BRB No. 97-0456 BLA

HAROLD E. PEARCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED ENERGIES, INC./	)	DATE ISSUED:
HARRISBURG COAL CO.,	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (SIU Legal Clinic), Carbondale, Illinois, for claimant.

Curtis D. McKenzie (Arter & Hadden), Washington D.C., for employer.

Rita Roppolo (J. Davitt McAteer, Acting 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-2610) of Administrative Law Judge Mollie W. Neal 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). In this duplicate claim, the administrative law judge credited claimant with thirty-six years of coal mine employment, and based on the filing date,

adjudicated this case pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence sufficient to establish the presence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), to show a worsening of claimant's respiratory impairment at 20 C.F.R. §718.204(c), and to establish that claimant's respiratory impairment was due in part to his pneumoconiosis at 20 C.F.R. §718.204(b). The administrative law judge then concluded that claimant demonstrated a material change in conditions at 20 C.F.R. §725.309 as required by the decision of the United States Court of Appeals for the Seventh Circuit, within whose appellate jurisdiction this case arises, in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). Accordingly, benefits were awarded. On appeal, employer challenges the administrative law judge's findings that the evidence established the existence of pneumoconiosis, and a worsening pulmonary condition that is due to pneumoconiosis since the denial of the prior claim. Employer also challenges the administrative law judge's finding that it is liable for any benefits awarded. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter response addressing only the arguments on the issue of responsible operator liability.[2]

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,

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[1] Claimant filed his initial application for benefits on October 17, 1988, which the district director denied on May 25, 1989 on the grounds that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 25. Claimant took no further action until he filed the present claim on February 18, 1994. Director's Exhibit 1.

[2] We affirm the administrative law judge's finding of thirty-six years of coal mine employment and the findings made pursuant to 20 C.F.R. §§718.202(a)(3), 718.203(b), and 718.204(c),as well as the treatment of the medical opinions of Drs. Sanjabi and Lyle as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. At Section 718.202(a)(1), the administrative law judge acted within her discretion when she decided to accord determinative weight only to the x-ray interpretations of the dually-qualified readers and declined to accord any determinative weight to the readings of physicians whose credentials in the record indicate that they are either a B-reader or a Board-certified radiologist only.[3] *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, the administrative law judge did err when she gave weight only to the x-ray interpretations of Drs. Bassali, Wiot, Ahmed and Mathur, all Board-certified radiologists (BCR) and B-readers. *See Id.*; Decision and Order at 19-20. Contrary to employer's contention that the administrative law judge merely counted heads, the administrative law judge permissibly found that claimant established the existence of pneumoconiosis by x-ray based on a preponderance of the evidence as the positive interpretations of the March 14, 1994 and October 18, 1994 by the dually qualified readers outweighed the negative interpretations of these x-rays by Dr. Wiot, a dually qualified reader.[4] *Director, OWCP*

[3] Dual qualified readers are physicians who are both Board-certified radiologists and NOISH B-readers.

[4] Employer contends that Dr. Wiot opinion that claimant has emphysema, but not pneumoconiosis is "entitled to weight" because he is a professor of radiology who also oversaw the instruction of other B-readers and because he alone read the films in a series and explained his negative diagnosis. Dr. Bassali also read the two new x-rays and found the x-rays positive for pneumoconiosis. When questioned in his deposition about the difference in readings, Dr Wiot acknowledged that an 0/1 interpretation of an x-ray could be read as 1/0 and that a 1/1 interpretation could be read as 1/0 or 0/1 by competent readers. Employer's Exhibit 14 at p. 21. Dr. Wiot also agreed that emphysema, which claimant has, can mask pneumoconiosis on x-ray. *Id.* at p. 22. We, thus, reject employer's argument as the Board is not empowered to reweigh the evidence on appeal.

v. Greenwich Collieries [Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Furthermore, the administrative law judge did not ignore the x-ray interpretations of the B-readers; rather, she acted within her discretion when she chose not to accord any determinative weight to these x-ray interpretations.[5] *See Clark, supra*; *Scheckler, supra*; Decision and Order at 18-19. We, therefore, affirm the finding of the administrative law judge that claimant established the existence of pneumoconiosis at Section 718.202(a)(1) as it is supported by substantial evidence and is in accordance with law.[6]

Employer argues that under the standard enunciated by the United States Court of Appeals for the Seventh Circuit in *McNew*, claimant cannot establish a material change in conditions. Subsequent to the issuance of the Decision and Order in this case, the court explained its decision on the proper standard to demonstrate a material change in conditions pursuant to Section 725.309 in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(*en banc*). The court reemphazied its position that claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial; rather claimant must show that something capable of making a difference has changed since the record closed on the first application. *Id.* The court then stated that if the first claim were denied because claimant failed to show both pneumoconiosis and total disability, claimant can avoid automatic denial by showing a material change in either of these elements. *Id.* In the instant case, the administrative law judge properly concluded that claimant's prior claim was finally denied on May 25, 1989, Director's

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[5] The record indicates that Drs. Abramowitz, Wershba and Binns are only B-readers as found by the administrative law judge in footnote 8 of her Decision and Order. *See* Decision and Order at 19; Employer's Exhibits 4-7.

[6] As we affirm the findings of the administrative law judge on the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), we need not consider her alternate findings on this issue at 20 C.F.R. §718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR1-344 (1985).

Exhibit 25, and that this claim was denied, in part, because Dr. Sanjabi diagnosed smoker's bronchitis and bronchiectasis and did not diagnose pneumoconiosis. Director's Exhibit 7. The administrative law judge then considered all of the newly submitted evidence concerning claimant's current health condition. Thus, as we affirm the finding of the administrative law judge on the presence of pneumoconiosis, an element of entitlement not established in claimant's prior claim, we affirm the finding of the administrative law judge that claimant demonstrated a material change in conditions pursuant to Section 725.309 as a matter of law. *Spese, supra*.[7]

At Section 718.204(b), employer contends that claimant must show that his pneumoconiosis is a necessary cause of his totally disabling respiratory impairment. Employer argues that claimant has failed to meet his burden of proof because Drs. Sanjabi, Selby and Tuteur found that his pneumoconiosis was not a cause of his respiratory impairment. In finding the evidence sufficient to meet claimant's burden of proof on causation, the administrative law judge articulated that claimant must establish that his pnuemoconiosis is a contributing cause of his total disability and that contributing cause means that pneumoconiosis must be a necessary, but need not be a sufficient condition of the miner's total disability, citing to *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990) and *Hawkins v. Director , OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). The administrative law judge then found the medical opinions of Drs. Sanjabi, Selby and Tuteur less probative than the medical opinion of Dr. Cohen, which relates claimant's respiratory impairment to his coal mine employment, because none of the other physicians diagnosed pneumoconiosis. Decision and Order at 27. Employer has not challenged this rationale provided by the administrative law judge for according little weight to the opinions of Drs. Sanjabi, Selby and Tuteur. Employer's contention that Dr. Cohen's opinion does not satisfy claimant's burden in the Seventh Circuit to establish coal mine employment as a contributing cause of claimant's impairment is without merit. Dr. Cohen opined that claimant was totally disabled due to his respiratory impairment caused by obstructive lung disease and that claimant's "25 years of coal mine employment were significantly contributory to the development of obstructive lung disease." Claimant's Exhibit 4 at 9.

[7] We need not address employer's contention that the administrative law judge erred in finding a change in condition based upon a worsening of claimant's physical condition since the prior denial.

Finally, we reject employer's argument that it cannot be held responsible for the payment of benefits because there is no causal connection between employer and the presence of pneumoconiosis. Employer does not dispute that it was the last employer for whom claimant worked for at least one year, prior to his employment with the Mine Safety and Health Administration (MSHA), a federal agency. In addition, employer does not challenge its designation as the responsible operator pursuant to the provisions of 20 C.F.R. §725.493, nor the determination of the administrative law judge that MSHA was exempt from liability. Because employer is the properly designated responsible operator, it bears the burden of rebutting the presumption that the miner's pneumoconiosis arose in whole or in part out of his employment with employer. *See* 20 C.F.R. §725.493(a)(6).[8] Employer argues that it has rebutted the presumption with evidence that claimant did not have pneumoconiosis until many years after leaving its employ. Employer relies upon Dr. Sanjabi's 1983 medical opinion, the only medical opinion in the prior claim, in which the doctor opined that claimant did not have pneumoconiosis. Director's Exhibit 25. Claimant had left employer in 1978.[9] Employer's contention that claimant's pneumoconiosis cannot be attributed to exposure from employer because it was diagnosed several years after claimant left employer requires medical evidence to support it. *Freeman United Coal Co. v. Hillard*, 65 F.3d 667, 673, 19 BLR 2-282, 2-288 (7th Cir. 1995). As the Director correctly argues,

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[8] The regulation at 20 C.F.R. §725.493(a)(6) provides:

> "In the event an operator or other employer is determined to be a responsible operator under the provisions of paragraphs (a)(1)-(b)(4) of this section, there shall be a rebuttable presumption that the miner's pneumoconiosis arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis or disability therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment."

[9] Contrary to employer's representation, the record contains a report from Dr. Lyle, a physician for another coal mine employer, who diagnosed pneumoconiosis when he conducted a pre-employment physical of claimant on February 14, 1978. Director's Exhibit 4. Claimant testified that he was working with employer at the time of this physical examination and that he was denied employment by the other coal mine employer because of Dr. Lyle's diagnosis. Director's Exhibit 19 at p. 34-35.

employer offers no medical evidence that claimant's work with it did not contribute to or aggravate the progression or advancement claimant's loss of ability to perform his regular coal mine employment. Employer attempts to shift the burden of proof to the Director by asserting that liability does not attach to it because claimant would have been totally disabled to the same degree if he had never worked as a coal miner, citing to the standards enunciated in *Shelton, supra* (addressing the burden of proof at Section 718.204(b)) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994)(addressing the burden of proof at Section 727.203(b)(3)). Employer's assertion, however, is no substitution for the requisite medical evidence to demonstrate that employment with employer did not contribute to or aggravated claimant's condition. Hence, employer has failed to rebut the presumption at Section 725.493(a)(6). We, therefore, affirm the finding of the administrative law judge that employer is responsible for payment of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge