BRB No. 08-0378 BLA

D.R.I.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 02/27/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Administrative Law Judge Daniel F. Solomon, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington D.C., for employer.

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting Associate Solicitor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2006-BLA-05393) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent 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).[1] After a review of the record, the administrative law judge accepted employer's concession that claimant worked as a miner for twenty-four years, that employer is the responsible operator, that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and that claimant has one dependent for augmentation purposes. Decision and Order at 2; Hearing Transcript at 6, 7. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). The administrative law judge further determined, however, that the newly submitted medical opinions of Drs. Simpao and Baker supported a finding of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.203(b) and 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's finding under Section 725.309(d). Employer has replied and reiterates his arguments under Section 725.309(d).[2]

[1] Claimant filed his initial claim on July 9, 1998. Director's Exhibit 1 at 198. In a Proposed Decision and Order issued on March 30, 1999, the district director denied benefits, indicating that claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis. *Id*. at 12. Claimant took no further action until he filed this subsequent claim for benefits on February 22, 2005. Director's Exhibit 3. On November 17, 2005, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 28. Employer requested a formal hearing, which was held before the administrative law judge in Owensboro, Kentucky on February 6, 2006. Director's Exhibits 30, 39. The administrative law judge issued the Decision and Order that is the subject of this appeal on February 8, 2008.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant worked twenty-fours years as a miner, that employer is the responsible operator, that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and has one dependent, and that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Section 725.309

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

In challenging the administrative law judge's finding that claimant established a change in an applicable condition of entitlement, employer argues that the administrative law judge could not properly rely upon the newly submitted opinion in which Dr. Simpao diagnosed legal pneumoconiosis, as Dr. Simpao rendered essentially the same opinion in the prior, denied claim. The Director has responded, asserting that employer's contention is without merit, as the amended version of Section 725.309(d) does not require a qualitative comparison of the evidence considered in the denied claim and the newly submitted evidence. The Director also maintains that because total respiratory or pulmonary disability was one of the elements of entitlement adjudicated against claimant, employer's concession that claimant is totally disabled had the effect of establishing a change in an applicable condition of entitlement under Section 725.309(d), thereby rendering employer's argument moot. In reply, employer notes that the administrative law judge found that the prior claim was denied because claimant did not establish the existence of pneumoconiosis. Employer also contends that it is unclear from the district director's denial whether total disability was an element of entitlement adjudicated against claimant.

The district director's initial denial of claimant's 1998 claim appeared on Form CM-1000a and was dated October 27, 1998. Form CM-1000a contains a section stating:

You do not qualify for benefits because the evidence in your claim[:]

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

1. (X) does not show that you have pneumoconiosis (black lung disease).

2. (X) does not show that the disease was caused at least in part by coal mine work.

3. (X) does not show that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of the breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation.

Director's Exhibit 1 at 28. The district director attached Form CM-988, which explicitly indicated that the valid pulmonary function and blood gas studies did not meet the standards for establishing total disability. Director's Exhibit 1 at 28, 30. The district director also noted on Form 1000g (Guide for Submitting Additional Evidence), that claimant needed to proffer objective studies meeting the total disability standards set forth in the regulations. *Id*. at 32. In the subsequent Proposed Decision and Order Memorandum of Conference, issued on March 30, 1999, the district director reiterated the determinations made with respect to the objective evidence relevant to total disability and indicated that none of the doctors who provided a medical opinion found that claimant was totally disabled. *Id*. at 12-13.

Based upon our review of the record, we agree with the Director that claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis.[4] Employer's concession that claimant is now totally disabled had the effect, therefore, of establishing an element of entitlement that was previously adjudicated against claimant. Thus, in accordance with Section 725.309(d), claimant was entitled to have his subsequent claim considered on the merits, based upon a weighing of all of the evidence of record. Moreover, the Director is correct in stating that the case law cited by employer is not applicable in this current

[4] At the hearing, employer indicated that in the initial claim, the district director found that claimant proved that he was totally disabled, but failed to establish that he had pneumoconiosis or was totally disabled by the disease. Hearing Transcript at 6. The administrative law judge appeared to rely upon this erroneous representation in his Decision and Order, stating "the prior claim was denied because [c]laimant failed to establish the existence of pneumoconiosis." Decision and Order at 3.

claim, which was filed after the effective date of the amendments to this regulation.[5] Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the date upon which the prior denial became final by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based.[6] *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004) (*en banc*). Consequently, we reject employer's contention that the administrative law judge was required to conduct a qualitative comparison of the opinions submitted by Dr. Simpao pursuant to Section 725.309.

Sections 718.202(a)(4) and 718.204(c)

Employer next argues that the administrative law judge erred in finding that the newly submitted opinions in which Drs. Simpao and Baker identified coal dust exposure as a contributing cause of claimant's chronic obstructive pulmonary disease (COPD)/emphysema were sufficient to establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(c).[7] Employer further contends that the administrative law judge erred in discrediting the newly submitted opinions in which Drs. Repsher and Fino attributed claimant's pulmonary disease solely to cigarette smoking.

[5] The Department of Labor made substantive revisions to 20 C.F.R.§725.309 when it amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. 20 C.F.R. §725.2(c). The revisions pertaining to Section 725.309 apply to claims filed after January 19, 2001. *Id*.

[6] In amending 20 C.F.R. §725.309, the Department of Labor adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), which does not require a qualitative comparison of the old and new evidence. *See* 65 Fed. Reg. 79968 (Dec. 20, 2000); *cf. Sharondale Corp. v. Ross*, 42F.3d 993, 19 BLR 2-10 (6th Cir. 1994) .

[7] Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

In conjunction with claimant's subsequent claim, Dr. Simpao examined claimant at the request of the Department of Labor. Director's Exhibit 15 at 35. Dr. Simpao diagnosed coal workers' pneumoconiosis by x-ray and emphysema by history and stated that claimant "has a severe degree of pulmonary impairment due to his many years of coal dust exposure." *Id*. at 38. Dr. Simpao also indicated that claimant has a smoking history "which would aggravate his pulmonary condition." *Id*. In response to a request for clarification from a claims examiner, Dr. Simpao stated that claimant has legal pneumoconiosis "with [a] 24-year history of coal mine exposure being the significant contributing factor in his pulmonary disease." Director's Exhibit 17 at 2. Dr. Simpao reiterated his diagnoses in a subsequent deposition, and indicated that coal dust exposure and smoking were contributing causes of claimant's emphysema and totally disabling obstructive impairment. Claimant's Exhibit 2 at 20-21. On cross-examination by employer's counsel, Dr. Simpao agreed that claimant's subjective complaints and abnormal physical findings could be consistent with disease caused by cigarette smoking. *Id*. at 28. Dr. Simpao also indicated that he could not identify the percentage of claimant's impairment attributable to smoking and could not rule out coal dust exposure as a contributing cause of claimant's COPD, as "one or the other will cause the immunosuppressed situation in the individual which can go hand-[in]-hand to cause the problem." *Id*. at 37.

Dr. Baker examined claimant and diagnosed coal workers' pneumoconiosis, COPD, and chronic bronchitis. Claimant's Exhibit 1. Dr. Baker stated:

> [Claimant] has [COPD] with a moderate obstructive defect on pulmonary function testing, and a symptom complex of chronic bronchitis with cough, sputum production, wheezing and shortness of breath and production of one-fourth cup of sputum per 24 hours on the average. He does have a 26 to 27-pack year history of smoking, but has not smoked for 20 years. He also has a known 24¼ years of coal dust exposure with x-ray evidence of [c]oal [w]orkers' [p]neumoconiosis suggesting he has had a significant dust load on his lungs. While his cigarette smoking may be the slightly predominant cause of his COPD and chronic bronchitis, there has also been a significant contribution from his coal dust exposure as well. Therefore, his impairment is significantly related to and substantially aggravated by dust exposure from his coal mine employment. There may also be some synergistic effect between cigarette smoking and coal dust exposure that may be manifest in this patient.

Id.

Dr. Repsher examined claimant and diagnosed COPD. Employer's Exhibit 1. Dr. Repsher indicated that there was no evidence of medical or legal pneumoconiosis and

attached medical literature in support of his opinion that miners exposed to coal dust "and most other dusts may also develop COPD," but exposure to coal dust alone does not cause clinically significant obstruction in pulmonary function. *Id*. Dr. Repsher further concluded that "to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal dust." *Id*.

Dr. Fino reviewed medical evidence submitted with the prior claim and newly submitted evidence and concluded that claimant does not have pneumoconiosis or any dust related lung disease. Employer's Exhibit 2. Dr. Fino diagnosed a moderate obstructive impairment due to smoking. *Id*. Dr. Fino also critiqued the studies that purport to show a relationship between coal dust exposure and clinically significant obstructive impairment. *Id*.

The administrative law judge determined that Drs. Simpao and Baker rendered reasoned diagnoses of legal pneumoconiosis and total disability due to pneumoconiosis. Decision and Order at 9, 11. With respect to the opinions of Drs. Repsher and Fino, the administrative law judge found that the studies that they cited in support of their view that coal dust exposure is not associated with clinically significant decrements in FEV1 did not address the issue of whether coal dust exposure aggravated claimant's COPD. Decision and Order at 9. The administrative law judge stated "[a]lthough the arguments re: FEV1 may be valid, I find that they are less rational than a theory of aggravation by exposure given the fact that the regulation now contains the aggravation language." *Id*. at 9-10. The administrative law judge also determined that Dr. Fino's opinion was entitled to less weight because he did not examine claimant. *Id*. at 10. The administrative law judge concluded that the opinions of Drs. Simpao and Baker were sufficient to establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(c). *Id*. at 10, 11.

Employer argues that the administrative law judge did not provide an adequate rationale for discrediting the opinions of Drs. Repsher and Fino. Employer asserts that in finding that they were entitled to less weight on the ground that they did not consider whether coal dust exposure aggravated claimant's COPD, the administrative law judge shifted the burden of proof to employer to rule out coal dust inhalation as a contributing factor. We disagree. The administrative law judge acted within his discretion as fact-finder in discrediting the opinions of Drs. Repsher and Fino under Sections 718.202(a)(4) and 718.204(c) because, in contrast to Drs. Simpao and Baker, they did not discuss the issue of aggravation and, therefore, did not fully address the statutory definition of pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 9-10.

Employer further contends that the administrative law judge should have discredited the opinions of Drs. Simpao and Baker, as these physicians did no more than recognize the possibility that coal dust exposure contributed to claimant's COPD. This contention is without merit. Contrary to employer's position, a physician's acknowledgement that he cannot establish the precise percentage of lung obstruction attributable to cigarette smoke and coal mine dust exposure does not render his opinion unreasoned. An exact apportionment of the extent to which each factor is a contributing cause of claimant's impairment is not required to satisfy the definition of legal pneumoconiosis. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482, 222 BLR 2-265, 2-280 (7th Cir. 2001); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. The administrative law judge considered the entirety of the opinions of Drs. Simpao and Baker and noted that their diagnoses of legal pneumoconiosis were supported by the results of their examinations of claimant, including claimant's pulmonary function studies, and claimant's coal mine employment history. Decision and Order at 7-9, 10; Director's Exhibits 15, 17; Claimant's Exhibits 1, 2. In light of these appropriate findings, the administrative law judge was not required to discredit the opinions of Drs. Simpao and Baker on the grounds identified by employer. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *see also Williams*, 453 F.3d at 622, 23 BLR at 2-372.

Employer further argues that the administrative law judge should have addressed whether Dr. Baker's opinion was undermined by his reliance upon an inaccurate smoking history and a positive x-ray interpretation that the administrative law judge determined was outweighed. Because we have affirmed the administrative law judge's decision to discredit the opinions of Drs. Repsher and Fino and his decision to credit Dr. Simpao's opinion, error, if any, in the administrative law judge's weighing of Dr. Baker's opinion is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We affirm, therefore, the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to legal pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge