BRB No. 94-3758 BLA

ALICE BREWER (Widow of COLUMBUS BREWER) Claimant-Respondent v. FALCON COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

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

Alison Wells Hylton, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (93-BLA-1113) of Administrative Law Judge Donald W. Mosser awarding benefits on a claim[1] filed pursuant to the

[1] Claimant is Alice Brewer, widow of Columbus Brewer, the miner, who filed his initial application for benefits on August 21, 1973. Director's Exhibit 76. The claim was finally denied on March 31, 1980. *Id*. The miner filed this claim on May 12, 1987, and was awarded benefits on February 10, 1988. Director's Exhibits 1, 52, 61.

provisions of Title IV of the Federal

Employer appealed the district director's finding of a material change in conditions to the Board, which remanded the claim to the Office of Administrative Law Judges in light of *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990). Director's Exhibit 73. Mr. Brewer died while employer's appeal of the award of benefits was pending and the Board, by order dated March 25, 1996, granted Mrs. Brewer's motion to be substituted as
the claimant.

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited the miner with thirty years of coal mine employment pursuant to the parties' stipulation, found that he had one dependent for purposes of benefits augmentation, and determined that employer was the responsible operator.

The administrative law judge found a material change in conditions established pursuant to 20 C.F.R. §725.309(d) and considered the merits of the claim. He found the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and (4), 718.203(b), and 718.204 established and, accordingly, awarded benefits effective May 1, 1987.

On appeal, employer contends that Section 725.309(d) is invalid and that the administrative law judge applied the wrong duplicate claim standard. Employer also challenges the administrative law judge's weighing of the evidence pursuant to Sections 718.202(a)(1) and (4), and 718.204(b). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the Board reject employer's argument regarding the validity of Section 725.309(d).[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, responsible operator status, entitlement date, and pursuant to 20 C.F.R. §§718.203(b) and 718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Pursuant to Section 725.309(d), employer initially contends that the duplicate claim regulation itself is invalid because it conflicts with 33 U.S.C. §922.[3] Employer's Brief at 6-12. Specifically, employer asserts that because Section 725.309(d) allows for the filing of a claim more than one year after the denial of a previous claim, it conflicts with the "intent for finality" expressed by Congress in Section 22 of the Longshore and Harbor Workers' Compensation Act. *Id*.

Employer's contention is meritless. The Secretary of Labor has broad policy-making discretion in implementing the Act, *see BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (l991), *aff'g* 890 F.2d l295, 13 BLR 2-162 (3d Cir. l989), and the United States Courts of Appeals have recognized Section 725.309(d) as consistent with the intent of Section 22. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(at issue under the material change provision is relief from the principles of finality for those miners whose conditions have deteriorated due to the progressive nature of pneumoconiosis); *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990)(real purpose behind the statute was to open the door to subsequent claims); *see also Sellards v. Director*, 17 BLR 1-77, 1-79 (1993). Therefore, we reject this contention.

Employer further contends that remand is required because the administrative law judge failed to apply the proper duplicate claim standard. Employer's Brief at 8. The administrative law judge found a material change in conditions established pursuant to *Spese v. Peabody Coal Co*., 11 BLR 1-174 (1988). Decision and Order at 3-4. Subsequent to the issuance of his Decision and Order, the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, held that pursuant to Section 725.309(d), the administrative law judge must consider all the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). If so, claimant has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes

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[3] Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, incorporated into the Act by 30 U.S.C. §932(a), provides for modification of a denied claim "at any time prior to one year after the rejection of the claim." Although requests for modification, governed by Section 725.310, must be filed within one year of the denial, Section 725.309(d) allows the filing of duplicate claims outside the one-year period. For a discussion of how the Department of Labor reached the policy decision to provide for such claims in light of the progressive nature of pneumoconiosis, see *Lukman v. Director, OWCP*, 896 F.2d 1248, 1253-54, 13 BLR 2-332, 2-343-44 (10th Cir. 1990).

entitlement to benefits. *Ross*, *supra*.

In this case, virtually all of the evidence was developed in connection with the miner's second claim.[4] Thus, the evidence the administrative law judge considered was essentially new evidence. In his first claim, the miner failed to establish any element of entitlement, Director's Exhibit 76; here, the administrative law judge weighed the new evidence and found entitlement established. In the circumstances of this case, the administrative law judge's analysis meets the *Ross* standard; therefore, we reject employer's contention.

[4] The medical exhibits from the miner's 1973 claim consist of one negative x-ray reading by a physician whose radiological credentials are not of record and a 1975 medical opinion that does not address the existence of pneumoconiosis, total respiratory disability, or causation. Director's Exhibit 76.

Pursuant to Section 718.202(a)(1), employer asserts that the administrative law judge failed to weigh the x-rays against each other. Employer's Brief at 14. Contrary to employer's contention, after considering each x-ray separately, the administrative law judge weighed the readings in light of the readers' qualifications and found that the weight of the x-ray evidence was positive.[5] Decision and Order at 12; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Therefore we reject employer's contention. Contrary to employer's assertion that the administrative law judge gave undue consideration to the numerical superiority of the positive readings, the administrative law judge considered both the quantity and quality of the x-ray evidence. Employer's Brief at 15; Decision and Order at 12; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward*, *supra*.

Employer next argues that remand is required because the administrative law judge mechanically applied the later evidence rule. Employer's Brief at 16. In weighing the x-ray interpretations based on the readers' qualifications, the administrative law judge also stated that he relied on the October 7, 1987 x-ray because it was the most recent film and because the two positive readings of it were uncontradicted. Decision and Order at 12. Although employer raises a valid argument that the pattern of x-ray readings in this case--alternating batches of positive and negative readings of x-rays taken over a period of one year, with only two months separating the last two films--is not particularly suitable for application of the later-evidence rule, *see Woodward*, *supra*, we conclude that remand is not required.

With the exception of the 1975 x-ray reading, *see* n.4, the administrative law judge discussed all the readings and considered both their quantity and quality. *See*

[5] In addition to the 1975 x-ray reading, there were twenty-six interpretations of eleven films, with sixteen positive and eight negative readings. Director's Exhibits 17-20, 22-25, 29-31, 33, 34, 36, 37, 42, 46, 48, 49, 79. One film was not classified and another was found unreadable. Director's Exhibits 31, 36.

Staton, *supra*; *Woodward*; *supra*. He cited recency as one weighing factor, and as to one film only. Moreover, he correctly found that the October 7, 1987 x-ray had been read positive twice, once by a B-reader, and that those readings were uncontradicted. Director's Exhibit 48. Therefore, we reject employer's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).[6]

Pursuant to Section 718.204(b), employer argues that the administrative law judge failed to resolve the conflicts in the miner's testimony regarding his smoking history. Employer's Brief at 22. The miner testified in 1992 that he smoked sporadically over a period of twenty years, quitting three times. [1992] Hearing Transcript at 36. After a remand to the district director for further proceedings regarding identification of the responsible operator, another hearing was held, at which the miner testified that he smoked on and off over a period of possibly twenty-five years, for a total continuous smoking history of ten to twelve years. [1993] Hearing Transcript at 23. At both hearings, the miner disagreed with the one pack per day, thirty-six year smoking history that had been recorded by most of the physicians of record.

The administrative law judge found the miner's testimony to be credible. Decision and Order at 3. Although the administrative law judge did not specifically refer to the miner's 1992 testimony before a different administrative law judge, that earlier testimony appears consistent with the 1993 testimony found credible by this administrative law judge.

Moreover, while the administrative law judge mentioned a "minimal" smoking history compared to the miner's "extensive" thirty-year coal mine employment history, Decision and Order at 16, the administrative law judge's use of the word "minimal" is inconsequential because there was no conflict in the medical opinions regarding the length of time the miner smoked--all the physicians recorded a lengthy smoking history. Director's Exhibits 16, 18-23, 48, 51; Employer's Exhibits 1, 2. The opinions the administrative law judge credited were all based on a thirty-six year smoking history and those physicians still concluded, some of them under cross-

[6] As we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1), we reject employer's contentions that the administrative law judge's weighing of the x-ray evidence tainted his consideration of the evidence at Sections 718.202(a)(4) and 718.204(b). Employer's Brief at 17, 24-25.

examination by employer, that pneumoconiosis was at least a contributing cause of the miner's total disability. Director's Exhibits 18-20, 22; Claimant's Exhibits 1-4; *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge found that the preponderance of the medical opinion evidence established causation pursuant to Section 718.204(b), and substantial evidence supports his finding. Therefore, we reject employer's contention.

Employer further asserts that the administrative law judge failed to explain his inconsistent treatment of Dr. Anderson's
opinion, which the administrative law judge credited at Section 718.202(a)(4) but not at Section 718.204(b). Employer's Brief at 25. Although Dr. Anderson believed that the miner had pneumoconiosis, and the administrative law judge credited that aspect of his opinion along with the reports of other physicians who diagnosed pneumoconiosis, Decision and Order at 13, Dr. Anderson disagreed with Drs. Myers, Clarke, Williams, and Wright regarding causation. Director's Exhibits 18-20, 22; Employer's Exhibit 1. The administrative law judge permissibly found that the weight of the evidence established causation. *See* discussion, *supra*. Dr. Anderson simply was not part of the preponderance of physicians whom the administrative law judge credited in determining that pneumoconiosis was at least a contributing cause of total disability. Therefore, we reject employer's contention.

Employer lastly contends that the opinions credited do not explain why cigarette smoking alone would not have disabled the miner. Employer's Brief at 27. Pursuant to Section 718.204(b), a claimant need only prove by a preponderance of the evidence that pneumoconiosis was a contributing cause of his total disability. *See Adams*, *supra*. He need not prove that smoking was not the sole cause of total disability to prevail. Therefore, we reject employer's contention and affirm the administrative law judge's finding pursuant to Section 718.204(b).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge