BRB Nos. 90-1856 BLA
and 90-1856 BLA-A

ANNABELLE SPESE (widow of JOHN SPESE) Claimant-Respondent v. PEABODY 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 Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Raymond T. Reott (Jenner & Block), Chicago, Illinois, for claimant.

Mark J. Botti and William E. Berlin (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals and claimant[1] cross-appeals the Decision and Order (83-BLA-1075) of Administrative Law Judge Richard E. Huddleston awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

[1]Claimant is Annabelle Spese, widow of the miner John Spese, who initially filed a claim on April 1, 1976, Director's Exhibit 1, that was finally denied on April 30, 1979, Director's Exhibit 17. He then filed the instant claim on December 18, 1981, which claim is being pursued by his surviving widow. *See* 30 U.S.C. §§901(a), 932(l); 20 C.F.R. §725.212; Director's Exhibit 2. There is no evidence in the record regarding the miner's death, or of any application for survivor's benefits having been filed.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. The administrative law judge initially found that claimant established a material change in conditions in this duplicate claim pursuant to 20 C.F.R. §725.309(c), that the miner's 1976 and 1981 claims merged, and accepted the parties' stipulation of forty years of qualifying coal mine employment. Decision and Order at 7-8. Adjudicating the claim pursuant to the criteria set forth at Part 727, the administrative law judge further found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), Decision and Order at 8, and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b), Decision and Order at 12. Accordingly, benefits were awarded with the date of entitlement established as the first filing date, *i.e.*, April 1, 1976. The administrative law judge subsequently issued a Decision and Order awarding attorney's fees.

Employer appealed, and, pursuant to the Board's Order dated March 23, 1988, oral argument was held in Chicago, Illinois, on May 4, 1988. In disposing of that appeal the Board, after articulating the standard for determining whether a material change in conditions had been demonstrated in duplicate claims pursuant to Section 725.309,[2] *Spese v. Peabody Coal Co.*, 11 BLR 1-174, 1-176 (1988), concluded that the administrative law judge erred in finding a basis for merger of the claims. The Board held that the administrative law judge should have adjudicated the instant duplicate claim pursuant to the permanent criteria set forth at Part 718, based on its December 18, 1981 filing date. *Spese*, 11 BLR at 1-177-178. Because the administrative law judge had improperly relied on the filing date of the first claim as the operative filing date in this adjudication, the date of entitlement was also ruled to be incorrect. *Spese*, 11 BLR at 1-178. The Board remanded the case to the administrative law judge to review the record as a whole to determine if entitlement had been established under Part 718, and, if entitlement were again established, to reconsider the date of entitlement.[3] *Id.*

---

[2]In *Spese*, a material change in conditions was defined as evidence which, if fully credited, presents a reasonable possibility of changing the prior administrative result. *Spese*, 11 BLR at 1-176; *see Shupink v. LTV Steel Co.*, 17 BLR 1-24, 1-27 (1992); *Rice v. Sahara Coal Company, Inc.*, 15 BLR 1-19, 1-21 (1990)(*en banc*); *cf. Sharondale Corp. v. Ross*, F.3d , BLR , 1994 U.S. App. LEXIS 35172 (6th Cir. Dec. 16, 1994).

[3]An appeal of the Board's decision was taken to the United States Court of Appeals for the Seventh Circuit, but dismissed with prejudice by stipulation. *See* Fed.R.App.P.

On remand, the administrative law judge again found that claimant established a material change in conditions pursuant to Section 725.309(c), and accepted the parties' stipulation of forty years of qualifying coal mine employment. Decision and Order on Remand at 2-3. He then applied the permanent criteria set forth at Part 718, reviewed all the evidence of record, and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). Decision and Order on Remand at 4. The administrative law judge also found that claimant qualified for the fifteen-year presumption of total disability due to pneumoconiosis, *see* Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, based on his finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c), and on his determination that the miner completed forty years of coal mine employment, "at least 50%" of which was spent in "dust conditions which are substantially similar to those in an underground mine." Decision and Order on Remand at 6-8. The administrative law judge found that employer failed to rebut this presumption. *Id.* Benefits were therefore awarded with entitlement to commence December 1, 1981, the filing date of claimant's second claim. Decision and Order on Remand at 8. The instant appeals followed.

In its appeal, employer contends that the administrative law judge erred at Section 725.309 because he failed to apply the "material change" standard articulated in *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), in this case which arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, Employer's Brief at 1-2, and that he erred in his findings pursuant to Sections 718.202(a)(1) and 718.204, Employer's Brief at 11-14. Employer further contends that the miner's work in a strip mine was not comparable to the work in an underground mine, and thus the administrative law judge erred in finding that the conditions of this coal mine employment were substantially similar to underground coal mine work. Employer's Brief at 15; *see* 30 U.S.C. §921(c)(4). Claimant filed a combined brief in support of her cross-appeal and in response to employer's appeal, urging affirmance of the award of benefits.

42(a); *Spese v. Peabody Coal Co.*, No. 88-3309 (7th Cir. Feb. 2, 1989)(Order).

In her cross-appeal, claimant contends that the administrative law judge erred in his entitlement date finding because, claimant urges, the 1981 claim merged into the 1976 claim; therefore, the instant claim should have been adjudicated pursuant to Part 727. Claimant's Brief at 2 n.1. Employer filed a brief in response to claimant's cross-appeal and in reply to claimant's response brief, again urging that the administrative law judge erred in finding a material change in conditions established and in awarding benefits, Employer's Response/Reply Brief at 2, and, alternatively, if benefits were awarded, urging that such benefits could not begin prior to the onset of the miner's total disability, Employer's Response/Reply Brief at 5. Citing the Seventh Circuit's decision in *Zeigler Coal Co. v. Office of Workers' Compensation Programs* [*Lemon*], 23 F.3d 1235, 18 BLR 2-279 (7th Cir. 1994), employer reasserts its contention that simple pneumoconiosis is not a progressive disease, and argues that the finding of pneumoconiosis based on that premise is in error. Employer's Response/Reply Brief at 3. The Director, Office of Workers' Compensation Programs, did not respond to either appeal.[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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As urged by employer, regarding Section 725.309(c), subsequent to the administrative law judge's Decision and Order on Remand, the Seventh Circuit court defined a material change in conditions as encompassing cases in which the miner did not have pneumoconiosis at the time of the first application but had since contracted it and become totally disabled by it, or in which the miner's pneumoconiosis had progressed to the point of total respiratory disability since the filing of the first application. *McNew*, 946 F.2d at 556, 15 BLR at 2-229. The administrative law judge based his finding of a material change in conditions pursuant to Section 725.309(c) on the presence of positive x-ray evidence which, when contrasted to the prior negative x-ray evidence, was relevant and probative so that there was a "reasonable possibility that it would change the prior administrative result." Decision and Order on Remand at 2; *see* n.2, *supra*.

---

[4]We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.203(b) and 718.204(c)(1)-(3) as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The standard set forth in *McNew* is applicable to the determination of whether claimant had established a material change in conditions.[5] We hold, however, that under the circumstances found here, the administrative law judge's findings on the merits effectively satisfy the test for a material change in conditions required by the Court of Appeals in *McNew*. *See Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). In the instant case the miner's first claim, which was adjudicated before the district director only and did not reach the Office of Administrative Law Judges for hearing, was administratively denied because the miner failed to establish either the existence of pneumoconiosis or total respiratory disability. Director's Exhibits 16, 17. The administrative law judge has now properly found, as discussed *infra*, that the miner not only had pneumoconiosis but also was totally disabled due to pneumoconiosis, Decision and Order on Remand at 4, 6, as is required by *McNew* to support a finding that a material change in conditions has been established. We therefore hold the administrative law judge's failure to apply the standard outlined in *McNew* to be harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), and affirm his finding pursuant to Section 725.309(c).

[5]In order to maintain as much consistency in our decisions as possible, we will continue to apply the material change standard first articulated in our initial decision in this case, and reaffirmed in *Shupink*, *supra*, in cases arising outside the jurisdiction of the Seventh Circuit, and, in view of the recent pronouncement by the United States Court of Appeals for the Sixth Circuit in *Ross*, *supra*, in cases arising outside the Sixth Circuit, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

We also reject employer's challenge to the administrative law judge's finding of pneumoconiosis pursuant to Section 718.202(a)(1). Contrary to employer's contention that the administrative law judge must credit the numerically superior negative x-ray readings,[6] Employer's Brief at 11, we conclude that the administrative law judge, after noting that all three x-ray interpretations of record were by B-readers, and that the one positive x-ray preponderated over the earlier negative films,[7] permissibly assigned greater weight to the positive x-ray reading by a B-reader, which was three years more recent than the two negative readings, *see Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276, 18 BLR 2-42, 2-45 (7th Cir. 1993); *Chubb v. Consolidation Coal Co.*, 741 F.2d 968, 973 (7th Cir. 1984); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Inasmuch as the administrative law judge properly exercised his discretion to credit the positive reading of a highly qualified physician where the reading was of the most recent x-ray of record, *see Chubb*, 741 F.2d at 973, we affirm his finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[8] *See generally Mullins*

---

[6]Employer asserts that simple pneumoconiosis is not a progressive disease, and also argues that, because the miner had no further coal dust exposure, his disease could not have progressed since the prior denial. Employer's Brief at 8. In support of this contention, employer cites a report of the Surgeon General, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace* (1985) but has submitted no medical evidence in support of its argument in this case. Furthermore, it has long been held that pneumoconiosis is a progressive and irreversible disease. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Chubb v. Consolidation Coal Co.*, 741 F.2d 968, 973 (7th Cir. 1984) (not irrational for administrative law judge to find that positive x-ray three years more recent was more probative); *accord Back v. Director, OWCP*, 796 F.2d 169, 172, 9 BLR 2-93, 2-97 (6th Cir. 1986); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727, 8 BLR 2-192, 2-197 (6th Cir. 1986); *see also Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990); *Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990); *Belcher v. Beth-Elkhorn Corp.*, 6 BLR 1-1180 (1984).

[7]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins*, 484 U.S. at 145 n.16, 11 BLR at 2-16 n.16; *Battram*, 7 F.3d at 1276 n.2, 18 BLR at 2-45 n.2.

[8]The Seventh Circuit's decision in *Lemon*, *supra*, does not require us, as employer urges, to overturn the administrative law judge's reliance on the recency of the positive x-ray to find pneumoconiosis established. 20 C.F.R. §718.202(a)(1). The court in *Lemon* criticized that administrative law judge's apparent assumption, without a scientific or medical basis, that "pneumoconiosis is a progressive disease *of the sort that might well remain undetectable until long after the patient['s] exposures to coal dust*

Coal Co. of Va. v. Director, OWCP, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 33, 3 BLR 2-36, 2-55 (1976)(negative x-ray readings not a trustworthy indicator of absence of pneumoconiosis).

Regarding Section 718.204(c), the administrative law judge properly found that none of the pulmonary function or blood gas studies was qualifying[9] to demonstrate total respiratory disability, *see* 20 C.F.R. §718.204(c)(1)-(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986), and that there is no evidence of record of cor pulmonale with right-sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3). Decision and Order on Remand at 5. He then discussed the medical opinions of record[10] and claimant's hearing testimony regarding the physical requirements of his usual coal mine work. Decision and Order on Remand at 5-6. The administrative law judge permissibly concluded that the physical limitations found by Dr. Sachdev, coupled with his diagnoses of chronic bronchitis and probable coal workers' pneumoconiosis related to the miner's coal mine employment dust exposure, and when compared with the miner's usual work activities, would preclude him from performing his

---

are terminated." *Lemon*, 23 F.3d at 1238; 18 BLR at 2-288 [emphasis supplied]. We do not read *Lemon*, however, to signal the court's rejection of the characterization, cited with approval in *Chubb*, *supra*, and other cases, *see*, *e.g.*, *Mullins*, *supra*; *Battram*, *supra*; *Back*, *supra*, of pneumoconiosis as a progressive disease, and a disapproval of a fact-finder's reliance on the progressive nature of this disease to find more probative those more recent films that detected its presence. The court, moreover, ruled that the administrative law judge did not adequately explain why the most recent x-ray, which was read as positive twice and negative three times, was adequate to establish the existence of pneumoconiosis. *Lemon*, 23 F.3d at 1239, 18 BLR at 2-288-89.

[9]A "qualifying" 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 Part 718, Appendices B and C, respectively. A "non-qualifying " study yields values that exceed those in the tables. 20 C.F.R. §718.204(c)(1), (2); *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

[10]Dr. Hickey examined claimant in 1976, diagnosed chronic bronchitis due to coal dust exposure in coal mine work, and opined that the miner's impairment was "mildly severe." Director's Exhibit 9. Dr. Sachdev examined claimant in 1982, listed limitations to claimant's physical activities, diagnosed, *inter alia*, chronic bronchitis and "probable coal workers' pneumoconiosis not evident on chest x-ray" due to coal dust exposure, and opined that claimant had an American Medical Association Classification Stage III cardio-pulmonary impairment. Director's Exhibit 10. Dr. Teran stated that the miner was under his care for multiple medical problems and was too weak to travel out of town. Joint Exhibit 1.

usual employment, *see Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-355-56 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); thus, total respiratory disability was demonstrated pursuant to Section 718.204(c)(4), *see Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Decision and Order on Remand at 6.

The administrative law judge then properly weighed the contrary probative evidence and found that claimant had established total respiratory disability pursuant to Section 718.204(c). *Id.*; *see Beatty v. Danri Corp. and Triangle Enters.*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Finally, we conclude that the administrative law judge properly applied the fifteen-year presumption set forth at Section 411(c)(4) and implemented by 20 C.F.R. §718.305. This presumption is available in claims such as the instant claim, which were filed before January 1, 1982, where the miner worked at least fifteen years in underground mining or comparable surface mining, and the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment. *See Mitchell v. Office of Workers' Compensation*, 25 F.3d 500, 504, 18 BLR 2-257, 2-266 (7th Cir. 1994); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 13 BLR 2-196 (10th Cir. 1989); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85, 1-86-87 (1987).

We also conclude that the administrative law judge rendered the "comparability" finding that is essential to application of the Section 718.305 presumption in this case where the miner was not engaged in underground coal mine employment *per se*. *See* 30 U.S.C. §921(c)(4). The administrative law judge credited the miner's testimony regarding his exposure to coal dust, and permissibly found that at least fifty percent of the miner's work (*i.e.*, twenty years) was in dust conditions that were substantially similar to those of an underground mine. Decision and Order on Remand at 7; *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Wagahoff v. Freeman United Coal Mining Co.*, 10 BLR 1-100 (1987). Furthermore, the administrative law judge properly concluded that employer failed to rebut this presumption. Decision and Order on Remand at 7-8. Employer must rebut the fifteen year presumption by establishing that the miner did not have pneumoconiosis or that the miner's totally disabling respiratory impairment did not arise out of, or in connection with, the miner's coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(a), (d); *Mitchell*, 25 F.3d at 504, 18 BLR at 2-266; *Bosco*, 892 F.2d at 1479, 13 BLR at 2-207; *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988); *Tanner*, 10 BLR at 1-87-88. As discussed, *supra*, the administrative law judge permissibly found the existence of pneumoconiosis established by x-ray evidence at Section 718.202(a)(1). Decision and Order on Remand at 4.[11] Moreover, the administrative law judge also

[11]It is noted that, inasmuch as invocation of the Section 718.305 presumption regarding the existence of pneumoconiosis was made under Section 718.202(a)(3), *see*

correctly found that the medical opinion evidence failed to affirmatively exclude coal mine employment as a causative factor of the miner's total respiratory disability,[12] Decision and Order on Remand at 8; *see* 20 C.F.R. §718.305(a), (c); *Mitchell*, 25 F.3d at 506, 18 BLR at 2-269; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *DeFore*, *supra*; *Tanner*, *supra*, and therefore did not satisfy the requirement that employer prove that the miner's totally disabling respiratory or pulmonary impairment did not arise out of or in connection with coal mine employment.

In her cross-appeal, claimant contends that the miner's claim should be adjudicated pursuant to the interim criteria set forth at Part 727, and that the appropriate date of entitlement should be April 1, 1976, the date the miner filed his first claim. Claimant's Brief at 2 n.1. The Board's previous holding, *see Spese*, *supra*, constitutes the law of the case on this issue, *see Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). Moreover, in determining the date of entitlement pursuant to 20 C.F.R. §725.503, the administrative law judge considered all relevant evidence, *see Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989), and, within a proper exercise of his discretion as fact-finder, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), determined that the medical evidence was insufficient to establish the date of onset of total disability due to pneumoconiosis; thus the miner's second filing date was relied upon to establish the date of entitlement. Decision and Order at 12; Decision and Order on Remand at 9; *see* 30 U.S.C. §945(c); 20 C.F.R. §725.503; *Foley v. Director, OWCP*, 7 BLR 1-896 (1985). We therefore affirm
the administrative law judge's finding that claimant is entitled to benefits as of December 1, 1981.

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

SO ORDERED.

---

20 C.F.R. §718.202(a)(3); *DeFore*, 12 BLR at 1-29-30, the administrative law judge need not have rendered a finding under Section 718.202(a)(1), but his evaluation of the x-ray evidence thereunder is pertinent to rebuttal of the Section 718.305 presumption based on proof of the absence of pneumoconiosis, *see Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984).

[12]The administrative law judge alternatively found that, had the fifteen-year presumption not been applicable, the opinions of Drs. Hickey and Sachdev, *see* n.8, *supra*; Director's Exhibits 9-10, would establish that claimant's impairment was due at least in part to pneumoconiosis. Decision and Order on Remand at 9; 20 C.F.R. §718.204(b); *see Hawkins v. Director, OWCP*, 907 F.2d 697, 705, 14 BLR 2-17, 2-27 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 690, 693, 13 BLR 2-444, 2-448 (7th Cir. 1990).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge