thirteen times, with five positive and eight negative readings. D&O at 3; DXs 30, 34,36, 43; CXs 5-9. There is also a film dated May 18, 1995 which was read as positive by five B-readers and negative by six B-readers. D&O at 3; DXs 39, 40, 44, 45; CXs 10-14 Finally, five B-readers read the August 3, 1995 film as positive while three B-readers read the same film as negative. D&O at 3; DX 38; CXs 15-18; EXs 1-4.

[3] The administrative law judge properly found that there is no biopsy or autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order (D&O) at 3. We note that claimant is unable to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) because he is not eligible for the presumptions contained therein.

Levinson, who did not diagnose pneumoconiosis. In weighing the conflicting opinions, the administrative law judge reasonably considered the qualifications of the physicians, and credited the opinions of Drs. Levinson and Ditman because he found them to be better qualified than Dr. Kraynak. D&O at 4-5. Inasmuch as the administrative law judge has discretion to assign greater probative weight to a physician's opinion based on his superior qualifications, *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), we affirm his finding that claimant failed to establish pneumoconiosis based on the newly submitted evidence at Section 718.202(a)(4).

Notwithstanding, we note that claimant's SSA claim was last denied by the Department of Labor because claimant was still employed in coal mine employment, and therefore was unable to establish total disability. Director's Exhibit 50. Because total disability is an element of entitlement previously adjudicated against claimant, in accordance with *Swarrow*, the administrative law judge is required to consider whether the newly submitted medical evidence established that claimant is now totally disabled. *Id*. The administrative law judge, however, only addressed the issue of the existence of pneumoconiosis. Inasmuch as the administrative law judge did not address whether claimant established total disability based on the newly submitted evidence, the denial of benefits is vacated.

On remand, the administrative law judge is directed to consider whether claimant is able to establish total disability. If so, the administrative law judge must consider the entire record to determine whether claimant established entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge